Judicial Independence in the International Criminal Court

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Abstract. Judges in international tribunals have historically been subject to political pressures which might influence the independence of their position. The Rome Statute for the International Criminal Court has created a system in which judges are selected by political representatives of state parties, without any independent screening process. Furthermore, judges will have a high degree of control over the fundamental decisions as to who should be prosecuted, an area which normally falls in the province of the Prosecutor. There are legitimate reasons to fear that this system will fail to provide the necessary safeguards to ensure that judicial independence is maintained.

1. INTRODUCTION

On 11 April 2002 the ratification process for the Rome Statute for the International Criminal Court ('ICC') was completed, bringing it into effect from 1 July of the same year. The aim of this paper is to assess the extent to which judges in the projected ICC can be expected to be free from pressures which are external to the judicial process, and to make decisions which are not influenced by political considerations.

International justice operates in very different circumstances from domestic forms of justice. In most liberal democracies the courts are independent of politics: the politicians make the law, and the judges interpret it. In the international arena, politics has a far greater role. In a world where there is as yet no permanent international criminal court it is politicians and diplomats who decide who will be put on trial and how they will be tried. Trials take place in the face of political realities of ongoing wars, delicate peace negotiations and uncooperative governments; criminal proceedings against individuals may not always be a priority for the United Nations.

The experience of the past decades has shown two tendencies. The first is the reluctance of the world community to become involved in many situations which could or should be dealt with by international criminal

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trials. There were trials following the atrocities of World War I and World War II, of Rwanda and the Former Yugoslavia, but not following the equal horrors of the Vietnam war, the killing fields of Cambodia, the murders, tortures and disappearances in Chile and Uruguay, and the Iraqi massacres of the Kurds. This is often seen as a sign of cynicism in the international community, a sign that the UN is unequal in its treatment of equally culpable governments and dictators for reasons of economics, politics and apathy. To date, the question of who should be tried has been the province of the international community. In the ICC, the judges will also have a significant role in this process.

The second tendency is to expect convictions, not merely fair proceedings from war crimes trials. This pressure comes from many sources, including the media, politicians and non-governmental organisations ('NGOs'). The popular perception is that an acquittal of a suspected war criminal is a failure of the process by which he was tried. This should never be allowed to influence an independent judiciary. Fair trials are bound to result in the acquittals of some guilty men as well as innocent ones: that is the inevitable consequence of the principle enshrined in the high standard of proof imposed upon the prosecution in any properly conducted criminal trial. There is some feeling that defendants before the International Criminal Tribunal for the Former Yugoslavia ('ICTY') and the International Criminal Tribunal for Rwanda ('ICTR') are not judged according to this high standard but are rather required to prove their innocence in order to achieve an acquittal.[1]

The weightily worded preamble to the 1998 Rome Statute of the International Criminal Court states that the parties are:

> Mindful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity, […]
>
> Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes, […]
>
> Resolved to guarantee lasting respect for and the enforcement of international justice […].[2]

These are high-minded aims. If they are to be achieved, the ICC will need judges who are resolute, firstly in trying people suspected of breaches of

1. The Appellant's briefs in the cases of The Prosecutor *v.* Jean Paul Akayesu, Judgement, Case No. ICTR-96-4-A, A.Ch., 1 June 2001, and The Prosecutor *v.* Alfred Musema, Judgement, Case No. ICTR-96-13-A, A.Ch., 16 November 2001, focused largely on alleged failures by the Trial Chamber to apply the correct burden and standard of proof. After the acquittal of Ignace Bagilishema (The Prosecutor *v.* Ignace Bagilishema, Judgement, Case No. ICTR-95-1A-T, T.Ch. I, 7 June 2001) it was widely thought that the defendant had succeeded in his case by proving his innocence, rather than by simply throwing doubt on prosecution evidence.
2. Statute for the International Criminal Court, Rome, 17 July 1998, UN Doc. A/CONF.183/9 (17 July 1998), Preamble.

international criminal law, however politically inconvenient this may be for the world community; and secondly in ensuring that those whom they try are judged fairly and impartially, without regard to any external pressure for convictions.

2. The Historical Context

War crimes trials in the first half of the 20th century were characterised by a periodic desire for justice followed by apathy and disintegration.

The Leipzig trials which followed the war crimes provisions in the 1919 Treaty of Versailles provide one illustration of this. The initial intention of the Allied Powers was to try the Kaiser and a number of other German military and political leaders before an international tribunal. A list of over 900 names of suspects was given to the German Government in 1920. But faced with the refusal of the German Government to hand over these suspects, accompanied by threats to recommence the war if this were insisted on, the Allies capitulated, and agreed that the Germans could hold their own trials. The ensuing proceedings were effectively a sham and only 13 of 901 defendants were convicted.[3]

This is not an isolated example. The political difficulties experienced in the course of the Constantinople trials in 1919 saw a similar collapse into embarrassment and failure.

2.1. Nuremberg

The first war crimes trial to be adjudicated by an international panel of judges was the Nuremberg Trial in 1946. Yet in almost every respect this is an isolated example from which few precedents can be derived. The decision to have a trial rather than summary executions was essentially American driven, the Soviets and initially Britain preferring the latter course. The British Lord Chancellor, Lord Simon, summed up British political sentiment in a Cabinet memorandum before the trial:

> The question of the fate of the Nazi leaders is a political, not a judicial question. It would not rest with judges, however eminent or learned, to decide finally a matter like this, which is of the widest and most vital public policy.[4]

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3. In The Nuremberg Trial, at 19 (1995) J. Tusa and A. Tusa write as follows:

> These trials eventually opened in Leipzig in late 1922. They were a fiasco. It proved difficult to find the accused or witnesses; it was almost impossible to make them appear. Eight hundred and eighty eight out of the 901 finally charged were acquitted or summarily dismissed. For the rest derisorily low sentences were passed. When several of the convicted escaped from prison, public congratulations were offered to the warders.

