PRACTICE ON INVESTIGATIVE ACTIVITIES IN INTERNATIONAL CRIMINAL COURTS AND TRIBUNALS

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Abstract

The modern trend in criminal investigations in Europe is of a movement away from inquisitorial investigative methods involving judicial enquiry and oversight towards investigations supervised by the public prosecutor.

Several important features distinguish investigative procedures in the common law/adversarial and the civil inquisitorial or hybrid civil adversarial systems. Summarized, these are the actual responsibility for investigating, the extent of the investigation itself, the discretion to investigate and or prosecute, and the role of the court in the indictment and the investigation process.

In international system, the prosecutor is responsible for investigating offences, although in practice in the civil law countries using adversarial trial procedures much investigative work is delegated to the police.

In many civil systems, investigation is mandatory once a criminal complaint is filed. In the common law the police have a discretion not to investigate, and the prosecutor has a broad discretion not to take a case to trial. In civil inquisitorial systems the investigator, whether a judge, prosecutor or police must investigate for exculpatory material. Common law systems, on the other hand, being party-driven, do not require the investigating agency to actively investigate for exculpatory material, but any found must be disclosed to the defense.

In common law systems the prosecutor has a wide discretion as to whether to bring a case to court after the investigation. In England and Wales the prosecutor takes a charge or indictment to the court. The charge is read out and the defendant then enters a plea of guilty or not guilty and the court proceeds (eventually) to trial or to sentence. By contrast in the other national and international systems reviewed the decision to allow the case to proceed in the court itself involves a judicial review of the evidence to determine whether sufficient evidence exists to confirm the charges and hence continue the case.

The role of the defense lawyer is similar in each system surveyed in that the defense lawyer responds to the prosecution case and assembles a defense case. In the international courts and tribunals the prosecution and defense conduct their own investigations. The International Criminal Court allows limited involvement by a pre-trial chamber in the investigative process.

Keywords: *investigations, international court, prosecutor, pre – trail*

1. INTRODUCTION AND OVERVIEW

In the international courts and tribunals the parties are responsible for conducting their own investigations except in the Extraordinary Chambers in the Courts in Cambodia (ECCC) in which investigating judges conduct the investigation. The other international institutions differ in how actively involved the judiciary is in the investigative process.

At the International Criminal Court (ICC) and the ad hoc and hybrid international tribunals the prosecutor is entirely in charge of investigations characterized by multi-disciplinary teams of lawyers, investigators, analysts and other relevant qualified staff. The ICC and the Special Tribunal for Lebanon (STL) may delegate some investigative tasks to national jurisdictions.

The prosecutor of each institution is responsible for gathering the evidence, including questioning victims, witnesses, experts, suspects and accused persons.

At the ICC victims are entitled to participate in the proceedings during the investigation. Victims are not entitled to participate until an indictment has been confirmed at the STL.

The ICTY and the ICTR (International Criminal Tribunal for Rwanda) Statutes and Rules give no statutory role to the victims during the investigation.

The STL Statute is influenced by Lebanese law and gives the pre-trial judge an active role and especially in collecting evidence. The judge may issue any orders or warrants of arrest, etc, and order the collection of certain evidence, either on application by a party or a victim-participant, or proprio motu. The pre-trial judge is also entrusted with taking some evidence such as from "anonymous witnesses".

A number of general principles apply to the international tribunals and courts. A prosecutor may question suspects and accused persons, the suspect or accused has the right to remain silent, a right to legal assistance in the interview, and the right to be so informed. The right to counsel may be voluntarily waived. No adverse inference can be drawn from silence. The use of oppressive conduct is prohibited. The accused must be informed of the nature of the charges before questioning. Free interpretation is a right. The interview should be audio or video-recorded. The suspect or accused must be warned that anything said can be used against them.

While essentially performing the same function in collecting evidence of crimes falling within their respective jurisdictions, the roles and duties of the ICC and ICTY Prosecutors are expressed quite differently. The ICC Statute and Rules result from extensive and detailed treaty negotiations involving many states and organizations, over many years, while the ICTY Statue was issued by the Security Council acting pursuant to Chapter VII of the UN Charter in 1993. The ICC Statute and Rules are more reflective of a blending of adversarial and inquisitorial philosophies and impose on the ICC Prosecutor a positive duty to seek the truth and to "investigate incriminating and exonerating circumstances equally". The ICTY Prosecutor has no such obligation.

2. THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA

The ICTY Statute provides that "The Prosecutor shall be responsible for the investigation and prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991". (Article 16 ICTY Statute)

According to the Statute "the Prosecutor shall initiate investigations ex-officio or on the basis of information obtained from any source, particularly from Governments, United Nations organs, intergovernmental and non-governmental organizations. The Prosecutor shall assess the information received or obtained and decide whether there is sufficient basis to proceed." And "the Prosecutor shall have the power to question suspects, victims and witnesses, to collect evidence and to conduct on-site investigations. In carrying out these tasks, the Prosecutor may, as appropriate, seek the assistance of the State authorities concerned". (Article 18 (1) ICTY Statute)

A suspect is entitled if questioned "to be assisted by counsel of his own choice, including the right to have legal assistance assigned to him without payment by him in any such case if he does not have sufficient means to pay for it, as well as to necessary translation into and from a language he speaks and understands". (Article 18 (3) ICTY Statute).

The investigation is "all activities undertaken by the Prosecutor… for the collection of information and evidence" whether before or after an indictment is confirmed. This presumes that the Prosecutor is entitled to continue investigating an offence and gathering evidence post-indictment and distinguishes it from common law systems where the Prosecution is generally bound by the evidence collected at the point of indictment and service of a brief of evidence against an accused person. (Rule 2 ICTY Rules of Procedure and Evidence)

Considering the magnitude and subject matter of the crimes under investigation the ICTY Rules have very sparse provisions concerning investigations. They provide that the Prosecutor is responsible for summonsing and questioning suspects, victims and witnesses and recording their statements and conducting on-site investigations. And that the prosecutor may undertake other necessary steps, including taking special steps for witness protection, seeking the assistance of any State authority, or relevant international body such as INTERPOL, and requesting necessary orders from a judge. (Rule 39 (i) ICTY Rules of Procedure and Evidence). A search warrant is an example of such an order.

In cases of urgency the prosecutor may request a State to provisionally arrest a suspect or accused, to seize physical evidence and to prevent the escape of a suspect or accused or injury or intimidation to a victim or witness or the destruction of any evidence. (Rule 40 ICTY Rules of Procedure and Evidence).

The Prosecutor must inform a suspect before questioning of the right to legal assistance, interpretation, and silence. A suspect may waive the right to counsel. The questioning must be audio-recorded. (Rules 42 and 43 ICTY Rules of Procedure and Evidence).

A confessions made by a defendants in accordance with the Rules is presumed voluntarily unless the contrary is proved. (Rule 92 ICTY Rules of Procedure and Evidence).

The Prosecutor is also responsible for the retention and storage of evidence at the ICTY. (Rule 41 ICTY Rules of Procedure and Evidence). The Prosecutor has extensive obligations for timely disclosure of the evidence to be used at trial and ongoing disclosure obligations in respect of excul pa tory material. Sanctions may be imposed for breaching disclosure obligations. (Rules 66 to 70 ICTY Rules of Procedure and Evidence)

The ICTY Rules also allow depositions to be taken at the request of a party or proprio motu for use at trial whether or not the deponent can physically appear at the Tribunal to testify. (Rule 71 ICTY Rules of Procedure and Evidence).

In distinction to the ICC Statute and the Criminal Procedure Codes of Italy and Bosnia and Herzegovina this procedure is not restricted to testimony that would not be available at trial but rather may be ordered "in the interests of justice".

Article 18 (4) provides that "Upon a determination that a prima facie case exists, the Prosecutor shall prepare an indictment containing a concise statement of the facts and the crime or crimes with which the accused is charged under the Statute. The indictment shall be transmitted to a judge of the Trial Chamber". A judge then reviews the indictment, and if satisfied of the existence of a prima facieses confirms it, or if not satisfied, dismisses it. (Article 19 ICTY Statute).

3. THE INTERNATIONAL CRIMINAL COURT

The ICC Prosecutor commences an investigation into "a situation" either by referral from the Security Council, or a State Party (to the Court) or proprio motu. To initiate an investigation the prosecutor must have information providing a reasonable basis to believe a crime within the Court's jurisdiction has been or is being committed, and that the case would be admissible under the Statute. (Article 53 (1) ICC Statute).

The Office of the Prosecutor is "responsible for receiving referrals and any substantiated information on crimes within the jurisdiction of the Court, for examining them and for conducting investigations and prosecutions before the Court". (Article 42 ICC Statute).

