ANTI-CORRUPTION HELPDESK

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INTERNATIONAL STANDARDS AND RECOMMENDATIONS ON PROSECUTORIAL DISCRETION AND JUDICIAL REVIEW

QUERY

Can you provide an overview of the main international/EU standards/principles related to judicial review and prosecutorial discretion?

CONTENT

1. Prosecutorial discretion and the role of public prosecutors in the criminal justice system
2. Prosecutors' autonomy vs. the need for judicial review and other accountability mechanisms
3. List of relevant international standards and recommendations

Author(s)

Maíra Martini, Transparency International,
tihelpdesk@transparency.org

Reviewer(s)

Marie Chêne, Transparency International; Robin Hodess PhD, Transparency International

Date

Responded: 5 July 2013

SUMMARY

There are several general international principles and recommendations regarding the conduct of prosecutors, prosecutorial discretion and accountability mechanisms, including judicial review. However, there are no specific international standards regarding judicial review by courts on prosecutors' decisions not to prosecute, as such principles and standards are very country-specific and depend on the country's legal framework.

This answer looks at the main issues and challenges when discussing prosecutorial discretion and judicial review, and provides an overview of the main recommendations put forward by international and intergovernmental organisations as well as professional associations to ensure that prosecutors' decisions are fair and impartial and that their discretionary power is not abused.

This anti-corruption Helpdesk is operated by Transparency International and funded by the European Union.

1. PROSECUTORIAL DISCRETION AND THE ROLE OF PUBLIC PROSECUTORS IN THE CRIMINAL JUSTICE SYSTEM

Overview

Public prosecutors are "*public authorities who, on behalf of society and in the public interest, ensure the application of the law where the breach of the law carries a criminal sanction, taking into account both the rights of the individual and the necessary effectiveness of the criminal justice system*" (Council of Europe Recommendation (2000)19).

Public prosecutors are vital to a well-functioning criminal justice system and, considering the fight against corruption, they play a key role in ensuring the corrupt do not go unpunished.

In jurisdictions around the world, public prosecutors are responsible for deciding on whether or not to initiate prosecution, conducting prosecutions and appealing court decisions. In some jurisdictions, these responsibilities are combined with other tasks such as the conduction of investigations, supervision of the execution of court decisions and assistance of victims, among others.

Governments should therefore provide the necessary safeguards to guarantee that public prosecutors can perform their duties in a fair and impartial manner, and a set of standards and principles should be in place to ensure that prosecutors act in the public interest. This includes guaranteeing that they are independent from judges and other government bodies as well as ensuring that they account for the decisions they take, including through the establishment of rules on the judicial review of prosecutors' decisions, among others.

Prosecutorial discretion

As mentioned, one of the main responsibilities of prosecutors includes the decision to indict or not. The level of discretion enjoyed by prosecutors when making this decision, however, varies depending on the country's legal system and traditions. Some countries, such as Italy, follow the 'legality' principle, where prosecutors enjoy little or no prosecutorial discretion. Other countries, such as France and the United Kingdom, follow the 'opportunity' principle and public prosecutors enjoy wide discretionary power in the decision to indict.

The term 'prosecutorial discretion' thus relates to the prosecution's power to choose whether or not to bring criminal charges, what charges to bring, as well as which cases can be dealt with without criminal proceedings (conciliation, plea-agreements etc.).

This power is considered by intergovernmental organisations to be an important instrument to guarantee the prosecutor's autonomy and independence. It also reflects the modernisation, socialisation, humanisation and rationalisation of the administration of court, playing an important role in reducing the case overload of courts (The Bordeaux Declaration Explanatory Note). But, irrespective of the legal system of the country, it is fundamental that such discretion is exercised responsibly and in the public interest.

According to international principles, public prosecutors have the mandate to proceed with a case when there is reasonable, reliable, and admissible evidence of a criminal activity (Council of Europe Committee of Ministers Recommendation 18 on the simplification of criminal justice, 1987). If the prosecutor believes that such evidence is not enough, he/she should not proceed with the case (The Bordeaux Declaration Explanatory Note on Judges and Prosecutors in a Democratic Society). The Budapest Guidelines, for instance, state that prosecutors should "take decisions based upon an impartial and professional assessment of the available evidence". It is also the responsibility of prosecutors to "scrutinise the lawfulness of investigations and monitor the observance of human rights when deciding whether a prosecution should commence or continue" (Bordeaux Declaration Explanatory Note).

