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Criteria for Prioritizing and Selecting Core International Crimes Cases
Morten Bergsmo (editor)



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Forum for International Criminal and Humanitarian Law (FICHL)
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PREFACE BY THE SERIES CO-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. The *Forum* seeks to contribute to scholarship and practice. Through this Publication Series we aspire to place high quality products on an Internet-based platform that is open and freely accessible to all, including those in less resourceful countries.

The seminar was co-organized by several organizations: the Norwegian Ministry of Foreign Affairs; the High Judicial and Prosecutorial Council of Bosnia and Herzegovina; the OSCE Mission to Bosnia and Herzegovina; the Procuración General de la Nación, Unidad de Asistencia para causas por violaciones a los Derechos Humanos durante el terrorismo de Estado; Amnesty International; Belgrade Centre for Human Rights; Center for Legal and Social Studies (CELS); Center for the Study of Law, Justice and Society (DeJuSticia); Chr. Michelsen Institute; Documenta; Human Rights Watch; Humanitarian Law Centre; Research and Documentation Center Sarajevo; the Norwegian Centre for Human Rights (University of Oslo); the Norwegian Helsinki Committee; the Norwegian Red Cross; and the International Peace Research Institute, Oslo (PRIO).

The broad institutional backing of the seminar is an indication of the importance of the topic. Criminal justice as a response to atrocities in armed conflict has enjoyed growing support in the international community of states. Several international and hybrid criminal jurisdictions have been created since 1993. All of them have faced more cases than they can process. Take the example of crimes committed during the conflicts in Bosnia and Herzegovina during the 1990s. The International Criminal Tribunal for the Former Yugoslavia will deal with less than 200 cases in its lifetime, most of them pertaining to Bosnia and Herzegovina. With an annual capacity of less than 30 cases, the national war crimes mechanism established within the criminal justice system of Bosnia and Herzegovina has maybe as many as 12,500 suspects in the existing backlog of open case files.

Armed conflicts tend to generate too many international crimes 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. That is the subject of a separate *Forum* seminar on abbreviated criminal procedures. Rather, the volume concerns the best way to select and prioritize cases to be investigated and prosecuted first. This is a question of the quality of discretion in the management of criminal justice for atrocities.

Both the *Forum* seminar on 26 September 2008 and this volume were made possible by financial support from the Norwegian Ministry of Foreign Affairs. Ambassador Jan Braathu at the Norwegian Embassy in Sarajevo and Mr. Sven Marius Urke of the High Judicial and Prosecutorial Council of Bosnia and Herzegovina made important contributions to discussions on the purpose of the seminar during the first half of 2008. The *Forum* would like to thank the Norwegian Red Cross for providing the seminar venue for free and the Norwegian Centre for Human Rights for assisting with the travel arrangements for the seminar speakers.¹

Morten Bergsmo

¹ The *Forum* would also like to thank Linda Hafstad (FICHL Intern 2006-2008) for taking care of the registration of seminar participants; Aida Šušić for assisting with the preparation of the Table of Contents and for reminding some of the speakers of the deadline to submit written contributions; Erlend des Bouvrie for proof-reading the manuscript; and PRIO's Information Department for assistance with making the covers of this volume.

PREFACE

PRIO is the ‘mother’ of the *Forum for International Criminal and Humanitarian Law* in the sense that our researchers Morten Bergsmo and Nobuo Hayashi are the driving forces behind this open, inclusive and innovative initiative. The rapid development of the Forum is a source of satisfaction and pride at PRIO. We see this as a positive process of incubation, network building and will to intellectual leadership – all values which are central to PRIO’s culture and aspirations.

For us it is particularly valuable that Morten and Nobuo are investing considerable mental energy on the framing of the issues which they put on the agenda of the *Forum*. We know from discourse analysis more broadly that framing the issue can in itself be a decisive intellectual contribution. I hope Morten and Nobuo will continue this line, with creativity and courage. Discourse entails occasional controversy, disagreement and provocation – one should welcome all three.

This publication is based on papers presented at a *Forum* seminar on 26 September 2008. The topic – *Criteria for prioritizing and selecting core international crimes cases* – is specific and technical. It would appear to be home ground for lawyers. Nevertheless, *Aftenposten* – an important daily newspaper in Norway – ran a long article on the seminar on its page 6 the day before the event. The headline reads: ‘The war crimes code shall be broken’ – suggesting that a key issue for the success of, and continued support for, war crimes prosecutions is that the best suited cases are selected for trials first. This is a common sense consideration of a political nature: it concerns everyone, not only lawyers. Whereas lawyers are uniquely placed to conduct discussion on selection and prioritization criteria, they also shoulder a distinct responsibility to ensure that effective and acceptable solutions are found. The circle of stakeholders in criminal justice for those who commit atrocities goes beyond the legal profession. The bill for criminal justice for atrocities is not paid by the legal community.

I therefore think that the topic of this publication has general importance. It seeks to contribute to the improvement of the quality of criminal justice for atrocities. That is necessary to ensure broad public support for criminal justice in transitions also in the future.

Stein Tønnesson
*PRIO Director*²

² **Dr. Stein Tønnesson** is Director of the International Peace Research Institute, Oslo (PRIO). He was trained as a historian, and has in particular worked on East Asia. His doctoral thesis, defended at the University of Oslo in 1991, was on the international history of the Vietnamese revolution in 1945, and he is currently working on a manuscript for the University of California Press on *Vietnam 1946: How the War Began*. As Director of PRIO he is engaged in dialogue work in Cyprus, studies of energy dependence and Middle East policies, of global counter-terrorist strategies, and of the causes behind global and regional trends towards less and less murderous warfare. He currently intends to set up a research project on how to explain the relative peace in East Asia since 1979.

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SOME INTRODUCTORY REMARKS

Siri Frigaard³

The international seminar on 26 September 2008 on the subject of criteria for prioritizing and selecting core international crimes cases is one of several seminars organized in the series of the Forum for International Criminal and Humanitarian Law. I work as the chief prosecutor and director of the Norwegian National Authority for Prosecution of Organized and Other Serious Crimes, a prosecution office with national jurisdiction situated in Oslo. This office has exclusive jurisdiction when it comes to the prosecution of “war crimes cases”, or cases involving the core international crimes: genocide, crimes against humanity or war crimes.

This National Prosecution Authority was established in August 2005. One of the reasons for its establishment was the “no safe haven policy”, but also to ensure respect for international legal obligations. The trial in the first case charging a person with crimes against humanity and war crimes took place in the early autumn of 2008. This was the first war crimes case in Norway since World War II.

When the Office was established in 2005, it had a backlog of approximately 80 cases. These involved alleged perpetrators from many different countries. One may ask whether it was just a random case selection or whether the cases were prioritized in accordance with a specific set of criteria.

This publication seeks to offer general perspectives on and understanding of the question of “how to prioritize cases for full investigation and trial”. This issue is essential for all units working with war crimes cases. It is important not only for the international tribunals or the hybrid courts, but also for the national units that have jurisdiction over the crimes committed in their own country, as well as for the national units dealing with these cases as a third country.

It is unrealistic to expect that all crimes committed during a specific conflict will be tried in a court, or to expect that every perpetrator will be held criminally responsible for the offences they have committed. Some cases will most likely never be tried, some due to lack of resources, some for other reasons. All cases characterised as core international crimes are im-

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portant. But some should be done before others and some need more immediate attention than others.

A proper selection process is therefore important.

In order to avoid unrealistic expectations from the public and accusations of, for instance, political pressure, it is important that the selection process is transparent and made known to those concerned through outreach.

The issue of case selection and prioritization opens many questions. For example, in order to prioritize and select the cases to be prosecuted we may ask whether, for instance, there is a need for written criteria. If so, what should those criteria consist of? Who should decide on the criteria? How flexible should the criteria be? Should the same criteria apply for international tribunals, hybrid courts and national courts in the conflict area as well as national courts in third countries?

While discussing these and other questions arising from the topic, we should be conscious of the reasons and importance of prosecuting the most serious crimes occurring in a specific conflict. Understanding the rationale behind the prosecution of core international crimes is crucial. One thing is clear; it is not the self-interest of the international prosecutor or an expert that prevails. We should ask ourselves whether we are doing it in order to reach sustainable peace in a country that has suffered the conflict. Or are we trying to contribute to reconciliation or are we prosecuting for reasons of deterrence? Are we trying to bring justice to the victims, or is it to ensure trust in the criminal justice system in the country? Or could it be another motivation, or is it a combination of several?

This leads back to the topic raised by the seminar and this follow-up publication, namely how to prioritize cases for full investigation and trial. It is interesting to see whether the answer to this question is a different one depending on which conflict we are dealing with. And does it depend on the type of unit that is dealing with it – international or national?

I have been working in East Timor, in charge of investigation and prosecution of the crimes against humanity that were committed prior to October 1999, and I am currently dealing with these cases in Norway. In both situations I have been confronted with a dual dilemma: How to pick the best suited cases for early trial? On which basis?

The Forum seminar on 26 September 2008 gathered an impressive selection of experts on the subject and sought to expound on a variety of issues relating to case selection and prioritization. This publication presents the practice of some jurisdictions that have already dealt with the issue of prioritization and selection criteria, as well as the views of leading experts in this field.

Part I:
**The relevancy and context of criteria for the
selection and prioritization of core international crimes cases**

The theme of selection and prioritization criteria and why it is relevant

Morten Bergsmo⁴

The decision by the UN Security Council in May 1993 to establish the International Criminal Tribunal for the Former Yugoslavia (ICTY) triggered a surge in the political will of states to respond to war crimes, crimes against humanity and genocide through criminal justice. Criminal responsibility for atrocities in conflict – not impunity – became the watchword of a new movement. Mechanisms for the prosecution of such core international crimes⁵ were subsequently established, *inter alia*, for Rwanda, Kosovo, East Timor, Sierra Leone, Cambodia, 'Ir aq, Indonesia and Colombia, as well as for countries such as Uganda, the Democratic Republic of the Congo and the Sudan through the International Criminal Court (ICC). In addition to (a) international or (b) hybrid war crimes jurisdictions and (c) criminal justice in territorial states affected by war crimes, some states have developed (d) a national legal and institutional capacity to investigate and prosecute such cases also when the crimes have been committed by foreign citizens in foreign countries (by use of the doctrine of universal jurisdiction).

Contemporary armed conflicts may generate several hundred thousand violations of international criminal law. This was for example the case in Rwanda when civilians were exterminated in such numbers. And just as there are many victims of crime in these conflicts, there may also be many persons responsible for the crimes: perpetrators as well as those who give orders, fail to prevent, aid or abet, or are part of a group with a common criminal purpose. The conflicts therefore give rise to numerous allegations of core international crimes. These allegations implicate many more persons than can be tried by the relevant criminal jurisdictions as we know them today.

In the case of Bosnia and Herzegovina, the ICTY has worked at the international level since 1994. It will have processed less than 200 trials when it terminates its activities, a majority of them dealing with crimes committed in Bosnia and Herzegovina. At the same time, several states have exercised universal jurisdiction and prosecuted crimes that occurred in Bosnia and Herzegovina in the 1990s, but the number of these cases remains low. More importantly, the national war crimes mechanism established in Bosnia and Herzegovina has thousands of open case files involving allegations of core international crimes in the various prosecutors'

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⁵ For the purposes of this publication, the term "core international crimes" is often used to refer to genocide, crimes against humanity and war crimes. The 26 September 2008 *Forum* seminar and this volume deal specifically with these crimes and not others in order to focus the discussion on the main challenges facing criminal justice for atrocities in territorial states.

offices at the state and entity levels of the country.⁶ Of the three levels of criminal justice for atrocities in Bosnia and Herzegovina – international, foreign state and territorial state – it is clear that the latter is left to carry the largest burden.

Backlogs of core international crimes cases challenge us in several ways, including (a) how best to obtain a complete overview of pending cases so that the workload is clear to stakeholders in the process and the case files can be properly categorised; (b) how to prioritize cases for full investigation and trial;⁷ (c) what to do with the large number of less serious cases with which the criminal justice system may not have the capacity to deal; and (d) how long should the international community remain involved in essentially national war crimes processes troubled by backlogs of cases. This publication only considers question (b). Question (c) will be the topic of follow-up activities of the *Forum for International Criminal and Humanitarian Law*.

Different approaches can be taken to large backlogs of core international crimes cases. A case selection may be made on a first come, first serve basis, without a proper overview of all case files in the backlog. Alternatively, one may choose those cases with the greatest ease of access to the evidence. Both approaches are probably much more common than we would like to think. Weak prosecution services may even select cases in response to political pressure. Other services may decide to proceed only with cases against the most senior leaders. The manner of case selection and prioritization can substantially affect the way in which the justice process is received by victims and others affected by the atrocities. It can also influence the perceived legitimacy of the process by states and the international community.

Formal criteria can be an essential tool for a more rational and coherent prioritization of war crimes cases. They can assist prosecution services in mapping and ranking cases so that those most suitable go to trial first. Criteria can serve the fundamental interest of equal treatment of all open case files. The practice of case prioritization does not *per se* require the deselection of other case files, hence the distinction between selection and prioritization. When made public, the criteria can also help to explain decisions on case prioritization to external stakeholders in the war crimes process, thus protecting the criminal justice actor in question against unfounded attacks.

As the papers in this volume clearly illustrate, war crimes jurisdictions have dealt with the issue of prioritization criteria in different ways. Several of them have not succeeded to adopt such criteria. Others have, but they differ significantly from each other in the manner in which they formulate their criteria. A common problem in practice has been to apply such criteria effectively and consistently. Changes in the application of criteria and other forms of unequal treatment of cases can amount to human rights problems in criminal proceedings. One may also take the principled position that case selection and prioritization both violate the equality of access to justice.

Part II of this publication considers relevant practise in some war crimes jurisdictions. Against this background, the volume discusses the role of prioritization and selection criteria

⁶ It has been difficult to obtain reasonably precise data on the number and nature of open core international crimes case files in the criminal justice system of Bosnia and Herzegovina. The “database of open case files” (DOCF) under development at the Office of the Prosecutor of Bosnia and Herzegovina seeks to establish a complete inventory of all open war crimes case files in the country according to a detailed information structure. For more information, see Morten Bergsmo, Kjetil Helvig, Ilija Utmelidze and Gorana Žagovec, *Some remarks on the handling of the backlog of core international crimes cases in Bosnia and Herzegovina*, 2008, pp. 28-41 (published as FICHL Publication Series No. 3 (2009)).

⁷ See Morten Bergsmo, Kjetil Helvig, Ilija Utmelidze and Gorana Žagovec, *Some remarks on the handling of the backlog of core international crimes cases in Bosnia and Herzegovina*, *op. cit.*, pp. 42-68.

for open war crimes case files; the requisite qualities of effective prioritization criteria; four main clusters of key criteria; the formulation of these criteria; the role of the judiciary in making prioritization criteria work; and whether perceptions of prosecutorial independence and discretion can inhibit the criteria's constructive use. The book concentrates on the situation where allegations of atrocities have already led to the opening of formal case files in the criminal justice system. How can it make use of prioritization criteria with regard to such case files? How to ensure that from the existing portfolio of open case files, the best-suited will go to trial first? This narrowing of the topic simply reflects the need for the 26 September 2008 *Forum* seminar to focus the discussion – not to exclude from the discourse the question of how criteria can be used prior to the opening of case files.

The book's topic is a matter of concern to public institutions and civil society alike. It drains public resources and trust when cases that are not best-suited for early prosecution are selected and prioritised first. It is not a birthright of prosecution services to fill their portfolios with cases against low level perpetrators. Pursuing war criminals at considerable cost to the public, without plan or strategy, with no prospect of addressing all crimes committed in the conflict, can hardly be justified by reference to prosecutorial independence alone. If a war crimes process selects and prioritises cases in a way which creates doubts about its ability to meet basic and reasonable expectations of justice, key stakeholders in the process may well end up challenging or restricting the autonomy of the criminal justice mechanism. In Chapter 5 below, *Angermaier* describes how the UN Security Council did exactly that *vis-à-vis* the ex-Yugoslavia Tribunal. More has been invested in criminal justice for atrocities in Bosnia and Herzegovina and Rwanda at the international and national levels combined than anywhere else. Bosnia and Herzegovina is in many ways the chief laboratory of criminal justice for atrocities. The precedent of the UN Security Council overruling the ICTY Office of the Prosecutor on case selection should therefore not be taken lightly. It should remind criminal justice officials in war crimes processes elsewhere to use their discretion to select and prioritise cases deliberately and responsibly.

These officials bring a professional authority of independence and impartiality to the discretionary exercise of selecting and prioritising cases which the political process normally does not. At the same time, providing criminal justice with such discretion in the first place represents a distinct measure of public trust. Has international(ised) criminal justice since 1993 proven itself worthy of this trust? *Agirre Aranburu* provides material for the consideration of this question in Chapter 20 below. It is necessary to ask this question if we are concerned with the longer term sustainability of criminal justice for atrocities. It should primarily be put to the lawyers who have led the international and hybrid war crimes jurisdictions since 1993. They have wielded formal and *de facto* authority over these institutions. They have been the chief bearers of the public trust on which the discretion to select and prioritise war crimes cases depends.

There have obviously been differences of opinion among these lawyers. I recall well the response of a senior Trial Attorney at the ICTY when I asked him why we were putting a certain accused on trial, apart from the fact that there was more than adequate evidence against him: "To provide a bit of theatre, I guess", implying that the "theatrical" value of this case was every bit as good as that of any of the other cases waiting in line. In that same spirit I have several times overheard international trial prosecutors remark that criminal justice for atrocities can not achieve more than putting a few of their authors on trial. By default, they argue, such trials show the world that atrocious conduct is unacceptable. From this perspective, the length of proceedings, the number of cases that are processed or the seniority of the accused may all seem less important than selecting sufficiently cruel conduct for prosecution to attract

public attention to the proceedings. When invoked in this context, the rhetoric of prosecutorial discretion simply beclouds an inadequate understanding of the role of the war crimes process. Needless to say, other practitioners of international(ised) criminal justice for atrocities do see the process in a broader perspective, in ways which do not dismiss reasonable expectations of justice, neither among victims nor in the international community of states.

In conflicts involving mass atrocity there is too much evidence of too many crimes. Prosecutors see crimes deserving prosecution wherever they look. No wonder prosecutors in *ad hoc* war crimes mechanisms feel that they must show results in the form of trials as soon as possible after the establishment of the jurisdiction, even if the selected defendant is only one of many low-level perpetrators. They perceive a pressure to commence proceedings, with their webs of deadlines and work requirements. Taking the time to first develop a strategy, a general plan of work and specific case preparation plans is easily dismissed as dwelling on methodology rather than getting on with the work. “Let us start and be guided by the evidence in the direction it takes us” is a common apology for focusing on the conduct of low-level perpetrators. Criteria for case selection and prioritisation can be a tool that tempers this tendency of random case selection. It is a professional tool of criminal justice, for criminal justice. Case selection and prioritisation by rational, clear and public criteria is preferable to selection by political interference (whether direct or by use of the budget).

The challenge of case selection and prioritisation is shared by international, hybrid, territorial state and foreign state criminal jurisdictions. But there are differences between these types of jurisdictions. As pointed out above, some foreign states with no connection to the conflict that gave rise to the crimes are nevertheless in a position to investigate and prosecute such crimes on the basis of universal jurisdiction. They typically have war criminals in their immigrant population from the area of the conflict. But the number of such cases is lower than that confronting international or hybrid jurisdictions set up *ad hoc* as a response to the conflict in question. And these jurisdictions end up having a much smaller case portfolio than the criminal justice system of the territorial state directly affected by the conflict and the crimes. If the latter has basic functionality and enjoys some trust by the public, it may easily be overwhelmed by war crimes case files. The highest numbers of victims and perpetrators normally reside in the territorial state. This is the situation in for example Bosnia and Herzegovina and Colombia.

The need for effective case selection and prioritisation criteria is most acute in the criminal jurisdictions confronted with the highest number of war crimes cases. Among these, the territorial states stand out. They are meant to be the first line of investigation and prosecution of these crimes. That is a consequence of the complementarity principle, on which the ICC – the only permanent international criminal jurisdiction – is based. This principle provides that the ICC can only step in when there is a lack of ability or willingness to process cases genuinely in national jurisdictions. The national level is therefore going to become gradually more important in the criminal justice for atrocities discourse.

Even when there is agreement in a given jurisdiction that it should have and use case selection and prioritisation criteria, there may be different opinions as to whether (a) these criteria should be binding and (b) the judges should have a role in making the criteria effective. Some prosecutors prefer that the criteria function merely as internal guidelines in the exercise of prosecutorial discretion, with no judicial supervision. The answer to both questions may depend on what type of jurisdiction it is. In countries where there is only a relatively small number of war criminals in the immigrant population (for example, in Canada or Norway), relevant criminal justice actors may not feel a need to make criteria binding. The likelihood of

serious public criticism of the criminal justice system for failing to deal with a large number of pending war crimes cases is rather low. The situation is materially different in a territorial state with a large backlog of war crimes cases (for example, in Bosnia and Herzegovina). Here the criminal justice system may suffer severe, sustained criticism when the expectations of justice for war crimes are broken by the recognition that the system in its current form is unable to process all cases, especially if a national legislative and institutional capacity has been established for such cases. Tacit public acceptance of initial prioritisation of cases against low-level perpetrators may well turn into a rejection of the ability of the criminal justice mechanism to adequately address the crimes.

Similarly, giving the judiciary a role in making criteria effective, may be more attractive in international, hybrid and territorial state jurisdictions than in foreign state jurisdictions. The example of the ICTY suggests that criteria are not applied consistently and effectively by prosecution services confronted with a high number of war crimes cases unless and until judges have the ability to enforce them. Procedurally speaking, judges can easily be given such a role in jurisdictions where the prosecution needs to turn to the judiciary for the confirmation of indictments.

The manner in which core international crimes cases are selected and prioritized affects the very quality of criminal justice as a response to atrocities in conflict. By bringing this topic to the forefront of the international criminal justice discourse, the *Forum for International Criminal and Humanitarian Law* and the co-organizers of the seminar on 26 September 2008 not only maintain a focus on the fundamentals of criminal justice in transitions from conflict to peace. The *Forum* also seeks to start a more thorough discussion on the topic of criteria for the selection and prioritisation of core international crimes cases. It is encouraging, in this light, to see the Annex on criteria in the National War Crimes Prosecution Strategy of Bosnia and Herzegovina adopted by the Working Group for the Development of a National War Crimes Prosecution Strategy in December 2008.

**Criteria for prosecution of international crimes:
the importance for states and the international community of the
quality of the criminal justice process for atrocities, in particular
of the exercise of fundamental discretion by key justice actors**

Rolf Einar Fife⁸

Speaking on behalf of the Ministry of Foreign Affairs, I should like to sincerely thank the International Peace Research Institute, Oslo (PRIO), and in particular Mr. Morten Bergsmo, for this timely initiative to engage not only in thorough but also systematic reflection on criteria for prosecutions of international crimes. An impressive array of international and national practitioners, many with hands-on experience from complex conflict situations, has been invited to share their insights. The questions before us are usefully limited to the criteria for prosecutions within a situation. We are therefore not discussing the choice of general situations or conflict areas in which to consider engaging prosecutions.

Already at the outset, a brief proviso may be called for, in order to prevent or overcome some misleading pre-conceptions. Intuitively, the issue of *prosecution of international crimes* is often associated with the *international prosecution of crimes*. International or cross-border co-operation to bring criminals to justice, say of individuals suspected of murder or serious fraud, may admittedly raise a number of difficult questions. But this is not the kind of issue we are considering here. Instead, we are focusing on a particular category of offences, namely international crimes. These are distinguished by a specific international dimension and concomitant legal obligations. They are crimes of concern to the international community as a whole. Having been recognized as such under international law, they give rise to specific international legal obligations, irrespective of the state of national laws. These crimes include genocide, crimes against humanity and war crimes. Ideally and primarily, these crimes should be dealt with domestically. Initiatives at the international levels should only be undertaken if and when the national system concerned is unable or unwilling to genuinely do so.

The perspective of criminalization of international crimes builds on recognition of key differences in scope and scale from ordinary crimes. Such a new paradigm is not only called for by international law. It is also largely, and increasingly, required by our national laws.

International crimes will usually concern mass crimes or crimes of particular gravity, potentially implicating large numbers of individuals, groups or social structures. Methodically, the emphasis is on the identification of large scale “patterns”. How do you identify and select patterns, as opposed to individual events?

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1. The contribution of legal informatics to grapple with objective assessments of complex patterns

An intuitive starting point for grasping challenges facing prosecutions of international crimes can be illustrated by the contributions of legal informatics. This discipline has increasingly demonstrated its relevance in the investigation of complex economic crimes and has been broadened to assist in identifying international crimes. We should here pause to congratulate Morten Bergsmo for receiving – just a few days prior to this seminar⁹ – the international “Dieter Meurer Prize for Legal Informatics”.¹⁰ The prize was intended to mark the creation and development of the Case Matrix. This is a tool designed to make work on accountability for international crimes committed more precise and effective.

Upon reflection, it should come as no surprise that a vast and complex body of law, as applied to vast and complex patterns of events, can be aided by legal informatics. Indeed, we speak of complex patterns rather than of single events or isolated acts. Using legal informatics can contribute to the quality of the criminal justice process for atrocities.

