LAWFARE

ICC Prosecutor Tapped External Panel to Review Evidence: Is That Even Allowed?

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Neither the Rome Statute nor fundamental fairness evidently permitted the ICC prosecutor to instruct an external panel of legal experts he assembled to review evidence he used to support his applications for arrest warrants of Israeli leaders.

International Criminal Court, The Hague (jbdodane, https://www.flickr.com/photos/jbdodane/38794179861, CC BY-NC 2.0)

Prosecutors must determine whether they hold sufficient evidence to justify criminal charges they contemplate to lay—this is basic in criminal law. The prosecutor of the International Criminal Court (ICC), however, in the lead-up to charges of crimes against humanity and war crimes that he recently leveled against Israel's top two wartime policy leaders, tasked a panel of external legal experts to review his investigation's evidence. Following the panel's review, the panel publicly backed the prosecutor, and the prosecutor publicly credited the panel's backing with bolstering his charges. The prosecutor should have known better. By tasking the panel as he did, the prosecutor arguably exceeded his authority. Moreover, there are grounds to conclude that by enjoying the panel's input on his evidence, and by publicizing and allowing the panel to publicize its backing, the prosecutor breached legal and ethical obligations and undermined fair process.

Prosecutor Announces Applications for Arrest Warrants

ICC Prosecutor Karim Khan announced on May 20 that he was applying to Pre-Trial Chamber I of the ICC for warrants of arrest in connection with the "Situation in the State of Palestine." The prosecutor explained that he was seeking warrants for the arrest not only of three Hamas leaders, but also of Israeli Prime Minister Benjamin Netanyahu and Israeli Minister of Defense Yoav Gallant. He had "reasonable grounds to believe," the prosecutor stated, that Netanyahu and Gallant had committed war crimes and crimes against humanity in connection with Israel's response to Hamas's invasion of Israel and attack on Israeli civilians and soldiers on Oct. 7, 2023.

In his announcement, the prosecutor disclosed that he had taken the advice of a panel of six "experts in international law," which he had convened. He termed the panel "impartial" and characterized its members as "experts of immense standing in international humanitarian law and international criminal law." The prosecutor explained that he had organized the panel to "support the evidence review and legal analysis" underpinning his applications. He added that the panel's work "supported and strengthened" the applications for the arrest warrants that his office had filed. In his announcement, the prosecutor also acknowledged contributions by a number of his "Special Advisors," and named two of them. Also in his announcement, the prosecutor linked to the panel's report, which is posted on the ICC website.

After his announcement, the prosecutor sat for an interview with CNN, in which he alluded to the contribution of the panel's members, whom he said he "brought ... in." He extolled the panel members as "people of distinction that are respected" and described the process of evidence review as "forensic."

Panel Issues Report and Publishes Op-Ed

On the same day the prosecutor announced his application for arrest warrants, the panel issued its unanimous report titled "Report of the Panel of Experts in International Law." The panel reported that it "was convened at the request of the Prosecutor" and that "each Panel Member was asked to assess objectively the material provided to them [sic] by the Prosecutor and to advise the Prosecutor whether it meets the relevant legal test." The panel self-asserted that its members were selected due to "their expertise in public international law, international human rights law, and international criminal law and, in the case of two of them, experience as judges of former international criminal tribunals." The expertise and experience notwithstanding, the panel also disclosed that it too had taken counsel: from two academic advisers.

In its report, the panel stated that since January 2024, it had extensively reviewed and analyzed material the prosecutor delivered to it, which included the arrest warrant applications and underlying evidence. The panel revealed that its members had attended "Evidence Review sessions" at the ICC in the Hague and online and that some of the evidence was confidential. The panel concluded that "there are reasonable grounds to believe" that Netanyahu and Gallant committed the crimes of which the prosecutor accuses them and declared that it agrees with the prosecutor that his applications demonstrate such reasonable grounds. To this the panel added its apparently gratuitous verdict that the panel "is satisfied that the [prosecutor's] process was fair, rigorous and independent[.]"

