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## Substantive and Organisational Issues

Minna Schrag\*

### 22.1. Introduction

The International Criminal Tribunal for the former Yugoslavia ('ICTY') is and should be considered a success, conducting credible trials and developing in concrete contexts the application of international law. But much could have been done to make the Tribunal even more effective. What follows are reflections, based on my own experience as a senior trial attorney in the Office of the Prosecutor in 1994 and 1995 during the Tribunal's early formative period. These reflections have been enhanced by my continuing conversations with former colleagues and my observations during occasional visits to The Hague in connection with my consulting activities since 1997. They are also informed by my participation in the Rome conference and meetings of the International Criminal Court ('ICC') Preparatory Commission as a member of the United States delegation, where my responsibilities concerned procedural issues.

At the beginning of the Tribunal's work, there was very little informed discussion about lessons learned from Nuremberg and Tokyo. The only references usually heard about Nuremberg were general comments that we had to be better and that we wanted to be viewed as less political

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and not engaged in victor's justice. I believe that mistakes could have been avoided if Nuremberg had been studied more closely. I therefore urge that the Office of the Prosecutor of the ICC take some time at the outset to consider and discuss fundamental principles as well as operating policies, and to profit from the ICTY (and International Criminal Tribunal for Rwanda) experience.

## **22.2. Goals of the International Criminal Tribunal for the Former Yugoslavia and International Criminal Court**

A long list of purposes is often ascribed to the ICTY and the ICC, and high expectations are attached to each one. Among those on the usual list are:

- to bring sense of justice to a war-torn place;
- to provide a sound foundation for lasting peace;
- to bring repose to victims;
- to provide a safe forum for victims to tell their stories;
- to enforce international law, end impunity for violations, especially for senior political and military leaders;
- to re-establish the rule of law;
- to demonstrate fairness and the highest standards of due process;
- to provide exemplary procedures to serve as a model for rebuilding a legal system devastated by war crimes and human rights violations;
- to create an accurate historical record, to forestall those who might later try to deny that the widespread violations of international law occurred;
- public education in general;
- in a didactic mode, to illuminate explanations about what caused the violations, and illustrate particular patterns of violations;
- to develop and expand the application and interpretation of international law and norms;
- to function with maximum transparency and public scrutiny;
- to provide a forum for considering restitution and reparations.



I believe that there is inherent tension among some of these goals, and that it is important that the senior staff in the Office of the Prosecutor spend some time considering what the priority should be among them.<sup>1</sup> Even notions of what constitutes appropriate ‘justice’ may vary widely. Whether or not a consensus emerges, the discussion itself will illuminate a variety of perspectives, and assist the prosecutor in setting fundamental approaches. My own view is that the prosecutor should emphasise in particular the didactic function and the perception in the affected region that justice is being done.

### **22.3. Political Context**

Throughout the ICTY’s life some important prosecutorial choices were made with insufficient appreciation of political issues and perceptions. Sources of support and assistance may have been overlooked or unnecessarily offended, because senior officials took the position, familiar in domestic contexts, that prosecutorial decisions must be immune from political influence and considerations. While I emphatically support prosecutorial independence, I believe that a nuanced appreciation of political realities and sensitive public statements would be helpful.

For example, at the ICTY opportunities to win early public support, particularly in Bosnia, were lost because the best-known senior perpetrators, like Milošević, Ražnatović (‘Arkan’) and Šešelj, were not targeted for investigation. Even the indictment of Karadžić and Mladić, more than a year after the Office of the Prosecutor began its work, had less impact

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<sup>1</sup> For example, there may be a tension between providing utmost fairness to the accused and special protections for victims. Similarly, there has been a mostly unexamined assumption that all victims of sexual assault will testify in closed session and need special protection, an assumption not necessarily based on real need and contrary to the goal of transparency and maximum public exposure. On the other hand, some witnesses, not necessarily only those who are victims, genuinely do require a wide array of special protective measures. Similarly, in conceiving trial strategy, it appears that the ICTY may have paid insufficient attention to its goals. There has been little concern for public education and the importance of keeping press attention; in some cases, more evidence was presented than necessary; the flexibility available under the rules to provide some of the uncontroversial background and contextual information in written form has been sparingly used. On the other hand, there has at times been insufficient attention to courtroom drama. For example, the very first trial, of Duško Tadić, began with the important but undramatic testimony of an expert witness regarding historical and political background, thereby losing the opportunity to capture the attention of the press who drifted away as the testimony continued over several days.

than it might have because it followed several indictments of relatively unknown persons.

Intense expectations that the Office of the Prosecutor immediately present indictments and cases to try led to the early decision by the Office to focus investigations on the Prijedor region where the Commission of Experts had done some detailed research. This decision kept everybody busy, but led to rapidly prepared early indictments. Time was never taken to conceive of a thorough prosecution strategy.