But does the law actually allow for criteria for prosecutions? What do we mean by “criteria” in this context? And are criteria even useful? In the following, I should like to share with you some reflections concerning prosecutorial discretion. Such reflections can of course not be expressive of official views of the Foreign Ministry and are purely personal. I follow here the invitation by the convenors to engage in matters that not only are delicate, but belong to the independent realm of prosecutorial or judicial activities, as opposed to those of political bodies or States. My basic proposition is that the quality of prosecutorial work is essential, also as seen from the perspective of States, and that it may be aided by an in-depth reflection on criteria.

2. Criteria – conceptual approaches

The notion of criteria is more commonly embraced by the so-called exact sciences than by jurisprudence in the field of prosecutorial discretion. Typically, references to stated criteria are required when making assessments or evaluations relating to experimental and quantifiable phenomena. Is the notion then really appropriate, or even applicable, to the activities of justice actors? These do not have much in common with the working methods of, say, natural, computer or even social sciences.

Paradoxically, the very root of the notion of criterion stems linguistically from the ancient Greek word for judging (*krino*, *krinein*: to judge). *Kriterion* came to signify a rule to distinguish between what is true from what is false. The noun was later taken up by Latin, now embracing the broader meaning “judgement”.

The history of criminal procedure evolved without delving into an analysis of criteria for exercising prosecutorial discretion. Instead, as expressed for example by legal theory in the French continental tradition, two abstract ideals emerged. These were encapsulated in a debate on the principle of legality of prosecutions vs. the principle of opportunity of prosecutions (*la légalité vs. l’opportunité*). The first affords in principle no discretion at all to the prosecutor, it mandates compulsory prosecutions. The other allows for choices and screening, but leaves this

⁹ The seminar took place on 26 September 2008.

¹⁰ The prize was granted in Saarbrücken on 18 September 2008. The event was organized by the German Association for Computing in the Judiciary and the German-language legal information service provider *juris GmbH*, (Germany’s “LexisNexis”, for our American friends, or “Lovdata”, for our Norwegian friends).

largely to the discretion of prosecutors. In most if not all national legal systems the reality has been situated somewhere in a magnetic field between those two ideals.

Let us briefly recognize important differences between the main legal systems of the world, including civil law and common law. Differences in legal cultures inspire our understanding, our pre-judgement when interpreting the very role of prosecutors and judges. However, momentous developments of international criminal justice have demonstrated that we can surmount or transcend such cleavages. Let us just note that there are national systems where the notion of individualized justice runs deep, as in the American tradition:

... enforcement of law is much more than applying to definite detailed states of fact the preappointed definite detailed consequences. Law must govern life, and the very essence of life is change. No legislative omniscience can predict and appoint consequences for the infinite variety of detailed facts which human conduct continually presents.¹¹

It has been stated that some of these choices are controlled by standards, but that one must recognize that other choices have to be deemed standardless. Nowhere is there a full enforcement policy. One compelling reason is that it would be too costly. Screening is therefore necessary.¹²

So, choices have to be made in processing cases. All prosecutors in national systems are, to different degrees, accustomed to that. Prosecutorial directions are, however, useful or necessary to promote priorities and an optimal use of resources. They may also promote effectiveness. They may enhance fairness and legitimacy. If combined with appropriate communication to the general public, they may contribute to consensus and increased support.

3. Criteria in the context of international crimes

If selection and prioritization are classical questions for all prosecutors at national levels for ordinary crimes, they are, in fact, no less pressing in practice with regard to international crimes, particularly after armed conflict in the territorial State. This has to do with the mere quantity and scale of the issues involved. It has also to do with corresponding challenges relating to expectations among groups of victims and populations involved. A selection is necessary. Legitimacy of priorities requires identifying and communicating objective factors that have inspired them.

A discussion of criteria is thus, in my view, not only necessary, it is useful. To dispel misunderstandings, I should add that criteria should not mean prescriptive straightjackets. Nor should they exclude re-appraisal and adjustment.

Nevertheless, indication of priorities and working methods is important also as seen from the perspective of States. States have a standing and an interest as *members of the international community*, members of political organs of the United Nations, parties to international legal instruments, including of the Rome Statute for the International Criminal Court, but not least as *Territorial States* in relation to crimes that have been committed.

¹¹ Roscoe Pound, *Criminal Justice in America*, 1945, p. 36.

¹² Stephen A Salzburg, *American Criminal Procedure*, 1988. For Criteria for screening in American law, see e.g., the *National Advisory Commission on Criminal Justice Standards and Goals* (1973).

Allow me here to suggest some possible or theoretical myths, for possible further discussion:

- That even handedness would require indicting members of all groups, irrespective of objective criteria directing quality of prosecutions, including gravity of crimes and quality of evidence.
- That even handedness would require that the same quantitative criteria must strictly apply in all cases, e.g., as to numbers of victims of crimes concerned.
- That the appearance of even handedness may be ensured by starting prosecutions, while awaiting in-depth determinations of evidence.
- That proceedings instigated out of political fairness may be necessary to ensure even handedness, even if they later lead to acquittals based on poor evidence.

Allow me to suggest key elements that should instead command the attention when considering criteria:

- The timely formulation of certain criteria may play an important role in communication, outreach and management of expectations among populations.
- The initial priorities and the quality of direction of investigations will have a huge impact on the resource base for later prosecutorial activities. Awareness of criteria may be helpful already at this stage.
- In a politically charged environment, it must be the quality of objective and professional prosecutorial assessments, based on the evidence and the gravity of the international crime concerned, that in the long term will promote legitimacy, consensus and increased support.
- Readiness to reconsider and adjust criteria is not necessarily a weakness, if carried out on the basis of professional and objective assessments.
- Acquittals based on poor evidence could have a negative impact as to outreach and the appearance of even handedness among certain groups.
- Stigmatization of persons through instigation of process is even more pronounced with regard to alleged international crimes. This should also be carefully weighed when making assessments.
- Respect for the principle of equality does not mean mathematical equality.
- Legitimacy, or trust, in prosecutorial matters must draw on professional experience and standards – as applied to the specific situation of international crimes.

I have now thrown in some postulates or rather questions. President Eisenhower once said that plans are nothing, and that planning is everything. I would not necessarily go as far here. But I would suggest that the main thrust of his point is still valid. Investing intellectual energy in a timely manner may prevent spending useless or expensive resources at later stages. Or, as encapsulated by the five celebrated “p”s in army parlance: Prior preparation prevents poor performance.

None of my remarks denotes any criticism of existing work or institutions. They are only meant to inspire a discussion in a field where the economy of the law, the management of expectations, the interests of victims and the long-term effects of re-establishing the rule of law all combine particular challenges – while having an important bearing on sustainable peace and security.

Part II:
**The selection and prioritization criteria
for core international crimes cases in a few jurisdictions**

Introductory remarks to Part II

Julija Bogoeva¹³

The second session of the Forum seminar on 26 September 2008 was on selection and prioritisation criteria for core international crimes cases in a number of criminal jurisdictions. The speakers were quite representative, covering a number of jurisdictions, at different levels and in diverse legal, cultural and socio-political settings. The seminar first heard about the approach taken and the practice of case selection and prioritization in existing international criminal courts and then in some national jurisdictions. We received extensive information on whether and how criteria for selecting and giving priority to war crimes cases are formulated, by whom, what form they take, whether they are implemented and what outcomes have been produced, in the legal, budgetary and strategic dimensions. Speakers addressed what the main dilemmas and constraints in this area have been.

It is important to address the question of transparency in this context: is it necessary and why and what does it entail? Moreover, when there is a large inventory of cases and a backlog, does case selection and prioritization necessarily mean that some perpetrators will not be prosecuted, as a *de facto* amnesty? Or can effective case selection and prioritization contribute to keeping all cases within the criminal justice system which may, for that purpose, have to undergo certain adjustments?

What more important task does any criminal justice system have than to ensure accountability for genocide, crimes against humanity and war crimes? Should the fact that such crimes imply large numbers of victims and perpetrators – an enormous challenge to any criminal justice system – be cause for giving up and giving in by prosecuting a few and granting *de facto* amnesty to many? Or should that hard reality be a call for doing what it takes to enable the criminal justice system to fulfil its purpose? Is there justification for prosecuting ordinary murderers while perpetrators of mass murder, rape, torture and other most serious crimes live freely and without stigma among us? What then of law and order and the rule of law and the claim that we are civilized? Do we still prefer, regardless of the cost, a dangerous illusion that “we” and “our values” are safe as long as the war criminals are somewhere else, in front of “the other’s” doorstep?

Here is my question: would optimal case selection and prioritization better persuade policy makers that prosecuting war criminals should always be a priority because it is a strategic investment in long-term stability and security?

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Case selection and prioritization criteria in the work of the International Criminal Tribunal for the Former Yugoslavia

Claudia Angermaier¹⁴

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.

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 Yugoslavia between 1 January 1991 and a date to be determined by the Security Council upon the restoration of peace".¹⁵

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 1979.¹⁶

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 interna-

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¹⁵ Security Council resolution 827 (1993), adopted 25 May 1993.

¹⁶ "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).

tional humanitarian law” are subject to prosecution before the Tribunal,¹⁷ 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.¹⁸

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 prosecutorial functions both from the other organs of the Tribunal as well as external sources.¹⁹ Once the Prosecutor determines that a *prima facie* case exists, he or she submits an indictment to a judge of the trial chamber.²⁰ 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.²¹ 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))”.²² 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 827.²³ According to Cassese this rather vague statement was meant to convey the judges’ view that the purpose of the ICTY lay in the prosecution of “those persons who bore major responsibility”.²⁴

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.²⁵ He further argues that the exercise of such judicial oversight on the investigative activities and

¹⁷ Antonio Cassese, *The ICTY: A Living and Vital Reality*, (2004) 2 *Journal of International Criminal Justice*, pp. 585, 587.

¹⁸ Larry Johnson, *Ten Years Later: Reflections on the Drafting*, (2004) 2 *Journal of International Criminal Justice* pp. 368, 369.

¹⁹ ICTY Statute, Art. 16(2).

²⁰ ICTY Statute, Art. 18(4).

²¹ See Cassese, *op. cit.*, p. 586.

²² *Ibid.*, p. 586.

²³ 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.un.org/icty/latest-e/index.htm>>.

²⁴ Cassese, *op. cit.*, p. 586, at note 4.

²⁵ Richard Goldstone, *A view from the Prosecution*, (2004) 2 *Journal of International Criminal Justice* pp. 380, 381.

policy of the Prosecutor could have resulted in a compromise of the judges' impartiality.²⁶ 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 exist a procedural mechanism which would have ensured that the Prosecutor acted in conformity with the general goals laid down in the ICTY Statute.²⁷ He stresses that it was not a decision of individual judges but rather that the judges acted unanimously as a collective body.²⁸ 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.²⁹

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.³⁰ Moreover, the first indictments included such low-level perpetrators as camp guards in the list of accused persons and therefore reflected the Prosecutor's stance that seniority was not a decisive criterion for the selection of cases.³¹

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.³²

The criteria were divided into five groups: "(a) person"; "(b) serious violation"; "(c) policy considerations"; "(d) practical considerations"; and "(e) other relevant considerations".³³

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;

²⁶ *Ibid.*, p. 381.

²⁷ Cassese, *op. cit.*, p. 587.

²⁸ Cassese, *op. cit.*, p. 588.

²⁹ *Ibid.*, pp. 587 *et seq.*

³⁰ Morten Bergsmo, Kjetil Helvig, Ilia Utmelidze, and Gorana Žagovec, *Some remarks on the handling of the backlog of core international crimes cases in Bosnia and Herzegovina* (2008), p. 52 (on file with the author).

³¹ 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.un.org/icty/latest-e/index.htm>>.

³² Bergsmo *et al.*, *op. cit.*, p. 52.

³³ The content of these groups of criteria has been taken from Bergsmo *et al.*, *op. cit.*, pp. 52 *et seq.* They also provide an in-depth analysis of each of these sets of criteria.

- 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;
- 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 “(e) other relevant considerations” were the following:

- 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.³⁴ Arguably, a focused case selection policy on the basis of this catalogue could hardly have been implemented.

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.³⁵

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

³⁴ *Ibid.*, p. 52.

³⁵ *Ibid.*, p. 58.

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 appropriately be tried in another judicial forum, such as a State Court ...³⁶

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 Čelebići 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).³⁷ 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.³⁸ 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"³⁹, one such principle being equality before the Tribunal. The Appeals Chamber 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.

³⁶ 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.un.org/icty/latest-e/index.htm>>.

³⁷ *Prosecutor v. Mučić et al.*, Appeals Chamber Judgement, Case No. IT-96-21, 20 February 2001, para. 612.

³⁸ *Ibid.*, para. 602.

³⁹ "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.

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.⁴⁰ 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 2007.⁴¹ 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.⁴²

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".⁴³ 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 2008.⁴⁴ 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.⁴⁵ 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,⁴⁶ 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.⁴⁷ According to the report, the ICTY Prosecutor objected to the possibility of the Trial Chamber also deciding *ex officio*, and not only on an ap-

⁴⁰ Dominic Raab, *Evaluating the ICTY and its Completion Strategy*, (2004) 2 *Journal of International Criminal Justice* pp. 82, 84.

⁴¹ 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>>.

⁴² 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>>.

⁴³ See Security Council resolution 1329 (2000), UN doc. S/RES/1329 (2000), 5 December 2000, preambular paras. 7 and 8.

⁴⁴ 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.

⁴⁵ *Ibid.*, para. 2 *et seq.*

⁴⁶ *Ibid.*, paras. 38-41.

⁴⁷ *Ibid.*, para. 42.

plication 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.⁴⁸

By Presidential Statement of 23 July 2002⁴⁹ 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.⁵⁰ 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.⁵¹ 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 activities by 2008; and lastly the completion of all work in 2010.⁵² 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.⁵³ 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.⁵⁴ 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.⁵⁵

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 dead-

⁴⁸ *Ibid.*, para. 43.

⁴⁹ 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://www.un.org/News/Press/docs/2002/sc7461.doc.htm>>.

⁵⁰ ICTY RPE, as amended on 12 December 2002, rule 11*bis*(A).

⁵¹ Security Council resolution 1503 (2003), UN doc. S/Res/1503 (2003), 28 August 2003, Preamble, para. 7.

⁵² *Ibid.*, operative para. 7.

⁵³ *Ibid.*, preambular para. 7.

⁵⁴ *Ibid.*, operative para. 6.

⁵⁵ See also Raab, *op. cit.*, p. 85.

lines contained in Security Council resolution 1503, it emphasised the importance of abiding by these deadlines and urged the Tribunal “to plan and act accordingly”.⁵⁶ 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.⁵⁷ Furthermore, it called upon the Tribunal to ensure that all new indictments only concentrate on the most senior leaders.⁵⁸ One commentator argued that this was a response to the Prosecutor’s stated intention to issue new indictments.⁵⁹ Lastly, the 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.⁶⁰ 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”.⁶¹

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 the rank of the accused coupled with his or her *de facto* and *de jure* extent of authority;⁶² his or her role in the commission of the crimes which

⁵⁶ Security Council resolution 1534 (2004), UN doc. S/RES/1534 (2004), preambular para. 8 and operative para. 3.

⁵⁷ *Ibid.*, operative para. 4.

⁵⁸ *Ibid.*, operative para. 5.

⁵⁹ Raab, *op. cit.*, p. 87.

⁶⁰ Security Council resolution 1534 (2004), UN doc. S/RES/1534 (2004), operative para. 6.

⁶¹ *Ibid.*, operative para. 7.

⁶² 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

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.⁶³ 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 11bis(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.⁶⁴ In one case, the type of crimes also constituted a factor for determining gravity of the crimes.⁶⁵ At a later stage, additional criteria besides the level of responsibility of the accused and the gravity of the crimes were included in the 11bis 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.⁶⁶

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.⁶⁷ 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”.⁶⁸ Given the immense pressure to complete investigations by 2004, it appears the

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”].

⁶³ See *Prosecutor v. Gojko Janković*, Decision on Referral of Case under Rule 11bis (With Confidential Annex), Case No. IT-96-23/2-PT, Referral Bench, 22 July 2005, para. 19.

⁶⁴ See, for instance, *Prosecutor v. Željko Mejakić et al.*, Decision on Prosecutor’s Motion for Referral of Case pursuant to Rule 11bis., Case No. IT-02-65-PT, Referral Bench, 20 July 2005, para. 21; *Prosecutor v. Gojko Janković*, Decision on Referral of Case under Rule 11bis (With Confidential Annex), Case No. IT-96-23/2-PT, Referral Bench, 22 July 2005, para. 19.

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

⁶⁶ ICTY RPE, Rule 11bis(B).

⁶⁷ 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.

⁶⁸ 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 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.

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.

Case selection and prioritization criteria at the International Criminal Tribunal for Rwanda

Alex Obote-Odora⁶⁹

1. Introduction

General principles of criminal law recognize the prosecutor's authority to decide whether or not to prosecute a given case.⁷⁰ The concept of case selection – or the exercise of prosecutorial discretion – is one on which defendants and the Office of the Prosecutor (OTP) differ in cases before the International Criminal Tribunal for Rwanda (ICTR). Accused at the ICTR have filed several motions before trial chambers alleging that the ICTR Prosecutor is conducting selective prosecution. All motions filed by accused alleging selective prosecutions have been dismissed except one which is pending when this text was written.⁷¹

In the pending Motion, the Accused seeks an order from the Trial Chamber to authorize him to interview former ICTR Prosecutor Carla del Ponte. The Accused wants the former ICTR Prosecutor to give reasons why the RPF soldiers, so far, have not been prosecuted. In the Motion, the Accused submitted that

Ambassador Carla del Ponte has firsthand information on the reasons why prosecution of RPF leaders, similarly situated to Mr. Nzirorera [the Accused], were not prosecuted. Therefore, the meeting sought with her is relevant to establish whether there may have been a discriminatory motive in the decision not to prosecute the RPF.⁷²

The Accused's Motion erroneously cited the ICTY Appeals Chamber in *Prosecutor v. Delalić et al.* in support of his submission.⁷³ On the exercise of prosecutorial discretion, the *Delalić et al.* Appeals Chamber had opined:

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 for the law. In this regard, the Secretary-General's

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⁷⁰ I readily admit that this principle has been applied differently in different jurisdictions since prosecutors have different degrees of discretion, although all have some discretion.

⁷¹ See *Prosecutor v. Nzirorera et al.*, Case No. ICTR-98-44-T, Joseph Nzirorera's Motion for Request for Cooperation to Government of Switzerland, filed on 12 September 2008 ("Nzirorera Motion").

⁷² *Ibid.*, para. 13.

⁷³ *Ibid.*, *Nzirorera* Motion, para. 14, citing, Case No. IT-96-21-A (21 February 2001).

Report stressed that the Tribunal, which encompasses all of its organs, including the Office of the Prosecutor, must abide by recognized principles of human rights.⁷⁴

The accused at the ICTR, appear to have equated the Prosecutor's exercise of prosecutorial discretion with selective prosecution, and have generally argued as if selective prosecution is the same or similar to the discredited defence of *tu quoquo*. The Prosecutor's exercise of prosecutorial discretion not to prosecute a person who committed crimes similar or identical to the crimes with which the accused is being prosecuted, is not a defence. Nor is the Prosecutor's decision not to prosecute a third person for a similar crime with which the accused is being prosecuted a reason for the Prosecutor to discontinue the prosecution of the accused.

I need not labour the point that the exercise of prosecutorial discretion is legal, reasonable and recognized in all legal systems. On the other hand, selective prosecution is a discriminatory practice, improper and is not the norm in any judicial system known to me.

In this paper, I will present the Prosecution's understanding of the Prosecutor's exercise of prosecutorial discretion and submit that the Prosecutor, under the ICTR Statute, has the legal authority to exercise such discretion in the execution of his mandate as authorized by the United Nations Security Council. The exercise of this discretion is not arbitrary but grounded on sound legal principles which encompass, *inter alia*, the principles of fair trial.⁷⁵ I will as well discuss the criteria that the ICTR Prosecutor has used and continues to use in the exercise of his prosecutorial discretion when deciding whether or not to prosecute, or – once prosecution has commenced – whether to discontinue criminal proceedings against any accused.

A brief background to the ICTR is necessary, if only to put the issues in context. The ICTR was established by United Nations Security Council resolution 955(1994). The objective of the ICTR is the prosecution of persons responsible for serious violations of international humanitarian law (IHL) committed in Rwanda and neighbouring States in 1994. The ICTR has three organs: The Chamber, the Registry and the Prosecutor. The Prosecutor is the head of the Office of the Prosecutor and his mandate is to conduct investigations and to prosecute persons responsible for serious violations of IHL in Rwanda and Rwandan citizens who committed such serious violations in neighbouring States between 1 January 1994 and 31 December 1994.⁷⁶ The Prosecutor is an independent and separate organ of the Tribunal and does not seek or receive instructions from any government or from any source.⁷⁷

In the exercise of his prosecutorial discretion, the Prosecutor has the responsibility to select cases that are to be investigated with the view to conducting prosecution at Arusha by the ICTR or to seek an order from a trial chamber and transfer the cases to national jurisdictions for prosecution as soon as it is practicable. The Prosecutor also has the power to transmit cases to Rwanda, without an order from a trial chamber, where investigations are not yet completed or where investigations are completed but indictments have not been drafted and submitted by the Prosecutor to a trial chamber for confirmation.

⁷⁴ *Prosecutor v. Delalić et al.*, Case No. IT-96-21-A, Judgement (AC), 20 February 2001, para. 604.

⁷⁵ On fair trial, see Article 14 of the United Nations Covenant on Civil and Political Rights and the commentary on Article 14 in Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, 2nd Edition, N.P. Engel, Publisher, 2005, at pp. 302 -357.

⁷⁶ Article 1 of the ICTR Statute.

⁷⁷ Article 15(2) of the ICTR Statute.

Justice Hassan Bubacar Jallow, the current ICTR Prosecutor, developed criteria for case selection for prosecution. These criteria are currently used by the OTP-ICTR.⁷⁸ The policy adopted by the ICTR Prosecutor outlines the process the OTP uses in selecting cases for trials at Arusha and cases earmarked for transfer to national jurisdictions. It is significant that while there are common criteria that may apply to every situation and in other jurisdictions in case selection, the context of the crime is a significant factor when deciding which of the many perpetrators are to be investigated with a view to prosecution. The case of Rwanda therefore provides a unique challenge. The case selection and prioritization criteria which are specific to the Rwanda situation may not necessarily apply to, or be easily replicated in, other situations.

There are many theories about the causes of the 1994 Rwanda crisis. However, the event that triggered the crisis which many experts, scholars and legal practitioners agree with is the shooting down of the plane carrying the President of Rwanda and his Burundi counterpart by yet unknown persons as it approached Kigali International Airport in the evening of April 6, 1994. As news began to spread that President Habyarimana was killed, allegedly by members of the minority Tutsi ethnic group, road blocks were immediately erected throughout Kigali. At these roadblocks, the Tutsis were identified by the mandatory identity cards which every Rwandan had to carry at all times. The identity card classified Rwandans into the three ethnic groups: namely *Hutu*, *Tutsi* and *Twa*. The targeted ethnic group for elimination was the *Tutsi*.

From 6 April 1994 and over the subsequent three months, more than eight hundred thousand *Tutsis* and *Hutus* considered moderate and opposed to the Interim Rwandan Government were killed by the *Hutu* majority group. There were, however, some *Hutus* who sheltered and protected *Tutsis* at great risks to themselves and their families. Not every *Hutu* therefore, participated in the madness that saw women, children, the old and the disabled indiscriminately killed through government-inspired violence.

Simultaneously with the on-going mass violence against the *Tutsi* ethnic group, there was a violent non-international armed conflict between the *Tutsi*-dominated rebel group, the Rwandan Patriotic Front (RPF), and its military wing, the Rwandan Patriotic Army (RPA), against the Rwandan Armed Forces (FAR) under the control and direction of its political and military leaders, comprising the *Hutu* extremists who formed the Interim Government and senior military leadership after the death of President Habyarimana and the murder of the moderate *Hutu* Prime Minister Agathe Uwilingiyimana.

During the fateful three months period in 1994 – from 7 April until mid-July – three distinct categories of crimes were committed in Rwanda. The crimes were genocide, crimes against humanity and war crimes. Of all the three crimes, genocide was the most profound and extensive. The deaths of an estimated eight hundred thousand people or more were a direct result of the genocide. As regards war crimes, it is not known how many people were killed as in conjunction with the non-international armed conflict in Rwanda. However, the numbers of deaths that would constitute war crimes is far fewer when compared to the genocide killings.

In the exercise of his prosecutorial discretion, the ICTR Prosecutor had to determine which perpetrators of the three categories of crimes he had to focus on. And after making that determination, the Prosecutor had to determine the criteria to be used to identify each perpetrator. To place the Prosecutor's challenge in context, it is necessary to recall that in 1994, the

⁷⁸ Justice Hassan Bubacar Jallow, *Prosecutorial Discretion and International Criminal Justice*, *Journal of International Criminal Justice*, Vol. 3, Issue 1 (2005), pp. 145-161.

population of Rwanda was about eight million. With at least eight hundred persons killed, that is, about 10% of the population, by machetes, beatings and at roadblocks (what may be referred to as “group killings”), it is reasonable to estimate that between three and five people, working in groups and providing support to each other, were involved in the killing of one person.⁷⁹ That translates into between 30% and 50% of the population who were involved in the killing of *Tutsis*, or those who stood by, watched the killings and did nothing to protect the victims. Some of these persons who stood by and did nothing may, under criminal law principles, be classified as accomplices and therefore could bear individual criminal responsibility for the substantive crimes committed by direct perpetrators as persons who aided and abetted the crimes. The Prosecutor was faced with, potentially a criminal population in which there was good cause for him to institute criminal investigations against several thousand suspects with reasonable prospect for prosecution and conviction.