Also on the day the prosecutor announced his applications, the panel's members published an op-ed in the Financial Times titled "Why we support ICC prosecutions for crimes in Israel and Gaza," in which they declared that they had felt "a duty to accept the invitation" to opine and that "[the panel] ... unanimously agrees that the evidence presented by the prosecutor provides reasonable grounds to believe" that Netanyahu and Gallant committed war crimes and crimes against humanity. In the op-ed, the panel embedded a link to its report.

That same day, panel member Amal Clooney published a statement titled "Amal Clooney Publishes Expert Report Supporting ICC Arrest Warrant Applications for Crimes in Israel and Palestine" on the website of the Clooney Foundation for Justice, a foundation of which she is a co-founder. In her statement, Clooney linked to the panel's report and to the op-ed. Also that day, academic adviser to the panel Marko Milanovic, together with Clooney, published a post titled "Panel of Experts Publishes Report Supporting ICC Arrest Warrant Applications for Crimes in Israel and Palestine" on EJIL!:Talk, a law blog of which Milanovic is co-editor. In their post, Milanovic and Clooney linked to the panel's report, the op-ed, and Clooney's statement. The ICC website, on its Panel of Experts in International Law page, which is indirectly located under the Office of the Prosecutor section, also linked to the op-ed.

Authority to Appoint External Reviewers, From Where?

The gateway question is whether the prosecutor had authority to convene a panel of external consultants to review, that is to examine and advise on the sufficiency of, his investigation's evidence. Since the prosecutor instructed not discrete individuals but an organized team of individuals, this question comprises two essential subquestions: one, did the prosecutor have authority to outsource a review of his investigation's evidence to external consultants, and two, if he did, did he have authority to do so to an organized group of external consultants. To date, the prosecutor has not articulated any source of authority for his turn to the panel.

The Rome Statute, an international treaty, founds the ICC. It establishes the "Office of the Prosecutor" as an independent organ of the ICC (Article 34) and authorizes only the Office of the Prosecutor to investigate and prosecute before the ICC crimes that are within the jurisdiction of the ICC (Article 42(1)).

Nothing in the Rome Statute authorizes the prosecutor to instruct external consultants to review investigation evidence, at least not explicitly. Article 42(9) of the Rome Statute does direct the prosecutor to appoint advisers with legal expertise, but only on "specific issues, including, but not limited to, sexual and gender violence and violence against children." There is indication that the prosecutor may nonetheless have at least casually grounded his convocation of the panel in Article 42(9). The ICC website's Special Advisors To The Prosecutor page, located directly under its Office of the Prosecutor section, lists all of the prosecutor's special advisers regardless of topic and links by name to its "Panel of Experts in International Law" page. The panel page describes the panel's mission and identifies its members and academic advisors and certain of their credentials.

Yet Article 42(9) fairly read refers only to experts with legal specialization who advise on topics. A general review by legal experts of investigation evidence—the same evidence that the prosecutor must review to perform his prosecutorial duties—does not literally or easily qualify as advice by legal experts on discrete topics. (Bergsmo, Harhoff, and Zhu observe that "[t]his provision concerns the need to have expertise on specific issues ... in the Office of the Prosecutor.")

Even if Article 42(9) could be read to authorize the prosecutor to appoint special advisers to review his evidence when investigating, Prosecutor Khan seems not to actually have done so. The ICC website page listing special advisers that includes the panel notwithstanding, the prosecutor in his announcement identified only two of the panel's six members as his special advisers and said nothing about the panel's academic advisers. This he did while pointedly acknowledging his "other Special Advisors," two by name, who the prosecutor said contributed.

Article 54(1)(b) of the Rome Statute does instruct the prosecutor to take "appropriate measures to ensure the effective investigation and prosecution of crimes within the jurisdiction of the Court." This, however, does not likely grant the prosecutor authority to engage external consultants to review his evidence. That is because the preceding provision in the statute establishes that prosecutor's powers are for determining the truth. (See De Meester, who comments: "Clearly,

this provision [Article 54(1)(b)] is to be read together with the Prosecutor's obligation 'to establish the truth' which is found under subparagraph (a).") Article 54(1)(a) obligates the prosecutor to, "[i]n 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."

