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Case Selection and Prioritization Criteria in the Work of the International Criminal Tribunal for the Former Yugoslavia

Claudia Angermaier*

5.1. Introduction

The selection of cases at the International Criminal Tribunal for the Former Yugoslavia (ICTY) was an issue from the very beginning of the Tribunal's work. Although there were initiatives in the Office of the Prosecutor to establish a framework and criteria for the selection of cases, it appears that a focused case selection policy was not consistently pursued. It was only through strong political pressure from the Security Council and through changes in the procedural system of the ICTY, allowing for a wider judicial review of the Prosecutor's decisions, that the Prosecutor of the ICTY undertook a stronger filtering of its cases. This paper explores the main stages of this development.

5.2. Substantive and Procedural Framework

The ICTY Statute and Rules do not contain a list of case selection criteria. In comparison to the more recent international and internationalised tribunals the ICTY was accorded a broad mandate, namely the prosecution of "persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugo-

* **Claudia Angermaier** holds a doctorate in law from the University of Vienna, in addition to a Bachelor of Arts from the University of the Witwatersrand in South Africa. Formerly Assistant Legal Advisor of the Legal Advisory Section, Office of the Prosecutor, ICC (2004-05); Research Assistant, Criminal Law Department, University of Vienna (2002-04); Country Manager for the FRY, International Centre for Migration Policy Development (2002). She researched selection criteria in international criminal justice when she worked for the ICC.

slavia between 1 January 1991 and a date to be determined by the Security Council upon the restoration of peace".[1]

The Statute of the Special Court for Sierra Leone specifically limits the jurisdiction of the Court, as well as the power of the Prosecutor to investigate and prosecute, to "persons who bear the greatest responsibility".

The Agreement on the Establishment of the Extraordinary Chambers in Cambodia stipulates that the Chambers have jurisdiction over "senior leaders of Democratic Kampuchea and those who were most responsible" for crimes committed between 1975 and 1979.[2]

While Antonio Cassese has argued that such a limitation can be inferred from Article 1 of the ICTY statute which provides that "persons responsible for *serious* violations of international humanitarian law" are subject to prosecution before the Tribunal,[3] the drafting process arguably suggests that there was a deliberate choice not to limit the jurisdictional mandate to senior persons: in establishing the Tribunal the Security Council did not follow the only prior example of an international tribunal, the Nuremberg Tribunal, which had a clear division of competencies, namely that only the trial of major war criminals was to be conducted before the Nuremberg Tribunal, minor war criminals were to be prosecuted by other courts.[4]

Article 16 of the ICTY Statute allocates the responsibility for investigations and prosecutions before the Tribunal solely to the Prosecutor. He or she is guaranteed independence in the exercise of prosecu-

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1 Security Council resolution 827 (1993), adopted 25 May 1993.

2 "The present Agreement further recognizes that the Extraordinary Chambers have personal jurisdiction over senior leaders of Democratic Kampuchea and those who were most responsible for the crimes referred to in Article 1 of the Agreement." See Article 2 of the *Draft Agreement between the United Nations and the Royal Government of Cambodia concerning the Prosecution under Cambodian Law of Crimes Committed during the period of Democratic Kampuchea* annexed to GA resolution 57/228, A/RES/57/228 (22 May 2003).

3 Antonio Cassese, The ICTY: *A Living and Vital Reality*, (2004) 2 *Journal of International Criminal Justice*, pp. 585, 587.

4 Larry Johnson, Ten Years Later: *Reflections on the Drafting*, (2004) 2 *Journal of International Criminal Justice* pp. 368, 369.

torial functions both from the other organs of the Tribunal as well as external sources.[5] Once the Prosecutor determines that a *prima facie* case exists, he or she submits an indictment to a judge of the trial chamber.[6] In submitting the indictment the Prosecutor selects a case for prosecution before the ICTY. Under Article 19 the judge of the trial chamber only has the possibility of reviewing a decision of the Prosecutor on the basis of whether the evidentiary threshold of a "*prima facie* case" has been met. This does not allow judges to review the application of extra-evidentiary criteria for the selection of cases.