4. Quoted *in* G. Robertson, Crimes Against Humanity: The Struggle for Global Justice, at 212 (2000).

Although it is now principally remembered as being a trial which focused on the Jewish Holocaust, it was in fact largely concerned with crimes committed against the four nations conducting the trial. In his authoritative work on the politics of war crimes trials, Professor Gary Bass writes:

> One of the great ironies of Nuremberg's legacy is that the tribunal is remembered as a product of Allied horror at the Holocaust, when in fact America and Britain, the two liberal countries that played major roles in deciding what Nuremberg would be, actually focused far more on the criminality of Nazi aggression than on the Holocaust. Nuremberg was self-serving in ways that are usually forgotten today.[5]

Four crimes were charged on the indictment:[6] the crime of waging aggressive war was prosecuted by the United States team; crimes against peace by the British; war crimes and crimes against humanity were shared by the French and the Russians according to whether they had occurred in Eastern or Western Europe. Only the last count included, among crimes which had been committed against a civilian population, the extermination of the Jews.

Judges and prosecutors from each of the four victorious nations were largely concerned with crimes committed against their own people. That anything even approaching a fair trial could be achieved in these circumstances is a tribute to the professionalism of judges who were prepared to countenance graduated sentences and acquittals.

But it was nevertheless a victors' tribunal, set up to try the leaders of a defeated power. There was never any prospect that Allied commanders would be tried. The decisions made by the prosecution not to charge the Germans with offences which had also been committed by the Allies (*e.g.*, the bombing of undefended cities) relieved the judges of much of the need to make decisions which might cause political embarrassment. Nevertheless, there are still parts of the judgement in which political considerations can clearly be detected. The final decision of the tribunal avoided discussion of many matters, such as the Protocol to the 1939 Nazi-Soviet Pact, which it was felt might cause embarrassment to any of the Allies.[7]

A good example of this difficulty is the part of the judgement dealing with the conviction of Admiral Doenitz: Doenitz had run a strong defence argument stating that he had not breached the international law of submarine warfare, and calling evidence from the US Admiral Nimitz to the effect that unrestricted submarine warfare had been practised by the United States as well as the Germans. The judgement cites this evidence and concludes:

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5. G. Bass, Stay the Hand of Vengeance: The Politics of War Crimes Tribunals, at 148 (2000).
6. His Majesty's Stationary Office, The Trial of German Major War Criminals: Proceedings of the International Military Tribunal Sitting at Nuremberg Germany, Part 1, at 2 (1946).
7. For the full text of the Nuremberg Judgement *see* His Majesty's Stationary Office, The Trial of German Major War Criminals: Proceedings of the International Military Tribunal Sitting at Nuremberg Germany, Part 22, at 411 (1950).

> In view of all the facts proved […], the sentence on Doenitz is not assessed on the ground of his breaches of the international law of submarine warfare.[8]

What remains unclear is on what the judgement and sentence is assessed. It seems that the judges were unwilling to criticise practices which were proved to be identical to those carried out by Allied Powers, despite the fact that *tu quoque* was not an available defence. But they still wished to convict Doenitz. This led to some highly questionable jurisprudence which has been the subject of much legal criticism since.

Some influence was more direct: the strongest political influence was exercised by the Soviet Union on the Russian judge Nikitchenko: despite the hopes of Biddle and Lawrence, his United States and English counterparts, for a unanimous judgement, he dissented on a number of grounds. On the day before judgement was given he confessed to Biddle that he had received orders from Moscow to object to the acquittals and to state that Hess should be hanged.[9]

2.2. Beyond Nuremberg

In the fifty years which followed, the use of international criminal trials was sporadic. The Tokyo trials became a mockery when it emerged that Emperor Hirohito had not only been granted exemption from criminal proceedings, but had also been allowed to retain the throne of Japan. Trials of increasingly aged Nazis continued in Germany until the 1970s, and Israel, France and Britain have each hosted trials. These were often trials with political goals: the trial of John Demjanjuk in 1987–1988 was forced on a reluctant Israel by the United States Department of Justice. Gitta Sereny writes:

> […] the American Department of State, unable by law to conduct a criminal trial in such cases and in need of further congressional support to maintain their Office of Special Investigations (OSI), needed a show trial of such a case abroad to justify the OSI's expensive denaturalization proceedings. In order to achieve this, they used political pressure to force the Israelis to extradite Demjanjuk for a criminal trial in Israel on a charge which – doubts which they did not mention to the Israelis – they knew from early evidence from Germany and the Soviet Union was at the very least questionable.[10]

Despite the obvious flaws in the evidence, in April 1988 Demjanjuk was found to be the notorious Ivan the Terrible, and was convicted of crimes committed at Treblinka extermination camp, for which he was sentenced to death.[11] At his appeal it was accepted that he could not have been Ivan

8. *Id.*, at 509.
9. Tusa & Tusa, *supra* note 3, at 466.
10. G. Sereny, The German Trauma: Experiences and Reflections 1938–2000, at 309 (2000).
11. Israel *v.* Demjanjuk, criminal case (Jerusalem), No. 373/86, 18 April 1988.

the Terrible of Treblinka; it was also clear that he had worked at the extermination camp at Sobibor.[12] But far from this being the end of the case, it was a further fifteen months before he was released, as the Israeli authorities tried to find ways to charge him of other crimes which he might have committed (but for which there was never a shred of evidence) at Sobibor.

The *Demjanjuk* case is perhaps the worst post-war example of politics being given precedence over justice. It is an illustration of the fact that justice cannot be used as a way of achieving other ends, however desirable they may be. In the world political arena many of the supporters of an international criminal justice system advocate it as a way of achieving reconciliation and peace, impunity and deterrence. Justice may indeed assist towards these desirable goals in many cases; but it must be accepted that when a just trial results in an unpalatable result, it cannot be compromised for the sake of other aims.