Intergovernmental organisations and the Prosecutors Professional Association have recommended that countries establish coherent and clear guidelines as regards the exercise of their prosecution powers (The Bordeaux Declaration, paragraph 9; Council of Europe Committee of Ministers Recommendation 18). The Council of Europe Recommendation (2000)19 also calls on governments to "define

general principles and criteria to serve as a reference against which decisions are taken by prosecutors in individual cases".

Many countries have established guidelines on prosecutorial discretion that spell out a number of factors that should be considered at the pre-trial stage. In countries where prosecutors enjoy wide prosecutorial discretion, besides the existence of reasonable evidence, such factors may include the surrounding circumstances of the offence, the seriousness of the offence, the existence of extenuating circumstances, the defendant's criminal record, and whether the prosecution would serve as a deterrent, among others. This is the case, for instance, in Canada where the decision to prosecute will depend of the sufficiency of evidence and the public interest criteria as spelt out in the Federal Prosecution Service Deskbook.

In the United Kingdom, both a Code for Prosecutors and a Guideline on prosecution discretion are available. Both documents contain relevant information to be considered by Crown Prosecutors and the Serious Fraud Office when exercising their functions.

2. PROSECUTOR'S AUTONOMY VS. THE NEED FOR ACCOUNTABILITY MECHANISMS

While prosecutorial discretion is important to guarantee prosecutors' independence and the separation of powers, proper mechanisms should be in place to ensure accountability so that prosecutors do not abuse their discretionary powers and decisions are not motivated by private interests or taken in an unfair and impartial manner.

There are several ways to enhance prosecutors' accountability, including: (i) requirements to report on the activities undertaken as well as the decisions not to prosecute; (ii) the establishment of rules allowing the victim to pursue criminal or civil redress in spite of the prosecutor's decision not to indict; as well as (iii) the establishment of rules allowing for judicial review by the courts.

Reporting requirements

Enhancing transparency so decisions can be examined is instrumental to hold prosecutors accountable, and international standards have recommended that governments establish clear reporting requirements as well as guidelines and codes of conduct for prosecutions. The application of these rules and the body responsible for overseeing/receiving such reports will vary according to the country's legal system (Venice Commission Report on European standards as regards the independence of the judicial system, 2010).

Ensuring the rights of victims are respected

Allowing the victim to bring cases, where prosecutors have decided not to prosecute directly, to court is one of the means to be used by governments to protect the rights of the victim and avoid arbitrary decisions by public prosecutors.

Recommendations by professional associations and intergovernmental organisations have encouraged countries to establish such rules (Council of Europe Recommendation 18 and Recommendation 19).

Judicial review

Judicial review by the courts in cases where prosecutors decided not to indict is seen as an important safeguard, but clear guidelines specifying in which circumstances judicial review can be applied should be established in order to guarantee the independence of judges and prosecutors. In fact, the application of judicial review in such cases should be narrow.

There are no specific international principles or standards regarding the judicial review of the prosecutor's decision to prosecute or not. The criteria and rules for judicial review are often decided at the national level, according to the country's legal system and traditions. The above-mentioned recommendations, however, highlight general aspects of judicial review.

For instance, the Council of Europe Recommendation (2000)19 states that governments should establish mechanisms allowing for judicial review of prosecutors' decisions to indict or not. The Bordeaux Declaration and its Explanatory Note stress that "it is also necessary to enable any person

affected, in particular the victims, to seek a review of the prosecutor's decision not to prosecute", and that "*any review according to the law of a decision by the prosecutor to prosecute or not should be carried out impartially and objectively, whether or not it is being carried out within the prosecution service itself or by an independent judicial authority*".

However, specific rules on cases where judicial review of prosecutorial discretion may be applied can only be found in national legislation and case laws.

In the United Kingdom, for example, a decision by the Crown Prosecution Service (CPS) to prosecute or not to prosecute may be judicially reviewed. From case law, it is clear that judicial review of prosecutorial discretion can be sought in the following cases: (i) when it is apparent that the law has not been properly understood and applied; (ii) where it can be demonstrated on an objective appraisal of the case that some serious evidence supporting a prosecution has not been carefully considered; (iii) when the rules set out by the CPS, such as those in the Code for Crown Prosecutors, have not been properly applied and/or complied with; and (iv) where it can be demonstrated that the decision was arrived at as a result of fraud, corruption or bad faith; among others (The Crown Prosecution Service, 2009).

Example of judicial review of prosecutorial discretion

In 2004, the Serious Fraud Office (SFO) in the United Kingdom started investigating BAE Systems for alleged bribery and false accounting in deals with Saudi Arabia.

In 2006, however, Saudi Arabia threatened to suspend commercial orders and diplomatic ties with the United Kingdom. Consequently, the SFO ended the investigations into the alleged corruption offences, saying that continuing the investigation could pose challenges to national and international security.