Delivery of evidence to external lawyers and judges, advised by academics, with a mandate to review the evidence and advise on its sufficiency for arrest warrant applications does not comfortably qualify as an Article 54(1)(b) appropriate measure. The work of these outside consultants does not promote, let alone ensure, an effective investigation. The views of a team of lawyers or judges, "experts in international law" as they may be, or of academics, learned as they may be, do not improve on any method or practice of truth discovery, nor do they extend the prosecutor's investigation to cover relevant facts or circumstances that the prosecutor may have failed to obtain. They also do not add to the Office of the Prosecutor any obvious "forensic" value. Even with the panel including, appropriately or inappropriately, two former international criminal tribunal judges —one of the ICC—legal commentator Joshua Rozenberg KC observes that the panel members' "legal skills do not give them any special expertise to assess evidence that is untried and untested." (See also Kern and Herzberg, who question whether outsourcing the Office of the Prosecutor's review function qualifies as an Article 54(1)(b) measure.)

Nor does the Rome Statute lend itself well to the notion that its explicit grants of authority to the prosecutor imply an authority to share investigation evidence with external consultants and instruct them to advise on it. The Rome Statute requires strict autonomy in prosecutorial decision-making. According to the statute's Article 42(1): "A member of the Office [of the Prosecutor] shall not seek or act on instruction from any external source." When the prosecutor asks for advice from outside experts on the sufficiency of his or her evidence, surely the prosecutor invites some direction from the experts; else, why ask? The Rome Statue's command to keep prosecutorial decisions free from external influence seems to foreclose a turn by the prosecutor to outside experts to review his investigation's evidence.

Critically, the states that negotiated the Rome Statute debated vigorously the extent of the prosecutor's independence from other organs of the ICC. (See Stegmiller, who notes: "The *proprio motu* power was one of the most controversial aspects during the Rome Conference.") The result of the debate was that the Rome Statute checks the prosecutor's autonomy in a number of ways, to improve responsible prosecutorial action. For example, the Rome Statute empowers the prosecutor to investigate on his own motion information on crimes (Article 15(1)), but only up to a preliminary point. If after analyzing the "seriousness of the information," the prosecutor concludes that a reasonable basis to proceed with an investigation exists, the prosecutor must obtain authorization of a pre-trial

chamber of the ICC to commence a full-blown investigation (Article 15(2)-(4)). (As Bergsmo, Pejic, and Zhu note: "An additional obstacle to unwarranted prosecutorial activism is judicial confirmation of charges against persons suspected of crimes within the Court's jurisdiction.") The foundational concern with prosecutorial overreach urges a conception of the Rome Statute as a charter that limits the authority of the prosecutor to what authority the charter grants explicitly.

Authority to Empanel External Reviewers, From Where?

The prosecutor shared his evidence with and instructed not merely a single external expert or an array of disparate external experts but an organized team of external experts. It would take a particularly aggressive view of the scope of any of the prosecutor's authorities under the Rome Statute to include authority to commission a board of external consultants to review the prosecutor's investigation evidence.

When an organized group, as opposed to unconnected individuals, reviews evidence, the risk of influenced thinking necessarily rises. Groupthink is a recognized socio-psychological phenomenon whereby a decision-making group elevates unanimity over realistic appraisal and subdues dissent and consideration of alternatives. Top credentials across group members are no antidote.

The risk of suppression of nonconforming views that can inhere in a structured group of decision-makers clashes with the Rome Statute requirement that the prosecutor comport himself or herself with strict impartiality. Under the Rome Statute, neither the prosecutor nor any deputy prosecutor—a deputy prosecutor assists the prosecutor and can carry out acts that the Rome Statute requires of the prosecutor (Article 42(3))—may "participate in any matter in which their [sic] impartiality might reasonably be doubted on any ground," on pain of disqualification (Article 42(7)), and Article 45 of the Rome Statute requires the prosecutor and each of the deputy prosecutors to "make a solemn undertaking in open court to exercise his or her respective functions impartially and conscientiously" (Article 45). The ICC Appeals Chamber has made clear in *Prosecutor v. Gaddafi and Al-Senussi* (2012) that, when looking for prosecutorial bias, the test is not merely for "actual lack of impartiality," but more stringently for "whether it reasonably appears that the Prosecutor lacks impartiality." A reading of the Rome Statute that capacitates the prosecutor to empanel a group of outsiders to examine and advise on his or her investigation evidence ignores the inbuilt risk of partiality that would flow with the advice from the group to the prosecutor.

