

THE ROLE AND INDEPENDENCE OF PROSECUTORS

Paul Mageean, Belfast, Northern Ireland

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I. INTRODUCTION

I would like firstly to thank the organisers of this event for the invitation to speak to you today. I would also like to acknowledge the role of Professor John Jackson from the School of Law in Queens University Belfast. The international sections of this paper draw on his work. I should also like to make clear that I am speaking in my personal capacity today.

This paper will be an attempt to examine some of the key elements which make up properly functioning public prosecution systems with reference to international standards. I also intend to use the experience of public prosecution in Northern Ireland as a way of illustrating the difficulties in marrying the twin themes of independence and accountability. Most of you will know that in Northern Ireland we had between 1969 and the mid 1990s a period of violent conflict. The government chose to respond to the violence primarily through the use of the criminal justice system, and as a consequence, all of the criminal justice agencies including the office of the Director of Public Prosecutions (DPP) became embroiled in regular complaints about a lack of independence and accountability. As a result of the peace Agreement reached in Belfast in 1998 we have had a significant program of reform of various aspects of the criminal justice system including, in particular the system of public prosecution. We are on the verge of the establishment of a new office, the Public Prosecution Service. I intend using some examples from Northern Ireland during the course of the paper to

illustrate the points I am making and also to show to delegates that the task of building independent and accountable public prosecution offices is not something which is just confined to the Arab world.

One of the difficulties in speaking about the role of prosecutors in an international context is that there are a wide variety of different prosecution systems around the world with differing functions and responsibilities. Some public prosecution systems are well established within their national countries and have been developed over many centuries. Others are relatively new and under-developed. There has been a long tradition in civil law systems of public prosecutors taking responsibility for prosecutions in the public interest. In the common law tradition by contrast prosecutorial functions remained mainly in the hands of private individuals until police forces developed in the nineteenth century. The notion of a separate prosecution agency emerged in most common law countries after police forces had already been established and is not so embedded within the common law culture. During the course of the 20th century, however, independent prosecution services established themselves taking over responsibility for most if not all prosecutions.

It was not until 1986 that England and Wales developed an independent prosecution service, known as the Crown Prosecution Service, to take over all prosecutions. Until this time the police were responsible for investigating crime and for the prosecution of cases through the courts with the exception of the most complex cases which could be referred by the Attorney General to the Director of Public Prosecutions, an office created in the late 19th century for prosecuting the most serious crimes. A similar office was not even created in Northern Ireland until 1972.

In Europe there are a wide variety of public prosecution services with their roots in either the inquisitorial or adversarial tradition. As a consequence, although all member states of the Council of Europe have a public prosecuting authority, there are great differences in the institutional position of the public prosecutor from one country to another, firstly in terms of its relationship with the executive power of the state (ranging from subordination to independence) and, secondly, with regard to the relationship between prosecutors and judges: in some systems they belong to a single professional corps while in others they are entirely separate. In 2000 a Committee of Experts on the Role of Public Prosecution in the Criminal Justice System concluded that the public prosecutors' specific duties and functions could be seen as forming a series of concentric circles, with an inner circle containing the duties common to prosecutors in all criminal justice systems – the “core” tasks – and outer circles representing tasks that are not found in all legal systems. Although the committee was concerned only with European systems, its analysis provides a useful framework for examining the public prosecution systems of many other countries as well.

The core tasks identified by the committee were as follows:

- Deciding whether to initiate or continue a prosecution;
- Conducting prosecutions before the courts
- Appealing or conducting appeals concerning all or some court decisions.

Other tasks which public prosecutors conduct in other systems include:

- Implementing national crime policy and adapting it to local or regional circumstances;
- Conducting, directing or supervising investigations

- Ensuring that victims are effectively assisted
- Deciding on alternatives to prosecution, particularly in the case of young persons
- Supervising the execution of court decisions
- Recommending appropriate sentences.

I would add another – engaging in outreach to civil society and thus increasing public understanding of and confidence in the criminal justice system overall.

II. THE DEVELOPMENT OF INTERNATIONAL NORMS AND STANDARDS

Given the variety of different prosecution systems and the differing roles and functions that have been developed for them, it is not easy to develop a set of common international norms that apply to each of them. Yet in recent years pressure has been building up to try to develop a set of such norms. This has come from two quarters. First of all, states have signed up to international binding human rights instruments which have important implications for the role of the prosecutor. In addition to general texts such as the United Nations Charter (1945) and the Universal Declaration of Human Rights (1948)(UNDHR), human rights conventions which are particularly relevant for prosecutors include the International Covenant on Civil and Political Rights (ICCPR) and special conventions such as the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT) and the UN Convention on the Rights of the Child (1976)(CRC). These conventions set down a number of pre-trial human rights standards that have particular relevance to prosecutors such as ensuring that detained suspects are brought promptly before a judicial authority (ICCPR Art 9(3), CRC Art 37(d)) and that accused persons are guaranteed a fair trial with due regard to the rights of the defence (ICCPR Arts 14(1) 14(3)). Also as an independent body having early contact with the police investigative process, the