Antonio Cassese, who at the time was the President of the ICTY, notes that already in the early stages of the Tribunal's work, the judges expressed their disagreement with the Prosecutor's prosecutorial policy. On 20 January 1995, a few months after Richard Goldstone took office as the first Prosecutor of the ICTY, the judges held an *in camera* meeting with the Prosecutor on his bottom-up approach, which entailed targeting low-level suspects and only at a later stage moving up the ladder of command to indict persons in senior positions.[7] The judges expressed their disagreement, arguing that it was the role of the Tribunal to "immediately target the military and political leaders or other high ranking commanders, based on the notion of command responsibility as laid down in the statute (Article 7(3))".[8] On 30 January 1995, the judges adopted a declaration in which they expressed their concern that the indictment practice be consonant with the expectations of the Security Council and the international community as expressed in resolutions 808 and 827.[9] According to Cassese this rather vague statement was meant to convey the judges' view that the purpose of the

5 ICTY Statute, Art. 16(2).

6 ICTY Statute, Art. 18(4).

7 See Cassese, *op. cit.*, p. 586.

8 *Ibid.,* p. 586.

9 The declaration was made public the next day and is reprinted in ICTY Press Release CC/PIO/003-E, issued on 1 February 1995, "The judges of The tribunal for The Former Yugoslavia Express their Concern Regarding the Substance of their Programme of Judicial Work For 1995", available at http://www.icty.org/sid/7251.

ICTY lay in the prosecution of "those persons who bore major responsibility".[10]

Richard Goldstone maintains that the judges' insistence on receiving regular reports on the policy and progress of investigations constituted an encroachment on the independence of the Prosecutor and was born out of frustration that there were yet no trials to be conducted.[11] He further argues that the exercise of such judicial oversight on the investigative activities and policy of the Prosecutor could have resulted in a compromise of the judges' impartiality.[12] Antonio Cassese, however, maintains that the decision of the judges to "meddle" with the case selection policy of the Prosecutor was necessary because there did not a exist a procedural mechanism which would have ensured that the Prosecutor acted in conformity with the general goals laid down in the ICTY Statute.[13] He stresses that it was not a decision of individual judges but rather that the judges acted unanimously as a collective body.[14] He argues that because there was no interference with specific cases, but only a review of the general case selection policy of the Prosecutor, the judges did not violate judicial ethics or propriety.[15]

The early indictments of the Office of the Prosecutor arguably demonstrate that the selection of cases was governed mainly by the availability of evidence and the interest of individual ICTY prosecutors in particular cases.[16] Moreover, the first indictments included such low-level perpetrators as camp guards in the list of accused persons

[10] Cassese, *op. cit.*, p. 586, at note 4.

[11] Richard Goldstone, *A view from the Prosecution*, (2004) 2 *Journal of International Criminal Justice* pp. 380, 381.

[12] *Ibid.*, p. 381.

[13] Cassese, *op. cit.*, p. 587.

[14] Cassese, *op. cit.*, p. 588.

[15] *Ibid*., pp. 587 *et seq.*

[16] Morten Bergsmo, Kjetil Helvig, Ilia Utmelidze and Gorana Ţagovec, *The Backlog of Core International Crimes Cases in Bosnia and Herzegovina*, Second Edition, Torkel Opsahl Academic EPublisher, Oslo, 2010, pp. 98-99.

and therefore reflected the Prosecutor's stance that seniority was not a decisive criterion for the selection of cases.[17]

5.3. The 1995 Criteria

In October 1995, however, the Office of the Prosecutor formally adopted a set of case selection criteria, in which the level of responsibility of the accused was defined as a criterion for the selection of cases. The stated purpose of these criteria was to enable an effective allocation of resources and the fulfilment of the Tribunal's mandate.[18]