Significantly, the panel does not compare well to a bench of judges. In fair judicial systems, people or processes unrelated to the prosecution select judges. With respect to the panel, however, the prosecutor announced that he convened it, and the panel reported that the prosecutor requested that it convene. The panel stated that its members were invited, but neither the prosecutor nor the panel mentioned a formal selection process. The impression is that the prosecutor or

someone on his behalf hand-selected the panel members, something which in its own right engenders a risk of bias. The Rome Statute does not even permit the prosecutor to hand-select his own deputy prosecutors—the prosecutor can only nominate three candidates for each position of deputy prosecutor and the Rome Statute's "Assembly of State Parties" elects, by secret ballot, deputy prosecutors (Article 42(4)).

The prosecutor has said little, if anything, that quells concerns about groupthink or about selection bias when forming the panel. He has not explained what methodology he required the panel use in its work, if he required any at all, nor has he explained the process by which he or someone else selected the panel members, or chose for the panel members' respective areas of specialization. Nor has the prosecutor explained how he or someone else chose the panel's academic advisers or for what purpose. In its op-ed, the panel volunteered that its members were "lawyers in international law hailing from diverse personal backgrounds," but it is curious that the biographies of all the panel's members and academic advisers, which were appended to the panel report, show strong life or work ties to the U.K., from where the prosecutor hails.

The panel, apparently sensitive to the issue of its legality, took pains to justify its role. It averred in its op-ed that it is "not unusual" for the prosecutor to "invite external experts to participate in an evidence-review" during an investigation, and that it is "not the first time an international prosecutor has formed a Panel of Experts to advise on potential charges related to a conflict." The panel did not identify any specific precedents. "Usual," however, is not a source of authority and "usual" does not make right. The same goes for "not the first time," even if that refers to the practice of an ICC prosecutor, as opposed to another international system's prosecutor, or to delivery of evidence, some of it confidential, to an external panel. Moreover, the averred justification says nothing about external panels reviewing evidence after the prosecutor has begun a full-blown investigation.

Fairness Requires Fair Process

Fairness, a concept on which the ICC depends for its legitimacy, ought to elevate the rights of accused individuals over arbitrary prosecutorial actions. (See former ICC President Judge Sang-Hyun Song, who explains that procedural fairness is a "cornerstone of ICC integrity.") For individuals subject to a criminal justice system, fairness requires fair process—namely, procedures and practices that ensure fair treatment and fair adjudication. To analogize to U.S. constitutional law, "due process of law" is the principle that obliges government to treat its citizenry fairly, and it encompasses "procedural due process," which compels authorities to use only fair methods and procedures when seeking to deprive an individual of life, liberty, or property. The Rome Statute acknowledges the "principle of due process recognized by international law," but only when addressing how to allocate cases between international and national adjudications (Article 17(2)). Nevertheless, as Rome Statute commentators Christopher Hall and Dov Jacobs observe, the Rome

Statute "echoes" the due process guarantee of the U.S. Constitution and the precedent assurance of the English Magna Carta when the statute provides that no person may be "deprived of his or her liberty except on such grounds and in accordance with such procedures are established in the Statute" (Article 55(1)(2)). (See also Stahn, who writes: "Fairness of proceedings is the cardinal principle of the Rome system of justice.")

At the ICC, the rights of accused or prosecuted individuals to fair process trace more particularly to the Rome Statute's Article 64(2), which requires the trial chamber of the ICC to ensure that trials are fair and expeditious, and its Article 67, which guarantees the right of the accused to a fair and impartial trial, as well as to various other provisions of the statute that articulate specific rights considered necessary to fair trials and other proceedings. An ICC Pre-Trial Chamber ruled in *Situation in the Democratic Republic of Congo* (2006), when considering the then-prosecutor's actions during an investigation, that "the principle of a fair trial applies not only to the case phase ... but also prior to the case phase." Accordingly, fair process, a fundament of the Rome Statute, applies even when the prosecutor reviews evidence prior to applying for warrants of arrest.