Moreover, because armed conflict continued for a year and a half after the Office of the Prosecutor began work, much criticism was received from those who considered the Tribunal's prosecutions inconsistent with peace. Greatly to his credit, Richard J. Goldstone immediately understood that he had to devote his personal energy to countering that criticism and generally to obtaining support for the Tribunal from political leaders, the press and influential organisations. The ICC prosecutor may have to attend to similar issues.

The political context in the former Yugoslavia required more attention than it received. We should have addressed more forcefully at the outset the perception that the ICTY was anti-Serb. Instead, we relied on claims of professional prosecutorial impartiality, familiar in a domestic context, which were not persuasive to those who were already convinced that the Tribunal was biased. More sensitivity to the political effects of Tribunal's work might have produced greater public understanding.

Managing budget approval through the General Assembly process required a different kind of political skill. There was little understanding, especially at first, at the United Nations about how expensive investigations and prosecutions are, especially in the midst of an ongoing armed conflict. Even though the budget grew quickly, the Office of the Prosecutor has been chronically underfunded. Similar skill will be required for the ICC. In my view, it is essential that the prosecutor participate actively with the registrar in creating the budget and in advocating for it at the Assembly of States Parties.

## 22.4. Office of the Prosecutor: Substantive Issues

### 22.4.1. Selection of Persons to Prosecute

Once a particular event, or place, has been selected for investigation, I suggest that the focus be on preparing prosecutions of the important perpetrators. Too much focus on the events themselves may be conducive to producing a history of a particular place, rather than on creating a strategy to pursue the most senior persons responsible for the crimes.

At the ICTY many low- and middle-level perpetrators were indicted because the evidence against them was readily available. This used up resources and clogged the system, so that many accused persons have waited several years for trial, undermining perceptions of fairness. While there may be good reasons to prosecute at least some low- and middle-level perpetrators, not enough attention was paid to limiting the number of them.

Moreover, there was insufficient overall co-ordination of investigations, and a belief held by some, not founded in any legal requirement, that if evidence was acquired that demonstrated a person's culpability, there was an obligation to indict that person. Since most evidence at first was collected from people who had been in detention camps, most evidence related to low-level prison guards.

A decision was made not to pursue theme cases, or in other ways not to give priority to the didactic purposes of prosecution. The only theme case so far, about sexual assault in Foča, has received more press attention than any case other than the Milošević trial. Reflecting a misapprehension about Nuremberg, the antipathy to theme cases was usually explained as not wanting to be perceived as "political" or to present "show trials". In my view, if cases are based on solid evidence, they cannot correctly be described as for show purposes.

But there were significant problems with the *Foča* case, too. The people who were prosecuted were middle-level officials who directly participated in sexual assaults, not more senior officials who directed the policy of using sexual assault as a weapon. More importantly, the focus of much prosecution energy in the case was to expand the prohibition against slavery to include sexual slavery, even though the facts of the case do not conform to popular notions of what constitutes slavery. Whether or not one believes that expanding and modernising the reach of international

law is a primary goal of the Tribunal, the priority in the case seemed to be on legal theory rather than on the more immediate purpose of illustrating and showing how, and explaining why, sexual assault is used as a weapon of terror.

One reason for the particular emphasis on law expansion may be that those who see the Tribunal as a vehicle and a rare opportunity to advance international law are paying closer attention than any other audience, and through their advocacy they may have disproportionate influence over prosecutorial strategy. For example, arguments from outside legal advocates may have led one trial team, without broader discussion within the Office of the Prosecutor, to seek and obtain from the judges authorisation to present an anonymous witness at trial, a decision that caused widespread criticism and diverted at a very early stage much needed attention and support. A strong senior level co-ordination of prosecution policy and practices might serve to minimise such disproportionate influences and encourage thorough internal discussion of decisions, especially of those likely to provoke controversy.

#### **22.4.2. Creating an International Prosecutor's Office**

It will be a great challenge for the ICC Office of the Prosecutor, as it was at the ICTY, to mold the staff into a cohesive body with a common approach to substantive and procedural issues. No task before the prosecutor will be more important or more immediate. No matter how detailed the rules of procedure will be, for example, it is inevitable that lawyers and investigators alike will tend to rely on their habitual approaches and instincts that they used in their domestic experience. For instance, staff members may bring with them dramatically different notions about how a witness statement should be written, or what constitutes exculpatory material, or whether and how a witness should be prepared for cross-examination. Failure to resolve at the outset the countless issues like these that inevitably will arise may create staff tension, inconsistency and significant misunderstandings, internal and external.<sup>2</sup>

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<sup>2</sup> For example, at the ICTY several indictments were sealed upon confirmation. The use of sealed indictments is unremarkable to many common law prosecutors, but in some civil law systems, where the issuance and confirmation of the indictment is invariably a public proceeding that is in many ways almost as important as the trial itself, sealed indictments are viewed with suspicion. From this perspective, the denouncement by otherwise support-



I suggest that the senior staff of the Office of the Prosecutor meet regularly to discuss these issues, and that consideration be given to creating an office manual, setting forth the practices and procedures that will be followed.