The criteria were divided into five groups: "(a) person"; "(b) serious violation"; "(c) policy considerations"; "(d) practical considerations"; and "(e) other relevant considerations".[19]

The first list, "(a) person" contained the following factors:

- Position in hierarchy under investigation;
- political, military, paramilitary or civilian leader;
- leadership at municipal, regional or national level;
- nationality;
- role/participation in policy/strategy decisions;
- personal culpability for specific atrocities;
- notoriousness/responsibility for particularly heinous acts;
- extent of direct participation in the alleged incidents;
- authority and control exercised by the suspects;
- the suspect's alleged notice and knowledge of acts by subordinates;
- arrest potential;
- evidence/witness availability;

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[17] See ICTY Press Release CC/PIO/004-E, issued on 13 February 1995, "The International tribunal For The Former Yugoslavia Charges 21 Serbs With Atrocities Committed Inside And Outside The Omarska Death Camp", available at http://www.icty.org/sid/7250.

[18] Bergsmo *et al.*, *op. cit.*, p. 99.

[19] The content of these groups of criteria has been taken from Bergsmo *et al.*, *op. cit.*, pp. 98 *et seq.* They also provide an in-depth analysis of each of these sets of criteria.

- media/government/NGO target; and
- potential roll-over witness/likelihood of linkage evidence.

The group of criteria entitled "(b) serious violation" listed the following:

- Number of victims;
- nature of acts;
- area of destruction;
- duration and repetition of the offence;
- location of the crime;
- linkage to other cases;
- nationality of perpetrators/victims;
- arrest potential;
- evidence/witness availability;
- showcase or pattern crime; and
- media/government/NGO target.

Under the section "(c) policy considerations" these criteria were listed:

- Advancement of international jurisprudence (reinforcement of existing norms, building precedent, clarifying and advancing the scope of existing protections);
- willingness and ability of national courts to prosecute the alleged perpetrator;
- potential symbolic or deterrent value of prosecution;
- public perception concerning the effective functioning of Tribunal;
- public perception concerning immediate response to on-going atrocities;
- public perception concerning impartiality/balance.

The section "(d) practical considerations" read as follows:

- Available investigative resources;
- impact that the new investigation will have on ongoing investigations and on making existing indictments trial ready;
- the estimated time to complete the investigation;

- timing of the investigation (for example, the impact initiating a particular investigation will have on the ability to conduct future investigations in the country);
- possibility or likelihood of arrest of the alleged perpetrator;
- consideration of other work carried out in relation to the case (including a check against Rules of Road cases);
- completeness of evidence;
- availability of exculpatory information and evidence; and
- consideration of other OTP investigations in the same geographical area, particularly those of "opposite ethnicity" perpetrators and victims.

And, lastly, the group "(e) other relevant considerations" included the following criteria:

- The particular statutory offence or parts thereof, that can be charged;
- the charging theories available;
- potential legal impediments to prosecution;
- potential defences;
- theory of liability and legal framework of each potential suspect;
- the extent to which the crime base fits in with current investigations and overall strategic direction;
- the extent to which a successful investigation/prosecution of the case would further the strategic aims;
- the extent to which the case can take the investigation to higher political, military, police and civil chains of command; and
- to what extent the case fits into a larger pattern-type of ongoing or future investigations and prosecutions.

Bergsmo *et al*. maintain that these criteria merely provided a catalogue of considerations to be considered as a whole when deciding whether to pursue an investigation and prosecution. The considerations were not ranked according to their importance.[20] Arguably, a focused

[20] *Ibid.,* p. 99.

case selection policy on the basis of this catalogue could hardly have been implemented.