2.3. The *Ad Hoc* Tribunals

The advent of the *Ad Hoc* Tribunals in the 1990s brought the issue of international criminal trials to the forefront of the political agenda. The idealism of the immediate post war years was revived, and the possibility of trials carried out not by individual countries but by an international panel of judges became a reality for the first time since Nuremberg.

The ICTR and ICTY operate in quite different conditions from the Nuremberg Tribunal. The ICTY's first president, the distinguished Italian jurist Antonio Cassese, said in a speech to the UN in 1994: "This is a truly international institution. It is an expression of the entire world community, not the long arm of four powerful victors."[13]

The Tribunals are made up not of victor nations but of supposedly independent judges with no desire to achieve any result beyond that of fair and expeditious trials of any accused. But both Tribunals have been subject to allegations of political and personal bias.

The Rome Statute for the ICC can be said to have grown out of the *Ad Hoc* Tribunals. It is clear to anyone who has followed the progress of debates on the ICC legislation that the experience of the *Ad Hoc* Tribunals is an important consideration in the making of the rules and procedural mechanisms of the ICC. So the problems which have arisen over the independence of the judiciary, even in this limited context, provide examples from which those involved in making the ICC legislation can learn.

12. Demjanjuk *v.* Israel, criminal appeal, No. 347/88, Supreme Court, 29 July 1993.
13. 1994 ICTY Yearbook, at 136–137 (14 November 1994).

2.3.1. The Barayagwiza *case*

On 3 November 1999 the Appeals Chamber for the ICTR handed down a decision in the case of Jean Bosco Barayagwiza.[14] It stated that owing to defects in the procedure by which the defendant was dealt with in the pre-trial stages of his case, the indictment should be dismissed and the defendant granted immediate release. However, pursuant to a Prosecutor's request for a review, it reversed this decision on 31 March 2000,[15] reinstated the indictment, and ordered that the defendant remain in custody awaiting trial.

This caused consternation in international legal circles. The Judgement of 31 March 2000 emphasises that the only reason for the reversal of the previous decision was the finding of facts different from those upon which the original decision was made.[16] But there was widespread speculation that this was not the whole story. The initial decision had provoked outrage in Rwandan government circles. The interpretation in Kigali, Rwanda's capital, was that one of the major suspects of genocide was escaping trial due to technicalities. The ICTR had always been viewed with some suspicion by Rwandans who felt that justice could be better dispensed locally: in 1994 when the ICTR was established by the Security Council, Rwanda, which had a seat on the Security Council at the time, had been alone in voting against it.[17] Now the ICTR was seen to be allowing a presumed war criminal to go free.

Rwandan outrage was expressed in immediate practical terms. The Rwandan Government suspended co-operation with the ICTR pending resolution of the issue. This was a matter of serious concern for the ICTR. The Office of the Prosecutor ('OTP') was and is based in Kigali. It relies on the co-operation of the Rwandan government for help in allowing access to sites, finding witnesses, and bringing evidence to the Court. Without this co-operation the work of the OTP and thus the whole trial process was severely compromised.

There can be no doubt that during the OTP's application for review this concern was uppermost in the mind of the Prosecutor, Carla Del Ponte. In the course of the oral hearing of the matter on 22 February 2000 she addressed the issue in the following manner:

> Let me just say a few words with respect to the government of Rwanda. The government of Rwanda reacted very seriously in a tough manner to the decision of 3 November 1999. It was a politically motivated decision, which is understandable.

14. Jean Bosco Barayagwiza *v.* The Prosecutor, Decision, Case No. ICTR-97-19-AR72, A.Ch., 3 November 1999.
15. Jean Bosco Barayagwiza *v.* The Prosecutor, Decision (Prosecutor's Request for Review or Reconsideration), Case No. ICTR-97-19-AR72, A.Ch., 31 March 2000.
16. *Id.*, at para. 52.
17. *See* P. Akhavan, *The International Criminal Tribunal for Rwanda: The Politics and Pragmatics of Punishment*, 90 AJIL 501 (1996).

> It can only be understood if one is cognisant of the situation, if one is aware of what happened in Rwanda in 1994. I also notice that, well, it was the Prosecutor that had no visa to travel to Rwanda. It was the Prosecutor who could not be received by Rwandan authorities. In November, after your decision, there was no co-operation, no collaboration with the Office of the Prosecutor. In other words, justice, as dispensed by this tribunal, was paralysed. It was the trial of Bagilishema which had to be adjourned because the Rwandan government did not allow 16 witnesses to appear before this court. […]
>
> Whether we want it or not, we must come to terms with the fact that our ability to continue with our prosecution and investigations depend on the government of Rwanda. That is the reality we face. […]
>
> In other words we can as well put the key in the door, close the door and then open that of the prison. And in that case the Rwandan government will not be involved in any manner.[18]

It must be stressed that this argument was not accepted as valid by the Appeal Court judges. In the main body of the Judgement of 31 March the Court stated:

> The Appeals Chamber wishes to stress that the Tribunal is an independent body, whose decisions are based solely on justice and law. If a decision in any case should be followed by non-co-operation, that consequence would be a matter for the Security Council.[19]

Judge Rafael Nieto-Navia's Separate Opinion deals with the matter more strongly:

> In my view, the Appeals Chamber, although mindful of this essential need for co-operation by the Rwandan government, is also mindful of the role the Tribunal plays in this process and therefore I refute most strenuously the suggestion that in reaching decisions, political considerations should play a persuasive or governing role, in order to assuage States and ensure co-operation to achieve the long-term goals of the Tribunal. On the contrary, in no circumstances would such considerations cause the Tribunal to compromise its judicial independence and integrity. This is a Tribunal whose decisions must be taken, solely with the intention of both implementing the law and guaranteeing justice to the case before it, not as a result of political pressure and threats to withhold co-operation being asserted by an angry government.[20]

This is clearly a correct legal statement, but it failed to assuage fears that political expediency had in fact played a greater role in the decision than outward appearances would suggest. It is certainly arguable that the first decision was incorrect due to lack of knowledge of certain factual circumstances. But given that there were no new facts which had been unavailable, as opposed to unknown to the Appeals Chamber, at the time

18. Barayagwiza, *supra* note 15, quoted *in* Declaration of Judge Nieto-Navia, at para. 2.
19. *Id.*, at para. 34.
20. *Id.*, at para. 7.

of the initial decision it was unfortunate that there had to be two conflicting judgements before this issue was resolved.[21]

2.3.2. Independence of the Ad Hoc *Tribunals*

It is in this respect that any international court differs so substantially from courts in national jurisdictions. It is a United Nations institution, and thus it is difficult for it to ignore the political priorities of the world community. This is easily illustrated by the different experiences of the two *Ad Hoc* Tribunals.