The ICTR Statute requires the Prosecutor to prosecute those responsible for serious violations of IHL. The Prosecutor is therefore not expected, and the ICTR does not demand of the Prosecutor, to prosecute every person who violated international humanitarian law in Rwanda in 1994 or every Rwandan citizen who violated the law in the neighbouring States. It was therefore not surprising that many low-level perpetrators at roadblocks, public places, including churches, schools and hospitals where many *Tutsis* were killed, were neither investigated nor prosecuted by the ICTR. These are the perpetrators that later the Government of Rwanda prosecuted through the ordinary courts and the *Gacaca* process.

The second limitation imposed on the Prosecutor were Security Council resolutions 1503(2003) and 1534(2004). These resolutions required the Prosecutor to complete all trial activities by 2008 and all appeals by 2010. A new Rule 11*bis* of the ICTR Rules of Procedure and Evidence (the “Rules”) was adopted by the Judges of the ICTR.⁸⁰ Rule 11*bis* of the Rules must therefore be read together with Security Council resolutions 1503(2003) and 1534(2004).

The new Rule 11*bis* allows the Prosecutor to identify accused persons who are in the custody or still at large, and seek orders from a trial chamber to transfer them to national jurisdictions for prosecutions.⁸¹ Rule 11*bis* is meant to address some of the constraints imposed by the ICTR Completion Strategy as stipulated in Security Council resolutions 1503(2003) and 1534(2004). In exercising his authority to decide which case(s) are to be transferred to a na-

⁷⁹ It is also correct that in some instances, particularly in churches and schools, places where many *Tutsi* sought shelter and safety, members of the Rwanda Armed Forces threw grenades in the midst of civilians’ killings many civilians. In other instances, members of the Rwanda Armed Forces shot at civilians indiscriminately. However, the preferred method of killing the *Tutsi* ethnic group was by use of machetes, and primarily by members of the *Interahamwe*.

⁸⁰ Rule 11*bis*(A) reads as follows: “If an indictment has been confirmed, whether or not the accused is in custody of the Tribunal, the President may designate a Trial Chamber which shall determine whether the case should be referred to the authorities of a State:

- (i) in whose territory the crime was committed; or
- (ii) in which the accused was arrested; or
- (iii) having jurisdiction and being willing and adequately prepared to accept such a case,

so that those authorities should forthwith refer the case to the appropriate court for trial within that State”.

⁸¹ The Prosecutor has successfully sought the transfer of two accused to a national jurisdiction. They were transferred to France: *Laurent Bucyibaruta*, Case No. ICTR-05-85 and *Father Wenceslas Munyeshyaka*, Case No. ICTR-05-87. The Prosecutor has also filed five motions seeking the transfer of five accused to Rwanda. Three requests for transfer, at the time of writing, had been rejected by trial chambers and appeals are pending before the Appeals Chamber. The three accused, all at the United Nations Detention Facility (UNDF) at Arusha in Tanzania, are: *Yussuf Munyakazi*, Case No. ICTR-97-36A; *Idelphonse Hategekimana*, Case No. ICTR-00-55; and, *Gaspard Kanyarukiga*, Case No. ICTR-02-78. The two cases pending before the Trial Chamber are: *Jean Baptiste Gatete*, Case No. ICTR-00-61 (detained at UNDF) and *Fulgence Kayishema*, Case No. ICTR-01-67 (a fugitive).

tional jurisdiction and which case(s) are to be retained for prosecution at the ICTR, the Prosecutor has developed criteria that inform his decision.

2. Case selection criteria: general principles

There are general criminal law principles that inform Prosecutors in any jurisdiction in the selection of cases for prosecution before national courts and tribunals. Some of these case selection criteria may be relevant for selecting cases for prosecutions before international criminal tribunals and courts depending on the nature and scope of the crimes that are being investigated.

In making decisions on whether or not to prosecute a person in a national court, the Prosecutor must take into account the interests of the victims, the accused⁸² and the community at large. The initial consideration in the exercise of this discretion is whether the evidence is sufficient to justify a prosecution. A proper evaluation of the evidence, including an objective evaluation of the credibility and reliability of witnesses is an important consideration. A prosecution should not be instituted unless the evidence, as collected by the investigators and evaluated by prosecuting counsel is admissible, substantial, and reliable and is sufficient to prove that there is a *prima facie* case to draft an indictment.

However, the fact that the evidence collected and evaluated proves that there is a *prima facie* case for the purpose of drafting an indictment is not sufficient to proceed to trial. Once a *prima facie* case is established, the Prosecutor must consider the prospect of a conviction. The trial should not proceed if the Prosecutor has formed an opinion that there is no reasonable prospect of a conviction. At this stage, the Prosecutor may discontinue the proceedings by withdrawing the indictment and conduct further investigations, or amend the indictment and retain counts which have reasonable prospects for sustaining a conviction.⁸³

In deciding whether there is a reasonable prospect for conviction, the Prosecutor shall assess and evaluate how strong the case is likely to be presented in court. There are a number of issues that the Prosecutor must consider. First, the Prosecutor must consider the availability of witnesses and the importance of each witness to the Prosecutor's theory of the case. However good a witness is, if the witness is unable or unwilling to testify for the prosecution, the absence of that witness will weaken the prosecution's case. If two or more prosecution witnesses are either unwilling or unable to testify, the Prosecutor will have to re-evaluate his strategy and the entire theory of the prosecution case. The Prosecutor may have to consider the nature of the witness protection regime that is available to him and whether he is able to persuade the key witnesses who are unwilling or unable to testify for security, personal or other reasons to be placed in a witness protection programme. The outcome of the Prosecutor's negotiations with the witnesses who fall under this category impacts on the Prosecutor's eventual decision on whether to proceed with a trial or to discontinue it.

⁸² The term "accused" in this paper is used to include suspects, arrested accused in third countries awaiting transfer to the seat of the Tribunal, those indicted but at large, and accused persons currently in the custody of the Tribunal at the United Nations Detention Facility (UNDF) at Arusha in Tanzania.

⁸³ The ICTR Prosecutor has, so far, withdrawn two Indictments. In *Prosecutor v. Bernard Ntuyahaga*, Case No. ICTR-98-40, the Prosecutor withdrew the Indictment but the Accused was subsequently prosecuted in Belgium. The Accused was a Major in the Rwandan Armed Forces and was responsible for the death of Belgian soldiers, a crime he was prosecuted for by Belgium and convicted. He is serving his sentence in Belgium. In *Prosecutor v. Leonidas Rusatira*, Case No. ICTR-02-80, the Prosecutor withdrew the indictment for lack of evidence. The Accused was a Colonel in the Rwandan Armed Forces.

Second, the Prosecutor must consider the competence and credibility of each witness he intends to call and the likely impression of each of the witnesses before the court. A witness who is competent may not necessarily be credible. A competent witness who happens to be an accomplice, a serial killer or a drug addict may suffer some limitations even if he was an eye-witness and present at the scene of crimes. If the Prosecutor finds himself in a situation where he has to use this particular witness, the Prosecutor must consider whether there are other witnesses who can corroborate the testimony of this witness. If there are none, even if the witness is telling the truth, the Prosecutor may have to consider dropping the witness or the counts in the indictment the witnesses was intended to support or to drop both the witness and the count.

A competent witness may also be a co-perpetrator and, like “insider witnesses”, he may confess to crimes that he jointly planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution with the accused persons. The Prosecutor shall evaluate the admissibility of the confession, its reliability and probative value, and whether the court can put any weight on it. A witness who is a co-perpetrator or an accomplice, as a general rule, needs to be prosecuted. Such a prosecution may function to enhance the credibility and reliability of the witness before the court.

In evaluating the evidence, the Prosecutor shall take into account how the evidence was obtained and whether there are any possibilities that the court may exclude the evidence for any reasons. If so, the Prosecutor must consider whether the exclusion of such evidence may substantially affect the decision of whether or not to institute or proceed with the prosecution. If, for example, the prosecution’s case depends on admissions or confessions of the accused, the Prosecutor must still consider whether there are any grounds to believe that the accused is not withholding other relevant information or embellishing the contributions of others while downplaying his role in the commission of the crimes. The Prosecutor therefore has to consider whether the accused, or a witness who is an accomplice, has motive for telling less than the whole truth. The fact that a witness has told lies in some parts of his testimony is not evidence that his entire testimony must be rejected on account of lies. The court may reject part of the testimony that has been proved to be lies while accepting other parts of the testimony that remained untainted or corroborated by other evidence. The Prosecutor must, therefore, evaluate very carefully witness statements that are, *prima facie*, unreliable or lies.

In assessing the competence and credibility of a witness, the Prosecutor must consider matters which the defence might put to the witness with the sole objective of attacking his credibility. The Prosecutor must have a general idea on how the witness shall respond to attacks on his credibility by the defence and evaluate what impression the witness is likely to make and further how the witness can withstand cross-examination. In this context, the Prosecutor must consider whether the witness suffers from any disability which is likely to affect his testimony and credibility. If the witness states that he was an eyewitness, it is necessary for the Prosecutor to determine the respective distance between the witness and the accused; the time of day or night, visibility, and other relevant factors at the time the crime was committed. It is necessary for the Prosecutor to consider, for example, whether the witness has good eyesight, i.e., whether he wears glasses or whether he is not colour blind. Thus, as far as is practically possible, the Prosecutor should know whether the witness suffers from any physical or mental disability which is likely to affect his credibility.

The Prosecutor must also consider whether there are conflicts of interests between the witness and the accused, discrepancies between statements of the same witness if he has made more than one statement to investigators, or whether there are contradictions between eyewit-

nesses or different witnesses testifying about the same crimes an accused is alleged to have committed in a particular place, date and time. Clarifying areas of conflict or contradictions early in the investigations allows the Prosecutor to know whether the accused may, for example, raise defence of alibi by claiming that he was elsewhere other than the place where the crimes were committed.

Having evaluated the competence and credibility of the witness, including the admissibility of his evidence, the Prosecutor shall also consider any lines of defence which are open to, or have been indicated by the accused, and any other factors which in the view of the Prosecutor could affect the likelihood or otherwise of a conviction. Assessing possible defences that the accused may raise is a difficult one to make. However a dispassionate assessment of the facts of the prosecution's indictment and supporting materials, an objective evaluation of the credibility of the witnesses, admissibility of their testimonies, and considering the lines of defence of the accused, is the recommended process to avoid the risk of prosecuting an "innocent" person.

3. Case selection criteria: ICTR specific

The ICTR is an *ad hoc* Tribunal with a limited life-span. It is not expected to prosecute, and will not prosecute, every person who committed crimes in Rwanda that fall within its temporal jurisdiction. Yet, as pointed out in the introduction, more than eight hundred thousand persons were killed during the Rwandan crisis in 1994. It is estimated that persons responsible for serious violations of IHL may be as high as one million if persons who stood by and watched others being killed are excluded from the estimate. The ICTR Prosecutor, or any prosecutor for that matter, would not be in a position to prosecute all perpetrators. The extensive nature of the crimes and the limitation of an *ad hoc* tribunal imposed on the Prosecutor a strategy of selecting the most serious cases only and adopting a policy of transferring the remaining cases for prosecution to national jurisdictions.

In 2004, the ICTR Prosecutor reviewed its caseload in the context of the Completion Strategy as stipulated in Security Council resolution 1503(2003) and developed criteria for selecting cases for prosecution at the ICTR and cases that were identified for transfer to national jurisdictions for immediate prosecution.⁸⁴ The policy adopted by the ICTR Prosecutor was to focus on prosecuting persons responsible for the most "serious" violations of international law. However, while the ICTR Statute makes references to "serious" violations of IHL; it is silent on how the "seriousness" of the crimes should be defined. It was therefore left to the Prosecutor, to exercise his discretion, in the determination of what constitutes "serious". Many scholars, legal practitioners, and politicians will probably agree that the crime of genocide is "serious", and has even been described as the "crime of all crimes", and no one, I submit, can fault the ICTR Prosecutor for focusing principally on the prosecution of persons who committed genocide in Rwanda in 1994.

In determining what is "serious", the Prosecutor considered a number of factors, but focusing on the nature of the crime and the role played by each perpetrator in the commission of the crime, the focus was on the prosecution of the crime of genocide. The Prosecutor consciously decided to include all of the various groups represented in the atrocities to ensure that different types of involvement were covered. Many of the individuals selected were as well the most guilty as judged by their level of participation and their standing in society.

⁸⁴ Justice Hassan Bubacar Jallow, *Prosecutorial Discretion and International Criminal Justice*, *op. cit.*, pp. 145-161.

The Prosecutor's starting point was the fact that the genocide in Rwanda was a result of a well planned conspiracy by members of the government in power, the ruling party, the MRND and the senior military leadership. Individual members of the Government participated in the commission of the crimes. Having made this determination, the primary target for prosecution was therefore the members of the Interim Government including leaders of political parties,⁸⁵ ministers,⁸⁶ prefects,⁸⁷ *bourgmestres*⁸⁸ and other administrative personnel.⁸⁹ In this category, the Prosecutor included leaders of the various political parties who served in or supported the Interim Government. The leadership of the MRND youth wing and its members, commonly known as the *Interahamwe*, was also a target for prosecution.⁹⁰

The Rwandan Armed Forces (FAR) working jointly with the Interim Government and other political leaders in the commission of genocide and other crimes were as well selected for prosecution. While the FAR was engaged in a non-international armed conflict with the Rwandan Patriotic Front/Army (RPF/A), linked to that armed conflict, the FAR and its allies, the Civil Defence forces and the *Interahamwe*, were killing *Tutsi* civilians deemed to be supporters of the RPF/A. The Prosecutor therefore selected senior members of the FAR, Civil Defence forces and the leaders of the *Interahamwe* for prosecution.⁹¹

The media in Rwanda played a significant and destructive role in 1994, particularly in promoting ethnic hatred and inciting people to acts of violence, murder and destruction of property. The radio (RTL) and the press (*Kangura*) incited the public and announced on the radio places where *Tutsis* were hiding or places where there were large concentrations of *Tutsis* for the FAR, Civil Defence forces and the *Interahamwe* to speedily travel there and kill *Tutsis*. The radio and the press provided running commentary on the various places where

⁸⁵ Senior political leaders prosecuted by the ICTR include *Joseph Nzirorera*, Case No. ICTR-98-48 (Secretary General of MRND); *Edouard Karemera*, Case No. ICTR-97-24 (President of MRND). Both *Nzirorera* and *Karemera* are now being tried together, as joinder Case No. ICTR-98-44-T.

⁸⁶ The Prime Minister and ministers of the Interim Government selected for prosecution are: *Jean Kambanda*, Case No. ICTR-97-23 (Prime Minister; he pleaded guilty); *Jean Kamuhanda*, Case No. ICTR-99-54 (convicted and serving sentence); *Emmanuel Nindabahizi*, Case No. ICTR-01-71 (convicted and serving sentence); *Eliezer Niyitegeka*, Case No. ICTR-96-14 (convicted and serving sentence); *Andre Rwamakuba*, Case No. ICTR-98-44C (acquitted); *Jerome Bicamumpaka*, Case No. ICTR-99-49 (trial in progress); *Pauline Nyiramasuhuko*, Case No. ICTR-97-21 (trial in progress); *Andre Ntagerura*, Case No. ICTR-96-10A (acquitted); *Augustin Bizimana*, Case No. ICTR-98-44 (Defence Minister and is a fugitive); *Callixte Nzabonimana*, Case No. ICTR-98-44 (awaiting trial); and *Callixte Kalimanzira*, Case No. ICTR-05-88 (trial in progress).

⁸⁷ Prefects selected for prosecution include: *Clement Kayishema*, Case No. ICTR-95-I (convicted and serving sentence); *Emmanuel Bagambiki*, Case No. ICTR-97-36 (acquitted); *Lt.Col. Tharcisse Renzaho*, Case No. ICTR-97-31-DP (trial completed and pending judgement); and *Laurent Semanza*, Case No. ICTR-97-20 (convicted and serving sentence).

⁸⁸ The *bourgemestres* selected for prosecution include: *Jean Paul Akayesu*, Case No. ICTR-96-4-T (convicted and sentenced); *Ignace Bagilishema*, Case No. ICTR-95-1A (acquitted); and *Sylvestre Gacumbitsi*, Case No. ICTR-01-64 (convicted).

⁸⁹ Other junior officials include *sous-prefects* and *conseillers*. Some of them are: *Mikael Muhimana*, Case No. ICTR-96-13 (convicted and sentenced); *Dominique Ntawukulilyo*, Case No. ICTR-2005-82 (arrested and pending transfer to ICTR); *Vincent Rutaganira*, Case No. ICTR 95-1C (pleaded guilty and upon serving sentenced released).

⁹⁰ The *Interahamwe* leaders selected for prosecution include: *Georges Rutaganda*, Case No. ICTR-96-3 (convicted and serving sentence); *Obed Ruzindana*, Case No. ICTR-95-I (convicted and serving sentence); and *Juvenal Kajelijeli*, Case No. ICTR-98-44A (convicted and serving sentence).

⁹¹ Military officers including leaders of the *Interahamwe* who were selected and prosecuted include: *Col. Theoneste Bagosora*, Case No. ICTR-96-7 (pending judgement); *Gen. Gratiien Kabiligi*, Case No. ICTR-97-34 (pending judgement); *Lt. Col. Anatole Nsengiyumva*, Case No. ICTR-96-12 (pending judgement); *Major Aloys Ntabakuze*, Case No. ICTR-97-30 (pending judgement); *Gen. Augustin Bizimungu*, Case No. ICTR-00-56 (trial in progress); *Gen. Augustin Nindiliyimana*, Case No. ICTR-00-56 (trial in progress); *Lt. Col. Francois-Xavier Nzuwonemeye*, Case No. ICTR-00-56 (trial in progress); *Major Innocent Sagahutu*, Case No. ICTR-00-56 (trial in progress); and *George Rutaganda*, Case No. ICTR-96-3 (*Interahamwe* leader; convicted).

there were road blocks (barriers) where *Tutsis* were being identified by FAR, Civil Defence forces and the *Interahamwe* and killed. The Prosecutor therefore selected the owners, directors and senior employees of the radio RTLM and newspaper *Kangura* for prosecution.⁹²

The church through the clergy actively participated in serious violations of IHL in Rwanda. Many *Tutsi* civilians were killed in churches and schools under the control and management of the church. The Prosecutor therefore decided, based on their individual participation, to select members of the clergy for prosecution.⁹³

The Prosecutor also considered some specific categories of crimes for prosecution, such as rape and other sexual violence. Early in the conduct of investigation by the OTP, evidence of widespread and systematic rape and other sexual violence began to emerge. Where evidence of rape and other sexual violence was discovered, the OTP investigators diligently pursued all leads.⁹⁴ Rape and other sexual violence were used as means in the commission of genocide, crimes against humanity and war crimes. In pursuit of this policy by the Prosecutor, any person, regardless of his or her status, found to have instigated or aided and abetted in the commission of the crime of rape or other sexual violence, was selected for prosecution.⁹⁵

To avoid creating any perception of possible bias, favouritism or discrimination which may suggest that only individuals from certain locations in Rwanda committed serious violations of IHL, the Prosecutor decided to adopt the criteria for geographic spread with regards to targets and incidents.⁹⁶ Therefore, recognizing that the crimes committed in Rwanda were widespread and left no part of Rwanda unaffected, the Prosecutor took a conscious decision to identify perpetrators across the geographic spread of Rwanda ensuring that the perpetrators selected for prosecution represented all regions of Rwanda. The Prosecutor further decided to select crime scenes that covered the entire territory of Rwanda to ensure that crimes committed in Rwanda were investigated and prosecuted.

The pitfall of this policy, in the context of limited prosecution, meant that some targets in one location in Rwanda may have had to be excluded from the list of persons selected for prosecution to accommodate other perpetrators from other administrative areas of Rwanda to meet the criteria of geographical representation.

4. Prioritization criteria: prosecution of genocide

In 1994, the Government of Rwanda requested the Security Council to establish an international tribunal for the *sole* purpose of prosecuting persons responsible for *genocide* and other

⁹² Radio and newspaper owners including journalists selected and prosecuted include: *Ferdinand Nahimana*, Case No. ICTR-96-11 (convicted and serving sentence); *Jean Bosco Barayagwiza*, Case No. ICTR-97-19 (convicted and serving sentence); *Hassan Ngeze*, Case No. ICTR-97-27 (convicted and currently serving sentence); and *Georges Ruggiu*, Case No. ICTR-97-IC (pleaded guilty and serving sentence).

⁹³ The Church leaders who were selected and prosecuted include: *Bishop Samuel Musabyimana*, Case No. ICTR-01-62 (died before trial); *Pastor Elizaphan Ntakirutimana*, Case No. ICTR-96-10 (died after release upon completion of sentence); *Father Emmanuel Rukundo*, Case No. ICTR-01-70 (case completed pending judgement); *Father Athanase Seromba*, Case No. ICTR-2001-66 (convicted and serving sentence).

⁹⁴ Extensive acts of rape and sexual violence committed by Muhimana are one such example. See *Prosecutor v. Mikael Muhimana*, Case No. ICTR-96-13 (convicted and serving sentence).

⁹⁵ The only female charged with rape and sexual violence is the former Minister for Women and Gender Affairs in the Interim Government, Ms. Pauline Nyiramsuhuko, see *Prosecutor v. Nyiramsuhuko*, Case No. ICTR-97-21. (trial in progress).

⁹⁶ Justice Hassan Bubacar Jallow, *Prosecutorial Discretion and International Criminal Justice*, *op. cit.*

serious violations of IHL committed in the territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994.⁹⁷ The Security Council endorsed the request in resolution 955(1994) establishing the ICTR and annexed the ICTR Statute to the resolution.

The Government of Rwanda was aware at the time it made the request that massive killings had taken place in the country. The Government was also mindful that other violations of IHL should be investigated and prosecuted. Thus, Rwanda's request should not be seen as rejecting possible prosecution of persons responsible for crimes against humanity and war crimes. Rather, it must be viewed as prioritizing the prosecution of genocide.

Independent organisations and individuals who have conducted research in Rwanda generally agree that war crimes committed in Rwanda pale when compared to the crimes of genocide and crimes against humanity committed during the Rwandan crisis in 1994. Africa Rights, one of the first human rights organisations to issue reports on the mass killings in Rwanda, documents the killing of *Tutsis* throughout Rwanda.⁹⁸ Africa Rights names the perpetrators and their accomplices,⁹⁹ the elimination of political opposition, dissent and the adoption of a policy of massacre of the *Tutsis* by the Interim Government.¹⁰⁰ Africa Rights further describes the policy of rape and abduction of women and girls including violence against children adopted by the Interim Government, the FAR, Civil Defence forces and the *Interahamwe*.¹⁰¹ The widespread and systematic killing of *Tutsi* civilians in churches, hospitals and other public places are as well documented by Africa Rights.¹⁰²

Human Rights Watch, another reputable human rights organisation, published a detailed and informative report in March of 1999,¹⁰³ addressing the context of the Rwandan genocide,¹⁰⁴ the organisation of genocide at the national level by the Interim Government,¹⁰⁵ and the organisation of genocide at the local (grass-root) level.¹⁰⁶ The Human Rights Watch report goes beyond Rwanda and describes the role of the international community, first by denying and much later, acknowledging the genocide in Rwanda.¹⁰⁷

Human Rights Watch states that the RPF/A committed war crimes but also stresses that the RPF have repeatedly declared their commitment to establishing accountability, including for soldiers who committed abuses against civilians.¹⁰⁸ Human Rights Watch further stated that: "In September 1994, authorities said they had arrested soldiers who killed civilians and executed two of them".¹⁰⁹ According to Human Rights Watch, when its "researcher presented

⁹⁷ See UN doc. S/1994/115 (emphasis added).

⁹⁸ Africa Rights, *Rwanda: Death, Despair and Defiance*, Africa Rights, revised edition, August 1995.

⁹⁹ *Ibid.*, pp. 100-176.

¹⁰⁰ *Ibid.*, pp. 177-747.

¹⁰¹ *Ibid.*, pp. 748-853.

¹⁰² *Ibid.*, pp. 862-1060.

¹⁰³ Alison Des Forges, *Leave None To Tell The Story*, Human Rights Watch, New York, Washington, London, Brussels, March 1999.

¹⁰⁴ *Ibid.*, pp. 31-178.

¹⁰⁵ *Ibid.*, pp. 180-301.

¹⁰⁶ *Ibid.*, pp. 303-591.

¹⁰⁷ *Ibid.*, pp. 595-690.

¹⁰⁸ *Ibid.*, p. 733.

