The International Criminal Court, Independence and the Prosecutor

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The ICC Decision

On 20 November 2017, the Prosecutor submitted the 'Request for authorisation of an investigation pursuant to article 15' (the 'Request') to the Pre-Trial Chamber (PTC). Three groups were considered to be involved in crimes within the jurisdiction of the Court:

1. The Taliban and other armed groups (crimes against humanity, murder, imprisonment or other severe deprivation of physical liberty and persecution on political and gender grounds, war crimes, of murder; intentionally directing attacks against the civilian population, humanitarian personnel and protected objects; conscripting or enlisting children under the age of 15 years or using them to participate actively in hostilities; and killing or wounding treacherously a combatant adversary);

2. Afghan Forces (war crimes of torture and cruel treatment, outrages upon personal dignity and sexual violence); and

3. US Forces and the CIA (war crimes of torture and cruel treatment, outrages upon personal dignity, and rape and other forms of sexual violence pursuant to a policy approved by the US authorities. The Prosecution mainly relied on the findings of the US Senate Select Committee on Intelligence, the US Senate Armed Services Committee and the US Department of Defense.)

The Prosecutor had not reached a determination in respect of the 'Other acts' by members of international armed forces (particularly in relation to complicity in the torture of detainees and to civilian casualties caused by military operations) that crimes within the jurisdiction of the Court had occurred' and so did not request authorisation to investigate these alleged incidents.

794 victims of the situation came forward to present their views, in support of the Prosecutor.

Having determined that the crimes were within the jurisdiction, for the purposes of Article 12, that they were admissible and that the “gravity threshold” was met, the PTC went on to determine there were nonetheless no substantial reasons to believe that an investigation would serve the interests of justice as the investigation was inevitably doomed to failure on the basis of lack of cooperation. The decision was influenced by budgetary concerns: “authorising the investigation would therefore result in the Prosecution having to reallocate its financial and human resources...”[§95] The court had a very cynical assessment of the 794 victims’ objectives. In other words, the PTC was not making a determination on the merits of a case presented for prosecution, but deciding the very matters that the prosecutor was to decide in determining whether to bring a case before the court.

It is a terrible precedent.

A Flawed Statutory Basis

The decision of the ICC to refuse the prosecutor's request for judicial authorisation[1] has generated quite some debate about, *inter alia*, whether its decision in the case was, or was not, correct.[2] Even the issue of a possible prosecutor's appeal has been the source of lively discussion.[3]

When the court was created, I was still serving as a prosecuting legal officer in the British Army and welcomed the creation of the court. At last, I thought, there is a truly independent court that will truly hold those who commit atrocities accountable. In retrospect, I concede that it was naive of me to hold such a view.

That there are fundamental problems with the court is somewhat axiomatic. The absence of three of the Permanent 5 members[4] of the Security Council also diminishes its credibility, which has further deteriorated in the wake of the threats from the US to arrest and prosecute court staff undertaking investigations into US crimes in Afghanistan. A cynic might think that the decision of the court was a total capitulation to this threat.

However, this still tends to overlook what I believe is a fatal hole below the waterline of this institution which undermines principles of impartiality that guide the way in which all courts must operate under the rule of law. Moreover, that flaw is inherent in the Rome Statute itself and raises fundamental questions about its independence.

Independence

It is fundamental that courts must be impartial. That also applies to the prosecutor who must "act independently of partisan concerns and other improper motives."[5] They must be separate from each other,[6] as it is the court's role to deliberate upon the evidence brought before it by an independent prosecutor who has assessed the evidence produced by investigators[7] who, themselves, must operate free from any state control or direction. Yet, as the PTC identified, under the Statute, "the Pre-Trial Chamber is vested with a specific, fundamental and decisive filtering role in the context of proceedings

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[1] Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan, ICC-02/17-33, 12 April 2019, Pre-Trial Chamber II, Decision: https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-02/17-33

[2] See, for example, the references cited in Douglas Guilfoyle's article, "Reforming the International Criminal Court: Is it Time for the Assembly of State Parties to be the adults in the room?", *EJILTalk!*, May 8, 2019, https://www.ejiltalk.org/reforming-the-international-criminal-court-is-it-time-for-the-assembly-of-state-parties-to-be-the-adults-in-the-room/

[3] "Strategies for Appealing the Afghanistan Decision", Kevin Jon Heller, *Opinio Juris*, 17 April 2019, http://opiniojuris.org/2019/04/17/additional-thoughts-on-whether-the-otp-can-appeal-the-afghanistan-rejection/ and Dov Jacobs, "Some Additional Thoughts On Appeal Strategies for the OTP in Relation to the Afghanistan Decision", *Opinio Juris*, 23 April 2019