The principal problem for the ICTY in its early years was in arresting high ranking individuals who had played a part in the Bosnian conflict. Its first trial in 1996 was of an obscure Serbian cafe owner who, while he was alleged to have tortured and murdered Muslims in concentration camps, was not alleged to have had any position of political or military power. Meanwhile Radovan Karađzić, Ratko Mladić and many other indicted leaders are still at liberty six years on. The political situation in the Former Yugoslavia was such that there was a real reluctance in the UN to jeopardise the fragile 1995 Dayton Peace Accord by arresting the major suspects. This did not really begin to change until the fall of the old Serb regime in 2000 which led eventually to the arrest of former President Milošević in April 2001 and his subsequent extradition to The Hague in June of the same year.

The frustration suffered by the judges during the early years of operation of the ICTY was illustrated by the tendency of the Tribunal's judges to step into the political arena. In February 1995 the judges issued a press release requiring the Prosecution to issue a "programme of indictments" to "meet the expectations of the Security Council and of the world community at large."[22] This is clearly a foray into the province of the Prosecutor. Even more so was the call of Judge Cassese, President of the ICTY, on the International Olympic Committee in 1996 to prevent Serbia from participating in the Olympic Games of that year unless it helped arrest Karađzić and Mladić, to whom he specifically referred as "war criminals."[23] For a judge to describe as guilty a man whom his court has not yet tried suggests a lack of the impartiality required of that judge at trial.

When the ICTY handed down its first acquittal of Colonel Delalić there was much adverse comment in the media, which suggested that an acquittal

21. *See* W.A. Schabas, *Barayagwiza v. Prosecutor: Prosecutor's Request for Review or Reconsideration*, 94 AJIL 563 (2000).
22. ICTY Press Release, 1 February 1995, CC/P10/003-E.
23. Congressional Research Service, *Library of Congress 96-177F: Bosnia: Civil Implementation of the Peace Agreement, reporting on the Mid Term Conference on the Implementation of the Dayton Accord*, Florence, 13–14 June 1996.

was a failure of justice.[24] But an independent tribunal has a duty to ensure that justice takes its course, even if this leads to the acquittal of defendants who are widely believed to be guilty. If this is not the case then there is no point in having trials at all, as the essential decision-making process has already taken place.

In Rwanda on the other hand the political situation was very different. The Hutus had been ousted from power in the course of the conflict in 1994 and had been replaced by a Tutsi regime under President Kagame. As a result, Rwanda was willing to assist in the trial of Hutu leaders, and the detention centre in Arusha is full of top military commanders, as well as almost all the ministers of the interim government which was in power during the massacres. One of the first cases to come to trial was that of ex-Prime Minister Kambanda, who pleaded guilty to genocide in 1997. But, despite the fact that there is strong evidence that Tutsis as well as Hutus committed massacres, not a single Tutsi has been indicted by the ICTR.

There is a notable reluctance on the part of some judges to countenance acquittals, even in the face of overwhelming evidence of innocence. The recent Judgement of the ICTR in the case of *Ignace Bagilishema* is a case in point. The minority judgements of Judges Guney (Turkey) and Gunawardana (India) read as if they had been present at different trials. Judge Gunawardana wrote as follows:

> It is clear from the above analysis of the evidence in this case, that the Accused has established the plea set up by him, that the resources which were available to him were inadequate to prevent the massacres of the scale that took place in Mabanza commune, with the means available to him. Moreover the Prosecutor has failed to disprove this position.[25]

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24. For example, the Los Angeles Times of 17 November 1998 carried this comment:

> The release of wartime commander General Delalić is likely to intensify already widespread criticism that those who plotted the worst violence in Europe since the Nazi era are allowed to go free while authorities punish their underlings […]. [Delalić's] acquittal bodes poorly for the prospects of bringing to justice the two men considered chief orchestrators of the Bosnian horrors: Serbian nationalist leader Radovan Karađzić and his military commander, General Ratko Mladić.

at 6.

There were similarly adverse reactions to the acquittal of Ignace Bagilishema by the ICTR on 7 June 2001. On 16 June 2001, The Economist published the following comment:

> The only case of consequence heard since July 1999, that of Ignace Bagilishema, a former mayor in Western Rwanda, ended on June 7th with his acquittal. Mr Bagilishema, who had been accused of being instrumental in the deaths of 45,000 Tutsis, was let off because of insufficient evidence. Perhaps the verdict was correct; but with confidence in the court so low, many are doubtful that justice has been done.

at 27.

25. The Prosecutor *v.* Ignace Bagilishema, Separate Opinion of Judge Asoka Z. Gunawardana, Case No. ICTR-95-1A-T, T.Ch. I, 7 June 2001, para. 130.

Judge Guney on the other hand dissented with the acquittal on the count of conspiracy to commit genocide, and deemed the appropriate penalty to be life imprisonment, the maximum available to the Court. He said:

> I am satisfied that the presence of the Accused at Gatwara Stadium on 18 April 1994 contributed substantially to the perpetration of the crimes testified to by the witnesses during the massacre of the Tutsi refugees […]. I am thoroughly convinced that the Accused is guilty under Article 6(1) of the Statute, of complicity in genocide and crimes against humanity […].[26]

The problem which has been consistently seen with the *Ad Hoc* Tribunals is that the judges appear to place an evidential burden on the defence: even in the Bagilishema acquittal, a perusal of the Judgement makes it clear that the majority of the Trial Chamber was of the opinion not so much that the Prosecution had failed to prove its case beyond reasonable doubt, but that the Defence had succeeded in proving the innocence of the accused.

