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Morten Bergsmo, Klaus Rackwitz and SONG Tianying (editors)



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The Establishment and Operation of the Office of the Prosecutor

Sir Geoffrey Nice*

At the International Criminal Tribunal for the former Yugoslavia ('ICTY'), staff members in the Prosecutor's office from specific backgrounds (for example, analysts, researchers and so on) were put into cadres along with people with similar expertise. I believe this concept has to be challenged. The prosecutor should focus on the creation of multidisciplinary teams under strong leadership. Thus, the authority (chain of command) should run 'vertically' within teams rather than within sections. And those teams should themselves be component parts of an overall office responding 'vertically' to top management so that a comprehensive and coherent conception of the history of and actions within the conflict could form, be challenged and adjusted over time. To an extent that happened in the earlier days of the ICTY where, under the leadership of Louise Arbour, important issues such as the issuing of indictments were subject to office-wide and internally open review.

The International Criminal Court ('ICC'), just like the ICTY, will experience problems in recruiting the right people for the type of work required. There is no pool of international criminal lawyers or investigators that can be drawn upon. This fact stresses the importance of the willingness to reconsider a decision to hire somebody as soon as it becomes ap-

* Sir **Geoffrey Nice** QC was lead-prosecutor at Slobodan Milošević's trial in The Hague. He initiated the prosecution's initial case of linking atrocities committed in the former Yugoslavia to Milošević. He also prosecuted several cases for the International Criminal Tribunal for the former Yugoslavia since 1998, including the cases of the Bosnian Croat Dario Kordić, who was subsequently jailed for 25 years, and the successful prosecution of Goran Jelisić, the self-styled 'Serbian Adolf'. In the United Kingdom, his practice also includes human rights/public law and personal injury. He was created a Knight Bachelor in 2007. The text of this chapter was originally written at the time of the establishment of the ICC Office of the Prosecutor. It reflects information available to the author at the time. The text has deliberately not been updated since. Only minor textual editing has been undertaken. Personal views expressed in the chapter do not represent the views of former or current employers.

parent that he or she is not suitable for the job, that is, it will be harmful if the notion exists that a job with ICC is a job for life! Better that new recruits should have to *prove* that they were correctly identified as good team members and that they may have to be let go if they are not absolutely first class. It must be crucial to create a strong team spirit of appropriately motivated and directed individuals at this early stage. From this the new culture of the ICC Office of the Prosecutor will develop.

Further to the previous point, it should be highlighted to prospective applicants for legal positions within the Office of the Prosecutor that classic advocacy will only be a minor part of their job – the role advocacy plays in international settings is even less significant than in domestic proceedings. Applicants have to be prepared to undertake other tasks, such as legal research, investigations, management and other in-house types of work.

It is of utmost importance to take the profit aspect out of field missions. Rather than providing daily subsistence allowance, investigators should be reimbursed on a receipt basis. This will prevent waste of money and personal resources, and lead to missions being planned more carefully and focused on the most important issues. An illustration of the problems encountered in this respect at the ICTY is the fact that 1,300 witness statements were taken in relation to the Kosovo conflict, a number that no one could realistically expect to be used in Court. Where a mission is planned because of the profit it may bring to investigators, the waste is enormous. First, there are the costs of an unnecessary mission itself; then the costs of those on mission not being available to do other more pressing work; and finally, the unnecessary mission generates material (to justify the mission at all) that has to be worked on – a further waste of resources.

At the outset of an investigation, or even at a preliminary examination, the Office of the Prosecutor should strive to get in touch with friendly intelligence services and academic experts specialised in the region and conflict, with a view to finding out what really occurred and, just as importantly, to giving the investigators an idea of the right approaches to take during an investigation. This would save resources and guide investigators in their task.

A policy of full disclosure would be desirable. One way to implement it would be the establishment of a comprehensive *dossier* – provided

that the judges read and review it themselves and supervise its maintenance and updating.

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Historical Origins of International Criminal Law: Volume 5

Morten Bergsmo, Klaus Rackwitz and SONG Tianying (editors)

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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