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Criteria for Prioritizing and Selecting Core International Crimes Cases

Morten Bergsmo (editor)

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Introductory Remarks on the Characteristics of Effective Criteria for the Prioritization of Core International Crimes Cases

Mirsad Tokača*

The establishment of efficient criteria for the selection of core international crimes cases represents one of the fundamental tasks before the Bosnian-Herzegovinian society. There are several reasons why it is so. Firstly, at the moment of adoption of the Strategy for the processing of war crimes cases in Bosnia and Herzegovina ("the Strategy"), it would be very hard to imagine its efficient implementation if, at the same time, the selection criteria and prioritization criteria ("the criteria") are not ready. Secondly, prior to the very adoption of the Strategy and criteria, a number of speculations emerged about the number of war crimes cases in Bosnia and Herzegovina, varying from 10,000 to 16,000, causing widespread confusion. As the estimation was not based on detailed analysis it caused mixed impressions. On the one hand, the impression was created that it has not been possible to deal with the high number of cases, that capacity building for their processing has not been successful, leading to the conclusion that it would have been the best to give up the entire criminal justice project and search for some other mechanisms (truth commission or similar) to solve the issue. On the other hand, the impression is that the intension

* **Mirsad Tokača** is the Founder and President of the Research and Documentation Center in Sarajevo, since its establishment in 2004. Prior to that, he served for more than a decade as General Secretary of the State Commission for Gathering Facts on War Crimes. He has been an expert witness before the ICTY. As an independent member of the BiH delegation, Mr. Tokaĉa attended the sessions of the United Nations Human Rights Commission in Geneva in 1996 and 1997. He is also a member of the scholars' initiative of Purdue University (USA) which deals with the problem of the dissolution of the former Yugoslavia.

has been to blur the whole issue and prolong it indefinitely, by using the vast number of cases as justification.

Unfortunately, only a minority seems to have argued that it is first necessary to do an in-depth analysis of the global problem of backlog of cases, a mapping of crimes, and only after that – based on the full picture of the current number of case files – to create and implement criteria for selection and prioritization of cases and based on that basis, to build the long-term strategy and organization of resources necessary for efficient prosecution.

This approach has been supported by those who consider criteria as a principal operative instrument for the implementation of the Strategy for war crimes prosecution in Bosnia and Herzegovina. The approach, which I personally support, starts from the viewpoint that criteria should help the long-term directing of the inquiry of the Prosecutor's Office, as they can focus a well-planned use of the limited resources of the prosecution. If successfully prosecuted, such war crimes cases will produce significant societal consequences, primarily for the victims of the crimes, but also for society more widely. Criteria for case selection directly influence the prioritization of the prosecution.

Although these two dimensions interrelate, the focus of this volume is on operative criteria for the rational selection of cases of interest to the prosecutor's office – only in the second phase should the question of prioritization be addressed.

18.1. Prosecution or Court Independence v. Public Interest

One of the dilemmas which we have witnessed in Bosnia and Herzegovina is whether the wider – expert and even public – debate about criteria can affect the independence of prosecutors. As this proposition has been brought up in different forms, my opinion is that it should be responded to.

Broad dialogue about such criteria, at the time of their creation, can in no way jeopardize the independence of prosecution services. There are two separate processes: establishment *and* application of criteria. During the criteria-defining phase, differences of opinion should be expressed in search of the best solutions. In the implementa-

tion phase, it is the sole responsibility of the criminal justice system to apply the criteria to cases. Its independence and impartiality should not be brought into question.

Efficient selection and prioritization criteria are not only in the interest of the prosecution. They appear as the convergence of prosecution and victims' interests, providing for a joint effort to renew the rule of law, to eradicate the culture of impunity and to affirm the impartiality of the prosecutor, not through his or her inaccessibility, but through a measure of acceptable social co-operation in which all profit.

Is there perhaps a fear of an – in some jurisdictions, for years – inaccessible institution to open itself to full exposure to the public interest? Many are not aware that this kind of public consultation does not necessarily signify the undermining of institutional autonomy and independence. Or perhaps the fear – cloaked in a veil of independence – is an attempt to hide inefficiency in the work of the prosecution service in question.

It is really hard to see how the development of transparent and efficient criteria can endanger the independence or impartiality of the prosecutor. *Au contraire*, it seems that such an approach can protect the prosecutors against unwanted external influence and pressures, with political, ethnic, religious or some other prefix. Such pressures are brought to bear on prosecution services exactly because of insufficiently transparent criteria – and a weak attitude of prosecutors towards political pressure.

I think debates about this problem would show that their purpose is not to pressurize or impose any concept or solution on the prosecution, but rather reflects an effort to involve interested parties, either professional or societal, in one common pursuit of the system that would strengthen the efficiency of both the courts and prosecutors and their role in society.

There need not be any fear of confrontation among parties to the process. It will certainly be difficult to influence the discretionary powers of the prosecutors and their authority over the practical application of criteria. Clear limits of propriety exist in this regard, but that is the subject of another discussion. However, in a new system – or one

which has been radically reformed – one can not hide behind arguments of independence and impartiality, as those standards do not mean denial of access to information on the results and work of the courts and prosecutor's office to the public.

It is clear that with criteria we do not address many other preconditions to effective criminal justice for atrocities, including external circumstances such as the harmonization of laws, finances, organization, human resources and equipment. But good selection and prioritization criteria can assist. As criteria are not out of or above the existing criminal justice system, external circumstances can influence the efficient application of criteria.

As a matter of fact, we must be aware of and keep in mind the experience of the ICTY and the problems it has been facing, which criteria in no way could influence. Even under the assumption that we were able to create ideal criteria, we would not be able to raise the level of efficacy of the prosecutors and courts in the prosecution of war crimes cases.

18.2. Gravity, Scale, Nature of Crimes, Interests of Victims

There are a number of questions that should be very precisely defined by the criteria. The key criteria should be focused on several things. Firstly, it should be the gravity, scale and nature of the crime. Without these three dimensions it is simply impossible to build efficient and objective criteria. As regards Bosnia and Herzegovina, it is clear, primarily based on the experiences of the work of the ICTY, that there are areas in which the crimes were concentrated. These crimes were part of systematic and planned military activities, executed in specific time ranges. In that sense, the criteria must be supported by a precise demographic and area conflict-analysis.

Furthermore, it is important that the criteria treat the nature of crimes in an appropriate way, insofar as the same importance – and, together with that, priority – can not be given to individual killings and mass executions, or destruction and plunder of property versus the destruction of cultural and historical inheritance, or war crimes versus acts of genocide.

Finally, criteria must take into consideration the significant effect that war crimes prosecutions have on the whole community, that is, to which extent we fulfil the expectations and needs of the largest number of victims. It is very important in the context of Bosnia and Herzegovina that the criteria should not accommodate any kind of ethno-religious balancing – they should be strictly focused on the crime and its characteristics. This is very important since the courts and prosecutors are under constant and very persistent pressure of ethnic representation in the process. The so-called „balanced ethnic approach' advocated by some brings into question whether the legal institutions are indeed there to implement legal norms.

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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 volum

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