Even setting aside the dubious authority of the prosecutor to delegate his investigative evidence review duties to outsiders, it is difficult to imagine that fair process would permit external consultants to shape the prosecutor's view of investigation evidence even to a mild extent. A good reason for that is that laws and rules that govern the prosecutor do not apply to external consultants, at all or with the same effect. It stands to reason then that any defect in method or behavior of a panel member in connection with the panel's review of the prosecutor's evidence must be attributed to the prosecutor. This in turn means that the prosecutor can have breached his legal or ethical obligations through the actions or omissions of a panel member. If the prosecutor did so breach, the breach can have compromised his evidence review process or the pending proceedings at the ICC's Pre-Trial Chamber I, potentially to the extent of denying fair process.

Prosecutor Is Obligated by Strict Impartiality

As noted, the Rome Statute's Article 42(7) requires the prosecutor and the deputy prosecutors abstain not from the appearance of partiality and the statute's Article 45 requires the prosecutor and each of the deputy prosecutors solemnly undertake in open court to act impartially. The Rome Statute, however, does not apply to external consultants of the prosecutor. Consequently, no panel member or academic adviser was as obligated to avoid the appearance of impartiality, act impartially, and avow impartiality as the prosecutor, if at all.

The ICC has Rules of Procedure and Evidence, which apply precepts of the Rome Statute to the functioning of the ICC and to practice before it. Rule 34 of these rules provides, explicitly in addition to grounds for disqualification set forth in Article 42(7) of the Rome Statute, an open-ended list of grounds for disqualification of a prosecutor or deputy prosecutor. One of the listed grounds is "performance of functions, prior to taking office, during which he or she could be

expected to have formed an opinion on the case in question, on the parties or on their legal representatives that, objectively, could adversely affect the required impartiality of the person concerned." In advising the prosecutor on his evidence, the panel members and academic advisers did not act in or before the ICC, meaning that Rule 34 did not apply to them.

The already-noted phenomenon of groupthink persists as a concern about partiality. The panel reviewed evidence that the prosecutor shared with it in a coordinated manner, including meeting at the ICC and in video calls. It reached unanimous conclusions on all questions posed to it—maybe even on more, since the panel commended the prosecutor's own process of review—and it drafted its report as one. The prosecutor declared that the panel's analysis supported and strengthened his applications. The risk that some opinion of some panel member was advertently or inadvertently quashed for the sake of group unison is inherent to the panel and the way it apparently worked and should be charged to the prosecutor. This risk alone points to a conclusion that the prosecutor failed to meet his legal obligation to abstain from at least the appearance of partiality.

What is more, external consultants may have had prior functions or can have affiliations or agendas that bias their conclusions. The prosecutor did not disclose whether he or anyone screened the panel's members or academic advisers for problematic prior functions or formed opinions. The prosecutor did label the panel "impartial" but left unsaid how he determined that the panel members were impartial and how he ensured that they would act impartially. As for the panel's academic advisers, the prosecutor said nothing about their state of impartiality. Regardless, the asymmetry between the impartiality obligations of the prosecutor, which are maximally stringent, and those, if any, of the panel members or academic advisers introduces the possibility of bias. This possibility should be charged to the prosecutor and further points to a conclusion that the prosecutor did not comply with his obligations concerning impartiality.

Prosecutor Must Seek Truth

Also as noted, Article 54(1)(a) of the Rome Statute obligates the prosecutor to investigate "incriminating and exonerating circumstances equally" to "establish the truth." In addition, the ICC has a Code of Conduct for the Office of the Prosecutor, which is a code of ethics that prescribes minimum standards of conduct by the prosecutor and his office. The code too concerns itself with objective truth-seeking. It imposes a duty on members of the prosecutor's office to consider all relevant circumstances when assessing evidence, regardless of whether they advantage or disadvantage the prosecution (Paragraph 49(b)).

Like the Rome Statute, the code does not apply to outsiders—that is, it explicitly does not bind consultants, contractors, and special advisers of the office of the prosecutor unless they agree otherwise in their contracts (Paragraph 2). Even if they do agree, however, the code directs its disciplinary measures for breaches solely at staff of the office of the prosecutor (Paragraphs 74-76). The code therefore did not bind the panel's members or its academic advisers—who in any

event may have advised only the panel and not the prosecutor or his office—if it bound them at all, to the same effect as it binds the prosecutor. This means that the prosecutor, by enjoying input from the panel, took advice on his evidence from persons not as ethically constrained as he.