5.4. The 1998 Review of Cases

In 1998 an internal memorandum was prepared for the Chief Prosecutor Louise Arbour which demonstrated that only few of the ICTY indictees were persons with leadership responsibility. This 1998 memorandum did not contain criteria but rather a guideline on some issues to be addressed for justifying the selection of a specific case for investigation. [21]

Nevertheless, the memorandum appears to have resulted in a re-evaluation of the Office of the Prosecutor's existing case portfolio. In May 1998 the Chief Prosecutor withdrew charges against 14 accused. In a press statement on 8 May 1998 she outlined the overall investigative and prosecutorial strategies of the ICTY Office of the Prosecutor:

> […] I have re-evaluated all outstanding indictments vis-à-vis the overall investigative and prosecutorial strategies of my Office. Consistent with those strategies, which involve maintaining an investigative focus on persons holding higher levels of responsibility, or on those who have been personally responsible for the exceptionally brutal or otherwise extremely serious offences, I decided that it was appropriate to withdraw the charges against a number of accused in what have become known as the Omarska and Keraterm indictments, which were confirmed in February 1995 and July 1995 respectively.
>
> This decision was taken in an attempt to balance the available resources within the tribunal and in recognition of the need to prosecute cases fairly and expeditiously. I wish to emphasize that this decision is not based on any lack of evidence in respect of these accused. I do not consider it feasible at this time to hold multiple separate trials for related offences committed by perpetrators who could

[21] *Ibid.,* p. 60.

> appropriately be tried in another judicial forum, such as a State Court […][22]

This statement of Louise Arbour demonstrated a clear shift towards a more accused-centred approach and reflected the course that the ICTY Prosecutor would be forced to pursue far more vigorously under the Security Council's so-called "completion strategy".

As a result of the withdrawal of charges, the accused Landžo in the Ĉelebići case sought to ensure a judicial review of the Prosecutor's decision. He alleged a violation of the principle of equality enshrined in Article 21(1) of the ICTY Statute because the Prosecutor had not in accordance with her newly adopted prosecutorial strategy withdrawn charges against Landžo – in spite of him being a "low-level accused" – in order to give appearance of "even-handedness" (the accused was a Muslim, while those against whom charges had been withdrawn were Serbian).[23] Although the Appeals Chamber ultimately dismissed the appeal, it set out some guidelines regarding the case selection policy of the Prosecutor. First, it stipulated that despite the Prosecutor's broad discretion regarding the initiation of investigations and the preparation of indictments, this power was not unlimited but subject to certain limitations contained in the Statute and Rules of Procedure and Evidence of the Tribunal.[24] Accordingly, the Prosecutor is only allowed to exercise her functions in accordance "with full respect of the law", which includes "recognised principles of human rights"[25], one such principle being equality before the Tribunal. The Appeals Chamber

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[22] ICTY Press Release CC/PIO/314-E, issued on 8 May 1998, "Statement By The Prosecutor Following The Withdrawal Of The Charges Against 14 Accused", available at http://www.icty.org/sid/7671.

[23] *Prosecutor v. Mučić et al.,* Appeals Chamber Judgement, Case No. IT-96-21, 20 February 2001, para. 612.

[24] *Ibid.*, para. 602.

[25] "The discretion of the Prosecutor at all times is circumscribed in a more general way by the nature of her position as an official vested with specific duties imposed by the Statute of the tribunal. The Prosecutor is committed to discharge those duties with full respect of the law. In this regard, the Secretary-General's Report stressed that the tribunal, which encompasses all of its organs, including the Office of the Prosecutor, must abide by the recognised principles of human rights." *Ibid.,* para. 604.

then stated that it was for the accused to prove that this principle had been violated, by showing that the prosecution was based on an "unlawful or improper (including discriminatory) motive"; and that "other similarly situated persons were not prosecuted". The Appeals Chamber rejected the grounds for appeal, holding that the prosecutorial policy was not only limited to persons holding higher levels of responsibility but also included notorious offenders. In the Chamber's view, because the accused could be considered a notorious offender the prosecutorial policy was not applied in a discriminate manner.

