

The Role of the Prosecutor in Upholding the Rule of Law

The Role of the Prosecutor is, by many analyses, the most powerful one in the criminal justice process. Even when acting within the proper exercise of their functions, prosecutors have great powers to affect and change lives—

Nevertheless, that power is not unlimited, nor should it be.

Accordingly, in my limited time I want to address the role of the prosecutor by looking at appropriate limitations on that role. Specifically, I want to address two areas in which we still see prosecutors overstepping appropriate bounds, either because national laws still allow them to, or because national practice encourages them to.

(1) First is the issue of the prosecutor's continued exercise, in many jurisdictions of the OSCE, of judicial or quasi-judicial functions better left to the courts, and

(2) Second is the prosecutor's responsibility to recognize the legitimate function that defense counsel play in the adjudication of criminal cases, and to exercise fairness towards defense counsel

We must avoid the temptation to gain unfair advantage during the investigation or trial at the expense of the rights of the defendant and his or her counsel

Item One:

Do prosecutors in OSCE countries retain powers and responsibilities that should be left to the judiciary?

Are prosecutors in some jurisdictions still performing what are, by any definition, judicial functions?

The answer is: YES, sometimes.

This is particularly true in countries that are still undergoing the transition from Soviet era laws and institutions—The legal powers of prosecutors in the CIS still sometimes far exceed those of prosecutors in much of western Europe or North America.

When national law still reserves to prosecutors the right to sanction arrest and to decide on the issue of pretrial detention—this is a usurpation of the judicial function, and it is not an appropriate exercise of prosecutorial function.

The international standards are clear that decisions as to arrest and detention should be left to a judge or someone with judicial power, and not a prosecutor—

It is important that we keep in mind our responsibilities both to the accused as parties with substantial rights, and their lawyers, who have a critical function to play in the criminal justice process. In our zeal to pursue our cases—and justice—We often forget this responsibility or give it short shift.

Indeed, we must remember that, as prosecutors, we are only one half of a process.

It would serve us well as prosecutors to remember that –by international law and standard--we stand on equal footing with defense counsel before the court:

“Equality of Arms is a principle well established by relevant international standards, including for example, Article 14 of the ICCPR.

This means that prosecutors should not be afforded special privileges or preferential treatment during the trial process

The COE Recommendations on the Role of Public Prosecution in the Criminal Justice System rules emphasize that prosecutors must “safeguard the principle of equality of arms.

The fact of the matter is:

We are better at our jobs when we face well trained, competent defense attorneys—they make us better prosecutors; they make us work harder.

The knowledge that we will face a well-trained, well prepared defense counsel makes us prepare our case more carefully.

The result is a fuller, more careful presentation of the evidence.

In so doing, we help the courts as they struggle to do justice.

Many of our countries have well established law and practices on the responsibilities of prosecutor,

In the US, as prosecutors, we are required to give over to the defense evidence which will be “helpful” to them (our famous Brady rule), as well as evidence that is material to the defense in preparing their case, and evidence the prosecutor intends to use at trial (Rule 16).

This is not are only duty to the defense, but it is the primary one.

Our own domestic rules are reflected in various international standards

there are many sources of law here, but I will limit my reference to the International Covenant on Civil and Political Rights (ICCPR) which I think is most relevant because all of the countries assembled here are signatories.

Article 9 of the ICCPR requires both a prompt appearance by arrested persons before a judge, and that pretrial detention be decided by a judge:

It is not consistent with the ICCPR for the prosecutor to be in the position to sign arrest warrants, or for investigators to obtain sanction of arrest merely by obtaining the signature of the prosecutor.

It is not consistent with the ICCPR for the prosecutor to be the one authorizing pretrial detention or signing detention orders—this is true both as to the first instance decision and as to extensions of pretrial detentions

These are functions properly left to the courts. Where national laws are not consistent with the provisions of the ICCPR it is incumbent for us to change those laws.

This is a trend we see throughout the OSCE, and it is a positive trend.

Prosecutors may also sometimes infringe on judicial functions when national law provides them with the right of Supervisory Review, and when such review by prosecutors extends to the courts and is applied to judicial decisions.

I would argue that the mere notion that a prosecutor can by law exercise a supervisory function over the courts directly contradicts the notion of judicial independence.

Again, fortunately, the trend is to limit the exercise of such supervisory functions by the prosecutors, especially as applied to the courts.

This trend is evidenced, for example, by the limitations of supervisory review of judicial decisions contained in the new Russian CCP of 2002.

That trend is to be commended.

The Second area I want to reference—treatment of defense counsel—is perhaps a more subtle area in which prosecutors can abuse powers, and therefore, all the more important for us to focus on:

What are our responsibilities to defense attorneys?

Yes, the word is appropriate, we do have responsibilities

I think it is also useful for us to take a minute to focus on the way these obligations have been incorporated into relevant **international standards that govern the role and function of the prosecutor:**

Standards:

These international standards require us to treat defense counsel with respect, to not bar their access to their clients, to make evidence favorable to their client available. These are standards that we may not be aware of or pay much attention to.

Article 20 of the UN Guidelines on the Role of Prosecutors sets the tone and requires that:

“in order to ensure the fairness and effectiveness of prosecution, prosecutors shall cooperate with the legal profession [and] public defenders.”

The International Association of Prosecutors (IPA) adopts this language as Standard 5(a)—adding only that this cooperation specifically extends to defence counsel.

[“In order to ensure the fairness and effectiveness of prosecution, prosecutors shall . . . cooperate with the legal profession, defence counsel and public defenders.”]

Standard 1(f) on Professional Conduct requires that “Prosecutors shall . . . always protect an accused person’s right to a fair trial, and in particular ensure that evidence favorable to the accused is disclosed in accordance with the law or the requirement of a fair trial.”

IAP Standard 4.3(c) actually requires that “Prosecutors shall . . . safeguard the rights of the accused.”

And finally, Article 29 of the COE Recommendations on the Role of Public Prosecution in the Criminal Justice System:

“Prosecutors should seek to safeguard the principle of equality of arms, particularly in disclosing to the other parties, save where otherwise provided in the law, any information they possess which may affect the justice of the proceedings.”

There is then a line between the prosecutor’s duty as advocate of a cause—the interest of the State in convicting those accused of crimes, and the prosecutor’s duty to see that justice is done.

This is a line we must deal with in every case, and in every decision we make as prosecutors.

In closing, as a prosecutor, I often kept in mind the admonition of one of our very senior federal judges in New York, Judge Ira Glasser, who on more than one occasion reminded me when I was perhaps being a too fiercely zealous advocate for the government:

“Mr. Lehmann, the government wins when justice is done”