¹⁰⁹ *Ibid.*

evidence of the Mukingi massacre to Kagame in September 1994, the vice-president expressed his appreciation for being given the details of an affair that, he said, he had known about only in general terms. He stated that Major Sam Bigabiro had been arrested for killing civilians and might have been in command at Mukingi”.¹¹⁰ Both Major Bigabiro and his subordinate, Col. Denis Gato, were found guilty and sentenced to prison, Bigabiro for life and Gato for forty-five months.¹¹¹ Human Rights Watch further reported that “twenty-one RPF soldiers had been charged with killing civilians in November 1994. Hundreds of others have since been arrested, but it is not known how many of this group are charged with serious human rights violations. Of the twenty-one in 1994, six were tried by June 1998 and all found guilty”.¹¹²

Human Rights Watch therefore acknowledges that when members of the RPF commit war crimes, and the leadership of the RPF/A are made aware of the alleged crimes, investigations are conducted. Where sufficient evidence exists, the perpetrators are prosecuted. In its latest report, Human Rights Watch notes that as of April 2008, the ICTR Prosecutor “had not committed himself to prosecuting any RPA soldiers at the ICTR although he had not foreclosed the possibility of trying RPA soldiers at the ICTR”.¹¹³

Gen. Romeo Dallaire, the United Nations Commander of UNAMIR, is one of the few eye-witnesses to the genocide in Rwanda to have published an account of the genocide.¹¹⁴ The other is his deputy, Brigadier Henry Kwami Anyidoho.¹¹⁵ Gen. Dallaire describes how the “Shadow Force” under the control of, among others, Col. Bagosora organised assassinations and ambushes that eventually led to genocide after the killing of President Habayirimana.¹¹⁶ Linda Melvern, writing after the genocide, has provided detailed accounts in two of her books on Rwanda, both leading to the conclusion of mass killings of *Tutsi* civilians.¹¹⁷

The priority of the ICTR was, and still is, the prosecution of genocide and crimes against humanity. The Prosecutor’s decision is consistent with not only the reports published by Africa Rights, Human Rights Watch, and non-Rwandan eye-witnesses to the genocide, as for example, Gen. Dallaire and Brig. Anyidoho, but is also supported by the case law of the ICTR. Prime Minister Kambanda pleaded guilty to genocide and provided additional evidence on the planning and execution of genocide. The ICTR has now taken judicial notice of the crime of genocide as committed in Rwanda in 1994.¹¹⁸

After genocide, the Prosecutor also focused on the selection of perpetrators who committed crimes against humanity. The Prosecutor’s decision to select and indict many perpetrators was justified, as evidence of widespread and systematic killings were proved beyond reasonable doubt before the trial and Appeals chambers. In addition, the ICTR has taken judicial

¹¹⁰ *Ibid.*

¹¹¹ *Ibid.*

¹¹² *Ibid.*

¹¹³ *Law and Reality: Progress in Judicial Reform in Rwanda*, Human Rights Watch, 25 July 2008, p. 87.

¹¹⁴ Gen. Romeo Dallaire, *Shake Hands With The Devil: The Failure of Humanity in Rwanda*, Random House, Canada, 2003.

¹¹⁵ Henry Kwami Anyidoho, *Guns Over Kigali: The Rwandese Civil War - 1994*, Fountain Publishers, Kampala, 1997.

¹¹⁶ See Gen. Romeo Dallaire, *op. cit.*, pp. 135-420.

¹¹⁷ Linda Melvern, *A People Betrayed: The Role of the West in Rwanda’s Genocide*, Zed Books, Cape Town, 2000; Linda Melvern, *Conspiracy To Murder: The Rwanda Genocide*, Verso, London, New York, 2004.

¹¹⁸ *Prosecutor v. Edouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera*, Case No. ICTR-98-44-AR73 (C), Decision on Prosecutor’s Interlocutory Appeal of Decision on Judicial Notice (AC), 16 June 2006.

notice that there were throughout Rwanda in 1994 widespread or systematic attacks against a civilian population based on *Tutsi* ethnic identification.¹¹⁹

Compared to genocide and crimes against humanity, the Prosecutor has selected fewer perpetrators to prosecute for *war crimes*. This has prompted accused at the ICTR to argue, without supporting evidence, that the Prosecutor has decided not to prosecute members of the RPF. Nothing could be further from the truth. The Prosecutor, in the exercise of his prosecutorial discretion, has not adopted a policy not to prosecute either the RPF or any person where the Prosecutor has sufficient evidence to prosecute. On the contrary, the Prosecutor has a policy of investigating all crimes as stipulated in the ICTR Statute, namely: genocide, crimes against humanity and war crimes; and selects perpetrators for prosecution whenever there is sufficient evidence. The Prosecutor is not prosecuting *Twas*, *Tutsis* or *Hutus*, but individuals who committed serious crimes. It is of no consequence that the perpetrator selected by the Prosecutor for investigation and, whenever sufficient evidence is available, prosecuted, happens to be *Twa*, *Tutsi* or *Hutu*. Significantly, since the Prosecutor is not prosecuting individuals based on their ethnic backgrounds, there is no basis for making comparisons as to how many *Twas*, *Tutsis* or *Hutus* have been prosecuted by the ICTR. The proper test is whether there is sufficient evidence to prosecute any person who is alleged to have committed serious violations of international humanitarian law.

As researched and reported by Human Rights Watch, when information is provided to the Government of Rwanda that RPF soldiers have committed crimes, the perpetrators were investigated, and when evidence is available, the accused were prosecuted. Similarly, the ICTR has transmitted a case file involving the killing of some members of the clergy by RPF soldiers. The Prosecutor is monitoring the trial and reserves the right to re-call the case if he is advised by the monitors that the conduct of the trial does not guarantee minimum international standards.

The Prosecutor has, as well, transmitted thirty-five case files to the Prosecutor-General of Rwanda to conduct further investigations. If further investigations disclose sufficient evidence, the Prosecutor-General will take appropriate action. While Human Rights Watch welcomes the Rwandan Government's initiative to prosecute the persons whose files were transmitted to it by the ICTR, it notes that this does not absolve the ICTR of fulfilling its own mandate of trying RPA soldiers accused of crimes against humanity and war crimes.¹²⁰

It is my submission that Human Rights Watch erred when it noted that transferring case files to Rwanda for prosecution does not absolve the Prosecutor of "its own mandate of trying RPA soldiers accused of crimes against humanity and war crimes". I respectfully submit that the Prosecutor has no mandate to try RPA soldiers just because they happen to be RPA soldiers. Similarly, the Prosecutor has no mandate to prosecute any person because of who they are, or to which ethnic group they belong. The Prosecutor, however, has the mandate to investigate and prosecute serious violations of international humanitarian law. If RPA soldiers or any other person fall within that category, the Prosecutor will investigate, and where sufficient evidence is available, will prosecute. The responsibility of the Prosecutor is not to balance the number of persons selected for prosecution so that all sides to the Rwanda crisis in 1994 have equal representation in the dock. The Prosecutor is guided by the seriousness of the

¹¹⁹ *Ibid.* The Appeals Chamber took judicial notice of the existence of widespread and systematic attack, pp. 26-32. The Appeals Chamber also took judicial notice of genocide, pp. 33-38.

¹²⁰ *Law and Reality: Progress in Judicial Reform in Rwanda*, Human Rights Watch, 25 July 2008, pp. 89-90.

crimes, the availability of the evidence and Completion Strategy as stipulated in Security Council resolutions 1503(2003) and 1534(2004).

Human Rights Watch also erred when it submitted that the ICTR Prosecutor “had not committed himself to prosecuting any RPA soldiers at the ICTR although he had not foreclosed the possibility of trying RPA at the ICTR”. Human Rights Watch appears to have placed undue weight on the venue selected for trial. The imperative of a trial is not premised on the venue. A trial can be conducted anywhere as long as the court is independent, an accused can have a free and fair trial that provides all guarantees that meet minimum international standard. The Rule of Procedure and Evidence of the ICTR provides for the ICTR to hold hearing anywhere in the world, including Rwanda if the Chamber deems it necessary.¹²¹ The concern of Human Rights Watch should, in my submission, focus on whether the Rwanda judicial system can provide to an accused a free and fair trial, and not where an accused is tried.

By transferring cases relating to war crimes to Rwanda, there is no evidence to suggest that the Prosecutor has abused his prosecutorial discretion. On the contrary, consistent with Security Council resolutions 1503(2003) and 1534(2004), and the letter and spirit of Rule 11*bis* of the Rules, the Prosecutor has adopted a policy that will facilitate the closure of the ICTR responsibly in 2010. It must be noted, however, that the Prosecutor has selected and prosecuted war crimes cases before the ICTR.¹²² The priority for the selection and prosecution of perpetrators, however, remains the crimes of genocide and crimes against humanity.

5. Conclusion

On many occasions, the accused charged at the ICTR have argued that the policy of selective prosecution was adopted towards them by the Prosecutor. This is, however, not supported by any evidence and it is an argument that can be entirely sourced to the accused and their own particular situations, and one that has neither basis in the law nor in the practice of the Tribunal and is distinct from the exercise of prosecutorial discretion which is permitted in law.

Case selection and prioritization criteria depend on the context of the crimes committed, the nature of the crimes, and what each prosecutor considers to be his or her priority within the discretionary legal framework. While there are general principles which provide useful guidelines, the prosecutor’s ultimate decision on whether to select a particular perpetra-

¹²¹ See Rule 4 of the ICTR Rules of Procedure and Evidence: Sittings Away from the Seat of the Tribunal: “A Chamber or a Judge may exercise their functions away from the Seat of the Tribunal, if so authorized by the President in the interests of justice”. Judge Pillay authorized, as President of the ICTR, in the interests of justice, that a hearing take place on 28 February 2003 to take the testimony of Professor Guichaoua and that such hearing take place at the seat of the ICTY in The Hague (see *Georges Rutaganda v. Prosecutor*, Case No. ICTR-96-3-A, dated 20 February 2003). In *Prosecutor v. Ferdinand Nahimana, Hassan Ngeze and Jean Bosco Barayagwiza*, Case No. ICTR-99-52-I, “Decision on the Prosecutor’s Application to add Witness X to its list of witnesses and for protective measures” dated 14 September 2001, at para. 33, the Chamber stated: “On the basis of the available material the Chamber accepts Witness X is in a particularly vulnerable position and that special security measures are required in connection with his testimony. It is undisputed by the parties that the Tribunal’s Rules allow for the change of venue. Reference is made to Resolution 955 (1994) para. 6, according to which the Tribunal may meet away from its seat when it considers it necessary for efficient exercise of its functions. Rule 4 provides that a Chamber or a Judge may exercise their functions away from the seat of the Tribunal, if so authorized by the President in the interests of justice. Moreover, Rule 71(D) provides that a deposition may be given by means of a video conference”.

¹²² See for example, *Prosecutor v. Georges Rutaganda*, Case No. ICTR-96-3; *Prosecutor v. Laurent Semanza*, Case No. ICTR-97-20; *Prosecutor v. Bagosora, Kabiligi, Nsengiyumva and Ntabakuze* (Military I Case), Case No. ICTR-98-41; and *Prosecutor v. Bizimungu, Ndindiliyimana, Nzuwonemeye and Sagahutu* (Military II case), Case No. ICTR-00-56.

tor for investigation and, where sufficient evidence exist, prosecution depends on a number of factors as described in the paper.

The policy adopted by the ICTR Prosecutor may not be suitable for other tribunals or courts. For the ICTR, the policy has, so far, worked well as many of the political and military leaders who planned, organized and executed the genocide in Rwanda are already serving their sentences. Others, where there is sufficient evidence establishing a *prima facie* case against them, are in custody, on trial or fugitives on the run.

The selection and prioritization of cases by the Office of the Prosecutor of the International Criminal Court

Paul Seils¹²³

This paper will address three areas. First it will identify the principal sources that indicate the criteria for the selection and prioritization of cases with respect to the public documents issued by the Office of the Prosecutor (OTP) of the ICC so far; in the process of identifying these sources, it will explore the process that has led to these criteria and third, it will reflect on some of the particular challenges facing the OTP in the matters of selection and prioritization.

For the sake of clarity it should be made clear that this paper does not address the issue of the selection of situations for investigation by the Office of the Prosecutor. While the issue of situation selection is unquestionably complex, it is not the matter of the current study.

Public statements of policy by the ICC Office of the Prosecutor

There are three public documents that set out the criteria the Office has employed to date. These are the Policy Paper of September 2003, a draft policy paper on selection and prioritization of cases that was widely circulated to both states parties and civil society organisations in June 2006, and the Office's first three year report presented on 12 September 2006. A number of internal documents have been developed throughout the time the Office has been in existence, but discussion for the moment reflects those that are in the public domain.

The policy paper of September 2003 sets out some of the key provisions that have informed selection policy from the earliest days of the Court. The draft selection paper of June 2006 offers a more detailed analysis of the relevant criteria as well as presenting some new matters for consideration; the three year report provides some commentary on why certain selections were made in certain situations, particularly in relation to the DRC and Uganda, but does not add much to the principles enunciated in the earlier documents.

1. Key Provisions of the Policy Paper of September 2003:

- a. The Office will, in principle, seek to prosecute those bearing the greatest degree of responsibility.

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- b. The Office will take account of “the practical realities” of a situation when choosing and prioritizing cases, including the issue of witness security and access to witnesses.
- c. The Office will carry out focused investigations with a view to ensuring expeditious court proceedings.

2. Draft Paper of June 2006:

The Draft Paper circulated in June 2006 did not change any of the preceding general principles but made explicit that the pursuit of those bearing the greatest responsibility was necessarily dependent on the evidence that emerged in the course of an investigation. The idea of pursuing those bearing the greatest responsibility became the subject of a very significant decision in the case of the Bosco Ntaganda. The Pre-Trial Chamber had rejected the Prosecutor’s application for a warrant of arrest against Ntaganda on the basis that Ntaganda was not in a position of sufficient importance to render him among the most responsible and that therefore the case failed to meet the sufficient gravity test set out in Article 17(1)(d) of the Rome Statute.¹²⁴

The Appeals Chamber ruled that the Pre-Trial Chamber had erred in law in several respects on this decision but for present purposes the important consideration is that the Appeals Chamber found that the position of the person named in an arrest warrant application is not a relevant criterion in determining the gravity of a crime. It agreed with the Office of the Prosecutor that, among other things, such a position would limit the potential deterrent effect of the ICC in that all but the very senior commanders of groups or organisations could expect to be prosecuted, therefore perhaps tempting others beneath them to believe they would enjoy impunity.

This part of the decision of the Appeal Chamber allows three reflections to be made. In the first place, the Chamber implicitly accepted that it was a legitimate policy decision on the part of the Prosecutor to pursue those bearing the greatest degree of responsibility but explicitly stated that it was not a legal requirement. Secondly, what the prosecutor had thought obvious in fact had to be rendered explicit – namely that the concept of the greatest degree of responsibility depended on the evidence.

The reasoning of the Pre-Trial Chamber was deficient in two key respects which are important for the understanding of the concept. The Chamber seemed to understand the idea of those bearing the greatest responsibility in both a rigid, formulaic fashion, running a serious risk of entering the treacherous waters of strict liability, but also in an excessively narrow sense, guaranteeing impunity to all but the very top level.

This brings us to the third reflection: the concept of those bearing the greatest degree of responsibility is not only evidence dependent, but can embrace a relatively large number of people depending on the crimes in question. This is seen for example in the case of Ali Kushayb in the first case brought in relation to the Darfur situation. If one were to have applied the logic of the Pre-trial Chamber it is extremely doubtful that one would ever have reached a local commander of the Janjaweed, but a proper understanding of the concept – relying on evidence concerning the specific crimes, not the position of the person in general – renders the selection of Kushayb eminently justified as being one of the most responsible *for those particular crimes*.

¹²⁴ See Appeal Chamber decision in Case No.: ICC-01/04-01/07 10 February 2006, especially at paragraphs 42-62 at: <http://www.icc-cpi.int/library/cases/ICC-01-04-02-06-20-Anx2-ENG.pdf>.

Therefore, while the June 2006 paper only briefly qualifies the concept of those bearing the greatest responsibility, it may be important to understand the context in which that explicit clarification was made.

The gravity criteria developed

The June 2006 paper was significant in that it went into much greater detail on the Office's understanding of gravity as a selection criterion. The paper identifies four elements to be considered:

- a. The scale of the crime in question, including the numbers of victims and possible consideration of temporal and geographic intensity.
- b. The nature of the crime itself.
- c. The manner of the crime (taking into account especially aggravating factors such as particular cruelty, targeting of especially vulnerable victims, the abuse of authority).
- d. The impact of the crime.

The paper explicitly states that the Office will not attempt to attribute specific weights to each of the elements to produce an arithmetic scorecard upon which to base selection: rather it will consider all the facts, as it were, in the round. It is in this sense that one can say that the matter of selection cannot be regarded as a science, but nor is it so unattached to principle to be nothing more than artistic intuition: if anything it might be considered a craft, based on guiding principles but sufficiently flexible to address the infinite variety of factual scenarios that will present themselves.

Nonetheless, it is also obvious that some factors set out by the Office raise a number of points worthy of discussion. The first issue of scale is relatively uncontroversial, as is the potentially useful reference to aggravating factors to assist in the selection of cases, but the other two bases provide fertile grounds for debate.

The idea that the nature of the crime provides a distinguishing factor to be considered in selection was based on the argument that while there is no explicit hierarchy of crimes in the Rome Statute, it is generally accepted that most national systems of law enforcement will prioritize certain kinds of crimes, in particular those dealing with loss of life or serious violation of physical integrity. On this basis the Office highlighted the crimes of killing and rape as among those of the utmost gravity.

Two problems emerged. In the first place the Office elected to prosecute Thomas Lubanga in relation to the recruitment and use of child soldiers and brought no charges in relation to killings or rapes. In the second place empirical research in the areas where the Office was investigating has indicated that the values reflected in the particular crimes highlighted in the draft paper may be insufficiently broad to capture what local populations consider as very serious crimes.

The latter of the problems can be addressed more simply. Research carried out by a number of NGOs has indicated that local populations in areas where serious crimes have been committed may consider, for example, crimes involving looting or destruction of property as very grave indeed. On reflection, this ought not to be surprising: in the absence of any safety net in the form of welfare or humanitarian assistance, the loss of shelter and food can spell massive suffering for large groups of people. This not to say that the issues of killing and rape are not seen as very serious, but rather that it is not self evident to those populations how a

useful division of gravity between these and other crimes is likely to be drawn. In fact, as a matter of practice, the Office has acknowledged this reality in a number of warrant applications where such crimes are indeed charged.

The decision to charge Thomas Lubanga in relation to the recruitment and use of child soldiers provoked considerable dismay and criticism among national and international NGOs. While being prepared to acknowledge the seriousness of the crime itself, they felt that allegations of killings and sexual violence ought to have been reflected in the charging.

The Office's position in this regard was threefold: firstly, it highlighted the seriousness of the crime itself (although this was generally not publicly contested); secondly, it pointed out that the criteria applied to the selection of matters for investigation may have included other matters beside child recruitment and indeed indicated in its application for an arrest warrant that it wanted to leave open the possibility of bringing further charges. Thirdly, it argued on the basis of what is sometimes called in these contexts the principle of opportunity.

At the time in question, Lubanga had been detained for almost a year in Kinshasa by the DRC authorities in relation to matters not being investigated by the OTP. His detention was to be the subject of judicial review on the expiry of a twelve-month period. The Office considered that in the particular circumstances that prevailed, there was a reasonable chance that a judge might order the release of Lubanga at that time. The Office did not claim it was anything more than a possibility, but it quite reasonably was not inclined to take unnecessary risks at that point: the arrest of suspects is quite easily the greatest challenge facing the ICC – the efficacy of the Court depends significantly on suspects being brought to trial.

At that point, the Office was not in a position to bring charges in relation to matters other than the recruitment of child soldiers. It therefore elected to seek an arrest warrant on this limited ground in order to avoid the risk of Lubanga being released and rendering the prospect of his future arrest much more difficult.

This decision has been questioned by some as a departure from the criterion of gravity as the determining concept for case selection. It should be relatively obvious that the principle of opportunity in this context is exceptional. In all other warrant applications the Office has brought a wider array of charges. Faced with the choice of gambling on Lubanga's continued detention or ensuring his trial for the serious crime of recruiting child soldiers, the Office opted for the latter. Criticism on this basis seems pusillanimous if not wrong-headed. While not explicitly articulated in the paper of September 2003, the idea of a principle of opportunity seems to fit very comfortably within the considerations of the practical realities the Office indicated it would always take into account.

It is true that in due course the Office indicated that it would not in fact bring further charges. There remains significant criticism among some parties for this decision that, among other things, they feel has never been properly explained. Whatever the reason for the failure to find sufficient evidence to prosecute Lubanga for other matters, it does not negate the legitimacy of the principle of opportunity on an exceptional basis as long as the crime itself meets the necessary threshold of gravity prescribed in Article 17(1)(d).

In retrospect, it may appear that the highlighting of killings and rapes as being of the utmost gravity is a less useful factor in assisting the office in selecting case hypotheses and finally cases for prosecution than originally thought. At the very least, the Office's own practice has consistently embraced a broader range of crimes in its warrant applications and there appears to be an increasing tendency for the Office to avoid the suggestion of an inherent hierarchy of gravity in relation to the crimes themselves.

The relevance of impact

The fourth element identified in the paper of June 2006 was that of impact. The way in which it was presented there was explicitly on the basis that the prosecution of certain crimes may have a preventative impact on other (such) crimes being committed. On the other hand, public statements by the Prosecutor have indicated that the concept has another possible aspect: in speaking of attacks on peacekeepers, he has suggested that because such attacks may have the hugely negative impact of rendering local populations less secure, such attacks have an impact beyond the fact of the violence done to the victims themselves. This is an important consideration and is a reasonable attempt to indicate that a case focusing on peacekeepers does not suggest in any way that peacekeepers' lives are inherently more valuable than those of local people, but that rather it is the damage that such attacks are likely to do to the local people which might justify the selection of such a case. This approach seems to embody a qualitative aspect of aggravation rather than a preventative ambition. As such it seems to fit sensibly within the concept of gravity generally. However the invocation of the concept of preventative impact in general, as a possible factor assisting in selection, appears confusing. The overall purpose of the Court as mentioned in the preamble to the Statute is to end impunity and thus prevent such crimes being committed in the future. Since the primary objective of the Court is to help prevent the commission of all the crimes set out in the Statute, the value of preventative impact as a distinguishing factor justifying selection seems questionable.

One should not always presume that certain kinds of attacks will have specific kinds of impact. The impact of an attack on peacekeepers may not have the negative consequences presumed if there is any reason to believe that such peacekeepers, for example, had lost the confidence of the local population as result of an apparent lack of neutrality. Justifying the selection of a case partly on the basis of impact ought to require objective factual analysis that there was indeed such an impact.

Challenges for the OTP of the ICC

a. Expectations

This is a challenge that faces all justice institutions, especially in the aftermath of mass atrocities. Effective and legitimate lobbying by groups with particular interests can sometimes nonetheless have the effect of raising expectations that for a variety of equally legitimate reasons are very unlikely to be met. The Office of the Prosecutor has done more than any other international justice institution at this stage of its life to present relatively detailed documents explaining its policies and the criteria it will apply. This does not always help those whose expectations are not met, but it is an important recognition of the need for such institutions to take seriously the legitimate public interest in such matters and to make a serious attempt to do what it reasonably can to address matters of interest.

b. Representative selection and instrumentalization

A common criticism has been the unwitting victim of political instrumentalization which has in turn led to some suggesting the office is not being seen to act impartially. The Office has consistently indicated that all of the cases it has sought to investigate are premised on a prior determination of gravity on the basis of the information available to be analyzed.

It is clear that there is a perception issue where one is dealing with self-referrals from States, but the analysis of the substance perhaps needs to be more dispassionate. If it is correct

that the cases that were selected for investigation in the DRC, Uganda and the CAR were all among the gravest for which credible and reliable information existed at the point of beginning the detailed investigation, these same cases would have been the ones selected even if they had begun by virtue of a *proprio motu* investigation rather than a referral. In the draft paper of June 2006 the Office made clear that it did not see the idea of the equivalence of blame as a legitimate criterion of selection. In practice the Office has in some cases now brought cases against a variety of actors. For example in the DRC, cases have been brought against leaders of the rival factions of the UPC and FNI. These cases have not been brought to show that all are *in some way responsible*, but because on an objective analysis of the facts it was considered that FNI crimes were of sufficient gravity to merit prosecution.

It may well be the case that some perception difficulties could have been avoided if the two cases had been brought simultaneously. As a matter of prioritization this is a legitimate point. In the draft of June 2006 the Prosecutor indicated that he would follow a practice of sequential investigation. The precise reasoning for that position is not made explicit. It is noticeable that in more recent *ad hoc* statements and briefings the idea of sequential investigations is not repeated.

The perception of instrumentalization will accompany much of the Prosecutor's work. A legitimate challenge to the prosecutorial choices on prioritization and selection has to demonstrate that there exists a reasonable basis to believe that other crimes of a similar or greater gravity have been committed. Much of the criticism in the Ugandan case relates to a failure to prosecute allegations of UPDF crimes. A large part of that argument depends on whether one considers that allegations relating to forced displacement actually constitute crimes within the meaning of the Statute.

Conclusion

The ICC Office of the Prosecutor has been rightly praised for its more transparent processes from its earliest days compared to other similar institutions. Because the process of selection and prioritization is a craft rather than a science there will always be differing views about precisely what judgments should be made in particular circumstances. The nature of the process is likely to leave some, if not many, dissatisfied. These are issues about which reasonable people will very often disagree. In the final analysis, however, the Prosecutor must exercise his judgment and his discretion. The Office has gone quite far in indicating the criteria used in exercising its discretion. As long as these criteria are applied genuinely and faithfully, the Office has nothing to fear from reasonable disagreement.