5.5. The Completion Strategy

With the adoption of the so-called completion strategy the level of responsibility of the accused has been defined as *the* decisive criterion for the selection of cases at the Tribunal. The completion strategy was a result of the waning enthusiasm of the donor states for the Tribunal's work. The ICTY was originally conceived to be a temporary measure, however, in 1999 there was no end in sight for the Tribunal's activities.[26] In June 2000 the President of the ICTY, Claude Jorda, presented a report to the Security Council in which he proposed a strategy for completing first instance trials by the year 2007.[27] This involved creating a pool of *ad litem* judges to be able to dispose of the heavy trial load. As a further measure the report discussed the possibility of the ICTY focusing on high-level perpetrators, leaving those in the lower echelons to be tried by national courts in the Balkans. The report stated that the judges were not in favour of this option at this point in time due to the political climate in the relevant states and the issues of safety for witnesses and victims.[28]

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[26] Dominic Raab, *Evaluating the ICTY and its Completion Strategy*, (2004) 2 *Journal of International Criminal Justice* pp. 82, 84.

[27] Security Council Press Release SC/6879, issued on 20 June 2000, "President of International tribunal For Former Yugoslavia Briefs Security Council, Asks for Change in Court's Statute", available at http://www.un.org/News/Press/docs/2000/20000620.sc6879.doc.html.

[28] See *Report on the Operation of the International Criminal tribunal for the Former Yugoslavia*, 12 May 2000, available at http://www.un.org/icty/pressreal/RAP000620e.htm.

The Security Council approved the proposal for the creation of a pool of *ad litem* judges. It also took "particular note" of the ICTY's position that "civilian, military and paramilitary leaders should be tried before them in preference to minor actors" and the possibility "to suspend an indictment to allow for a national court to deal with a particular case".[29] This resolution gave rise to the ICTY's completion strategy.

In a report submitted to the UN Secretary-General on 10 June 2002, the President of the ICTY laid out a comprehensive plan for the referral of cases involving intermediate and lower-level accused to national courts in the former Yugoslavia. This was presented as a measure to ensure the completion of first instance trials by 2008.[30] The report stressed the strong need for judicial reform in these countries, but in principle the report, in contrast to the earlier position in 2000, advocated the referral of cases to these courts.[31] The report further proposed an amendment of rule 11*bis* of the ICTY rules which already provided for the referral of cases under certain limited conditions. Besides broadening the possibility to refer cases to states other than the state in which the person was arrested and other procedural issues,[32] it was argued that it was in the interests of transparency vis-à-vis the international community as well as the states of the former Yugoslavia, to provide criteria for the referral of cases. It was suggested that the criteria should be formulated in broad terms, namely "the position of the accused" and "the gravity of the crimes with which he is charged", leaving the precise interpretation of these criteria to the Tribunal.[33] According to the report, the ICTY Prosecutor objected to the possibility of the Trial Chamber also deciding *ex officio,* and not only on an

[29] See Security Council resolution 1329 (2000), UN doc. S/RES/1329 (2000), 5 December 2000, preambular paras. 7 and 8.

[30] See Letter dated 17 June 2002 from the Secretary General addressed to the president of the Security Council, UN doc. S/2002/678, 19 June 2003, to which the *Report on the Judicial Status of the International Criminal tribunal For the Former Yugoslavia and the Prospects for Referring Certain Cases to National Courts* is attached.

[31] *Ibid.*, para. 2 *et seq.*

[32] *Ibid.,* paras. 38-41.

[33] *Ibid.,* para. 42.

application of the Prosecutor, whether to refer a case to a national court, reasoning that such a procedural mechanism infringed on the statutory powers of the Prosecutor.[34]

By Presidential Statement of 23 July 2002[35] the Security Council "recognized", "that the ICTY should concentrate its work on the prosecution and trial of the civilian, military and paramilitary leaders suspected of being responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991, rather than on minor actors" and "endorsed" "the broad strategy for the transfer of cases involving intermediary and lower-level accused to competent national jurisdictions".