It cannot be certain that the panel's members, or its academic advisers if they participated in a review of evidence, considered all relevant, including exculpating, circumstances. The Rome Statute did not compel them to do so—it does not apply to them. Nor did the Code of Conduct for the Office of the Prosecutor, either at all or to a significant effect—the code applies only to service providers of the prosecutor who have contractually agreed to it, and even then, without the code's disciplinary consequences. Additionally, panel members, and panel academic advisers if they participated in a review of evidence, presumably reviewed only what the prosecutor showed them and had no way to assess the credibility of witnesses. Any of these deficiencies could easily have given rise to distortions, exactly what the prosecutor must avoid when investigating to establish the truth.

The prosecutor should own the fundamental defect that ingrains in a review of investigation evidence by people not as obligated to, or given the circumstances even capable of, truth-seeking as he. This defect clashes with his legal and ethical obligations to investigate incriminating and exonerating circumstances equally and points to a conclusion that the prosecutor failed to meet his obligations to investigate evenhandedly.

Prosecutor Is Circumscribed in Public Pronouncements

The Code of Conduct for the Office of the Prosecutor instructs members of the prosecutor's office to, among other things, "refrain from making any public pronouncements outside the context of proceedings before the Court that they know, or reasonably ought to know, may be disseminated by means of public communication and may have a substantial likelihood of prejudicing the judicial proceedings or the rights of any person in the proceedings" (Paragraph 39). Between the prosecutor, the panel, and some panel participants, several public pronouncements outside the context of ICC proceedings accompanied the prosecutor's announcement of his application for arrest warrants.

In his public announcement of his applications, the prosecutor vaunted panel members as unbiased experts of enormous prestige and credited the panel's work as supporting and strengthening his applications for arrest warrants. In his CNN interview, the prosecutor lauded panel members and implied that they approved of his actions. The high praise the prosecutor heaped on the panel not only reinforces the perception that the panel exerted meaningful influence on him but also inescapably impresses the public. The public can well include ICC judges, even those of Pre-Trial Chamber I.

The panel too went public. It saw fit to publish an op-ed in a newspaper with global reach promoting its support of not only the prosecutor's applications for arrest warrants but also his internal process of preparing the applications. The panel

linked to the report in its op-ed, and a panel member and a panel academic adviser headlined and posted the panel's report, each (in the case of Milanovic, together with Clooney and linking also to Clooney's statement) on non-ICC websites. Moreover, the ICC, presumably at the initiative or consent of the prosecutor, linked to the panel's op-ed on the ICC website. These actions aim widely and impact public opinion. An op-ed is nearly by definition an opinion article meant to persuade a readership, and the title of the op-ed alone boosts the stature of the prosecutor's applications. The "public" in "public opinion" can well include ICC judges, even those of Pre-Trial Chamber I.

The prosecutor, through his public promotion of the panel and the acknowledged effect of its report on his applications for warrants of arrest, as well as his presumed connection to the link on the ICC website to the panel's op-ed, introduced a notable quantum of likelihood of prejudice into the judicial proceedings that his applications activated. The panel, and separately some panel participants, with acts of promotion of the panel's report and points of view on public media platforms, increased that quantum considerably. These acts should be deemed the prosecutor's own doings, and, together with his actual doings, they point to a conclusion that the prosecutor failed to comply with his ethical duty to refrain from at least potentially, if not actually, prejudicial public pronouncements.

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The ICC prosecutor interprets the Rome Statute as authorizing him to instruct external legal experts to review his investigation evidence and even to empanel them. On both counts, he is arguably wrong. Separately, the prosecutor submitted investigation evidence—some of it confidential—to a panel he convened comprising external experts who were not as legally and ethically bound as he, and sought and enjoyed its advice. This raises serious concerns that the prosecutor breached his obligations concerning impartiality and his duties to investigate equitably, thus disregarding fair process. Moreover, the prosecutor publicly touted, and tolerated the panel publicly touting, the panel's support for his applications for arrest warrants. This conduct suggests that the prosecutor engaged in a questionable campaign of public persuasion, further disregarding fair process.

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