[4] The USA, China and Russia

[5] R-*v*- Cawthorne, 2016 SCC 32, Supreme Court of Canada, July 22, 2016, Dockets: 36466, 36844: https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/16070/index.do

[6] Cooper -*v*- United Kingdom, [2003] ECtHR Grand Chamber, http://hudoc.echr.coe.int/eng?i=001-61549 *ibid* § 115

[7] Al-Skeini And Others -*v*- The United Kingdom, (Application No. 55721/07), Grand Chamber, 7 July 2011. See the court's assessment at, eg, §§164, 170, 173, 175 & 182: http://hudoc.echr.coe.int/eng?i=001-105606 See also, OĞUR v. TURKEY, (Application no. 21594/93), 20 May 1999, §§85-93: http://hudoc.echr.coe.int/eng?i=001-58251

under article 15." [§30], applying the standard of "a 'reasonable basis to proceed', the lowest in the Court's statutory framework." [§31] This filtering role, the PTC suggested, was to weed out "unwarranted, frivolous, or politically motivated investigations that could have a negative effect on its credibility." If it is an independent prosecutor's role to oversee an investigation, a court that participates in determining what is or is not investigated might be considered susceptible to pre-judging the issue and determining the evidence it wishes to hear. It thereby acquires an appearance of partiality.

The court did point out [§32] that where the Prosecution intends to open an investigation in the absence of a referral, and on its own initiative, the Statute itself sets restrictions on the Prosecutor's right to investigate "designed to set boundaries to and restrain the discretion of the Prosecution acting *proprio motu*, in order to avoid manifestly ungrounded investigations due to lack of adequate factual or legal fundaments", and, when considering if "the investigation would serve the interests of justice, to avoid engaging in investigations which are likely to ultimately remain inconclusive." [§33]

The decision of the PTC's Powers to Review Interests of Justice Considerations has been criticised by Maria Varaiki as totally ignoring "the previous conceptual work of the OTP in an almost 'authoritarian' way and thus validates those voices of concern about an on-going judicial tendency to limit the width of prosecutorial discretion."[8] The author quite rightly raises concern about "the capacity of the PTC to assess a factor [resource allocations] that falls within the primary domain of the OTP". Dov Jacobs considered "the exercise that the Pre-Trial Chamber did is most likely *ultra vires*".[9] Professor Dopo Akande and Talita de Souza Dias argue that the PTC had the power to review "whether the interests of justice should bar the opening of an investigation".[10] However, whether or not the strict language of the statute may entertain that possibility, the more fundamental question, I suggest, is whether this role of the PTC actually conflicts with human rights guarantees of a fair trial. Victims affected by the decision may have strong views on this point.

The first problem lies in Article 34 of the Rome Statute which provides that the Court shall be composed of the (a) The Presidency; (b) An Appeals Division, a Trial Division and a Pre-Trial Division; (c) The Office of the Prosecutor; and (d) The Registry. Thus, the prosecutor is specified to be an organ of the court, which does not give the *appearance* of independence. Insofar as independence goes, appearances count for a lot.[11] The Office of the Prosecutor should be obviously independent and be seen to be so, free from the influence of the Court at any stage prior to trial.

The second problem lies in article 15, concerning the scrutiny by the Pre-Trial Chamber of the prosecutor's conclusion that "there is a reasonable basis to proceed with an investigation". An

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[8] Afghanistan and the 'interests of justice'; an unwise exercise? *EJILTalk!,* April 26, 2019, https://www.ejiltalk.org/afghanistan-and-the-interests-of-justice-an-unwise-exercise/

[9] "Spreading the Jam", 12 April 2019: https://dovjacobs.com/2019/04/12/icc-pre-trial-chamber-rejects-otp-request-to-open-an-investigation-in-afghanistan-some-preliminary-thoughts-on-an-ultra-vires-decision/ This is challenged by Kevin Jon Heller. See, "Can the PTC Review the Interests of Justice?", *Opinio Juris*, 12 April 2019: http://opiniojuris.org/2019/04/12/can-the-ptc-review-the-interests-of-justice/

[10] "The ICC Pre-Trial Chamber Decision on the Situation in Afghanistan: A Few Thoughts on the Interests of Justice", *EJILTALK!*, April 18, 2019, https://www.ejiltalk.org/the-icc-pre-trial-chamber-decision-on-the-situation-in-afghanistan-a-few-thoughts-on-the-interests-of-justice/

[11] See *Findlay*, on page 6

independent prosecutor does not have prosecutorial decisions scrutinised by the court. That is done once the decision to prosecute has been take and the evidence is presented to the court, or the case is not proceeded with.[12] The only role for the court to play in the pre-trial stage should be to determine applications for orders, summons and warrants etc eg under § 15(2), 19(2).