prosecuting authority can have a role in assessing the adequacy of investigations into criminal violations of human rights and in identifying and acting upon any misconduct by the investigators (ICCPR Arts 6(1) and 7, UNDHR Arts 3 and 5, UNCAT Art 15). In addition to these general binding standards, a “soft” law text was adopted at UN level during the 8th UN Congress on the Prevention of Crime and Treatment of Offenders in Havana in 1990 in the form of UN Guidelines on the Role of Prosecutors (UNG). These formulate further principles and behavioural rules tailored to the work of public prosecutors. Although these are not binding on states, they reflect the intention of states and can be regarded as obligations of co-operation and good faith.

The second impetus for focusing on international standards for prosecutions may be said to come from the growing realisation that states need to co-operate together in order to combat crime at a national and international level. To this end the Committee of Ministers of the Council of Europe has recommended that a definition of common principles for public prosecutors in member states should be encouraged and in 2000 it adopted a Recommendation on the Role of Public Prosecution in the Criminal Justice System. In addition to the need to formulate common principles for national systems, it is recognised that there is also a need for international or supranational criminal systems in order to cope with particular crime problems and for this purpose international prosecutors are being appointed. The best example to date is the appointment of a chief prosecutor for the International Criminal Court. Prosecutors themselves are realising the benefits of closer co-operation and in 1999 the International Association of Prosecutors formulated a set of general standards entitled the “Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Procedures” (IAPS).

III. THE COMMON PRINCIPLES

Impartiality, Fairness and Objectivity

Impartiality, fairness and objectivity are themes which recur frequently in the UN Guidelines and IAP Standards. The UN Guidelines require prosecutors to perform their duties fairly, consistently and expeditiously, to uphold human rights and to carry out their functions impartially, avoiding all political social religious, racial, cultural sexual or any other kind of discrimination (UNG 12, 13(a)). Objectivity and impartiality are referred to in the requirement that prosecutions should not be initiated, or should be discontinued, when an impartial investigation shows the charge to be unfounded (UNG 14), while the IAP Standards provide that a case should be proceeded with only when it is well founded upon evidence reasonably believed to be reliable and admissible (IAPS, 4(2)(d). Where there is a reasonable belief that evidence has been obtained unlawfully, especially if a suspect's human rights are violated, it is not to be deployed and the prosecutor is required to take steps to ensure that those responsible are brought to justice (UNG 16, IAPS 4.3(g) and 4(3)(h)). The Guidelines and Standards also refer to fairness when indicating how prosecutors should seek to comply with fair trial standards. UN Guideline 13b provides that prosecutors should take account of the position of the suspect and the victim and pay attention to all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect". The IAP standards talk of seeking "to ensure that all necessary and reasonable inquiries are made, and in accordance with the law or the requirements of a fair trial, the result disclosed whether that points to the guilt or innocence of the suspect." (IAPS 3.1e).

In Northern Ireland human rights organisations and others expressed concern during the course of the conflict that cases were brought to trial despite the fact that evidence, and confession evidence in particular, had been obtained in circumstances where the rights of the suspect had been violated. There have also been particular concerns that a

number of individuals, charged with offences connected with the conflict in Northern Ireland, were wrongly tried and convicted in Britain because vital evidence, pointing to the innocence of the suspects, was withheld by the prosecution from the defence.

International standards also impose duties on states to provide conditions whereby prosecutors are able to act with impartiality, fairness and objectivity. States are enjoined to ensure that the recruitment, promotion and transfer of prosecutors are based on objective factors, in particular professional qualifications, ability, integrity and experience and decided upon in accordance with fair and impartial procedures (UNG 7, IAPS 6).

Independence

Impartiality, fairness and objectivity can only be safeguarded if prosecutors are enabled to act with independence and the Guidelines and Standards place duties on states to protect the independence of prosecutors. In particular UN Guideline 4 places a duty on states to ensure that prosecutors can act “without intimidation, hindrance, harassment, improper interference or unjustified exposure to civil, penal or other liability”. They and the IAP Standards also recognise the importance of conditions of service, remuneration and tenure being organised in a way that reinforces independence (UNG 6, IAPS 6). The Standards say that prosecution should “remain unaffected by individual or sectional interests and public or media pressures and shall have regard to the public interest” (IAPS 3). This is particularly important in systems where prosecutors are given discretion whether to prosecute or not. Paragraph 2.1 of the Standards states that the use of prosecutorial discretion should be exercised independently and free from political interference.