The Corner House, the Campaign Against Arms Trade (CAAT) and others denounced the SFO's decision as unlawful and asked for it to be reviewed. According to these organisations, the OECD Anti-Bribery Convention, of which the United Kingdom is a signatory country, forbids the termination of corruption investigations due to the "potential effect upon relations with other States" (Article 5). Within this framework, The Corner House and the CAAT applied for judicial review, which was granted by the High Court in 2007.

In 2008, the High Court decided that the SFO's decision to stop the corruption investigation was unlawful, but the SFO appealed and reformed the decision.

Another request for judicial review was filed after the SFO signed a plea bargain with BAE regarding investigations into corruption in Tanzania, and decided not to proceed with the investigations in other countries. Corner House and CAAT accused the SFO of failing to apply prosecution guidance, including its own, but the judicial review was refused by the High Court after the SFO appeal.

For more information please see the CAAT website.

3. LIST OF RELEVANT INTERNATIONAL STANDARDS AND RECOMMENDATIONS

There are several international standards and recommendations put forward by international and intergovernmental organisations as well as professional associations that highlight the need for governments to establish mechanisms that ensure public prosecutors can work in an independent, autonomous and effective manner. These instruments, as mentioned in the previous section, also underscore the main functions to be performed by public prosecutors, their relation with other branches of government, as well as accountability mechanisms such as judicial review. These include:

- The Council of Europe Committee of Ministers Recommendation No. 18, 1987 on the simplification of criminal justice. This recommendation discusses several issues related to prosecutorial discretion, such as the need for empowering public prosecutors to make decisions and at the same time ensuring that such decisions follow clear rules and guidelines to avoid abuse of power. The recommendation, however, does not contain any general principle or guidance with regard to judicial review.

- The Council of Europe Committee of Ministers Recommendation No. 19, 2000. This recommendation addresses the main issues related to the role of public prosecutors in the criminal justice system, including their functions (paragraphs 2 and 3) and safeguards to ensure their independence (paragraphs 4, 11, 14, 16 and 17). The recommendation also encourages states to allow for judicial review of prosecutorial discretion, as well as to establish other mechanisms to enhance accountability and protect the rights of the victims.

- The Bordeaux Declaration of the Consultative Council of European Judges and the Consultative Council of European Prosecutors on "Judges and Prosecutors in a Democratic Society", 2009. The declaration and its explanatory note combine the opinion of the Council of European Judges and the Council of European Prosecutors with regard to the status of judges and prosecutors. It spells out guarantees for the internal and external independence of judges and prosecutors (declaration p. 8 and 9), and underscores the importance of setting accountability mechanisms to avoid abuse of power and arbitrary decisions by prosecutors, including the possibility of judicial review of prosecutors' decisions to prosecute or not.

- Parliamentary Assembly of the Council of Europe Recommendation No. 1604, 2003 on the role of public prosecutors. Among other things, the assembly recommends that governments allow discretion in the decision to prosecute. In this respect, the assembly refers to the Committee of Ministers Recommendation No. R (87)18 concerning the simplification of criminal justice, whilst considering that the principle of discretionary prosecution should be adopted universally.

- The European Guidelines on Ethics and Conduct for Public Prosecutors (the Budapest Guidelines), Council of Europe, 2005. The guidelines set out standards of conduct and practice expected of all prosecutors working on behalf of a public prosecutor service. While not binding, these should be seen as widely accepted general principles for prosecutors in the performance of their duties.

- The Report on European standards as regards the independence of the judicial system, Venice Commission, 2010. The report underscores the importance of establishing safeguards of non-interference into the work of individual prosecutors, particularly in cases where they enjoy wide discretionary powers when deciding to prosecute or not. Moreover, the report stresses the need for accountability mechanisms, especially in former Soviet countries where public prosecutors often have too much power.

- The 1990 United Nations Guidelines on the Role of Prosecutors and its Explanatory Memorandum provide recommendations to countries as to how to ensure prosecutors perform their duties in an independent manner. With regards to prosecutorial discretion, the guidelines recommend the adoption of rules and regulations providing guidance to prosecutors in order to enhance fairness and consistency of approach in taking decisions in the prosecution process.

More specifically on corruption, international treaties such as the United Nations Conventions against Corruption, the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, and the Council of Europe Criminal Law Convention on Corruption also deal with the role of prosecutors and prosecutorial discretion, underscoring the importance of ensuring the independence of prosecution services, as well as establishing measures to strengthen integrity and to prevent opportunity for corruption among prosecutors.