The third problem, following on from this, appears in Article 53, concerning the initiation of an investigation itself. The effect of this provision is properly to place the responsibility for evaluating the information made available, and deciding whether to initiate an investigation, on the shoulders of the prosecutor.[13] That decision will depend upon the prosecutor applying an evidential test [article 53(1)(a)-(c)] which incorporates an assessment of the interests of justice which, importantly, includes the interests of victims. If the prosecutor decides, based solely upon substantial reasons to believe that an investigation would not serve the interests of justice, he or she shall inform the Pre-Trial Chamber. Where the decision is based upon an insufficiency of evidence [53(2)], he or she shall inform the Pre-Trial Chamber and the State making a referral under article 14 or the Security Council in a case under article 13, paragraph (b), of his or her conclusion and the reasons for the conclusion. [53(1)] This does not actually distinguish between the lower thresholds of commencing an investigation, based upon a "reasonable suspicion" that a crime has been committed, with the threshold for prosecution on the basis of evidential sufficiency. For example, in the UK, that threshold is where the evidence shows that a conviction is more likely than not.[14]

A decision not to prosecute is reviewable by the court either by its own initiative [53(3)(b)] or on the application of a state making a referral [53(3)(a)]. In addition, the prosecutor may at any time review his/her decision not to prosecute, "based on new facts or information" [53(4)].

However, the words ending article 53(1) and 53(2) place a responsibility on the prosecutor to inform the court that he or she is not proceeding with an investigation, namely, *not to prosecute/investigate.* As Dov Jacobs pointed out, under the Statute, the "only job of the PTC when the Prosecutor requests the opening of an investigation is to determine jurisdiction and admissibility." [15]

On the ICC website, it is declared that:

> It is for the first time in history that an international Prosecutor has been given the mandate, by an ever-growing number of States, *to independently and impartiality select situations for investigation* where atrocity crimes are or have been committed on their

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[12] See below, FN 24

[13] In common law jurisdictions, the prosecutor would not usually perform this function. Instead, the prosecutor would be available to advise the investigating agency and determine, once the evidence was presented to him/her, whether there was sufficient to prosecute. In the UK, there is a duty placed upon the prosecutor by virtue of the Attorney General's Guidelines of 2013 (https://www.gov.uk/government/publications/attorney-generals-guidelines-on-disclosure-2013), s.3 Criminal Procedure and Investigations Act 1996, and the CPIA Code of Practice, to disclose any material which might reasonably be considered capable of undermining the case for the prosecution against the accused or of assisting the case for the accused. The prosecutor must keep this under constant review. Any failure to comply with this duty is a matter considered at trial, when the prosecution case is presented.

[14] See, The Code for Crown Prosecutors: https://www.cps.gov.uk/publication/code-crown-prosecutors

[15] *Supra*, FN 9

> territories or by their nationals. Like the judges of the Court, the Prosecutor and Deputy Prosecutor are elected by the ASP for a non-renewable mandate of nine years.... In applying the Rome Statute criteria, *should the OTP determine it needs to open an investigation*, it will do so without hesitation. Political considerations never form part of the Office's decision making. [Emphasis added].[16]

The duties of the Prosecutor are clearly expressed in article 54 and are aimed at an "assessment of whether there is criminal responsibility under this Statute." In doing so, he or she must "investigate incriminating and exonerating circumstances equally."

The Prosecutor may conduct investigations on the territory of a State:

> (a) In accordance with the provisions of Part 9 [obligation of states to cooperate]; or
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> (b) As *authorized* by the Pre-Trial Chamber under article 57, paragraph 3 (d) [where states have not agreed to cooperate because the *Pre-Trial Chamber* has determined in that case that the State is clearly unable to execute a request for cooperation due to the unavailability of any competent authority or any component of its judicial system].

Here, it seems once more, that there is a statutory fetter on the pre-trial power of the Prosecutor to investigate independently. Article 56 (Role of the Pre-Trial Chamber in relation to a unique investigative opportunity) again interferes with the pre-trial investigation by circumscribing the ability of the prosecutor to do his or her job. The underlying effect seems to be that the prosecutor's power to investigate/prosecute is subject to scrutiny by the court.