Rule 11*bis* was amended accordingly in December 2002. The President of the Tribunal could appoint a trial chamber after the confirmation of the indictment to determine whether the case should be referred to the authorities of a state.[36] Rule 11*bis*(B) stipulated that the trial chamber could take the decision on referral *proprio motu* or at the request of the Prosecutor. The criteria for the transferral of cases were "the gravity of the crimes charged" and the "level of responsibility" of the accused.

Although the procedural mechanism for implementing the proposed completion strategy was put in place, no decisions on the referral of cases were taken. On 28 August 2003, the Security Council adopted resolution 1503 in which it recalled and reaffirmed the ICTY completion strategy.[37] It now called upon the ICTY to "take all possible measures" to implement the completion strategy which it defined in the following terms: first, the completion of all investigations by the end of 2004; secondly, the completion of all first instance trial activi-

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[34] *Ibid.*, para. 43.

[35] Presidential Statement, UN doc. S/2002/PRST/21, 23 July 2002 printed in UN Press Release SC/7461, issued on 23 July 2002, "Security Council Endorses Proposed Strategy For Transfer To National Courts of Certain Cases Involving Humanitarian Crimes In Former Yugoslavia", available at http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N02/491/47/PDF/N0249147.pdf?OpenElement.

[36] ICTY RPE, as amended on 12 December 2002, rule 11*bis*(A).

[37] Security Council resolution 1503 (2003), UN doc. S/Res/1503 (2003), 28 August 2003, Preamble, para. 7.

ties by 2008; and lastly the completion of all work in 2010.[38] Furthermore, the Security Council explicitly recalled "in strongest terms" some of the measures proposed by the ICTY to meet these deadlines, namely focusing prosecution and trial before the ICTY on "the most senior leaders suspected of being most responsible for crimes within the ICTY's jurisdiction"; transferring cases not meeting this requisite to competent national courts; and thirdly, improving the domestic courts' capacity to deal with the these cases.[39] It then requested the Prosecutor and President of the ICTY to provide in their annual reports an explanation of the plans for implementing the completion strategy.[40] The Security Council hereby demonstrated its intention to exercise oversight on the prosecutorial and judicial activities of the ICTY. Most importantly, however, the Security Council formally imposed the completion strategy as a goal on the organs of the ICTY, as opposed to merely endorsing the Tribunal's self-imposed deadlines.[41]

With resolution 1534, adopted only seven months later on 26 March 2004, the Security Council took an even stronger stance towards the implementation of the completion strategy. Expressing its concern that the ICTY indicated that it might be impossible to fulfil the deadlines contained in Security Council resolution 1503, it emphasised the importance of abiding by these deadlines and urged the Tribunal "to plan and act accordingly".[42] In this context it called upon the ICTY Prosecutor to review the caseload with a view to deciding which cases to refer to national jurisdictions.[43] Furthermore, it called upon the Tribunal to ensure that all new indictments only concentrate on the most senior leaders.[44] One commentator argued that this was a response to the Prosecutor's stated intention to issue new indictments.[45] Lastly, the

[38] *Ibid.,* operative para. 7.

[39] *Ibid.,* preambular para. 7.

[40] *Ibid.,* operative para. 6.

[41] See also Raab, *op. cit.*, p. 85.

[42] Security Council resolution 1534 (2004), UN doc. S/RES/1534 (2004), preambular para. 8 and operative para. 3.

[43] *Ibid.,* operative para. 4.

[44] *Ibid.*, operative para. 5.

[45] Raab, *op. cit.*, p. 87.