The Statute clearly defines the duties and powers of the prosecutor: (Article 54 (1) (a) ICC Statute). "In order to establish the truth, extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute, and, in doing so, investigate incriminating and exonerating circumstances equally,

Take appropriate measures to ensure the effective investigation and prosecution of crimes within the jurisdiction of the Court … and Fully respect the rights of persons arising under this Statute."

The Prosecutor is authorized to collect and examine evidence, request the presence of and question persons being investigated, victims and witnesses, seek cooperation from States or intergovernmental organizations, enter into arrangements to facilitate the cooperation, agree not to disclose documents or information obtained on the condition of confidentiality and solely for the purpose of generating new evidence, unless the provider of the information consents, and take or request necessary measures for the confidentiality of information, the protection of any person or the preservation of evidence.

A person has the right to be informed before questioning that; grounds exist to believe the person has committed a crime within the Court's jurisdiction, of the right to remain silent, and to be questioned in the presence of counsel unless this right is voluntarily waived. (Article 55 ICC Statute)

The Pre-Trial Chamber has a potentially important role during the investigation in a "unique investigative opportunity" and in assisting the prosecution and defense. (Articles 56 and 57 ICC Statute)

The "unique investigative opportunity" is similar to the procedures the courts in Italy and Bosnia and Herzegovina use for preserving evidence and holding special or deposition hearings.

The prosecutor has to inform the chamber if an investigation presents "a unique opportunity to take testimony or a statement from a witness or to examine, collect or test evidence, which may not be available subsequently for the purposes of a trial".(Rule 56 ICC Rules of Procedure and Evidence).

The chamber may take such measures as necessary to ensure the efficiency and integrity of the proceedings and to protect the rights of the defense. This could include a hearing or taking necessary action to preserve evidence.

The Pre-Trial Chamber has an important role in the investigatory phase that includes; issuing orders and warrants at the Prosecutor's request, providing for the protection and privacy of victims, witnesses, protecting those arrested or summonsed, and protecting national security information. (Article 57 (3) ICC Statute)

Importantly, it may, upon request of the person arrested or summonsed to appear, issue orders such as those applicable in a "unique investigatory situation", or seek international cooperation necessary to assist the person in the preparation of a defense. Additionally it may: (Article 57 (3) (d) ICC Statute).

"Authorize the Prosecutor to take specific investigative steps within the territory of a State Party without having secured the cooperation of that State…if, whenever possible having regard to the views of the State concerned, 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 authority or any compo nent of its judicial system competent to execute the request for cooperation..."

Unlike the ICTY the ICC pre-trial chamber conducts hearings into the confirmation of an indictment.

4. EUROPEAN COURT OF HUMAN RIGHTS

International human rights law guarantees certain rights to suspects under investigation and to persons in police custody. The European Convention on Human Rights has several guarantees relevant to the investigatory phase, particularly those in Articles 5 and 6.

Article 5, the right to liberty and security of the person, provides important rights for those arrested on suspicion of committing an offence, with Article 5 (1) (c) stating, "No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: the lawful arrest or detention of a person effected for the purpose of bringing before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so."

A suspicion must always be genuinely held and the European Court has found violations when the basis for an arrest did not exist. (Steel v. United Kingdom)

Article 5 (2), while technically regulating the manner of the questioning of suspects in police custody, imposes certain obligations on the state. An arrested person "shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him". A person who is arrested is entitled to know why, allowing the person to deny the offence and seek release without having to resort to court proceedings. (Campbell and Hartley v. United Kingdom).The arrested person should be so informed "within a few hours of his arrest". (Murray v. United Kingdom).

Article 5 (3) provides, "Everyone arrested or detained in accordance with the provisions of paragraph 1.c of this Article shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial."

Article 5 (4) guarantees, "Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful".

Once it has been established that a person is the subject of a "criminal charge", all the guarantees of Article 6 will apply. The European Court has defined a "charge" as the "official notification given to an individual by the competent authority of an allegation that he is suspected of having committed a criminal offence", or, where "the situation of the [suspect] has been substantially affected because of that same suspicion". (Deweer v. Belgium).

A charge may be when a person is first questioned as a suspect, (Hozee v. The Netherlands) when their arrest for a criminal offence is ordered upon being officially informed of the prosecution, (Neumeister v. Austria) when a person has appointed a defence lawyer after the prosecutor has opened a file following a police report, (Angelucci v. Italy) and, when investigators require a person to produce evidence and freeze their bank account (Funke v. France).