The Orientation Criteria document in Bosnia and Herzegovina

Zekerija Mujkanović¹²⁵

Introduction

“The war raged on for four blood-stained summers and three long brutal winters throughout my country, Bosnia and Herzegovina, between 1992 and 1995”. When the fighting stopped, at least 97,000 soldiers and civilians of all ethnicities had, by then, lost their lives in the violence¹²⁶ and over one million people were displaced. The lack of trust had severed the relations of old neighbours and hostilities could not be covered up. State institutions, including the police, the prosecution and the courts, among others, were unable to operate as was expected and no longer enjoyed the trust of the citizens they served.

Thus, it is no surprise that during the first post-war years that very little was achieved on any side towards resolving the legacy left due to war crimes. After the war (even during various periods of the war), the police, the prosecution, investigative judges and the courts selected cases themselves to investigate and to criminally prosecute their enemies. Rarely was there any re-examination regarding the accountability of anyone from the same ethnic group. Due to divisions in the State and the continued insecurity of free movement through the sometimes invisible internal borders of post-war Bosnia and Herzegovina, few of them were able to collect sufficient evidence for any given case. To make things worse, complete archive materials were secretly carried out of the country. Large segments of valuable evidence that could have been used in local case processing were delivered to The Hague, while the victims had moved on to all parts of the world.

Huge efforts were made with the aim of reforming the judicial sector, which began in 2002, and in part started to resolve some of these issues. Due to the Exit Strategy the UN Security Council imposed on ICTY in 2003,¹²⁷ even more was tried to be done so as to deal with the war crimes issues of Bosnia and Herzegovina.

This paper is prepared against the background of these chains of events.

“War crimes”

To begin with, it is important to clarify what is to be understood with the term “war crimes”. Whenever I use the term “war crimes” in this paper, I mean genocide, crimes against human-

¹²⁵ Zekerija Mujkanović, Public Prosecutor of Brčko District of Bosnia and Herzegovina; Member of the High Judicial and Prosecutorial Council of Bosnia and Herzegovina since March 2005. Graduated from the Law Faculty, University of Sarajevo, in 1984, passed the bar exam in 1997. His professional career in the justice sector started in 1994 as a judge in Municipal Court of Brčko. He was President of the Municipal Court of Brčko 1997-2001. He became Public Prosecutor of Brčko District in 2001. Mujkanović is also member of the Steering Board and Deputy President of the Association of Prosecutors of Bosnia and Herzegovina.

¹²⁶ Correspondence with Ewe Tabe, demographer, ICTY Prosecution, 10 September 2008.

¹²⁷ See resolution 1503 of the UN Security Council (28 August 2003); resolution 1534 of the UN Security Council (26 March 2004).

ity and violation of the customs of war. I also mean conventional and common international criminal law.

However, I also view the term “war crimes” through the prism of domestic law, i.e., crimes as defined in the Criminal Code of Bosnia and Herzegovina which came into effect in 2003 as part of the reform of the judicial sector I mentioned earlier,¹²⁸ as well as the law that was in effect in Bosnia and Herzegovina prior to 2003.

Some confusion still exists regarding the application of domestic law in war crimes cases, i.e., whether to apply the laws that were in effect at the time of the conflict¹²⁹ or apply the 2003 Criminal Code of Bosnia and Herzegovina. This is a very significant issue, though I will not address it here.

I foresee roles of both conventional and customary international criminal law in the practice of Bosnia and Herzegovina in defining “war crimes”, both in the practical and conceptual sense.¹³⁰ I am also aware of the potential influence to be had on the development of customary international criminal law through the hundreds of cases which we will ultimately investigate and prosecute in Bosnia and Herzegovina.¹³¹

I am aware that international law requires Bosnia and Herzegovina to punish perpetrators of war crimes and genocide. This duty encompasses in my opinion a responsibility to as best as possible identify, investigate, prosecute and punish the most serious crimes and their perpetrators.¹³² In this regard, this paper addresses decision-making as to what needs to be done in this regard, by whom.

What has been done to date

A book published recently states that local courts throughout Bosnia and Herzegovina, in the ten years between 1995 and 2005, rendered 55 final verdicts in war crimes cases.¹³³ During the same period, the ICTY issued indictments against approximately 100 individuals for crimes committed during the conflict in the former Yugoslavia.

¹²⁸ Articles 171-184 of the Criminal Code of Bosnia and Herzegovina (2003).

¹²⁹ See, e.g., Chapter 16, Criminal offences against humanity and international law, Criminal Code of the Socialist Federative Republic of Yugoslavia (1976).

¹³⁰ See Article 4a of the Criminal Code of Bosnia and Herzegovina (2003); also see Article 7 of the European Convention on Human Rights (1950) which is applied through the application of Article 2 of the Constitution of Bosnia and Herzegovina (1995); Article 15 of the International Covenant on Civil and Political Rights (1966). Also, Bosnia and Herzegovina is the successor to the conventions, including the Geneva Convention (1949) and the Protocols for which the signer was the former Yugoslavia which ratified it.

¹³¹ E.g., Article 171 of the Criminal Code of Bosnia and Herzegovina (2003) defines the crime of genocide, using terms almost identical to those used in Article 6 of the Rome Statute of the International Criminal Court. We have already tried one exceptionally important domestic case for genocide, dealing with the *Kravice* warehouse in Srebrenica 1995, in which convictions were rendered at the main hearing in August 2008. Article 172 of the Criminal Code of Bosnia and Herzegovina (2003) defines crimes against humanity, again using terms almost identical to those used in Article 7 of the Rome Statute. We have held trials and verdicts have been passed, including a certain number of final verdicts in cases qualified as crimes against humanity. These first and second instance verdicts have been published. They provide domestic interpretation of the law and the way it was applied in each case. They are a potential source for commentaries on international criminal law, as will be the ever growing number of decisions from Bosnia and Herzegovina.

¹³² See, e.g., the Convention on the Prevention and Punishment of the Crime of Genocide (9 December 1948/12 January 1951).

¹³³ *War Crimes in Bosnia and Herzegovina: Legally Effective Criminal Sentences in Bosnia and Herzegovina, 1992-2005*, Sarajevo: ABA/ROLI, 2007.

Apart from this, the Special Department for War Crimes of the Prosecutor's Office of Bosnia and Herzegovina (BiH), in a little less than three months, issued indictments against 99 individuals charged with war crimes in 45 cases. We have achieved major success in these cases in a relatively short period and we are getting better and more efficient.

Historical context

The topic I have been invited to address has to be positioned in a brief historical context. When the Dayton Peace Accord was signed in 1995, there were probably a couple of hundred *major war criminals* at large in Bosnia and Herzegovina. At the same time, there were even a greater number of *war criminals who had committed serious crimes* who were also at large. Of course, there were also many *common soldiers* who had committed separate brutal offences. There were those who had participated in these offences on all levels.

They all, of course, require attention. No one should go unpunished for their unlawful ways. However, in practical terms, it is not possible to reach all perpetrators on every level. Even with the availability of more assets than we currently have at our disposal it would be wrong, and still is, to create a feeling of expectation that investigations and criminal prosecution will be brought against all those who have committed war crimes and that they will be convicted and punished severely. This would, quite definitely, lead to disappointment which would diminish confidence in the institutions that are responsible for processing war crimes as well as the whole criminal justice system.

At the same time, everything can not be done at once. And there is no point in processing one case at a time, something I will explain. A more regulated method is needed so as to take on the task of applying both domestic and international criminal law to process the crimes that were committed during the war.

The Special Department for War Crimes of the Prosecutor's Office of BiH, as well as the prosecutors of the cantonal and district prosecutor's offices, are tasked with investigating and prosecuting war crimes. I will describe this task and what the Special Department has done to bring order to the processing of these cases. There are questions that still need to be answered, such as whether the division of tasks between the Special Department and the cantonal and district prosecutor's offices still makes sense and whether new measures need to be developed.

I will elaborate on some tools that we currently use to give the process sense, though the decision basically on who will do what is a political one and one which has yet to receive a satisfactory answer. The National War Crimes Strategy which is currently being discussed will give answers to this and other questions, though we knew over a year ago that we could not wait for the development of a National War Crimes Strategy to achieve better methods to organise our workload. I believe we have a doable way to complete the work, a method which will continue to be valuable regardless of which political decision is made.

Task

In 2004, when the Rules of the Road Unit of the ICTY closed down, electronically scanned copies of materials from Unit files were returned to Bosnia and Herzegovina for review. The Rules of the Road files are cases which, according to the Rome Agreement that was reached in

1996¹³⁴ between the countries of the region and the ICTY, were sent to the ICTY for review and approval to be processed by the local authorities.¹³⁵

There is a background to the Rules of the Road. But the files that existed at the time of the Rome Agreement were packed and sent, which also happened for the new files that were compiled between 1996 and the end of 2004, when the Unit close down. The files that were returned to the Special Department for War Crimes in 2004 were, in principle, in the same state as when ICTY received them in 1996. No additional investigation had been undertaken in the mean time.

The Rules of the Road Unit of the ICTY Prosecution had assigned a “standard designation” to each file:

- **Standard Designation “A”** was given to files which the ICTY review team considered contain sufficient “evidence” pursuant to international standards to provide probable cause to conclude that the individuals named as potential suspects or accused had committed serious violations of international law;
- **Standard Designation “B”** was given to files which the ICTY review team considered *did not* contain sufficient “evidence” for the rendering of such conclusion;
- **Standard Designation “C”** was given to cases which the ICTY review team considered did not contain sufficient information to be able to make a decision; and
- **Standard Designations “D”, “E”, “F” and “G”** were given to cases for a variety of other reasons which did not necessarily refer to “quality” of the information contained.

From October 2004, the Special Department for War Crimes started receiving e-copies of 877 files that received the Standard Designation “A”. Electronic copies of materials from 2,389 files with Standard Designation “B” were ultimately returned. Standard Designation “C” was given to 702 files that were also returned to Bosnia and Herzegovina.

Deciding who will do what

The Special Department for War Crimes was tasked to sort out the returned files. A decision was made to focus on those files which standard designation was “A”. The decision was primarily based on the available funds.

Similar to what had been done by the ICTY staff tasked with the case review, the review initiated by the Special Department in 2005 was based only on what had been received. Additional investigations were not carried out.

Once a strategic decision was made that both the cantonal and district prosecutor's offices and the Prosecutor's Office of BiH would be engaged in the processing of returned cases, the Special Department adopted rules regulating the review of files designated “A”.¹³⁶ The

¹³⁴ Rome Agreement, Rome, 18 February 1996; see paragraph 5: Cooperation on War Crimes and Respect for Human Rights.

¹³⁵ See Procedures and Guidelines for Parties for Delivering Cases to the International Criminal Court for the Former Yugoslavia in accordance with the agreed measures of 18 February 1996 (Rules of the Road).

¹³⁶ The Prosecutor's Office of BiH, KTA-RZ-47/04-1, Book of Rules on the review of war crime cases, 28 December 2004; Addendum, A-441/04, Guiding criteria for sensitive cases of the Road Map, 12 October 2004.

rules were used to divide files which standard designation was "A" into the categories VERY SENSITIVE and SENSITIVE.

VERY SENSITIVE category

(a) CRIMINAL OFFENCE

- (i) Genocide¹³⁷
- (ii) Extermination
- (iii) Multiple murders
- (iv) Rapes and other sexual acts being part of the system (e.g., in concentration camps or during the attacks)
- (v) Enslavement
- (vi) Torture
- (vii) Persecution, widespread and systematic
- (viii) Mass, unlawful detention in concentration camps

(b) PERPETRATOR

- (i) Current or former commander (including paramilitary forces)
- (ii) Current or former political leaders (including municipal presidents/crisis headquarters)
- (iii) Current or former judicial office holders
- (iv) Current or former heads of police forces
- (v) Concentration camp commander
- (vi) Notorious persons
- (vii) Multiple rapist

(c) OTHER

- (i) Cases in which witnesses are "members of a smaller group of people" or "accused"
- (ii) Realistic chances for intimidation of witnesses
- (iii) Cases including perpetrators in the territory which is benevolent to them or where the interest of the authorities is to prevent public investigation of crimes.

SENSITIVE category

(a) CRIMINAL OFFENCE

- (i) Murder committed as part of or post the attack or in the camp
- (ii) Rapes and other serious sexual criminal offenses
- (iv) Serious attacks committed as part of the system
- (v) Inhuman and degrading treatment committed as part of the system

¹³⁷ This should be considered as an accusation in every Srebrenica-related case.

- (vi) Mass deportations or forcible transferring of people
 - (vii) Destruction or damage made to religious or cultural institutions on a large scale and systematically
 - (viii) Destruction of property on a large scale and systematically
 - (ix) Deprivation of fundamental human rights like medical treatment on a large scale and systematically
 - (x) Crimes belonging to notorious crimes, although not classified under Category I
- (b) PERPETRATORS
- (i) Current or former police officials
 - (ii) Current member of the army
 - (iii) Persons holding or who used to hold political function
 - (iv) Persons affiliated with the camp management
- (c) OTHER
- (i) Witness protection issue
 - (ii) Difficult legal issues
 - (iii) Crimes for which a potential long-term prison sentence could be imposed
 - (iv) Allegations connected with events that were already tried before the ICTY
 - (v) Cases with extensive documentation

Out of 877 files, 202 are estimated as VERY SENSITIVE and have been kept by the Special Department for War Crimes. The remaining files are estimated as SENSITIVE and have been sent for further investigation to the cantonal and district prosecutor's offices in places in which these incidents took place as stated in the files.

The rules and criteria used to carry out this review used to be the best way to share the work among one small unit for processing war crimes in the Prosecutor's Office of BiH and cantonal and district prosecutors.

We have learned over time that the original review process carried out by the ICTY was not very reliable. Many of the received files were "old". The information contained in the electronic copies that had been returned was often of poor quality, by all relevant standards, and as such could not be authenticated. In many cases it turned out that victims, witnesses or suspects had deceased or were inaccessible. Using an analytical approach, it was established that even the files which the ICTY gave the standard designation "B" contain information which, when cross-referenced against other information, lead to suspects and evidence which can be instrumental in criminal prosecutions in Bosnia and Herzegovina.

We have also learned that in 2005 the cantonal and district prosecutor's offices did not fully adopt the criteria set by the Special Department for War Crimes and the presuppositions they were based on. Even though they were reasonable at the time, these criteria are still not fully adopted.

Some deficiencies were noted in the review process as well. In order to be able to complete the assignment, the staff engaged in the review had to take the information from the files as reliable, while time and experience showed that it was actually not. Furthermore, due to financial constraints, the staff conducting the review in 2005 was forced to process a large number of cases in a very limited period of time. The files were not only incomplete, but they also contained statements and other documents in languages which the staff could not understand. The review and decisions were made on the basis of hastily prepared summaries and translations.

The review made in 2005 was the best possible that could be done under the circumstances, but the presumptions deriving from the review could not be justified. That is particularly true if you take into account the number of disputed cases. The review did not adequately address the issue of unnecessary documents contained in the files. A number of those refer to the same cases, events or situations, but it is almost impossible to detect or anticipate the overlapping without a thorough analysis. If you disregard the unnecessary documents,¹³⁸ numerous consequences can be expected in terms of investigation and criminal prosecution.

I will not go deeper into the method in which the cases had been selected prior to 2007, nor will I dwell further on the messy discussion on whether war crimes should be prosecuted at the state or cantonal and district levels. Rather, it is important what we have done over the past 18 months to improve our work and better organize the process of identification and selection of cases requiring investigation and prosecution, irrespective of the level at which the cases are processed.

Precious experience acquired in conducting investigations and preparing cases for prosecution – starting with the cases bearing “A” designation and classified as VERY SENSITIVE and retained in the Prosecutor’s Office of Bosnia and Herzegovina, as well as the experience from the field – have shown that a case-by-case prosecution is neither efficient nor effective. Such an approach did not lead us in the desired direction and only deepened the ongoing mess about what, who and how things should be done.

Whatever the term “core international crimes” might imply, the mere focusing on the existing files in order to determine what needs to be done, what can and must be done and who will do it, simply did not work in Bosnia and Herzegovina. Neither was it promising in terms of fulfilling expectations from the courts and prosecutor’s offices. The databases were not very useful in that sense (except for identification of potential sources of evidence pertaining to the committed war crimes), partly due to the condition in which the documents were returned from the ICTY. The databases themselves can never offer specific assessments or functions required by prosecutor. They are not an adequate replacement for smart and focused exercise of a discretionary right which each prosecutor should use in the public interest. Databases can be used for collecting and sorting information, but they can not “make decisions”.

Two years ago it became clear that we need a new approach to the issue of war crimes prosecution in Bosnia and Herzegovina. The response to this was the analytical approach treating the cases, events and situations instead of files. This approach aims at addressing the issue of prioritization of war crimes cases in the Prosecutor’s Office of BiH.

¹³⁸ Including minutes of numerous, well-intentioned but useless hearings of the same witnesses and victims by prosecutors and investigators who operated independently of each other, at the state, cantonal and district levels.

(The lack of) criteria for the selection of crimes against humanity cases: the experience of Argentina

Mirna Goransky¹³⁹ and María Luisa Piqué¹⁴⁰

Introduction

The thesis of this presentation is that when there is a decision to prosecute and judge crimes against the humanity, there are always some criteria for the selection and prioritization of the cases. Sometimes these criteria are legal, rational, regulated and follow elaborated strategies. Other times, they obey no rational rules.

In order to demonstrate this thesis we will shortly explain the trials that took place in Argentina more than 20 years ago and those that are currently being carried out. Two preliminary comments are needed: firstly, all the cases are considered crimes against humanity; secondly, we cannot present a model of prioritization of cases or selection criteria, simply because that model does not exist in Argentina in very important cases; rather, what we can present is a model for lack of criteria, so we will briefly present the combination of criteria and “non-criteria” that has ruled the criminal prosecution of crimes against humanity during the last two decades.

The military dictatorship (1976-1983)

During the military dictatorship that governed the country between 1976 and 1983, the Argentine armed forces implemented a plan for the systematic annihilation of political opponents, a category including not only armed activists promoting ideals antagonistic to those of the military, but also mere dissidents, their friends and their families. This plan included looting, kidnapping, torture, murder and the forced disappearance of a still undetermined number of people:

- more than 340 clandestine centres of detention throughout the country;
- between 20,000 and 30,000 “disappeared” persons;
- thousands of illegally executed people; and

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¹⁴⁰ **María Luisa Piqué**, lawyer of the team in charge of the trials against those accused of crimes against humanity in the Navy School of Mechanics (Escuela de Mecánica de la Armada, ESMA) and Operation Condor.

- more than a thousand members of the armed and security forces involved in those crimes.

Transition to democracy (1983-1985)

After the breakdown of the military regime and the reestablishment of democracy with the election of President Alfonsín in December 1983, the new administration began a process of controlled truth and justice. The beginning of this process was the creation of the National Commission on the Disappearance of Persons (CONADEP) which worked as an official truth commission,¹⁴¹ and by 1985, had documented the disappearances of at least 8,900 people.

Alfonsín's Government had a policy. As explained on numerous occasions by the President himself and his main advisers, they wanted to prosecute the highest authorities of the military repression and those who had gone too far, committing atrocious and abhorrent crimes.¹⁴² To do so they designed a blueprint for a trial, they passed the laws to implement it, and, as a consequence, the trial took place.

The trial against the juntas

By September 1984, thousands of crimes against humanity had been reported to CONADEP and in military courts, and the registered cases of disappeared persons at that moment increased to 8,900 people. It had to be decided which of those crimes would be tried and against whom. That decision was finally taken both by the prosecutor and the court.

On the one hand, the prosecutor's office could use discretionary powers and decided to bring charges in almost seven hundred cases. The choice was made within the cases with the greatest ease of access to evidence. This represented less than 8% of the totality of the documented cases.

The first hearing of the trial was on 22 April 1985. The verdict was rendered on 10 December of that same year. The members of the three military juntas that governed the country during 1976-1983 were in the dock of this historic trial.¹⁴³ And 869 persons – victims and relatives of the disappeared – declared as witness in the hearings.

¹⁴¹ The people appointed to the CONADEP were not professional politicians, but noteworthy personalities from Argentina's cultural, religious and journalistic elites, as well as activists from human rights organizations.

¹⁴² The government's initial strategy was to engage the armed forces themselves in the prosecution of their own officials. However, in case that the Armed Forces Supreme Council failed to move forward with the proceedings, the government sought a reform of the Military Justice Code in order to enable the civil courts to take over these proceedings. When the Armed Forces Supreme Council upheld the orders given by the commanders of each army in order to eliminate "terrorism", and ruled that they would not be punished because of them, on 26 September 1984, the Federal Court of Appeals of Buenos Aires took over and tried the juntas.

¹⁴³ Jorge Rafael Videla (Commander of the Army, between 1976 and 1978), Emilio Eduardo Massera (Commander of the Navy, between 1976 and 1978) and Orlando Ramón Agosti (Commander of the Air Force, between 1976 and 1978) who belonged to the First Military Junta (1976-1980); Roberto Eduardo Viola (Commander of the Army, between 1978 and 1979), Armando Lambruschini (Commander of the Navy, between 1978 and 1981), Omar Domingo Rubens Graffigna (Commander of the Air Force, between 1978 and 1979) who belonged to the Second Military Junta (1980-1981); and Leopoldo Fortunato Galtieri (Commander of the Army, between 1979 and 1982), Jorge Isaac Anaya (Commander of the Navy, between 1981 and 1982), Basilio Lami Dozo (Commander of the Air Force, between 1979 and 1982) who belonged to the Third Military Junta (1981-1982).

The Court decided that each commander would be held accountable only for the crimes committed by his subordinates, not for every crime reported under his tenure as a junta member.

The trial concluded with two comprehensive and severe convictions, three lesser ones and four acquittals. The judgment considered that the homicide of 73 people (near 10% of the cases included in the debate and less of 1% of the total of the people registered as disappeared) had been proven. Simultaneously, it left the door open to continue with the prosecution of those who followed in the military hierarchy. This decision was confirmed by the Supreme Court. Up until that point, publicly formulated criteria had been followed and, as a consequence, in less than two years a trial against the top hierarchy had been carried out and a seminal judgment rendered.

The end of the human rights spring and the impunity years (1987-2003)

The case selection made by the office of the prosecutor and the criteria adopted by the executive branch ruled the trial against the juntas but were never “legalized”. That is, there was no legislation that transformed these criteria into law – mainly not to confront the demands of human rights organizations, the victims and their relatives and an important sector of the Argentina society, who claimed “Justice for All”.

But, after the Juntas Trial, the courts responded to the demand of victims and human rights organizations and began to investigate and prosecute far beyond the expectation of the President. By 1987, there were hundreds of members of the armed and security forces who were being accused or were under investigation. After the Juntas Trial was over, an avalanche of complaints seeking prosecution of all perpetrators involved in the commission of gross human rights violations, and covering all instances of victimization, began.

One of the reasons why the strategy of President Alfonsín did not work was that as more details became known about what had happened during the repression years, it also became apparent that (almost) all the members of the armed forces had been involved one way or another in the commission of atrocious crimes.

The armed forces began to exert strong pressure over the executive, trying to stop judicial investigations, and, as a result of that pressure, the well-known “Full Stop” law was dictated. This law established a purely temporary criterion governing prosecution: a prosecution could only continue against those who were summoned for questioning within 60 days after the law was passed, with the only exception of those suspects who had fled.

This law did not work as an impunity norm. Contrary to the expectations of the government – slow justice and only a handful of members of the military being prosecuted – the law provoked a wave of intense judicial activity aimed at summoning a substantial number of members of the armed and security forces. Two days before the expiration date, around 400 members of the armed and security forces were prosecuted.

That was an example of the different rationale and criteria governing the acts of different branches of the state: the executive, aiming at limiting the prosecutions and trials; and the judges, speeding up the inquiries into the conduct of the most questioned repressors (and not only for good reasons).

The consequence of this judicial activism was that those who were summoned began to refuse to appear before the judges. The senior officers in the military endorsed this attitude.

The breaking point came when one of them not only refused to appear, but also incited a unit to rebel, beginning what was known as the “Rebellion of Easter”.

Facing this surge of investigations and with military pressure to avoid the judicial citations, the government sanctioned the “Due Obedience” law which established superior orders as a ground for full exclusion of criminal liability. This law benefited practically all members of the military who had been reported and was a clear imposition by the executive of criteria on the judiciary.

The constitutionality of this law was challenged. However, the Supreme Court validated it in June 1987 with a divided bench.¹⁴⁴ The “Due Obedience” law – and the Supreme Court’s validation – blocked prosecutions and trials regarding crimes against humanity, and the defendants were released.

To make things worse, the first stage of prosecution of these crimes was ultimately demolished by the next President, Mr. Carlos S. Menem, who not only, in 1989, pardoned the few military who had been convicted in the historical trial, but also those senior officers who were not covered by the amnesty laws. By decree he ordered that any proceedings against persons indicted for human rights violations who had not benefited from the earlier laws be discontinued. This legal shield from prosecution was maintained by the Supreme Court of Justice that guaranteed the laws and the pardons.

Between 1995 and 2003, a slow reopening began

This paralysis pushed human rights organizations to look for possible loopholes in the legal system. Thus, they started a slow but constant effort to find all the legal opportunities that allowed them to retake the judgments to the perpetrators of these atrocious and aberrant crimes and to force state authorities to keep on investigating the whereabouts of the disappeared.