The appearance of independence is not assisted by the set-up of the courts: in the *Ad Hoc* Tribunals, as well as in the projected structure of the ICC, the judges and the prosecution are served by the same registry. In The Hague and in Arusha, prosecution, judges and the registry work in the same building and share the same resources; the result is a blurring of the distinction between the roles of the prosecution and the judges, which is detrimental to judicial impartiality.

2.4. The *Pinochet* case

It was against the background of the 20th century's patchy record of international war crimes trials that the *Pinochet* extradition case was heard in Britain. In spite of the fact that it did not result in a trial, it represented an important and seminal achievement in the progress towards an international justice system.

The arrest of General Pinochet in London on 16 October 1998 was unprecedented in international law. Despite his knowledge of his indictment by the Spanish courts, Pinochet believed himself to be safe in coming to Britain to consult doctors. He expected to be shielded from international proceedings by the doctrine of sovereign immunity, as well as by the amnesty he had somewhat ludicrously granted to himself in 1978. His confidence in the unwillingness of states to interfere with the internal affairs of another country was empirically well justified: never before had a remotely similar arrest taken place.

The case proceeded through the British courts during 1999 and 2000. The only real question was that of sovereign immunity: it was not doubted that the courts would otherwise have jurisdiction over his acts since Britain's 1988 ratification of the Torture Convention which imposed a duty

26. *Id.*, Separate and Dissenting Opinion of Judge Mehmet Guney, paras. 154–155.

on any state hosting a person accused of torture to try or extradite him.[27] The final decision in *ex parte Pinochet* (No. 3)[28] was a landmark for international justice: it was decided by the House of Lords by a majority of 6-1 that sovereign immunity does not attach to such crimes, as they can never be legitimate functions of a state official.[29]

Despite intense political pressure from Pinochet's supporters in Chile, as well as from a strong US contingent and even from the Vatican, to respect the sovereign immunity of states even in the face of the most heinous of crimes, the landmark decision was made. It is perhaps the best example in international criminal law of judges remaining independent of any political pressure in their interpretation of modern international law, and deciding that there can be jurisdiction over the internal affairs of another state when crimes of such magnitude have been committed. The fact that Pinochet was eventually returned to Chile on grounds of ill health in March 2000, to have proceedings against him stayed in July 2001, does not derogate from the ground-breaking nature of the decision.

The *Pinochet* case was also notable for another assertion of the importance of judicial independence: after the decision to extradite Pinochet by a majority of 3-2 in *ex parte Pinochet* (No. 1)[30] another panel of Law Lords was persuaded in *ex parte Pinochet* (No. 2)[31] to refer the case for a new hearing. This was done on the grounds that Lord Hoffman (who had voted with the majority) should not have sat on the case, as he had been involved in fundraising for Amnesty International, which had appeared as *amicus curiae* before the court. Despite the tenuous nature of this connection, which Lord Hoffman had never attempted to hide, Pinochet was held to be entitled to a new hearing.

It is clear from the case law of the European Court of Human Rights that a tribunal must be objectively, as well as subjectively, impartial. For example, the case of *De Haan* v. *The Netherlands* states:

> The Court recalls that, when the impartiality of a tribunal for the purposes of Article 6 § 1 is being determined, regard must be had not only to the personal conviction and behaviour of a particular judge in a given case – the subjective approach – but also to whether it afforded sufficient guarantees to exclude any legitimate doubt in this respect.[32]

That the House of Lords was prepared to grant Pinochet a new hearing in this matter on these grounds shows that the utmost respect was given to

27. 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 UNTS 85.
28. Ex parte Pinochet (No. 3), 2 All ER 97 (1999).
29. *See* J. Bröhmer, *Immunity of a Former Head of State: General Pinochet and the House of Lords*; Part Three, 13 LJIL 229 (2000).
30. Ex Parte Pinochet (No. 1), 4 All ER 897 (1998).
31. Ex Parte Pinochet (No. 2), 1 All ER 577 (1999).
32. De Haan *v.* The Netherlands, Judgement of 26 August 1997, 26 EHRR 417, at para. 49.

the principle of judicial impartiality, as guaranteed by Article 6(1) of the 1950 European Convention on Human Rights.

In the event, the majority in *ex parte Pinochet* (No. 3) was overwhelming; accordingly no complaint could justifiably be made on the grounds that there had been an unfair bias.

3. The International Criminal Court

The ICC is likely to have to deal with all the problems in relation to judicial independence that have dogged other tribunals in this field, and more besides. If one turns to the Rome Statute one can see that the structure of the Court provides ample room for difficulties of this nature.

The question of judicial independence is explicitly dealt with in Articles 40 and 41 of the Rome Statute, where it is stated that every judge shall be independent and shall not participate in any case in which his impartiality might reasonably be doubted on any ground. This covers exactly the issue which arose with regard to Lord Hoffman in the *Pinochet* case. But as an analysis of the *Ad Hoc* Tribunals illustrates, it is independence in other respects which is the real concern.

3.1. Selection of judges

The first issue is the selection of the judges. The ICC will be overseen by the Assembly of States Parties, which will consist of representatives of all the states which have ratified the Statute. It is this assembly which will elect the judges of the Court.[33] Judges therefore are to be chosen by politicians and diplomats, which brings a political element into the appointments system. It would perhaps be preferable to have an independent appointments committee, for example composed of international practitioners and academics, which selects or recommends judges based solely on their experience and the quality of their work.

There was extensive discussion at the Rome Conference as to whether there should be some kind of screening process for potential candidates for judicial positions. This could take the form of a body with either binding or merely advisory powers. For example, the United Kingdom delegation proposed the formation of a screening committee consisting of the Chief Justices of each state party. This would assess candidates, obtain further information where necessary, and make recommendations.