### **22.5. Office of the Prosecutor: Organisation and Practices**

From my experience at the ICTY I offer the following observations regarding the organisation of the prosecutor's office and its practices:

1. On the assumption that ordinary domestic practices would be applicable, the police, rather than the lawyers, were given responsibility over investigations and strategy at the ICTY. This was, I believe, a great mistake that in recent years has been somewhat corrected. The nature of the investigations and prosecutions at the ICC will require legal direction and co-ordination from the beginning. The investigators should report to the lawyers who will be presenting the cases at trial and confirmation.
2. An early priority should be choosing software so that a database can be created that will be easily searchable. For example, potentially exculpatory material must be identified and accessible; confidential material must be maintained as such; material collected by one investigative team should be available to other teams.
3. It will be important to have on staff persons with capacity to analyse data and in particular to have analysts with military expertise.
4. Investigative and trial teams should be closely co-ordinated and supervised at a senior level. Failure to do this at the ICTY produced at times intra-office conflict, a failure to recognise and pursue leads, and a failure to recognise exculpatory material.
5. Investigations should be completed before indictments are presented for confirmation. At the ICTY failure to do this was understandable in light of the circumstances, but the subsequent need to amend indictments created an impression of carelessness and perhaps unfairness.

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ive Serb legal professionals of the Tribunal's procedures as illegal is understandable, and might have been better addressed.

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6. The investigative staff should receive special training in dealing with trauma victims. Trauma counsellors should be available to staff as well.
7. A senior staff member should have responsibility for co-ordinating communications with victim representatives and positions the prosecutor may take regarding victim participation in particular cases. That staff member may also be responsible for ensuring that victims and other witnesses are kept informed of significant developments in the cases.
8. Similarly, a senior staff member should be responsible to act as liaison with governments and other providers of confidential information, to ensure that agreed upon procedures for obtaining and maintaining that information are followed and to manage novel issues that inevitably will arise. That function was filled with great skill at the ICTY.
9. Because the ICC Rules of Procedure leave the conduct of the trials largely to the discretion of the Trial Chambers, it will be important to have a senior staff member responsible for formulating and co-ordinating the prosecutor's position on questions of trial practice. Different trial teams should be prevented from taking inconsistent positions.
10. There should be a unit responsible for co-ordinating responses to legal questions and for pursuing legal questions on appeal. In general, that unit might function as the intellectual centre of the prosecutor's office. It should be available to advise the investigative and trial teams and should participate in high-level policy decisions.
11. There should be a senior staff person responsible for supervising and co-ordinating the work of the prosecutors. For example, that person might receive a copy of all outgoing correspondence; when different cases are competing for the live testimony of a witness, decide which case should have priority; convene discussions to ensure that common goals will be pursued; and encourage development of an indictment form used consistently with the office that is readily intelligible and tells a story.
12. There should be staff members within the Office of the Prosecutor with particular responsibility for relations with the press, non-

governmental organisations and the Victims and Witness Unit within the Registry.

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## **Historical Origins of International Criminal Law: Volume 5**

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This volume is about the birth of the Office of the Prosecutor of the International Criminal Court. It concerns the strategy and activities of the preparatory team for the Office between 1 August 2002 and November 2003. The emphasis is on the thinking of the team and dozens of experts it consulted. Part 1 of the book contains 41 chapters by some of these experts, including Xabier Agirre, Richard J. Goldstone, Fabricio Guariglia, Mark B. Harmon, Daryl A. Mundis, Bernard O'Donnell, Mohamed C. Othman, John Ralston, Christopher Staker, William A. Schabas, James K. Stewart and Clint Williamson. Their reflections are relevant to builders of capacity to prosecute core international crimes also at the national level.

Part 2 has chapters on three expert-group reports that the preparatory team organised: on the length of proceedings, fact-finding and state co-operation, and complementarity in practice. Introductions by actors involved at the time explain the background, main issues, and impact of the reports. Parts 3 and 4 contain three chapters on governance documents prepared by the team with experts: the draft Regulations of the Office, the draft Code of Conduct, and budgetary documents.

In Chapter 1, Morten Bergsmo, the co-ordinator of the preparatory team, analyses its risk-assessment and strategy, as well as challenges that subsequently beset the ICC Office of the Prosecutor. He calls for accurate historical research on the institutions of international justice and, beyond that, for a sociology of international justice. He argues for renewed commitment to integrity as a binding legal standard.

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