The process kept growing. Between the end of the 1990s and the first years of the new millennium, the spider web of impunity was broken. The fight for justice found a new scenario. New proceedings against the repressors for the crimes committed in the years of the dictatorship began in different ways. The first step in this process was known as the “search of the truth”.¹⁴⁵ Secondly, they fostered trials regarding those crimes that were not covered by the

¹⁴⁴ The Court acknowledged the legislator’s power to establish that certain facts could not be prosecuted and criminalized – not only the authority to create sanctions, but also to erase its effects. It denied also the existence of an acquired right to the simple maintenance of rules. Therefore, according to the Court’s majority, the judiciary did not have the power to assess the ability of decisions by the legislator to reach their goals. At the most, the judges said, they could scrutinize the proportionality between the ends and the means, and whether the restriction of individual rights in a particular case was constitutional. Finally, the judges that upheld the law considered that this decision would not leave the crimes unpunished, but change the imputation towards other subjects. Justice Bacqué, on the other hand, in his dissenting opinion, denied the power of Congress to dictate amnesty laws when crimes against humanity were concerned, because of the primacy of international and *jus cogens* law. He also considered that the “Due Obedience” law affected the division of powers, since only the judiciary can state, on a case by case basis, that somebody has acted in due obedience. Thus, the law replaced the independent factual determination of judges with an arbitrary decision of the legislator whose power is to establish rules for future acts. Consequently, Justice Bacqué considered the law unconstitutional.

¹⁴⁵ The so-called “Truth Trials” were a result not only of human rights activists and organizations, but also of the confessions made by some mid-level officers who felt scapegoated and left behind by the armed forces they had served. Those officers admitted the commission of atrocities during the illegal repression. These dramatic confessions brought about intense public pressure for the reopening of human rights trials. On the other hand, relatives of victims and human rights attorneys once again demanded information about the whereabouts of the disappeared persons from different courts. The courts acknowledged the petitioners’ right of truth. Therefore, new proceedings began, justified by the principle that even though laws may be passed to prevent the prosecutions of those responsible for crimes, judicial investigations may continue in order to find out the truth. Judicial action was limited to investigation and documentation.

amnesty laws. Finally, this process was encouraged by international pressure and claims in favour of the prosecution of crimes against humanity committed within the last military government.

These proceedings contributed valuable data on the circumstances of the disappearance of victims of state terrorism and of the death and place of inhumation of the corpse of many victims.¹⁴⁶

During the late 1980's and the 1990's, Argentina came under strong pressure from abroad. Firstly, in late 1987, the Inter-American Commission on Human Rights began to receive petitions against Argentina denouncing the legislature's adoption of impunity laws and their enforcement by the judiciary.¹⁴⁷

Secondly, on 7 October 1998, the Inter-American Commission on Human Rights received a petition filed by the mother of a disappeared person, sponsored by several human rights organizations, against the Argentine state, alleging that the Argentine judicial authorities had denied her request to determine what had happened to her daughter, based on the right to truth and the right to bereavement (case 12,059 IACHR). On 29 February 2000, the Argentine Government signed a friendly settlement in which it accepted and guaranteed the right to the truth and declared that the right involved the exhaustion of all means to obtain information on the whereabouts of the disappeared persons.¹⁴⁸

Meanwhile, trials took place in other countries, most of them within the region of Western Europe. Countries such as Italy, France, Spain, Sweden and Germany began demanding the extradition of various military personnel to be tried for the disappearances of their citizens during the period of military dictatorship, and also held trials *in absentia* against several officers and commanders (in Italy and France).

Finally, in 2001, in a ruling on the Barrios Altos case in Peru, the Inter-American Court of Human Rights declared that two amnesty laws introduced by the Government of Peruvian President Alberto Fujimori in 1995 were incompatible with the American Convention on Human Rights and hence without legal effect. This ruling was very influential, as the Inter-American Court's interpretations of the Convention are binding on the Argentine state.

Judicial activism and the end of a dark phase for justice

In a judgment handed down by a federal judge on 6 March 2001, the "Full Stop" and "Due Obedience" laws were declared unconstitutional and null and void in a case concerning forced

¹⁴⁶ Another advance in court investigations involved the discovery that many babies born to mothers in military detention were stolen and put into an illegal adoption ring to be given to couples under false identities. These cases were not covered by the "Full Stop" and "Due Obedience" laws. Thus, former officers were prosecuted in 1998 for crimes committed as a result of abducting children and altering their identities in order to enter them into an adoption ring – although they were still protected from prosecution for the murder of their parents.

¹⁴⁷ The Commission indicated that the "Full Stop" and "Due Obedience" laws and presidential decrees on pardons were in conflict with Article XVIII (right to a fair trial) of the American Declaration of the Rights and Duties of Man, and with Articles 1, 8 and 25 of the American Convention on Human Rights, and with the duty of Argentina to take the necessary steps to bring to light the events and identify the persons responsible for the human rights violations which occurred during the past military dictatorship (IACHR, Report N° 28/92. Cases 10147, 10181, 10240, 10262, 10309, and 10311. Decision of 2 October 1992).

¹⁴⁸ In the settlement it was established that the fulfilment of the right to the truth was an obligation of means, not of results, which was valid as long as the results were not achieved, not subject to prescription.

disappearances and torture. Therefore, the prosecution against some officers who had benefited from those laws was reopened. The ruling was confirmed by the National Chamber of Appeals for Criminal and Correctional Matters for Buenos Aires. Eventually, the Supreme Court on 14 June 2005, by a majority of 7 to 1, confirmed the previous judicial decisions affirming the invalidity and unconstitutionality of the “Full Stop” and “Due Obedience” laws as contrary to international norms of human rights – the so-called Simón ruling.¹⁴⁹

What followed was the annulment of the impunity laws and the executive pardons. This means that according to Argentine law all the crimes committed in that period of time not only can but must be prosecuted.

The new trials (2003-today)

The result of the endless struggle against impunity was the annulment of the impunity laws, by the Supreme Court first and Congress later. This allowed for the reopening of all pending cases. By September 2008, there are 1,120 persons involved in crimes against humanity in cases under investigation in Argentine courts:

- around 500 had been formally accused;
- 32 had been convicted;
- two had been acquitted;
- 436 are in pre-trial detention; and
- 176 had passed away.

Of the 1,120 persons, 446 are members of the upper ranks of the armed forces and 180 are from the upper ranks of the security forces. There are about 250 case files opened, but only around 150 are really moving forward. Since 2003, there have been ten trials:

- In 2006:
 - one trial against one low-ranking policeman (sentenced to 25 years in prison);
 - one trial against a high-ranking policeman (sentenced to life in prison).
- In 2007:
 - one trial against a priest who was working with the police forces during the dictatorship (sentenced to life in prison);

¹⁴⁹ Congress had tried – without success – to foster those trials. Firstly, in March 1998, it repealed the “Full Stop” and “Due Obedience” laws. But their repeal was interpreted as not having retrospective effect and cases of human rights violations committed under the military governments therefore continued to be covered by them. Secondly, in August 2003 Congress passed Law 25.779 which established that the “Full Stop” and “Due Obedience” laws were null and void. This measure also led to some controversy: there was uncertainty as to the validity of this parliamentary decision. Nonetheless, after the annulment of the amnesty laws by Congress in 2003, several major cases against former military leaders were reopened despite uncertainty about their confirmation at the highest judicial level. With its decision in the Simón case, the Supreme Court removed that uncertainty and definitively cleared the path for judicial action. For further analysis of these and other aspects of the ruling, see Christine A. E. Bakker, *A Full Stop to Amnesty in Argentina. The Simón Case*, in *Journal of International Criminal Justice* 3 (2005) pp. 1106-1120.

- one trial against seven high-ranking armed forces officials (sentenced to between 22 and 25 years in prison).
- 2008 had been so far a much more active year with:
 - six trials against 26 accused (24 convicted and two acquitted);
 - 16 of the convictions were against high-ranking officials;
 - one of these trials was against some of the most notorious repressors (but only based on four crimes);
 - two of them have more than 20 victims.

How are judges selecting the cases that are coming to trial?

Faced by the legal obligation to prosecute, the questions are: Which are the actual investigations that are being carried out? How are cases selected and prioritized? Why have some cases come to trial?

Regrettably, in the majority of cases there are no criteria or regulated decisions for the selection of cases. Cases seem to go faster through the system for at least one of the following “reasons” (in most of the ten cases judged, there was a combination of these reasons):

- Because the activity of the relatives of the victims and their lawyers pushed for the reopening of the case even before the impunity laws were revoked, so these cases were more advanced than others.
- Because of a legal or bureaucratic reason that sometimes allows or pushes for a faster process (such as the fact that the defendant has been in pre-trial detention too long or a public defender missing the deadline to present an appeal).
- Because of the efforts of individual justice operators who decide to give priority to these cases (apart from any official instruction).

The whims of justice operators are the main reason why many other cases have not yet made it to trial. Compared with many other inquisitorial criminal procedure systems, Argentina’s is very attached to formalities. Judges, prosecutors and defence counsel have endless possibilities to delay a process. Prosecutors work in an isolated way, with no pro-activity to accelerate the main cases.

There are other problems that are not strictly related with the selection criteria but contribute to making this process even less efficient:

- There are very few courts judging these cases, only one in the capital city of Buenos Aires:
 - During 2007, there was only one trial, which did not reach a verdict (because the defendant committed suicide/was killed in prison).
 - In 2008, there were three trials but none in a major case.
- There is no centralized information system about these cases:¹⁵⁰

¹⁵⁰ We have been using a Case Matrix provided by the ICC that has proved to be very helpful, but its use is still very marginal among judicial operators.

- Each court and prosecutor has to collect its own data.
- There is considerable duplication of work.

The Mechanics School of the Navy (ESMA) case

In our particular case, we have been appointed to prosecute the crimes that took place in one of the most emblematic clandestine centres of detention of the city of Buenos Aires, the Mechanics School of the Navy (ESMA). The ESMA held thousands of political prisoners from 1976 to 1983:

- Some of them remained in cruel detention.
- The overwhelming majority disappeared in the “flights of the death” (that means they were drugged and dumped into the River Plate from the air).
- A few survived this nightmare and many of them have been declaring about these atrocities for more than 20 years in endless judicial processes.
- The defendants in pre-trial imprisonment or house arrest are around 50 members of the navy and a few members of the security forces.

The judge in charge of the prosecution decided to split cases that should have been investigated together (there are cases that took place in the same clandestine centre of detention and they have an important number of victims and perpetrators in common). Secondly, he investigated the crimes committed in the ESMA separating them by year. This case was reopened in 2003, investigating facts which occurred in 1976, and five years later it is working with crimes that happened in 1977. Additionally, the judge separated different events occurring in the ESMA with reference to the “complexity of the case”. For example, he decided to investigate in a separate process the murder and disappearance of a famous journalist, Rodolfo Walsh, or the kidnapping of a group of people in a church.

The problem is that all these cases share a great number of witnesses and victims as well as defendants. But each case advances at a different rhythm. No one can give the reason why one case is brought to trial before another.

The result of all these decisions was that the first trial for crimes committed in the ESMA – against a low-ranking member of the security forces for his participation in numerous kidnappings, tortures, homicides, disappearances and thefts of babies – only involved charges for four cases of kidnapping and torture. Thirty years after extremely serious crimes were committed by the navy, one single person is brought to trial. He was not even a member of the navy. And he was going to be judged only for a very small number of the crimes that he was involved in.¹⁵¹

The defendant was found dead four days before the verdict was to be read out. The autopsy found cyanide in his blood.

Many survivors and witnesses who will have to testify against other defendants in different trials, testified in this trial.

¹⁵¹ This case made it to trial because an acting defence counsel did not oppose the opening of the trial, probably due to an excessive work load.

There are other examples. Out of all the hideous crimes that were committed in the ESMA, one upcoming trial is about the seizure of an apartment and the robbery of a car and a bookcase. A woman was kidnapped, raped, tortured and kept under cruel conditions for months. And the first process in which she will have to testify as a victim is about the robbery of her bookcase. The parents and their daughter disappeared and the coming trial is about the robbery of a car.

Concluding remarks

The absence of legal regulation or criteria to select and prioritize cases makes decisions in some of Argentina's new trials on when, how, why, by whom and who to prosecute depend mostly on (a) the dedication (or the lack thereof) of the justice operators in question; (b) the greater or lesser attachment they have to empty formalities; and on (c) the initiative of the victims and their lawyers (in a sort of privatization of the decision on which cases are investigated first).

During the so-called spring of human rights, after the re-establishment of democracy, a major trial against the main accused behind the state terrorism apparatus was carried out in less than two years. The selection criteria defined by the executive were problematic, in that it was decided not to go beyond these high-ranking officials, but they made sense in terms of prioritization. Since 2003, there are no prioritization criteria and the result is small trials against a reduced number of defendants accused of a handful of crimes. Witnesses are forced to testify several times, with the associated emotional cost. Pre-trial detention is unduly prolonged and justice administration resources are wasted.

Argentina may be an example of what Bentham calls the "madness of the erudition". Justice administrators follow unreasonable procedural formalities, atomizing the trials, diluting the magnitude of the crimes.

However, there are important lessons to be learned from the Argentine experience on transitional justice – not only from the partial and incomplete attempts immediately after democracy was re-established, but also from those taking place today, 25 years later, albeit in a slow and inefficient manner.

Firstly, political will is not enough to see these processes through. Without strategy and planning on how to pursue these trials – and without a serious decision-making process to establish the criteria for the selection of cases – even the best of intentions will end up buried in papers and files. Moreover, even if the proceedings moved forward, they cannot satisfy the victims' and society's legitimate expectations of learning the truth about human rights violations. Isolated from context, only particular and specific crimes are usually tried, while thousands of other crimes against humanity will most likely remain unpunished.

Secondly, the Argentine experience – particularly, that of Mr. Alfonsín's Government – suggests that case selection criteria cannot be imposed by the political power. On the contrary, the satisfaction of society's expectations of truth and justice is more likely to be reached through active consultation with – and participation by – victims groups and the public in the determination of the criteria.

Finally, our experience also suggests that demands for justice and truth about past human rights violations from victims, human rights activists and society, cannot be minimized. From 1983 onwards, several governments underestimated the moral legitimacy of the victims to become the leaders of a broader social movement that pursued justice as a social good.

They did not understand that the victims, their lawyers and human rights organizations, would continue its endless struggle until they saw justice done and that, eventually, society would back that demand.

Prosecution criteria at the Khmer Rouge Tribunal

Anees Ahmed¹⁵² and Margaux Day¹⁵³

I. Introduction

The Khmer Rouge Tribunal (“KRT”), formally known as Extraordinary Chambers in the Courts of Cambodia, was established by a law passed by the Cambodian Parliament and promulgated on 10 August 2001 (“Statute”).¹⁵⁴ Pursuant to an Agreement (“Agreement”)¹⁵⁵ between the United Nations and the Government of Cambodia, extensive amendments were made to the Statute to implement the terms of that Agreement.¹⁵⁶

Articles 1 and 2 of the Agreement confer personal jurisdiction to the KRT over the following two categories of persons:

- (i) *senior leaders* of Democratic Kampuchea (“senior leaders’ category”), and
- (ii) *those who were most responsible* for “the crimes and serious violations of Cambodian laws related to crimes, international humanitarian law and custom and international conventions recognized by Cambodia that were committed during the period from 17 April 1975 to 6 January 1979” (“most responsible persons category”).

This enumeration of categories of persons subject to the jurisdiction of the KRT is identical to and mirrored in Article 2 of the Statute under the heading “Competence”. For a person to be prosecuted before the KRT, he must fall under one of the two referred categories. To make such a determination it is essential to interpret the meaning of the terms:

- (i) “senior leaders of Democratic Kampuchea (DK)” ; and
- (ii) “those who were most responsible for the crimes [...]”.

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¹⁵⁴ Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, promulgated on 10 August 2001 (NS/RKM/0801/12).

¹⁵⁵ 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, 6 June 2003. The Agreement was ratified by the RGC on 19 October 2004.

¹⁵⁶ The Statute as promulgated, with amendments, on 27 October 2004 (NSRKM/1004/006). Also see, Agreement Article 2(2).

II. Interpretation

The Vienna Convention on the Law of Treaties 1969 (“Vienna Convention”) applies to the Agreement.¹⁵⁷ Thus, principles of interpretation contained in that Convention shall be applicable to the Agreement. Further, since the Agreement “shall apply as law” in Cambodia, any interpretation to its articles regarding personal jurisdiction shall also apply to the identical provisions of the Statute.¹⁵⁸ Any other interpretation will result in the manifestly unreasonable consequence of two laws, with identical provisions, meaning differently.

Article 31 of the Vienna Convention states that instruments should be interpreted in good faith in accordance with the ordinary meaning to be given to their provisions in their context and in the light of the instrument’s object and purpose. The context of a provision includes both the full text of the instrument as well as any other agreements that were made in connection with that instrument.¹⁵⁹ The legislative history of a provision may also serve as a “supplementary means of interpretation”.¹⁶⁰

III. Who would fall under the senior leaders’ category?

In terms of Article 31 of the Vienna Convention, the starting point for interpreting the term “senior leaders of DK” should be its ordinary meaning. Wherever necessary, the ordinary meaning can be supplemented by the negotiating history of the term.

The word “senior” has several dictionary meanings, but the most relevant meaning in the context of the current analysis is a “person with higher standing or rank”.¹⁶¹ A “leader” is defined as “a person who leads” or “a person who has commanding authority or influence”.¹⁶² Consequently, the expression “leaders of DK” would refer to those individuals who had authority or influence in DK, while the addition of the word “senior” would suggest a hierarchy amongst those who had authority or influence. Within that hierarchy, only those individuals that had “higher rank or standing” than other leaders would, thus, be considered “senior leaders”. The expression “senior leaders of DK”, however, does not require that the senior leaders would be only those that had the *highest*, as against *higher* rank.

The legislative history of the two instruments (the Statute and the Agreement) indicates that the term “senior leaders” was meant to “target” a “small number” of people from the leadership of DK.¹⁶³ The selection of such individuals, however, was left to the Co-

¹⁵⁷ Agreement, Article 2(2).

¹⁵⁸ Statute, Article 47.

¹⁵⁹ Vienna Convention, Article 31(2).

¹⁶⁰ Vienna Convention, Article 32.

¹⁶¹ See Merriam-Webster Online Dictionary at <http://www.m-w.com/dictionary>. The most common alternate meaning is “a person older than another”. However, it seems unlikely that the jurisdiction of the ECCC was meant to be tied to the age of the accused, so this meaning will be discounted.

¹⁶² *Ibid.* An alternate definition of leader is “a person who directs a military force or unit”. However, this meaning is too limited, as it is unlikely that the term leader was meant to limit the ECCC to jurisdiction over military personnel.

¹⁶³ See comments of Mr. Sok An, the Deputy Prime Minister and the Minister of the Cabinet Council during the Debates on the Statute in the First Session of the Third Term of the Cambodian National Assembly, 4-5 October 2004. Translation by the Documentation Centre of Cambodia (“DC-Cam”), Phnom Penh. In the debate, it was indicated that the number of people expected to be prosecuted under the category of senior leaders would be “no more than ten people” (“National Assembly Debates 2004”).

Prosecutors.¹⁶⁴ Indeed, when the idea for the establishment of a tribunal to try “leaders of DK”¹⁶⁵ was first mooted by the Group of Experts, the Group’s Report was categorical that it did not believe that the term leaders should be equated with all persons at the senior levels of the government of DK or even of the Communist Party of Kampuchea (“CPK”). It recommended that the proposed tribunal must “focus upon senior leaders with responsibility over the abuses as well as those at the lower level who were directly implicated in the most serious atrocities”. This, the Group felt, would fully take into account the twin goals of individual accountability and national reconciliation.¹⁶⁶

The term “senior leaders” has also been interpreted by the International Criminal Tribunal for the Former Yugoslavia (“ICTY”) in the context of its mandate that similarly limits the scope of prosecution to a limited category of higher level perpetrators. While interpreting the term “most senior leaders”, the ICTY held that the term covered individuals who, “by virtue of their position and function in the relevant hierarchy, both *de jure* and *de facto*, [were] alleged to have exercised such a degree of authority that it [was] appropriate to describe them as among the ‘most senior’ rather than ‘intermediate’”.¹⁶⁷ The Tribunal’s Appeals Chamber, in another decision, approved this criterion and clarified that this assessment of level of responsibility could not be restricted only to military responsibility but that it equally extended to political responsibility also.¹⁶⁸

IV. Who would fall under the most responsible category?

The next term that must be interpreted is “those who were most responsible” for the crimes that were committed between April 1975 and January 1979. “Most” has two primary meanings, but the relevant one is “greatest in quantity, extent or degree”.¹⁶⁹ Responsible has multiple meanings as well, but the most relevant are “liable to be called to account as the primary cause, motive or agent”, and “being the cause or explanation”.¹⁷⁰ Taken together, these suggest that “those who were most responsible” are those individuals who bear the greatest quantity, extent or degree of responsibility for causing the crimes that occurred during the temporal jurisdiction of the court. It is important to note that responsibility has nothing to do with an individual’s rank or title and depends on how their actions contributed to the crimes that occurred. Thus, even relatively low-ranking individuals could bear the most responsibility for particular crimes.

¹⁶⁴ *Ibid.* Mr. Sok An also stated that, in deference to the prerogative of the Co-Prosecutors, it was not appropriate for the National Assembly to indicate as to who, within the DK hierarchy, would qualify for prosecution by the ECCC.

¹⁶⁵ As against the expression “senior leaders of DK” that was finally incorporated in the two instruments.

¹⁶⁶ Report of the Group of Experts for Cambodia Established Pursuant to General Assembly Resolution 52/135, 18 February 1999, para. 110.

¹⁶⁷ *The Prosecutor v. Dragomir Milošević*, Decision on Referral of Case Pursuant to Rule 11*bis*, Case No. IT-98-29/1-PT, 8 July 2005, para. 22. The ICTY was evaluating the seniority of the Accused in the context of an application of the Prosecution to transfer this case to a national jurisdiction pursuant to the United Nations Security Council resolution 1503 of 2003 which called upon that Tribunal to complete its proceedings at the first instance by 2008: “by concentrating on the prosecution and trial of the *most senior leaders* suspected of being most responsible for crimes within the ICTY’s jurisdiction and transferring cases involving those who may not bear this level of responsibility to competent national jurisdictions ...” (emphasis added).

¹⁶⁸ *The Prosecutor v. Gojko Janković*, Decision on Rule 11*bis* Referral, Case No. IT-96-23/2-AR11*bis*.2, 15 November 2005, para. 29.

¹⁶⁹ See Merriam-Webster Online Dictionary at <http://www.m-w.com/dictionary>. The primary alternate meaning is “the majority of”.

¹⁷⁰ *Ibid.*

The legislative history of the expression indicates that it was meant to target those who were not *senior leaders*, but those who committed crimes “as serious as those” by the *senior leaders*. No particular number of persons was contemplated as prospective candidates for prosecution, but it was felt that “there would not be too many, as in the case of the Sierra Leone Tribunal”.¹⁷¹ The Group of Experts contemplated that this term specifically covered “certain leaders at the zonal level, as well as officials of torture and interrogation centers such as *Tuol Sleng* [in central Phnom Penh]”.¹⁷²

Other international criminal tribunals have also interpreted the expression “persons most responsible”. For example, in interpreting Article 17(d) of the Rome Statute that lays down that cases that were not of “sufficient gravity” should not justify action by the International Criminal Court (“ICC”), a Pre-Trial Chamber of the ICC held that this Article was intended to ensure that the Court initiated cases only against the *most senior leaders* suspected of being most responsible for the crimes within its jurisdiction.¹⁷³ It enumerated the following elements for the satisfaction of that threshold:

the roles such person play, through acts or omissions, when the state entities, organization or armed groups to which they belong commit *systematic and large-scale crimes* within the jurisdiction of the Court (Further,) the role played by such state entities, organizations or armed groups in the overall commission of crimes within the jurisdiction of the Court (is also relevant).¹⁷⁴

The ICTY has stressed factors such as the extent and the geographical and temporal spread of the committed crime, number of civilians affected, extent of property damaged, number of military personnel involved *etc.* to assess whether such a criminal conduct could qualify to be tried before that Tribunal.¹⁷⁵ It has also considered as relevant the circumstances and context in which the crimes were committed especially “in the context of other cases tried before the tribunal”.¹⁷⁶

In interpreting its statute that mandated prosecution of “persons who bear the greatest responsibility” for the crimes enumerated therein, the Special Court for Sierra Leone (“SCSL”) concluded that the expression includes, “at a minimum, political and military leaders and implies an even broader range of individuals”.¹⁷⁷ For example, it suggested that children between the ages of 15 and 18 could constitute “persons who bear the greatest responsibility” for the crimes that occurred in Sierra Leone.¹⁷⁸ The Special Court recognized that “per-

¹⁷¹ See, again, the speech of Mr. Sok An in the National Assembly Debates 2004. He clearly indicated that there “is no specific amount of people to be indicted from the second group. Those committing atrocious crimes will possibly be indicted”.

¹⁷² Group of Experts Report, para. 110.