Of course, it may be that these measures of scrutiny are designed as cost-saving steps to protect the scarce financial resources underpinning the court from being allocated to unworthy or hopeless cases. Be that as it may, they gravely detract from the separation of functions.

Caselaw - Human Rights & ICC

The British Military Justice System (MJS) went through a very painful process in the 1990s, when it was analysed by the European Court of Human Rights (ECtHR). Under the system as it then was, trials were *ad hoc*, convened by a Convening Officer (a senior officer) who appointed the prosecutor, assistant prosecuting officer and assistant defending officer; appointed the members of the court; convened the trial, approved the charges and, post-trial, acted as Confirming Officer who, acting on the advice of an independent judge advocate, which he could ignore, held the power to overturn the trial proceedings. The case of *Findlay-v-UK*[17] decided that the Convening Officer's role was too closely associated with the pre-trial, trial and post-trial procedures, such that there was the appearance of partiality. In other

[16] Office of the Prosecutor: https://www.icc-cpi.int/about/otp

[17] [1997] ECHR 8 (25 February 1997) http://www.bailii.org/eu/cases/ECHR/1997/8.html

words, while the ECtHR did not say that the trial of *Findlay* was actually unfair, the very appearance[18] of partiality was sufficient to undermine the fairness of his trial.

The effect of *Findlay* was a radical overhaul of the MJS, first through the Armed Forces Act of 1996, which abolished the role of Convening Officer, created an independent prosecuting authority for each of the three Services, and a court administration responsible for convening and administering the trials. The system was further reformed by the 2006 Act, which "harmonized" the legislation, by replacing the three Service discipline acts with a uniform set of offences and procedures, creating a single, tri-Service, Prosecuting Authority and making the Court Martial a standing court.

Following the decision in *Findlay*, there were many cases which were found to be in breach of the impartiality principle necessary for a fair trial. In *G.W.-v- United Kingdom*,[19] the applicant complained that under article 6.1 that he did not have a fair hearing by an independent and impartial tribunal established by law because of conflicting roles of the convening authority and, notably, the latter's institutional connection with the prosecution and with the members of the court-martial. The complaint was upheld following *Findlay*.

In *Morris-v-United Kingdom*, [20] the ECtHR remarked, at para 62, that "The Court concludes that a separation has existed since the entering into force of the 1996 Act between the prosecutory and adjudicatory functions at a court martial which was not present in *Findlay*."

In *Grieves -v- United Kingdom*,[21] the Naval Prosecuting Authority (NPA) had the power to appoint a prosecutor from a list of uniformed naval barristers outside his own staff. In other words, legal officers serving in the chain of command. The ECtHR considered the essential point was that the prosecutor in the applicant's case came from the staff of the NPA and therefore was independent of the chain of command. In the case of *Cooper –v- United Kingdom*,[22] the court expressed satisfaction that statute separated the "prosecution, convening and adjudication elements of the court-martial process."

R-v-Stow [23] was a domestic challenge to the independence of the Navy Prosecuting Authority, who was reported upon by the chain of command. The Court Martial Appeal Court held that, while the Prosecuting Authority may not enjoy such a pivotal role as the Judge Advocate, his independence and impartiality is of great importance to a fair trial. It seemed to the court that the court-martial of the appellant could not, in these circumstances, be held to have observed the appellant's rights under Article 6(1). If his trial was not fair, then his conviction could not be regarded as safe.

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[18] §73. The Court recalls that in order to establish whether a tribunal can be considered as "independent", regard must be had, inter alia, to the manner of appointment of its members and their term of office, the existence of guarantees against outside pressures and the question whether the body presents an appearance of independence.

[19] ECtHR, Application 15 June 2004, at § 44 http://www.bailii.org/eu/cases/ECHR/2004/255.html

[20] (2002), (Application no. 38784/97), http://www.bailii.org/cgi-bin/markup.cgi?doc=/eu/cases/ECHR/2002/162.html

[21] [2003] ECtHR Grand Chamber (57067/00), http://www.bailii.org/eu/cases/ECHR/2003/688.html

[22] See above, FN6

[23] [2005] EWCA Crim 1157 http://www.bailii.org/ew/cases/EWCA/Crim/2005/1157.html