The question of independence raises issues about the organisation and structure of prosecuting authorities and their relationship with other bodies and persons in the criminal justice system. One of the concerns expressed by some in Northern Ireland is that the DPP has been too closely connected with the police and that there has been little sign of the constructive tension between the two organisations which exists in some other jurisdictions, leading to allegations that prosecutors in Northern Ireland were reluctant to take action against police officers or other officials who had contravened the criminal law. A key challenge for the new PPS in Northern Ireland will be to work closely with the police while making clear their independence from them. Crucially, in this context, the police will no longer be prosecuting anyone in Northern Ireland, with the new PPS taking over responsibility for all prosecutions. This marks, in my opinion, a vital assertion of prosecutorial independence.

UN Guideline 20 states that in the interests of fairness and effectiveness, prosecutors shall strive to cooperate with the police, the courts, the legal profession, public defenders and other government agencies or institutions. As already indicated, there is clearly a danger that these bodies may exercise undue influence over the public prosecutor and it is important that the independence of the prosecutor is safeguarded. The relationship between the public prosecutor and the executive and the legislature is particularly important here. Traditionally, a number of prosecution systems have operated under the subordination of the executive. The Guidelines and Standards do not seek to make structural changes to the organisation of prosecution systems. The Standards recognise that non-prosecutorial authorities may have the right to issue general or specific instructions to prosecutors but that in that event such instruction should be transparent, lawful and within established guidelines drawn up to safeguard the prosecutor's independence (IAP, 2.2). Similar structures apply where there is provision for prosecutors to be instructed by another authority on whether to proceed

with or discontinue individual cases. The Council of Europe recommendation goes further and states that instructions not to prosecute in a specific case should in principle be prohibited (COER, 13(f)). Should that not be the case, such instructions must remain exceptional and be subjected to transparency and appropriate control. Once again in Northern Ireland we have had difficulties which illustrate the importance of these safeguards. In a particularly high profile case dating back more than 20 years, involving killings by police officers, grave concerns were expressed by Members of Parliament that political pressure from the government of the day was placed on the DPP to reverse its prosecutorial decisions.

Accountability

While independence is a quality that is exceedingly important, it is also increasingly recognised that there have to be some mechanisms for calling prosecutors to account for their decisions. One of the reasons why many systems ensure that public prosecutors are under the subordination of a government law officer is so that the prosecutor is made accountable for the general overview of prosecution policy and also for specific decisions taken in particular cases. As this officer is in turn accountable to the legislature, this means that there is some democratic accountability in respect of the work of the prosecutor. International standards have less to say about how accountability should be safeguarded but the Council of Europe recommendation states that the public prosecution office should account periodically and publicly for its activities as a whole and in particular the way in which its priorities are carried (COER 11). The commentary says that these accounts must be made to the general public - either directly through the media or a published report or before an elected assembly. They may take the form of reports or bodies of statistics, indicating work done, aims achieved, ways in which crime policy was implemented, sums of money spent and setting out priorities.

It is sometimes suggested that independence and accountability are mutually exclusive with the result that there is an uneasy relationship between the two. If independence is taken to mean the absence of control and accountability to mean a relationship of subordination and obedience towards another, it is true the concepts may be seen as opposing. But if these concepts are qualified so that independence is seen as freedom from improper political or other influence and accountability as an obligation to explain the basis of a decision – “answerability”, in other words, then each concept can be seen as reinforcing the other. For one can only be assured that decisions have been made in the absence of improper influence if efforts are made after the event to justify how they were arrived at. The DPP of Western Australia has summarised the position as follows:

“The high responsibility given to an elected official to wield great power carries with it the duty to be accountable for its exercise ... A statutory office can be entirely independent in the sense of its decision making and nevertheless be properly accountable for the quality and consequences of that decision making.”

There is further work to be done in framing international norms and standards in the area of accountability. Apart from the question of democratic accountability, there are also questions about the need for prosecutors to account to the courts and victims for specific prosecution decisions. These questions are currently being debated in a number of countries and they are likely to figure increasingly in the international forum. The European Court of Human Rights has held, in a case which I brought from Northern Ireland, that the failure on the part of a prosecuting authority to give reasons for non-prosecution in a controversial incident involving the use of lethal force by the police may undermine public confidence in such a way as to amount to a breach of the right to life requirements of the ECHR (*Kelly and others v UK*). In my experience this refusal to give reasons for decisions, which is by no means confined to Northern Ireland, and

which has its rationale in prosecutorial independence, does more to damage public confidence than almost any other factor.

When asked to name the three greatest qualities of his office, the Director of Public Prosecutions in New South Wales, Australia is reported to have said, “independence, independence and independence”. But in my view based on a reading of the international standards and my own experience in a society struggling with these issues, a better answer may be “independence, independence and accountability”!