Security Council required that the President and Prosecutor of the Tribunal now provide specific reports on the implementation of the completion strategy every six months.[46] It also explicitly declared its intention to review the progress made by the Tribunal and "to ensure that the timeframe set out in the Completion Strategies … can be met".[47]

5.6. Rules 11*bis* and 28(A)

With resolution 1534 the Security Council exercised its yet strongest oversight of the Tribunal's performance. Most importantly, it introduced a substantive criterion for the confirmation of indictments, thereby forcing the Prosecutor only to select such cases for prosecution that targeted persons of the most senior level. On 6 April 2004, only a month after this resolution was adopted, the ICTY judges implemented the Security Council's request for additional judicial oversight of the Prosecutor's indictment practice. They amended Rule 28 (A) of the ICTY RPE to include an added review procedure for indictments: upon receipt of an indictment the President

> shall refer the matter to the Bureau which shall determine whether the indictment, *prima facie,* concentrates on one or more of the most senior leaders suspected of being most responsible for the crimes within the jurisdiction of the tribunal.

This procedure constitutes an additional measure of review to rule 11*bis.* While the latter applies only after the confirmation of the indictment, the review under rule 28(A) foresees a review before the indictment is submitted to the competent judge for confirmation on the basis of the evidence submitted. It is also interesting to note that rule 28(A) reflects the Security Council's language in speaking of most senior leaders being most responsible. Rule 11*bis* merely refers to the "level of responsibility of the accused".

The case law of the Referral Bench shows that the criterion of "level of responsibility" in rule 11*bis* was interpreted by reference to

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[46] Security Council resolution 1534 (2004), UN doc. S/RES/1534 (2004), operative para. 6.

[47] *Ibid.*, operative para. 7.

the rank of the accused coupled with his or her *de facto* and *de jure* extent of authority;[48] his or her role in the commission of the crimes which includes an assessment of the mode of liability by which he or she can be linked to the crime; and possibly any political role that the person additionally plays.[49] It is also interesting that while the Security Council resolutions on the completion strategy stipulate the seniority of the accused as a case selection criterion, they do not refer to the gravity of the crimes charged. However, Rule 11*bis*(C) stipulates that the gravity of the crimes also constitutes a criterion for deciding whether to refer cases to national courts. In order to determine the gravity of the crimes, the ICTY Referral Bench has focused on the scale of the crimes by reference to such factors as the number of victims, the duration of the crimes, as well as the geographic scope.[50] In one case, the type of crimes also constituted a factor for determining

[48] See, for instance, *Prosecutor v. Ademić et al.,* Decision for Referral to the Authorities of the Republic of Croatia pursuant to Rule 11*bis,* Case No. IT-04-78-PT, Referral Bench, 14 September 2005, paras. 29-30; *Prosecutor v. Dragomir Milošević,* Decision on Referral of Case pursuant to Rule 11*bis*, Case No. IT-98-29/1-PT, Referral Bench, 8 July 2005, para. 22. [The Referral Bench does not consider, however, that the phrase "most senior leaders" used by the Security Council is restricted to individuals who are "architects" of an "overall policy" which forms the basis of alleged crimes. Were it true that only cases against military commanders, who were at the highest policy-making levels of an army – in the case of the VRS the *Republika Srpska* highest political and supreme military levels – could not be referred under Rule 11*bis*, this would diminish the true level of responsibility of many commanders in the field and those at staff level. […] The Referral Bench therefore considers that individuals are also covered, who, by virtue of their position and function in the relevant hierarchy, both *de jure* and *de facto*, are alleged to have exercised such a degree of authority that it is appropriate to describe them as among the "most senior", rather than "intermediate".].

[49] See *Prosecutor v. Gojko Janković,* Decision on Referral of Case under Rule 11*bis* (With Confidential Annex), Case No. IT-96-23/2-PT, Referral Bench, 22 July 2005, para. 19.