However, this proposal was not viewed favourably:

> The notion of a screening process, albeit a non-binding one, was received with suspicion and reservation by many delegations. Apart from the cost implications of an additional body, there was considerable doubt as to its utility, especially if the

33. *Supra* note 2, Art. 36.

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> role and mandate of such a committee was not clearly defined. It was also argued that such a mechanism could easily be viewed as casting doubt on the integrity and judgement of States Parties.[34]

A compromise was finally reached whereby an Advisory Committee would be set up by the Assembly of States Parties when and if the Assembly found it to be necessary. This effectively shelved the initiative. Discussions during the course of the ninth meeting of the Preparatory Commission in April 2002 made it clear that it was unlikely to be revived.

This was an unfortunate decision: it deprives the Assembly of States Parties of a systematic mechanism whereby candidates for judicial office can be reviewed by those who have legal, rather than political, expertise. The cost implications of such a body would be small in comparison to its benefits. It should not need to be viewed as casting doubt on "the integrity and judgement of States Parties," but rather as a service providing both expertise which would otherwise be unavailable, and a non-political element in the appointments process.

3.2. Deciding who to try

The second issue is that the judges at the ICC, as well as the Security Council of the United Nations, will have a great deal more say over who is to be tried than judges at the *Ad Hoc* Tribunals. In the *Ad Hoc* Tribunals the decision as to who is to be tried is the province of the Prosecutor alone, provided that he can show a pre-Trial Chamber that he has sufficient evidence for an indictment to be confirmed. In the ICC this decision is regulated by Article 12 of the Rome Statute, which states:

> 2. […] the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:
> a. The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;
> b. The State of which the person accused of the crime is a national.

Paragraph 3 deals with states which choose to accept the jurisdiction of the Court even though they are not parties to the Statute.

The only other way in which the Court can obtain jurisdiction is on a reference to it by the Security Council under Chapter VII of the UN Charter, the same provision which was used to establish the two *Ad Hoc* Tribunals.

The Security Council's grip on the reins is further tightened by Article 16 which states:

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34. M.R. Rwelamira: *Composition and Administration of the Court*, *in* R. Lee (Ed.), The International Criminal Court: The Making of the Rome Statute, at 164 (1999).

> No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Security Council under the same conditions.

This Article means that the Security Council can effectively block not just prosecutions but also investigations for an indefinite amount of time; this is a severe impediment to the independence of the Prosecutor and the Court. However, even this is an improvement on the original wording of the Draft Statute[35] proposed by the International Law Commission ('ILC') which prevented the commencement of a prosecution in any situation with which the Security Council was dealing under Chapter VII without the Security Council's consent. This would have required a decision from the Security Council in every case, and consequently would have meant that any one of the five permanent members of the Council could block the Court from commencing investigations. As it stands, it requires a positive Security Council decision (by a majority of 9 of the 15 members) to halt investigations, still a significant impediment to the impartial distribution of justice. The problem was addressed by the Indian delegation at the Rome Conference, who issued a statement on 17 July 1998 opposing the Article 16 powers:

> On the one hand, it is argued that the ICC is being set up to try crimes of the gravest magnitude. On the other, it is argued that the maintenance of international peace and security might require that those who have committed these crimes should be permitted to escape justice, if the Council so decrees. The moment this argument is conceded, the Conference accepts the proposition that justice could undermine international peace and security.[36]

This analysis pinpoints the essential problem, which is that many states only want an end to impunity when it does not conflict with other political aims.

3.3. Questions of admissibility

Once the Prosecutor has decided that he wishes to prosecute a case, it is for the Pre-Trial Chamber of the Court to determine the preliminary question of admissibility. This question arises because of the principle of complementarity, explicitly stated in paragraph 10 of the Preamble to the Statute, and detailed in Article 17. Because national courts retain primacy,

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35. *See* Report of the International Law Commission on the Work of its Forty-Sixth Session, UN GAOR Supp. (No. 10), UN Doc. A/49/10 (3 May–23 July 1993), paras. 23–91, Art. 23.
36. "Explanation of the vote by India on the adoption of the Statute of the International Criminal Court, Rome, July 17, 1998," at 3, as quoted *in* W. Schabas, An Introduction to the International Criminal Court, at 66 (2000).

the Court has to decide whether a particular case should be tried by the ICC or left in the hands of the state concerned. Article 17 states:

> 1. Having regard to paragraph 10 of the Preamble and Article 1, the Court shall determine that a case is inadmissible where:
> a. The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;
> b. The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;
> c. The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under Article 20, paragraph 3 [*ne bis in idem*];
> d. The case is not of sufficient gravity to justify further action by the Court.
>
> 2. In order to determine unwillingness in a particular case, the Court shall consider, having regard for the principles of due process recognised by international law, whether one or more of the following exist, as applicable:
> a. The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in Article 5;
> b. There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person to justice;
> c. The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.
>
> 3. In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.

These are broad concepts, which leave the judges with a great deal of leeway to decide who will be tried. This is a consideration which does not apply in national jurisdictions, where it is for the prosecutor to decide who to bring to trial, and for the judges to decide whether there is a case against a defendant in fact and in law. The principle of complementarity makes a judicial decision unavoidable, but it is part of a process which is likely to push the judges into the forefront of the political arena.

Unless a state concedes that it is unable or unwilling to investigate or try a person (a concession which is likely to be rarely made) the judges will have to determine whether the investigations or proceedings in respect of that person constitute a real attempt to bring him to justice. Often this will not be a straightforward question, as it will be extremely difficult for a prosecutor to show that a process has been or will be effectively a sham.