¹⁷³ *Situation in the Democratic Republic of Congo in the Case of the Prosecutor v. Thomas Lubanga Dyilo*, Decision Concerning the Pre-Trial Chamber I’s Decision of 10 February 2006 and the Incorporation of documents into the Record of the Case Against Mr. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, 24 February 2006, para 50 (“Dyilo Decision”).

¹⁷⁴ *Ibid.*, para. 52 (emphasis added).

¹⁷⁵ Dragomir Milošević Decision, para. 24.

¹⁷⁶ Ademi Decision, para. 28.

¹⁷⁷ *Prosecutor v. Brima et al.*, Decision on Defence Motions for Judgment of Acquittal Pursuant to Rule 98, Case No. SCSL-04-16-T, 31 March 2006, para. 34.

¹⁷⁸ *Ibid.*, para. 37.

sons who bear the greatest responsibility” was a more limited jurisdictional standard than simply “persons most responsible”.¹⁷⁹

V. Recent practice at the Khmer Rouge Tribunal

The KRT began its judicial activities in June 2007 with the adoption of its Internal Rules. Immediately afterwards, on 18 July 2007, the prosecution requested the Investigating Judges to investigate five suspects for various crimes committed during the period of three years, eight months and twenty days that the Khmer Rouge was in power in Cambodia. These crimes, according to the prosecution, were committed as part of a joint criminal enterprise (“JCE”) constituting a systematic and unlawful denial of basic rights of the Cambodian population and the targeted persecution of specific groups. While requesting the prosecution of the first five suspects, the prosecution identified twenty-five distinct factual situations of murder, torture, forcible transfer, unlawful detention, forced labour and religious, political and ethnic persecution as evidence of the crimes committed in the execution of the alleged JCE.

The prosecution has declared that it is conducting additional investigations to identify further crimes and suspects.¹⁸⁰ While the media and the civil society have variously speculated about the total number of defendants that the KRT will finally prosecute, the prosecution has not offered any such figure. Any figure, however, will necessarily be a function of the time and resources available to the Tribunal. Further, although the Prosecution has not published the criteria of selection of suspects or the crimes, in its filings it has identified the role of the suspects and how s/he fits into one or both of the categories of persons that can be prosecuted before the Tribunal. The first five suspects represented the surviving senior leadership of the Khmer Rouge at the national level. While NUON Chea, IENG Sary, KHIEU Samphan and IENG Thirith were senior members of the government of Democratic Kampuchea and the Communist Party of Kampuchea, DUCH was the chairman of the most notorious and central security centre of that regime where more than fourteen thousand people were tortured and then done to death as suspected enemies of the regime. In identifying these suspects in its initial list, the Prosecution stated that it was satisfied that these suspects were senior leaders of Democratic Kampuchea “and/or” those most responsible for the crimes committed within the jurisdiction of the KRT.¹⁸¹

Once the Prosecution extends its investigations to those beyond the senior leadership, it may identify criteria of choosing only a few suspects from amongst potentially numerous likely candidates for prosecution. These criteria would serve both legal and societal purposes: (1) they would make prosecutorial decision-making predictable, certain and systematic; and (2) they would inform the Cambodian people and the international community that the prosecutorial discretion was exercised fairly and reasonably.

Some of the principles that may inform these criteria are decipherable from the basic documents of the KRT. For example:

¹⁷⁹ *Ibid.*, para. 32 (“The ‘most responsible’ formulation suggested by the Secretary-General of the United Nations was rejected by the Security Council, which insisted upon the ‘greatest responsibility’ formulation.”).

¹⁸⁰ The Court Report (monthly e-newsletter of the ECCC), 15 November 2008, p. 3, available at: <http://www.eccc.gov.kh/english/cabinet/fileUpload/91/2008-Oct-Court-Report.pdf>.

¹⁸¹ Statement of the Co-Prosecutors of the Extraordinary Chambers in the Courts of Cambodia (ECCC), 18 July 2007, available at http://www.eccc.gov.kh/english/cabinet/courtDoc/18/Statement_of_Co-Prosecutors_18-July-2007.pdf.

- i. The KRT prosecution is independent in the performance of its functions and mandate. It does not accept or seek instructions from any government or any other source.¹⁸²
- ii. The principal objective of the founding of the KRT was the pursuit of justice and national reconciliation, stability, peace and security in Cambodia.¹⁸³ One of the ways by which this objective can be achieved is to provide a true historical account of the crimes committed during the Khmer Rouge regime.
- iii. Within the constraints of the KRT's finite financial resources and the limited temporal mandate within which it must conclude its operations, the prosecution cannot prosecute all those persons who may have committed crimes within this Court's mandate and fall under the above-noted two categories. For the same reasons, the prosecution cannot conduct investigations into all the criminal acts that may fall under the KRT's jurisdiction.

Given the limited resources of the KRT and the fact that it can only prosecute a limited number of suspects, the prosecution may have to develop criteria for the selection of its crimes and suspects. On the basis of the experiences gained in other international criminal tribunals, it may consider using the following.

Criteria for selection of crimes

In selecting the crimes, the prosecution may consider the diverse categories of crimes within the KRT's mandate. It may focus on the severity, scope and systematic nature of the crimes committed. Particularly, it may select crimes which were most illustrative of the crimes committed during the period of Democratic Kampuchea. It may select the crimes with the greatest number of victims and broadest geographical impact. It may also consider the proportional magnitude of crimes inflicted upon specific sectors of the population.

Criteria for selection of senior leaders

Under this category, the prosecution may prosecute only those persons who were in highest political, governmental or military positions of decision-making at the national or the regional levels during Democratic Kampuchea.¹⁸⁴

Criteria for selection of persons most responsible

Under this category, the prosecution may select persons who bear the greatest quantity, extent or degree of responsibility for causing the crimes within the jurisdiction of the KRT. The prosecution may focus on those persons who, apart from being persons most responsible for chargeable crimes, were also in positions of political, administrative or military leadership, such that they could effectively control the perpetrators of acts that were most illustrative of the crimes committed during the period of Democratic Kampuchea.¹⁸⁵

¹⁸² Statute, Art. 19.

¹⁸³ Agreement, Preamble.

¹⁸⁴ Direct individual criminal responsibility also necessarily includes "committing" by way of participation in a joint criminal enterprise ("JCE") as a co-perpetrator.

¹⁸⁵ Direct individual criminal responsibility also necessarily includes "committing" by way of participation in a joint criminal enterprise ("JCE") as a co-perpetrator.

VI. Conclusion

As the Khmer Rouge Tribunal moves from the investigative to the prosecution stages of the proceedings, its decisions shall identify the criteria it employed for the selection of crimes and suspects, given the limitations of available time and resources. Any such decisions will clearly reflect a harmonization of the criteria adopted by the prosecution offices of other international tribunals with the imperatives of this unique hybrid *in-situ* Tribunal.

Canada's approach to file review in the context of war crimes cases

Terry M. Beitner¹⁸⁶

Introduction

The Forum for International Criminal and Humanitarian Law has stated that the:

main concern of the seminar is how criminal justice systems can make use of prioritization criteria with regard to case files that have already been opened.¹⁸⁷

The purpose of this paper will therefore be to explore Canada's use of selection criteria in the file review process. The ultimate objective of file review is the selection and application of the appropriate legal remedy, under Canadian law, where an alleged war criminal is present in Canada. Before commencing an analysis on this specific process, it is important to first provide a contextual background of Canada's approach to the issue of war crimes.¹⁸⁸

Canada's War Crimes Program

The Government of Canada established the War Crimes Program (hereinafter referred to as the "Program") in 1998. The goal of the Program is to enforce Canada's *no safe haven* policy, a policy asserting that "Canada is not a safe haven for anyone involved in crimes against humanity, war crimes, or genocide".¹⁸⁹ The Program provides for a co-ordinated governmental response to specific allegations that individuals either already present in or attempting to gain entry into Canada were involved in war crimes. Canada's approach includes a robust effort at its ports of entry and processing overseas to screen out people ineligible to enter the country resulting from involvement in such crimes.¹⁹⁰ Although these efforts are fundamental aspects

¹⁸⁶ Terry Beitner has been the Director and General Counsel of the Crimes Against Humanity and War Crimes Section of the Department of Justice Canada since 2000. He is qualified to practice in both the Common Law and Civil Law jurisdictions of Canada. He is responsible for selecting those cases from among the Canadian inventory of war crimes matters under investigation by the Royal Canadian Mounted Police that may ultimately be put before the Attorney General of Canada with a recommendation that the Public Prosecution Service of Canada commence a criminal prosecution under Canada's Crimes Against Humanity and War Crimes Act. Since 2003, he delivers annual lectures at the Faculty of Law of the University of Ottawa on selected issues with respect to the application of the various remedies available to the Government of Canada under its Crimes Against Humanity and War Crimes Program to deal with the presence in Canada of individuals who may have been involved in the commission of war crimes or crimes against humanity. The War Crimes Section is involved in the application of all remedies employed by the Government of Canada when dealing with war crimes matters.

¹⁸⁷ "080926 Seminar on criteria, concept paper (version 080725)".

¹⁸⁸ For the purposes of this paper a reference to "war crimes" includes crimes against humanity and genocide.

¹⁸⁹ See Canada's Program on Crimes Against Humanity and War Crimes, *Ninth Annual Report*, (Ottawa, ON: CBSA, 2005/2006), online: Canadian Border Services Agency <<http://www.cbsa-asfc.gc.ca/security-securite/wc-cg/wc-cg2006-eng.html>>.

¹⁹⁰ Section 35 of the *Immigration and Refugee Protection Act* provides that where there are "reasonable grounds to believe" that someone committed a war crime then that person is "inadmissible" to enter or remain in Canada. See *Immigration and Refugee Protection Act*, C., 2001 c. 27, s. 35, online: <<http://laws.justice.gc.ca/en/ShowFullDoc/cs/I-2.5//en>>.

of the Program, this paper will focus on the selection of remedies to be applied to individuals already located on Canadian soil.

The Program's objective is to respond to every credible allegation of the presence in Canada of an individual who may have committed war crimes. The Program's approach to the issue is consistent with the *no safe haven* policy. It also ensures respect for our obligations at international law. These international obligations include those arising from the various treaties adhered to over the years as well as those flowing from customary international law. The Program represents Canada's contribution to the international struggle against impunity for war crimes.

The Program brings together four key government departments and agencies: The Department of Citizenship and Immigration (CIC), The Department of Justice (DOJ), The Canadian Border Services Agency (CBSA) and Public Safety Canada (represented by the Royal Canadian Mounted Police, (RCMP)). Other government departments also play critical functions in the enforcement of the *no safe haven* policy and include the Public Prosecution Service of Canada and Foreign Affairs and International Trade Canada to name but two.

The Program ensures that separate government bodies do not operate at cross-purposes. It also avoids duplication of effort through the co-ordination of activities respecting individual cases. All of this is carried out with care so as not to fetter the independence of specific government authorities when charged with executing a particular mandate. For example, when the RCMP conducts an investigation into allegations, they remain in full control of their operations to the exclusion of other government players. With that said, this independence does not prevent the RCMP from seeking advice from analysts or counsel from the Crimes Against Humanity and War Crimes Section of the Department of Justice. In fact, one of the strengths of the Program is the co-ordination of efforts of all of the Program partners as well as the sharing of information between the departments. These activities are of course carried out in accordance with Canada's legal regime governing access to information and privacy.

The Program infrastructure provides for co-ordination and periodic oversight by senior government officials from the operational tier up to the Assistant Deputy Minister (ADM) level for all four departments. The ADMs meet annually and on an *ad hoc* basis when needed to review the activities of the Program and to receive reports from the Program Coordination and Operations Committee (PCOC). PCOC is the principal governing body of the operations of the Program. PCOC meets monthly and consists of the senior managers of all four partners. PCOC develops policy, co-ordinates operations and through a subcommittee assesses cases. The work of the File Review Subcommittee (FRS) is the focus of the remainder of this paper. This committee is responsible for applying the selection criteria.

The File Review Subcommittee (FRS)

The FRS includes members of all four departments (CIC, CBSA, DOJ and RCMP) and reviews allegations of participation in war crimes made against individuals currently residing in Canada. The FRS recommends further review/investigation/analysis or legal action by a specific organization. The legal remedies include: deportation; revocation of citizenship and deportation; transfer to an international tribunal (upon request); extradition (upon request);

criminal investigation and prosecution pursuant to Canada's *Crimes Against Humanity and War Crimes Act*.¹⁹¹

The most cumbersome and costly remedy is criminal investigation and prosecution in Canada. The majority of cases have been, and will no doubt continue to be, dealt with by employing remedies other than criminal investigation and prosecution. The practical realities surrounding the cost and complexity of carrying out international criminal investigations required to meet the rigorous legal burden on the prosecuting authority in Canada dictate that this remedy is to be used sparingly. What is meant by "sparingly" in this context is a discussion I leave for another day.

It is worth noting that the most recently published statistics indicate that there are 57 cases in the RCMP/DOJ criminal investigation inventory.¹⁹²

In light of the foregoing, we now return to the Forum's current issue under study: "how criminal justice systems can make use of prioritization criteria with regard to case files that have already been opened".¹⁹³ Translated into Canadian terms, the question would be: what criteria were employed to place the aforementioned 57 cases into an active criminal investigation inventory?

FRS selection criteria

The criteria employed by the FRS has recently been published in the 2005-2006 Program annual report which states the following at page eight of the English version:

In order for an allegation to be added to the RCMP/DOJ inventory, the allegation must disclose personal involvement or command responsibility, the evidence pertaining to the allegation must be corroborated, and the necessary evidence must be able to be obtained in a reasonably uncomplicated and rapid fashion.¹⁹⁴

In certain circumstances a file may be added to the RCMP/DOJ inventory where these conditions are not met. These include the following:

- The allegation pertains to a Canadian citizen living in Canada or to a person present in Canada who cannot be removed for practical or legal reasons.
- Policy reasons such as the national or public interest, or overarching reasons related to the interests of the war crimes program, international impunity or the search for justice exist.

The "inventory" is a pool of matters from which the RCMP selects specific files to investigate. Files are typically placed into groups with complementary crime-base elements. The crime-base can consist of a common element that may bring a number of investigations together enabling the RCMP to deal with several cases at one time. For example, a specific

¹⁹¹ *Crimes Against Humanity and War Crimes Act*, C. 2000, c. 24, online: <<http://laws.justice.gc.ca/en/ShowFullDoc/cs/C-45.9//en>>.

¹⁹² *Supra*, note 189.

¹⁹³ *Supra*, note 187.

¹⁹⁴ *Supra* note 189.

event or series of events that took place at a particular geographic location can serve as the crime-base to allow for the concurrent investigation of several files.¹⁹⁵

The criteria outlined above are the result of having previously employed different methods to select cases to be placed in the investigative pool. Previously, we engaged a two-stage process whereby the emphasis was placed on our obligations at international law (extradite or prosecute or “aut dedere aut judicare”) and the seriousness of the crime. If either element was satisfied at an early stage of the analysis then the file was added to the inventory.¹⁹⁶ Subsequently, the files were assigned a specific priority that would, in theory, determine the order in which the allegations would be examined.

The criteria that were previously employed to assign a priority consisted of the consideration of the following elements:

A. Nature of allegation

- credibility of allegation
- seriousness of allegation
- seriousness of crime (genocide – war crimes – crimes against humanity)
- military or civilian position
- strength of evidence.

B. Nature of investigation

- progress of investigation
- ability to secure co-operation with other country or international tribunal
- likelihood of effective co-operation with other countries
- presence of victims or witnesses in Canada
- presence of victims or witnesses in other countries with easy access
- likelihood of being part of group investigation in Canada
- likelihood of parallel investigation in other country or by international tribunal
- ability to conduct documentary research to test credibility of allegation

¹⁹⁵ Additionally, we must recall that Canada follows the British common law practice where the police are an independent investigative body that does not take direction from any other arm of the government. What is unique to the Program is the close co-operation between the police and the other departments involved in these investigations. Over time, Canadian police forces have formed “integrated” units to investigate complex crimes. Therefore the close co-operation between the RCMP and the other partners in the Program fits well in this modern trend. Other examples of Canadian integrated units include the Integrated Market Enforcement Teams (IMET) dealing with stock market fraud, the Integrated Proceeds of Crime units (IPOC) dealing with money laundering, possession of proceeds of crime and the Integrated Border Enforcement Teams (IBET) dealing with border enforcement issues including drug interdiction and people smuggling. All of these units have a combination of various experts including police officers, lawyers, accountants, and analysts working together to investigate these serious complex crimes.

¹⁹⁶ In practical terms, we translated the “aut dedere aut judicare” obligation, outside of an extradition situation where we are the receiving state of the request for extradition, to the obligation to submit the file to national authorities for investigation and, where appropriate under national law, prosecution. In Canada the decision to prosecute is governed by the following policy: the evidence must demonstrate that there is a reasonable prospect of conviction and the prosecution must be in the public interest.

- likelihood of continuing offence/danger to the public related to crimes against humanity and war crimes allegations.

C. Other considerations

- no likelihood of removal (credible allegation of risk of torture upon return)
- no likelihood of removal (Canadian Citizen)
- no reasonable prospect of fair and real prosecution in other country
- high profile case (publicity, representations, or interest from other countries)
- no indictment by international tribunal or no extradition request likely
- likelihood of continuing offence/danger to the public not related to crimes against humanity and war crimes allegations
- national interest considerations.

For a myriad of reasons this procedure was untenable because it led to an inordinate number of files to investigate.

Another factor that contributed to the development of the current practice outlined above is that we had to consider the singular situation where Canada has jurisdiction over the offence and the offender, but where it would be unreasonable to expend resources to such an investigation at the expense of other ongoing matters. Canada's legislation provides for broad jurisdiction over offences and individuals where, in some circumstances, the offender need not be present in Canada in order for our courts to assert jurisdiction. For example, Section 8(a)iii of the *Crimes Against Humanity and War Crimes Act* provides Canadian courts with jurisdiction if the victim of the alleged offence was a Canadian citizen.¹⁹⁷

When developing our criteria we had to ask ourselves the following questions: Is it appropriate to expend limited resources if the alleged perpetrator is not in Canada while we have a considerable number of other viable cases related to people currently located in Canada? What if there is no reasonable prospect that the individual can be brought to Canada to undergo a trial?¹⁹⁸ On this issue we decided that it would be consistent with our *no safe haven* policy to give priority generally to those files relating to individuals in Canada. Finally, what if the evidence is not available to Canadian authorities for investigation, assessment or trial?

The articulation of the criteria stated above flows from an analysis of these and other considerations. Perhaps one of the most important, if not *the* most important element in the decision-making matrix is cost. The investigation and prosecution of these matters are multi-

¹⁹⁷ Section 8 of the *Crimes Against Humanity and War Crimes Act* reads as follows:

“A person who is alleged to have committed an offence under section 6 or 7 may be prosecuted for that offence if

(a) at the time the offence is alleged to have been committed,

(i) the person was a Canadian citizen or was employed by Canada in a civilian or military capacity,

(ii) the person was a citizen of a state that was engaged in an armed conflict against Canada, or was employed in a civilian or military capacity by such a state,

(iii) the victim of the alleged offence was a Canadian citizen, or

(iv) the victim of the alleged offence was a citizen of a state that was allied with Canada in an armed conflict; or

(b) after the time the offence is alleged to have been committed, the person is present in Canada”. See *supra* note 191.

¹⁹⁸ Canadian law does not provide for ex-parte criminal trials as the accused has the right to be present at his trial.

million dollar undertakings. As in all major criminal investigations, a reasonable amount of money must be set aside for this work. Furthermore, there are justifiable limits to the amount of money to be attributed to such undertakings.

Conclusion

Like it or not, hard decisions must be made to demonstrate that public funds are spent wisely. Prosecutorial and police investigative discretion are recognized as important principles in the common law law-enforcement paradigm. Public interest considerations weighed by national law enforcement bodies combined with international public policy considerations all contribute to the complexity of establishing and applying criteria. I believe that regardless of the approach adopted and of the decisions made as to whether or not criteria should be developed and employed, national authorities will have to remain flexible in their approach. They must not hem themselves into a mechanical application of a specific standard. I believe that, for some countries, large inventories will have to be managed and difficult decisions made. Creativity and flexibility will be the key while staying true to the rule of law.

Problematic selection and lack of clear prioritization: the Colombian experience

Maria Paula Saffon¹⁹⁹

Unfortunately, the Colombian experience offers a good example of the dangers of ignoring the importance of the existence and effective implementation of criteria for the selection and prioritization of atrocious crimes.²⁰⁰ Indeed, the use of problematic selection criteria and the lack of clear prioritization criteria for the prosecution of crimes committed during the armed conflict risks bringing about impunity under the appearance of the application of justice. However, this disquieting scenario is not irreversible; the risk of impunity may still be mitigated if immediate and appropriate action is taken for the discussion and enforcement of clear, adequately justified and publicly discussed criteria for the prioritization of atrocious crimes.

In this short paper, I attempt to make a first approach to these issues. In the first part, I will offer a very brief account of the Colombian armed conflict, in order to highlight the complexity of the criminal cases under discussion. In the second part, I will describe the legal framework that was recently implemented in the country to face the massive demobilization of paramilitary groups in the country. In particular, I will show that this framework has operated as a very problematic mechanism of selection of the crimes to prosecute. In the third part, I will synthesize the main outcomes that the application of the framework in question has produced until now, and I will argue that they are in part the product of the absence of clear and transparent criteria for the prioritization of cases. In the fourth part, I will insist in the urgency of establishing appropriate criteria for the prioritization of the cases that are currently being investigated, and I will identify some elements of the criminal processes under analysis that may offer the grounds for moving forward in that direction.

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²⁰⁰ Two terminology clarifications seem important. First, for the purposes of this paper, I will rely on (without discussing) the distinction between selection and prioritization of cases offered by Morten Bergsmo in the introductory presentation of the Forum seminar on 26 September 2008 on the basis of which this publication was carried out. According to that distinction, selection may imply de-selection of crimes, whereas prioritization may not. Therefore, while the former leads to the non-investigation and/or non-prosecution of crimes, the latter refers to the order in which cases are investigated and/or prosecuted. Second, I use the expression of atrocious crimes as short for serious violations of international human rights law and to violations of international humanitarian law, which are the notions used by the Colombian legislation.

1. The Colombian armed conflict and the complexities of criminal cases²⁰¹

Several specific traits of the Colombian armed conflict make the investigation and prosecution of the crimes therein committed particularly complex. First, along with the Palestinian-Israeli and the India-Pakistan conflicts, the Colombian is one of the longest armed conflicts in the world.²⁰²

Second, the conflict includes various actors: subversive guerrilla groups,²⁰³ the State,²⁰⁴ and right-wing paramilitary groups,²⁰⁵ all of whom have committed atrocities against the civilian population on a significant scale.

²⁰¹ This section of the paper draws extensively from: Saffon, M.P. and Uprimny, R., *Uses and abuses of transitional justice in Colombia*, in Bergsmo, M. and Kalmanovitz, P. (eds.), *Law in Peace Negotiations*, FICHL Publication Series No. 5 (2009).

²⁰² See Colombian National Commission for Reparations and Reconciliation (CNRR for its Spanish initials), 2006, *Hoja de Ruta [Road Map]*, available at: www.cnrr.org.co/hoja_de_ruta.htm. The most cautious analysts point at 1964 as the contemporary origin of the Colombian conflict, since this was the year in which the Colombian Revolutionary Armed Forces (FARC for its Spanish initials) – the strongest guerrilla group in the country – took up arms. See CNRR, 2006, *Fundamentos Filosóficos y Operativos. Definiciones estratégicas de la Comisión Nacional de Reparación y Reconciliación [Philosophical and Operational Foundations. Strategic Definitions of the National Commission for Reparations and Reconciliation]*, available at: www.cnrr.org.co/cd/pdf/Definiciones_estrategicas.pdf. However, many other analysts point at the period of violence between the liberal and conservative political parties in the 1940s as the origin of the conflict as we know it nowadays. See Sánchez, G. and Peñaranda, R., 1991, *Pasado y presente de la violencia en Colombia [Past and present of violence in Colombia]*, Bogota: IEPRI-CEREC. The length and perpetuation of the conflict can be partially explained by the strong links between illegal armed groups and drug trafficking, as the latter constitutes an almost unlimited source of war financing. For the relationship between conflict and drug trafficking in Colombia, see López, A., 2006, “Narcotráfico, ilegalidad y conflicto en Colombia” [“Drug-traffic, illegality and conflict in Colombia”], in IEPRI (ed.), *op. cit.*

²⁰³ Today, only two subversive guerrilla groups confronting the Colombian State’s authority are still active: the Army of National Liberation (ELN for its Spanish initials), which is currently at the first stages of a peace negotiation with the government still with uncertain results, and the Colombian Armed Revolutionary Forces (FARC, for its Spanish initials), which has not shown any serious desire of holding peace negotiations with the current government, and which in the last years has continued the commission of atrocities against the civil society. However, several other subversive guerrilla groups have confronted the State in previous times, such as the April 19 Movement (M-19 for its Spanish initials), the Popular Liberation Army (EPL for its Spanish initials), the indigenous guerrilla group Quintín Lame, the Workers’ Revolutionary Party (PRT for its Spanish initials), and the Current of Socialist Renewal (CRS for its Spanish initials). The latter groups received amnesties in the 1990s. At varying magnitudes, all these groups have committed atrocities against the civilian population, particularly homicides and kidnappings.