In the context of investigation and the right to a fair trial guaranteed by Article 6 the minimum rights guaranteed by Article 6 (3) are also important. Article 6 (3) (b) provides a defendant the "right to have adequate time and facilities for the preparation of his defense". Article 6 (3) (c) provides an overlapping guarantee of the right to "examine and have examined witnesses against him and to obtain the attendance and examination of witnesses on his own behalf under the same conditions as witnesses against him". This guarantee, although most specifically relevant to the hearing of criminal charges at trial, has relevance in pre-trial procedures such as deposition hearings and hearings that may occur in the investigation.

The European Court has interpreted Article 6 (3) as providing an equality of arms between the prosecution and defense in criminal proceedings as "one feature of the notion of fairness" under Article 6 (1). (Monnell and Morris v. United Kingdom). It has held that "the right to an adversarial trial means, in a criminal case, that both prosecution and defense must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party". (Edwards and Lewis v. United Kingdom) The defense thus has a right to disclosure of the evidence against a defendant and to any material in the possession of the prosecution, or to which it could gain access, which may assist the defendant in exonerating himself or herself or in obtaining a reduction in sentence. This includes material that might undermine the credibility of a prosecution witness. (Jespers v. Belgium)

In Foucher v Francethe Commission found a breach of Article 6 (3) and the principle of equality of arms where the prosecutor had refused an unrepresented defendant access to inspect and copy its case file thus preventing him from preparing an adequate defense. (Foucher v. France)

Another guarantee is the freedom from self-incrimination and the right to silence, held by the Court as part of the right to a fair hearing under Article 6 (1). (Saunders v. United Kingdom, Funke v. France) This right, although curiously not actually specified in the European Convention, is guaranteed in Article 14 of the International Covenant on Civil and Political Rights. Admitting into evidence transcripts of a compelled interview with investigators, the duty to answer being enforceable by contempt proceedings, was held to breach Article 6 (1). (Saunders v. United Kingdom)

5. CONCLUSION

This study focused on the investigation phase in international criminal procedure. At the outset, it was noted that the importance of the investigation phase and of investigative actions for the further proceedings is not yet reflected to the full extent in academic writings on international criminal proceedings. While the number of academic writings on international criminal procedure is growing at a rapid pace, the investigation phase has so far received less attention. Moreover, two investigation phase 'deficits' were noted. First, a 'regulatory deficit' was observed insofar that the investigation phase in international criminal procedure has been the subject of far less regulation than its trial counterpart. While it was held that different factors may explain this, including the fact that international(ised) courts and tribunals have to rely to a large extent on states in the conduct of investigations, it raises the pertinent question whether or not the investigation phase should be regulated in more detail. Secondly, a 'jurisprudential deficit' was noted insofar that on

many aspects of the investigation phase, jurisprudence is scarce or non-existent. Many investigative activities seem to have largely taken place outside legal scrutiny.

The present study reviewed the law and practice of the different international(ised) criminal courts and tribunals on the conduct of investigations in order to identify any (emerging) rules of international criminal procedure. It sought to determine whether any procedural rules and/or practices on the conduct of investigations are commonly shared by all international(ised) criminal courts and tribunals. If so, this would prove that these institutions, notwithstanding their nature of 'self-contained regimes' adopted certain common approaches. Furthermore, this study also sought an answer to the normative question of what changes to these rules and/or practices are necessary to guarantee the fairness of these investigations?

The relevance of identifying these commonalities primarily lies in the clarification of the content of international criminal procedure. Furthermore, these commonly shared rules may also assist future international (ised) criminal courts and tribunals as well as national legislators regarding the investigation and prosecution of core crimes. Additionally, there is an even more pressing need to identify some core rules on the conduct of investigations. The investigation phase in international criminal procedure is fragmented over several jurisdictions. International criminal (ised) courts and tribunals necessarily have to rely on the 2 cooperation by states or other international actors in the conduct of investigations. Their cooperation is required because of the important limitations on the tribunals' ability to gather evidence and information autonomously and independently on the territory of states or to effectuate the arrest of suspects or accused persons. If any of the common rules which can be identified correspond to international human rights norms, then they should not only be upheld by the international criminal courts and tribunals, but also by states and/or other international actors involved in the investigation. In other words, these standards should be respected irrespective of the jurisdiction (the international criminal tribunal, national criminal justice system or international actor) which conducts the investigative act. It follows that these human rights norms may to some extent prevent the fragmentation which results from the division of labor between the international and national level to be to the detriment of the suspect or accused person.

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