UK domestic civilian courts have also examined the extent of prosecutorial discretion. In *DPP-v-Kebeline*,[24] the court was faced with a challenge to the decision by the Director of Public Prosecutions, an independent prosecutor, to the exercise of his discretion to prosecute. *Kebeline* was one of a number charged with terrorism offences. The court held that it is not possible to apply for judicial review of a decision to prosecute and that the only available remedies will be in the trial process or on appeal. One good reason for this is the inevitable delay which would be caused to the trial. Another is that the aggrieved defendant will "have his remedy by way of appeal against conviction". The court went on to state that, in "the opposite case, namely a decision not to prosecute, judicial review is available". [25]

Two observations can be shortly made about the *Kebeline* decision. First, the decision to prosecute is not reviewable before trial. Any defect in that decision can be examined at trial. Moreover, the court pointed out that statute[26] "would prohibit an application for judicial review of the decision of the Crown Court judge refusing to hold a prosecution to be an abuse of process by reason of an alleged breach of the Convention." The statutory limitation applied to an "issue between the Crown and the defendant formulated by the indictment."[27] Secondly, the case confirmed the right to review a decision not to prosecute. The court explained this as "a wholly different situation because in such a case there is no other remedy" to the decision not to prosecute.

This principle, in the context of the interests of justice, was recognised in the Kenya decision, [28] namely, that the review power of the court is only triggered by a decision not to proceed. Although this is the second part of the prosecutor's test in England, no prosecution would proceed, even if the evidential sufficiency test is met, unless it was in the interests of justice to do so. Similarly, not proceeding on this basis would, it is suggested, sweep up the decision on evidential sufficiency grounds.

Article 14 of the ICCPR, echoed in article 6 of the ECHR, provides an entitlement for everyone "to a fair and public hearing by a competent, independent and impartial tribunal established by law." It has been said that "prosecutors should be able to operate autonomously and in a manner that is absent of personal bias or undue influence from the executive.[29] The OSCE commitment to article 14 ICCPR and article 6 ECHR is to "respect the internationally recognized standards that relate to the independence of judges and legal practitioners and the impartial operation of the public judicial service including, *inter alia*, the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights…"[30]

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[24] [1999], UKHL 43, [2000] 2 AC 326, https://publications.parliament.uk/pa/ld199899/ldjudgmt/jd991028/kabel-1.htm

[25] The Crown Prosecution Service in UK a useful guide to Judicial Review of Prosecutorial Decisions not to prosecute, with examples from caselaw: https://www.cps.gov.uk/legal-guidance/appeals-judicial-review-prosecutorial-decisions

[26] See, Supreme Court Act 1981, as modified by The Civil Procedure (Modification of Supreme Court Act 1981) Order 2004. The Supreme Court Act 1981 was renamed the Senior Courts Act 1981, following the creation of the new Supreme Court by Constitutional Reform Act 2005, to replace the House of Lords. *Ibid* s. 59. Section 29(3) of the 1981 Act provides for the power of judicial review in "In relation to the jurisdiction of the Crown Court, other than its jurisdiction *in matters relating to trial on indictment*." [Emphasis added].

[27] *Ibid*, s.29(3)

[28] Situation In The Republic Of Kenya, No.: ICC-01/09, 31 March 2010, discussed at §§24, 43, 53 & 63: https://www.legal-tools.org/doc/f0caaf/pdf/

[29] See, Legal Digest of International Fair Trial Rights, 2012, at § 3 .4

[30] *Ibid*, p52

Further on it states:

> "It is the independence and impartiality of courts and tribunals that the Human Rights Committee and European Court of Human Rights have focused most on…. Also of relevance is the question of the independence, or autonomy, of prosecutors, including the extent to which prosecutors must act in an impartial way."[31]
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> "Many instances where objective impartiality is called into question concern situations where a judge plays different roles or functions in the course of the proceedings (prosecutorial and judicial, or advisory and judicial) or has taken part in different stages of same proceeding (as a first instance, and then as appeal judge)."

As discussed above, the provisions in the Rome Statute conflict with this principle. Any defects in the investigation, or errors or omissions in the prosecution case, are matters which fall within the purview of the court when a case comes to trial. In the context of the ICC, article 34 immediately creates the perception of partiality. This is further exacerbated by the control over what should be independent pre-trial functions of the prosecutor, in determining whether there is evidential sufficiency for trial. This is a direct interference in the decision to prosecute.

In conclusion, whether the PTC had the power under the Statute to act as it did is really a separate issue to the fundamental concern that the Statute itself is structurally incompatible with the concept of independence and impartiality of courts.

[31] *Ibid*, p53