[50] See, for instance, *Prosecutor v. Željko Mejakic et al.,* Decision on Prosecutor's Motion for Referral of Case pursuant to Rule 11*bis.,* Case No. IT-02-65-PT, Referral Bench, 20 July 2005, para. 21; *Prosecutor v. Gojko Janković,* Decision on Referral of Case under Rule 11*bis* (With Confidential Annex), Case No. IT-96-23/2-PT, Referral Bench, 22 July 2005, para. 19.

gravity of the crimes.[51] At a later stage, additional criteria besides the level of responsibility of the accused and the gravity of the crimes were included in the 11*bis* regime: the judges must also be satisfied that the accused will receive a fair trial and that the death penalty will not be imposed or carried out.[52]

5.7. Reduction of the Case Load

As a result of all these measures the Prosecutor in 2004 substantially reduced her case load. First, the number of persons under investigation was reduced. Before, in her annual report of 20 August 2003, the Prosecutor had categorised her investigations according to two priority lists. Priority list A referred to those investigations involving "the most serious crimes and the highest-level perpetrators" which would have been completed in accordance with the completion strategy by the end of 2004. Priority list B referred to investigations involving lower-level accused which would have only been completed if sufficient resources remained before the end of 2004. She had identified 17 investigations involving 35 suspects as falling under list A.[53] After the Security Council issued resolutions 1503 and 1534, the Prosecutor reduced the number of investigations and persons contained in list A. In her report to the Security Council on 24 May 2004 the Prosecutor listed only seven remaining investigations involving 13 suspects. She pointed out that her investigations had produced new results which indicated that some of the accused on her priority B list should rather be included in the priority A list. She then stated "[h]owever, I do not expect to re-evaluate additional accused from priority B to priority A".[54] Given the

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[51] See *Prosecutor v. Željko Mejakić et al.,* Decision on Prosecutor's Motion for Referral of Case pursuant to Rule 11*bis.,* Case No. IT-02-65-PT, Referral Bench, 20 July 2005, para. 21.

[52] ICTY RPE, Rule 11*bis*(B).

[53] *10th Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991*, UN doc. A/58/297-S/2003/829, 20 August 2003, para. 229.

[54] Assessment of Carla Del Ponte, Prosecutor of the International Criminal Tribunal for the Former Yugoslavia, provided to the Security Council pursuant to paragraph 6 of Security Council resolution 1534 (2004), Enclosure II of Letter dated 21 May 2004 from the President of the International Tribunal for the Prosecution

immense pressure to complete investigations by 2004, it appears the Prosecutor took a decision not to prosecute any additional persons, even if they fell into the category of being one of the most senior leaders.

In September 2004 the Prosecutor submitted her first motions for referral of cases under Rule 11*bis*. The Prosecutor has in total filed 14 referral motions involving 22 accused. Two referral motions were denied by the Referral Bench. The Appeals Chamber reversed one decision of the Referral Bench in which it had granted a motion to refer. In two cases involving two accused the accused entered into guilty pleas. One case involving three accused was withdrawn by the Prosecutor. Thus, in total eight motions for referral, involving 13 accused were granted.

of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, addressed to the President of the Security Council, UN doc. S/2004/420, 24 May 2004, paras. 14-15.

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Criteria for Prioritizing and Selecting Core International Crimes Cases

Morten Bergsmo (editor)

This volume contains papers presented at a seminar of the Forum for International Criminal and Humanitarian Law in Oslo on 26 September 2008 with the same title as the publication. It has 24 contributions by some of the leading practitioners and experts in international criminal justice and policy. Armed conflicts tend to generate too many war crimes and crimes against humanity for all persons responsible to be held criminally accountable. This volume does not address what should be done with cases which probably can not go to trial due to limited capacity in criminal justice systems. That is the subject of FICHL Publication Series No. 9. Rather, this volume concerns the best way to select and prioritize the cases that should be investigated and prosecuted first. This is a question of the quality of discretion in the management of criminal justice for atrocities. The Forum seeks to start a debate on the role of criteria in case selection and prioritization through this volume.

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