The US trial of William Calley[37] in 1970–1971 for the infamous My Lai

37. United States *v.* Calley, 46 CMR 1131 (1971), affirmed 48 CMR 19, at 24 (1973).

massacre during the Vietnam War provides an example of the sort of problem which may exercise the ICC. On 29 March 1971 Calley was convicted by a court martial in Georgia of complicity in the deaths of seventy Vietnamese villagers. Two days later he was sentenced to life imprisonment. There was a public outcry at the conviction, and President Nixon intervened. After repeated reductions in the sentence Calley was released on bond in November 1974, and was finally granted a pardon.

In this case therefore, there was a proper trial, conviction and sentence, which would appear to meet the criteria under Rule 17. Yet the final sentence served was negligible, and it is arguable that the process shielded Calley from criminal responsibility for his crimes.

Issues relating to amnesties and pardons were extensively discussed before the Rome Conference.[38] Many delegations were concerned that to give the Court a right to intervene in cases where a state had decided to grant pardons or amnesties would be an interference in the political decision-making process of that state. Since protracted negotiations produced no consensus, the issue was not included in the final text of the Rome Statute.

John Holmes, the Canadian delegate who chaired consultations on the issue of complementarity at the Preparatory Committee, sees this as a serious problem:

> Potentially, the greatest weakness to the complementarity regime lies in the failure to include in the Statute provisions related to pardons. The lacunae may permit a State to investigate, prosecute, convict and sentence a person, and then pardon or parole the person soon thereafter.[39]

Judges at the ICC would have to decide whether a case was admissible in these circumstances. They would have to make the decision in the knowledge that a positive decision would be likely to be met with strong resistance by the state concerned. The failure to include any provisions on this matter in the final text of the Statute, despite extensive discussions, will make it far more difficult for them to justify a decision in favour of admissibility.

Similar problems might arise if a state decided to conduct a truth commission in the place of criminal trials. ICC judges would then have to decide whether this met the criteria of Article 17. Over the last two decades truth commissions have been established in South Africa, Chile, El Salvador and Haiti to name only a few. It would be an unenviable task for a judge to have to decide whether these amounted to genuine investigations by the state concerned, or whether the ICC should intervene. This decision too would have extensive political ramifications.

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38. *See*, *e.g.*, Report of the Ad Hoc Committee on the Establishment of an International Criminal Court, UN GAOR Suppl. (No. 22), UN Doc. A/50/22 (1995), para. 46.
39. J.T. Holmes, *The Principle of Complementarity*, *in* Lee, *supra* note 34, at 76.

A highly relevant current example of these types of problems can be seen in East Timor. The UN is assisting local courts in East Timor to try crimes committed in 1999 by Indonesian military and the local militia groups under their control. While there have been trials of East Timorese defendants who are alleged to have belonged to the local militia groups, there have been no trials in East Timor of the Indonesian military leaders. Under pressure from the United Nations, Indonesia began to conduct trials of its own nationals in March 2002. But it is widely believed that this process is no more than a propaganda machine set up with the purpose of exculpating those most responsible for the bloodshed in East Timor. A detailed report by the International Crisis Group concludes that the trials are flawed from the outset, and that whatever the verdicts, justice will not be done.[40] If the ICC were seized of such a situation, it would be for the judges of the Court to decide whether Indonesia's actions fulfilled the criteria under Article 17 or not. This would clearly be a politically sensitive decision.

It is naive to imagine that in circumstances such as these there is no prospect of judges being influenced by political considerations regarding the state concerned, particularly if the state is a strong one with an influential role in the international community. This problem is inherent in the principle of complementarity. Although in the early stages of the Preparatory Committee there was some discussion about creating an international criminal court with superior, rather than complementary, jurisdiction, it became clear at an early stage that this would be wholly unacceptable to the majority of states.[41] Given that complementary jurisdiction is essential to the agreement to establish the ICC, it is even more important that the process of appointing judges should be removed from the political and state-influenced arena. This would help to ensure that judicial integrity could be maintained without the threat of political influence.

3.4. Powers over the investigation process

Quite apart from the question of admissibility, the judges have other powers in the preliminary part of an investigation which may make them susceptible to political pressure. Under Article 15, the Prosecutor, when he has information on which he wishes to commence an investigation, and has decided that there is sufficient evidence to proceed, must submit a request to a Pre-Trial Chamber, consisting of three judges, to authorise the

40. Indonesia: Implications of the Timor Trials International Crisis Group, Jakarta/Brussels, 8 May 2002, available at http://www.intl-crisis-group.org/projects/asia/indonesia/reports/A400643_08052002.pdf. The report states: "[…] the problem […] is with the limited mandate of the ad hoc court and the very weak way in which the indictments have been drawn up and presented by the prosecution." It concludes: "[…] whatever the outcome of the trials, both the mandate of the ad hoc court and the poor quality of the indictments will have cheapened the concept of crimes against humanity" (at 1 and 13).

41. Holmes, *supra* note 39.

investigation. If the Pre-Trial Chamber refuses the request no investigation can proceed. Conversely, under Article 53, the Pre-Trial Chamber has a power to order the Prosecutor to proceed with an investigation even if he has determined that there is not a sufficient basis for a prosecution.

The judges therefore have a very significant role in deciding who is and is not tried before the Court. This is in contrast to the *Ad Hoc* Tribunals, where the power to decide such matters remains in the hands of the independent prosecutor. These are matters of great concern to those who fear for judicial independence in the ICC: the judges will be made to decide matters which should simply not be within their province.

3.5. Political considerations

It is to be hoped that the judges chosen will be of sufficient character and integrity to refuse to bow to political pressure. But the judgements of the International Court of Justice ('ICJ') show that even here judges have not been immune to pressure to make decisions which pacify UN member states. The case of *Portugal* v. *Australia*[42] provides just one such example: On behalf of East Timor, Portugal took Australia to the ICJ claiming that its treaty with Indonesia to share the oil resources of the Timor Gap was unlawful as the Indonesians had acquired East Timor by force and had not respected its right to self-determination. Despite reiterating the undisputed principle that the right to self-determination is absolute, the ICJ declined to adjudicate the matter on the basis that Indonesia, which had not voluntarily subjected itself to the jurisdiction of the Court, was not a party to the case and the Court could not therefore evaluate the lawfulness of Indonesia's conduct. It is clear from the Statute of the ICJ that it can only have jurisdiction over a consenting party; but this decision meant that because of the non-consent of Indonesia, the Court felt itself unable to pass judgement on the separate conduct of Australia following the Indonesian annexation of East Timor. There were strong Dissenting Opinions from Judges Weeramantry and Skubiszewski to the effect that the Court could have jurisdiction over the conduct of Australia without adjudicating on the conduct of Indonesia; however, the majority view prevailed and East Timor's rights remain undefended by the Court.[43]

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42. Case Concerning East Timor (Portugal *v.* Australia), Judgment of 30 June 1995, 1995 ICJ Rep. 90.
43. Judge Weeramantry showed equally strong judgement in the case of Yugoslavia in 1999: Case Concerning Legality of Use of Force (Yugoslavia *v.* Belgium and others) (Provisional Measures), Order of 2 June 1999, reproduced *in* 38 ILM 950 (1999). Yugoslavia applied to the ICJ for a ruling that the NATO bombings of Belgrade and Kosovo were unlawful. The majority of the Court decided that they lacked *prima facie* jurisdiction, and therefore could not accede to Yugoslavia's request for interim measures. Judge Weeramantry, then President of the ICJ, was one of the four to dissent. Once again this was a case where the ICJ failed to intervene and provide a decision when the rights of the weaker power were protected.

This case illustrates the unwillingness of international judges to interfere to protect the rights of the weak in the face of the powers of the strong. There is little reason to believe that the judges of the future ICC will not face the same pressure to bow to the might of politically or economically important powers. In the light of this, it is dangerous to have a system where the judges have strong control over the prosecution process: the best hope is to have an independent prosecutor making decisions about the trial of suspects. With the two separate organs performing different functions, it is more likely that a balance can be achieved, and less likely that political influence will infect both the prosecution and the judiciary.

Of course there must also be safeguards to ensure prosecutorial independence; that too is a complex issue, and one which falls outside the scope of this article. But it is arguable that a prosecutor has the advantage that he is not seen as a representative of his country in the same way as a judge, and has more scope to perform his functions in an independent manner. An example of this can be found in the decision made by Richard Goldstone, the first Prosecutor at the ICTY, to issue indictments against Karađzić and Mladić before the conclusion of the Dayton Peace Agreement. He recalls:

> […] soon after the indictments had been issued, I met with [Boutros Boutros-Ghali, then UN Secretary-General]. He started by remarking that he was surprised that the tribunal had indicted Karađzić without consulting him and without seeking his views on the matter. Taken aback, I replied that on no account would I have consulted him […]. He made it clear that had I consulted him, he would have advised me not to indict Karađzić before peace had been brokered in Bosnia.[44]

Had this occurred before the projected ICC, Goldstone would have needed the permission of the Pre-Trial Chamber before commencing an investigation against Karađzić. The Pre-Trial Chamber would undoubtedly have been made aware of the political considerations in the course of the attendant publicity, and might well have refused to allow an investigation to continue. Any such investigation could in any case be halted by a decision of the Security Council acting under Article 16. There is ample opportunity here to sacrifice justice to the perceived need for appeasement of warring powers.

Not only does this type of appeasement compromise the stated aims which the ICC seeks to achieve, namely an end to impunity, but it can also compromise its own aims, in this case of achieving a peaceful resolution to the Bosnian conflict. As Goldstone points out:

> The political assessment of Boutros-Ghali over the timing of the indictment of Karađzić turned out to be incorrect. Had he not been indicted, the Dayton Accords would not have been brokered. Karađzić would have been free to attend the

44. R. Goldstone, For Humanity, at 102 (2000).

> meetings, and that would have made the attendance of Alija Izetbegovic, the President of Bosnia, impossible.[45]

This is not an isolated case: while Pinochet's supporters claimed that his arrest would endanger the new democracy in Chile, in fact it had the opposite effect. Geoffrey Robertson, a British barrister who specialises in human rights law, writes:

> […] his absence from Chile throughout 1999 served to give courage to the country's judiciary: army officers who had led the 'Caravan of Death' […]. were finally placed under arrest, on the basis that disappearances could be defined as kidnapping, an offence which continued, in the absence of a body, after the amnesty. The whirligig of time saw a socialist elected peacefully as president and a brain-damaged Pinochet return to a country which was healthier and happier than when he had left sixteen months previously.[46]

Political interference therefore does not necessarily achieve even the political ends it seeks. But whatever the political effects, a court should be able to act independently to serve the ends of justice without regard to outside influence.

4. CONCLUSION

In order to receive, or even to deserve, the respect of the international community and the fear of those whose actions it is designed to deter, the ICC needs to operate independently of the diplomatic and political elements by whom it was created. The difficulty that has arisen is that those who are instrumental in setting up a body which may one day have jurisdiction over their own nationals are disinclined to let go of the reins. Judges appointed under this system will undoubtedly have a difficult task in resisting political pressure, and their extensive involvement in the early stages of an investigation compromises the independence and decision-making power of the Prosecutor, and therefore of the Court as a whole.

It is essential to realise that while an international criminal court can achieve justice, it can do so only if this is its sole aim: it is not desirable or possible for it to seek to achieve other ends. It cannot aspire to promote international peace or political harmony or social improvement: these are the provinces of other institutions. Such a court may at times be antithetical to these goals, but it cannot take that possibility into consideration in its decision-making process.

Should the international community really wish to build an effective international criminal justice system, it must guarantee the independence of the separate organs comprising that system, and must allow it to have

45. *Id.*, at 103.
46. *See* G. Robertson, *supra* note 4, at 268.

power over all suspected criminals wherever and whoever they may be, and however inconvenient their trial may be for any party. Otherwise the ICC will be just another paper tiger, unable to do more than conduct show trials of the political leaders the world has deemed it convenient to condemn.

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