²⁰⁴ It is a notorious fact that the State, through its armed forces, participates in the armed conflict combating guerrilla groups and more recently paramilitary groups. Paradoxically, however, the current government denies the existence of an armed conflict in Colombia and instead talks about a terrorist threat, apparently with the objective of impeding the international political recognition of guerrilla groups as organized armed groups. See Uprimny, R., 2005, “¿Existe o no conflicto armado en Colombia?” [“Is there or is not there an armed conflict in Colombia?”], Plataforma Colombiana Democracia, Derechos Humanos y Desarrollo (ed.); *Más Allá del Embrujo: Tercer año de gobierno de Álvaro Uribe Vélez?* [Beyond Enchantment: Third Year of Álvaro Uribe Vélez’s Government], Bogota, Plataforma Colombiana Democracia, Derechos Humanos y Desarrollo. It has also been judicially proven (both at the national and the international levels) that agents of the Colombian State have been responsible for international human rights and humanitarian law violations either by commission or omission. See, for instance, the five cases that have been decided by the Inter-American Court of Human Rights against the Colombian State, regarding atrocities committed by paramilitaries with the collaboration or omission of agents of the public force. Inter-American Court of Human Rights, *Case of the massacre of 19 merchants v. Colombia*, Ruling of 5 July 2004, series C No. 109; *Case of the massacre of Mapiripán v. Colombia*, Ruling of 15 September 2005, series C No. 134; *Case of the massacre of Pueblo Bello*, Ruling of 31 January 2006, series C No. 140; *Caso of the massacres of Ituango v. Colombia*, Ruling of 1 July 2006, series C No. 149; *Caso of the massacre of La Rochela v. Colombia*, Ruling of 11 May 2007, series C No. 163.

²⁰⁵ In the 1980s, right-wing paramilitary groups appeared with the justification of the need to combat guerrilla groups in a stronger way. However, since the very beginning, paramilitaries committed heinous crimes against civilians, especially including massacres and forced disappearances. There have been more than thirty paramilitary groups in the country. See Office of the High Commissioner for Peace. *Peace Process with the Self-Defences*, available at: <http://www.altocomisionadoparalopez.gov.co/>. Although paramilitary groups are not organized hierarchically and do not have a united or centralized mandate, in 1997 most of them joined to create the Colombian Confederation of United Self-Defences (AUC for its Spanish initials). The leaders of most of the groups included in that Confederation participated in the peace nego-

Third, the conflict has produced approximately three million victims of internal forced displacement,²⁰⁶ and more than 100,000 victims of other atrocious crimes, including massacres, forced disappearances, kidnappings, sexual violence, torture, arbitrary detentions, among others.²⁰⁷ In general, these victims belonged to the least favourable sectors of society before the commission of atrocities, and most of them are under conditions of severe deprivation.²⁰⁸

Fourth, in the contemporary developments of the conflict, there have been no general peace agreements, but rather partial negotiations between the State and some armed groups.²⁰⁹ Therefore, these negotiations have taken place in the middle of conflict, and have not brought about a real or complete transition from war to peace.

Fifth, the most recent of these negotiations, held in 2002 between the Colombian government and most paramilitary groups ascribed to the Colombian Confederation of United Self-Defences (AUC for its Spanish initials), resulted in the demobilization of 35 paramilitary groups and over 30,000 individuals belonging to them.²¹⁰ These have been the first negotiations that have led to the development of a special legal framework intended to investigate and prosecute the crimes perpetrated by demobilized individuals.²¹¹ However, for various reasons,

tations with the government in 2002, and their members have demobilized in the following years. However, quite a few of those groups refused demobilizing and took arms again. Moreover, since the demobilizations, many new paramilitary groups – commonly known as emergent bands or black eagles – have been created, composed both by demobilized and non-demobilized paramilitaries.

²⁰⁶ Official sources talk about a little more than two million forcibly displaced persons in the country. See Acción Social, *Estadísticas de la población desplazada* [*Statistics of displaced population*], available at: www.accionsocial.gov.co/contenido/contenido.aspx?catID=383&conID=556. This is, however, a cipher that only takes into account the number of persons who are officially registered in the government's Displaced Population Only Register and, thus, excludes displaced people who have not been able to register. That is why other sources, such as the United Nations High Commissioner for Refugees, talk about around three million forcibly displaced people. See UNHCR, 2006. *Global Trends Refugees, Asylum-seekers, Returnees, Internally Displaced and Stateless Persons*, June, 2007, available at: www.unhcr.org/statistics.html.

²⁰⁷ For some preliminary calculations of the total amount of victims in Colombia and the cost of their reparation, see C. González, *Prólogo* ["Prologue"], 2007, in *Las cifras del conflicto* [*The ciphers of the conflict*], Bogotá: INDEPAZ; Richards, M., 2007, *Quantification of the financial resources required to repair victims of the Colombian conflict in accordance with the Justice and Peace Law*, Bogotá: CERAC.

²⁰⁸ This is so, perhaps with the exception of some victims of extortion kidnapping. In this, the Colombian situation is similar to that of Guatemala – where the majority of victims belonged to Mayan ethnic groups – and Peru – where the majority of victims were rural – and very different to that of Argentina and Chile – where victims were mostly from the middle classes.

²⁰⁹ There were general peace agreements and consequent amnesties during the period of violence between the liberal and conservative political parties between the 1940s and 1960s. See Colectivo de Abogados José Alvear Restrepo, 2001, *¿Terrorismo o Rebelión? Propuestas de regulación del conflicto armado* [*Terrorism or Rebellion? Proposals for the Regulation of the Armed Conflict*], Bogotá: Colectivo de Abogados José Alvear Restrepo; Sánchez, G. and Meertens, D., 2001, *Bandits, peasants, and politics: the case of "La Violencia" in Colombia*, Austin: University of Texas Press. However, in the contemporary developments of the conflict, there have only been partial peace negotiations with some factions of the conflict, notably with the M-19, EPL, Quintín Lame, PRT and CRS guerrilla groups during the 1990s, and with paramilitary groups in 2002. See Cepeda, I., 2003, "Pacto de lealtades e impunidad" ["Loyalty Pacts and Impunity"], available at: <http://www.derechos.org/nizkor/colombia/doc/cepeda9.html>; Colectivo de Abogados José Alvear Restrepo, *op. cit.* Many have argued that negotiations with paramilitary groups should not be considered a peace agreement, due to the fact that these groups never confronted or even opposed the government. On this see Cepeda, *op. cit.*

²¹⁰ According to the Office of the High Commissioner for Peace, as of today, the number of demobilized paramilitaries is 31,671. Office of the High Commissioner for Peace, *op. cit.*

²¹¹ Indeed, the peace agreements with guerrilla groups in the 1990s brought about individual pardons or the ceasing of criminal procedures for the members of these groups, but excluded from these benefits those individuals who had committed certain atrocious crimes and crimes without a political intention. However, no special criminal procedures were established for the purpose of prosecuting the excluded individuals, who were therefore submitted to the ordinary criminal laws. See Cepeda, *op. cit.*; Colectivo de Abogados José Alvear Restrepo, *op. cit.*

the nature of paramilitary groups imposes difficult challenges to the investigation and prosecution of their crimes.

On the one hand, paramilitary groups are pro-systemic, not anti-systemic actors.²¹² They never intended to overthrow the government or to defeat the army, but rather to support their struggle against guerrilla groups through illegal means. Moreover, for many years the State did not persecute them, and even benefited from their support.²¹³ On the other hand, paramilitary groups have created strong economic and political power structures. In fact, since their origins, they have held strong ties with economic elites and with drug lords, which have allowed them to amass substantive fortunes and to accumulate great extensions of land.²¹⁴ Furthermore, paramilitary groups have established strong relations of collaboration and complicity with State agents, who do not only include members of the public force,²¹⁵ but also agents of intelligence, local politicians, and many national Congressmen.²¹⁶ Finally, paramilitary groups are not organized hierarchically and do not have a united or centralized mandate, but rather function as semi-autonomous cells belonging to a nodal structure.²¹⁷

The aforementioned characteristics of the Colombian situation make the task of criminally investigating and prosecuting the crimes therein committed particularly difficult. Indeed, we are talking an attempt to carry out, in the middle of an armed conflict, the investigation and prosecution of a myriad of crimes, many of them of a systematic nature, committed in a quite long period of time by individuals belonging to different groups, many of which have complex political, economic and military structures.

2. The legal framework of the demobilization process: selection as an impunity strategy?

As was mentioned in the previous section, negotiations between the Colombian government and paramilitary groups in 2002 resulted in the formulation of a special legal framework aimed at dealing with atrocities committed by members of armed groups who decide to demo-

²¹² For this distinction, see L. Múnera, 2006, “Proceso de paz con actores armados ilegales y parasistémicos (los paramilitares y las políticas de reconciliación en Colombia)” [“Peace process with illegal and para-systemic armed actors (paramilitaries and reconciliation policies in Colombia)”], *Revista Pensamiento Jurídico* No. 17.

²¹³ For an analysis of the Colombian legal framework, on the base of which many paramilitary groups were created, see the five cases that have been decided by the Inter-American Court of Human Rights against the Colombian State, regarding atrocities committed by paramilitaries with the collaboration or omission of agents of the public force, *op. cit.*

²¹⁴ See M. Romero, 2003, *Paramilitares y autodefensas. 1982-2003* [*Paramilitaries and self-defences. 1998-2003*], Bogota: IEPRI-Planeta; G. Duncan, 2006, *Los señores de la guerra: de paramilitares, mafiosos y autodefensas en Colombia* [*The warlords: of paramilitaries, mafia and self-defences*], Bogota: Planeta; M.P. Saffon, 2006, *Poder paramilitar y debilidad institucional. El paramilitarismo en Colombia: un caso complejo de incumplimiento de normas* [*Paramilitary power and institutional weakness. Paramilitarism in Colombia: a complex case of disobedience to law*], Bogota: Los Andes University, Master’s thesis.

²¹⁵ On this also see the five cases decided by the Inter-American Court of Human Rights about the State’s responsibility in relation to paramilitary crimes, *op. cit.*

²¹⁶ See Duncan, *op. cit.*; Saffon, *op. cit.* So far, criminal investigations for links with paramilitaries have been opened against 65 Congressmen, which represent 23% of the total of members of the legislative. See “Cifras del escándalo de la parapólitica dejan al descubierto su dimension” [“Ciphers of the parapolitics scandal expose its dimension”], *El Tiempo*, 26 April 2008.

²¹⁷ On this, see M. Alonso, J. Giraldo, D. y Alonso, 2005, “Medellín: El complejo camino de la competencia armada” [“Medellin: The complex way of armed competition”], in *Diálogo Mayor. Memoria colectiva, reparación, justicia y democracia: el conflicto colombiano y la paz a la luz de experiencias internacionales* [*Major Dialogue. Collective memory, reparations, justice and democracy: the Colombian conflict and peace in light of international experiences*], Bogotá: Universidad del Rosario.

bilize either individually or collectively.²¹⁸ This legal framework constitutes an innovation in the Colombian context for at least two reasons. On the one hand, it moves away from the historic tendency to confer amnesties or individual pardons to the actors of conflict²¹⁹ because it establishes that demobilized individuals can receive legal pardons unless they have committed atrocious crimes.²²⁰ On the other hand, instead of leaving the investigation and prosecution of atrocious to the ordinary functioning of the criminal system,²²¹ it creates a special criminal procedure for the investigation, prosecution and judgment of atrocious crimes committed by demobilized individuals, as well as special prosecutorial and judicial units in charge of implementing it.

The main objective of the special criminal procedure, commonly known as the justice and peace procedure, is to grant a substantial reduction of the criminal sentence (a minimum of five and a maximum of eight years, regardless of the quantity and gravity of the crimes committed) to those demobilized individuals who cease their illegal activities, fully and trustworthily confess the crimes in which they participated, and give in assets for the reparation of their victims.²²²

According to the law, in order to verify the satisfaction of these conditions, and particularly the one referred to confessions, the newly created Peace and Law Unit of the General Prosecutor's Office must carry out public hearings in which each demobilized individual delivers her confession.²²³ Subsequent to each public hearing, the Unit must undertake an investigation aimed at determining the veracity of the confession, after the conclusion of which it formulates an indictment.²²⁴ If the Unit establishes that the concerned individual lied or omitted confessing crimes she committed, the indictment will only cover the confessed crimes, and the rest will have to be prosecuted and judged through the ordinary criminal process, thereby losing the benefits of the sentence reduction.²²⁵

After the indictment, the process will pass to the judgment stage, the competence of which falls on the justices of the Superior Tribunals of Justice and Peace, also specifically created by this framework.²²⁶ This stage will start with a hearing of conciliation in which the demobilized individual and her victims will try to reach an agreement regarding the reparations owed to the latter.²²⁷ Subsequently, the competent justice will issue the criminal sentence,

²¹⁸ This legal framework is composed by Laws 782 of 2002 and 975 of 2005, their governmental decrees and the rulings in which the Constitutional Court has analyzed the constitutionality of such laws. Although it was formulated as a response to the negotiations with paramilitary groups, it is also applicable to members of guerrilla groups who decide to demobilize. However, it excludes State agents, who have to be investigated and prosecuted through pre-existing criminal laws that regulate the prosecution of public servants (Law 975 of 2005, Article 2).

²¹⁹ See supra note 209. As was said in note 211, this historic tradition started to break in the amnesty processes carried out in the 1990s in relation with some guerrilla groups, which imposed certain conditions to the concession of pardons and the ceasing of criminal procedures.

²²⁰ Literally, the law refers to "atrocious acts of ferocity or barbarianism, terrorism, kidnapping, genocide, non-combat homicide or homicide against victims in a state of defenselessness". Law 782 of 2002, Article 5.

²²¹ As did the legal framework that regulated the negotiation processes carried out in the 1990s, by contemplating the possibility of prosecution of demobilized individuals who had committed certain atrocious crimes, but not instituting special criminal laws for that purpose.

²²² Law 975 of 2005, Art. 11.

²²³ Law 975 of 2005, Art. 17. The Peace and Law Unit of the General Prosecutor's Office was created by Law 975, Art. 34.

²²⁴ Law 975 of 2005, Arts. 17 and 18.

²²⁵ Constitutional Court, ruling C-370 of 2006.

²²⁶ Law 975 of 2005, Art. 68.

²²⁷ Law 975 of 2005, Art. 23.

which will also contain either the reparations agreement – if it was reached – or an order to repair based on the justice’s discretion.²²⁸ The sentence may be appealed before the Criminal Chamber of the Supreme Court of Justice.²²⁹

Although the previously described legal framework constitutes an important advancement towards the accountability of perpetrators of atrocities, it has been implemented in a way that might lead to significant levels of impunity. This is so because the government issued a decree in which it offered a lax interpretation of the legal disposition according to which demobilized individuals who have committed atrocities cannot receive legal pardons. Such interpretation contemplated that only those demobilized individuals who had been convicted or who were being prosecuted for the commission of atrocious crimes in 2003 would be excluded from those legal pardons.²³⁰ Even though this interpretation seems reasonable at first sight, in a country in which the impunity rate is exceptionally high,²³¹ it risks exonerating many perpetrators of atrocities. Indeed, many of the demobilized paramilitaries who received legal pardons might have participated in the commission of atrocities, but might have not had processes opened against them at the moment in which legal pardons were conceded. To a great extent, this explains why more than 90% (28,544) of the demobilized paramilitaries ended up benefiting from such pardons.²³²

The government’s interpretation can be understood as a measure of selection of atrocious crimes because it excludes certain individuals who might be responsible of the commission of such crimes from criminal investigation and prosecution. It is true that the pardoned individuals are not entirely armoured against prosecution; they could eventually be prosecuted if a criminal investigation proved their participation in an atrocious crime. However, it is highly unlikely that this will happen, given that the Prosecutor’s Office is already overloaded with the task of investigating the more than 3,000 demobilized paramilitaries who did enter the peace and law procedure, so it will probably not have the time and resources necessary to investigate the other more than 28,000 perpetrated atrocities.

For those reasons, this selection measure has been criticized as a veiled amnesty, which brings about impunity under the appearance of accountability.²³³ Apart from this very disturbing feature, the measure is also problematic because it was never presented as a selection measure, and therefore it was never justified nor publicly discussed, in spite of the significance of its impact.

²²⁸ Law 975 of 2005, Art. 24.

²²⁹ Law 975 of 2005, Art. 26.

²³⁰ Decree 128 of 2003, Art. 21.

²³¹ For the different ways in which such rate has been calculated, see E.M. Restrepo and M. Martínez (2004), “Impunidad penal: mitos y realidades” [“Criminal impunity: myths and realities”], *Documentos Cede* No. 24, June.

²³² See the 2008 report elaborated by a group of human rights organizations on the Colombian State’s compliance with human rights standards: VV.AA., *Informe para el Examen Periódico Universal de Colombia* [Report for the Periodic Universal Exam of Colombia], July 2008.

²³³ *Ibid.* See also G. Gallón (2007). “La CNRR: ¿Dr. Jekyll o Mr. Hyde?” [“The CNRR: ¿Dr. Jekyll or Mr. Hyde?”], in Hoyos, G. (ed.), *Las víctimas frente a la búsqueda de la verdad y la reparación en Colombia* [Victims in search for truth and reparations in Colombia], Bogota: Pontificia Universidad Javeriana.

3. The development of the criminal processes: arbitrary prioritization?

In spite of the problematic selection measure referred to in the previous section, a substantial number of demobilized paramilitaries were considered eligible by the government to apply for the criminal benefits of the justice and peace procedure.

The workload that more than 3,000 suspects impose on the Prosecutor's Office is not negligible, especially since the law requires that each render a full confession in an individual hearing, and that the Prosecutor's Office develop an investigation to verify the confessed crimes and to determine whether the individual committed other non-confessed crimes.

To manage this workload, the Peace and Law Unit of the General Prosecutor's Office has three subunits and 22 prosecutors. Each prosecutor is in charge of one or two of the 35 demobilized paramilitary groups, which means that she has to undertake the public hearings, investigation and prosecution of all the members of the group(s) who entered the peace and justice procedure.²³⁴

Two years after the beginning of the justice and peace procedures, 1,431 confession hearings have been initiated, 1,142 have been concluded and 289 are on course.²³⁵ However, the vast majority of the concluded hearings (941 by December 2007) is not the result of an efficient management of the cases, but is rather explained by the fact that the demobilized individuals did not ratify their decision to have recourse to the law.²³⁶

As of today, not a single sentence has been issued. The most advanced process, against alias "El Loro" ("The Parrot"), is currently at the stage of the reparations hearing. However, it is not in any way an exemplary case: at an advanced stage of the process it had to be annulled due to procedural irregularities. Moreover, in spite of being a case against a paramilitary commander who had an important degree of responsibility, he was only indicted for three crimes.²³⁷

At least in part, this discouraging situation has been the result of the absence of clear and adequate criteria for the prioritization of cases to prosecute. Indeed, the fact that many processes have been initiated but that very few of them have advanced efficiently and/or produced substantive results shows that such criteria have not been an important part of the Prosecutor's Office strategy.

This is also confirmed by the fact that it is not possible to identify any clear prioritization criteria in the practice of the Prosecutor's Office. Thus, according to the chief of the Justice and Peace Unit of the Prosecutor's Office, the Unit received 2,695 cases simultaneously in 2006,²³⁸ which means that it could not have applied a first-come-first-served criterion. Moreover, the chief of the Unit has also recognized that confession hearings of commanders and other demobilized individuals have been carried out simultaneously,²³⁹ which means that a seniority criterion has not been used either. On the other hand, it is possible to conclude that

²³⁴ This information was supplied by Mr. Luis González, the Chief of the Peace and Justice Unit, in a written response to an information petition that I presented, on 28 July 2008.

²³⁵ General Prosecutor's Office, 2008, *Informe de gestión despacho del Fiscal General de la Nación* [Management report of the Office of the Nation's General Prosecutor].

²³⁶ See *Report for the Periodic Universal Exam of Colombia*, *op. cit.*

²³⁷ Colombian Commission of Jurists, 2007, *Colombia: el Espejismo de la justicia y la paz* [The Mirage of justice and Peace], chapter 5, Bogota: Colombian Commission of Jurists.

²³⁸ Information supplied by Mr. Luis González, *op. cit.*

²³⁹ *Ibid.*

the gravity of crimes has not been a criterion for the prioritization of cases, given that, as it was mentioned before, prosecutors are developing the cases with a focus on the individuals who pertain to a demobilized group, and therefore are investigating and prosecuting all sorts of crimes committed by those individuals at the same time.²⁴⁰ Finally, it can also be concluded that cases are not being prioritized on the grounds of their readiness for being prosecuted either; otherwise, the most advanced case would not be against “El Loro”, which apparently lacked the necessary evidence to indict the paramilitary leader for more than three crimes.²⁴¹

Therefore, the outcomes of the justice and peace procedures seem to be the product of the lack of clear criteria for the prioritization of cases, perhaps added to the political pressure to produce results, regardless of their quality and effective impact. These results may be counterproductive, as they may highlight the inefficiency of the procedures, worsen the backlog of cases and be interpreted as the product of arbitrary and non-transparent criteria, all of which may discredit the work of the Prosecutor’s Office.

4. The importance of clear, adequately justified and publicly discussed prioritization criteria

The use of problematic criteria for the selection of crimes and the lack of clear criteria for the prioritization of crimes have generated notorious risks in Colombia. Nevertheless, the situation is still far from irreversible, at least with regards to the issue of prioritization. In effect, the justice and peace procedures were undertaken not very long ago, and they still have a lengthy and thorny way ahead. Therefore, immediate action should be taken for the selection and enforcement of clear, adequately justified and publicly discussed criteria for the prioritization of atrocious crimes.

Now, in spite of the utter importance of initiating this discussion in Colombia, no one seems willing to take the first step. The Prosecutor’s Office seems more interested in producing any type of results than in defining a consistent strategy for producing the best and most efficient possible. Moreover, it might fear the strong criticisms that would probably come if it were to raise the issue of criteria only now, as this could be interpreted as an admission of not having used clear or adequate criteria so far. On the other hand, the human rights and victims organizations seem reluctant to support the use of prioritization criteria, probably out of fear that they would end up being used as selection criteria, by indefinitely delaying the solution of certain cases.

Although the former concern is relevant, it is worth noting that the enforcement of clear prioritization criteria might diminish, instead of accruing the risk of indefinite delays of cases. In fact, if prioritization criteria were to be adopted, their selection would necessarily have to be made in a public and transparent way, and would thus allow the participation of all interested parties. Furthermore, such selection would require a solid justification, which, in case of being inadequate or insufficient, could be openly criticized and challenged. Finally, the existence of enforceable criteria would allow the interested parties to exercise a permanent control of their implementation and to challenge the non-application or the inadequate application of the chosen criteria. This would surely reduce the discretion of prosecutors and enhance their accountability.

²⁴⁰ *Ibid.*

²⁴¹ Colombian Commission of Jurists, *op. cit.*

Besides the previous points, I believe there is an important aspect of the way in which the justice and peace procedures have been carried out, which can be used as the basis for the development of a strategy for the adequate prioritization of cases.

As was mentioned before, each prosecutor of the Justice and Peace Unit is in charge of investigating and prosecuting the crimes committed by the members of one (or in some cases two) specific paramilitary group(s). In order to accomplish this task, they have undertaken the strategy of investigating and widely documenting the ways in which each paramilitary group, as a whole, acted in its regions of influence, before initiating the criminal procedures. As a result, they have accumulated very important information about the context of operation of such groups, their internal structures, their logics of operation, and the patterns of crimes they have committed, among others. So far, this information has been accumulated with the aims of contributing to the elucidation of the truth and of adequately planning the subsequent criminal investigations.

However, such information could continue to be accumulated and used with an additional aim in mind: that of identifying the most adequate criteria for the prioritization of cases. Thus, for instance, that information may clarify the command structures of each group, and therefore allow for a prioritization of cases based on the criterion of seniority. Or it may provide relevant information about the criminality patterns of each group, which may allow for the prioritization of paradigmatic cases referred to different types of crimes.

As can be seen, these are only a few preliminary ideas of a subject that should be discussed in greater detail by the Colombian community, but which may offer a useful basis for prompting such discussion.

Criteria for prioritising and selecting core international crimes cases: the situation in Croatia

Vesna Terselić²⁴²

In Croatia criteria for prioritization is not formally adopted. In the prosecution of war crimes in the 1990s one set of criteria was used for war crimes against Croats and another for crimes committed against Serbs. Double standards, typical of many other countries in immediate aftermath of war, became norm. Although a difference in attitude towards crimes committed on different sides of war nowadays is less obvious and striking, it is still there.

Landmark cases are thresholds in becoming less partial on the road to possible insignificant partiality. To mention just two: indicting and later sentencing General Norac and others for war crimes committed in 1991 around Gospić,²⁴³ or indicting and later sentencing of perpetrators for torture in the military prison Lora²⁴⁴ which became possible after political changes linked with elections held on 3 January 2000. Both have contributed to creating a better social climate for other war crimes trials. Gradual – in the beginning, grudging – change of heart of government institutions after 2000 can also be attributed to international pressure and effort to prove that the judiciary in Croatia can prosecute suspected war crimes as efficiently as the International Criminal Tribunal for the Former Yugoslavia (ICTY).

The summary of the latest war crimes trials report states:²⁴⁵

The greatest problems occurring year after year are yet again the adverse political context, the insufficient personnel and technical conditions for the processing of war crimes, and a large number of verdicts reached in absentia. The defects observed in the criminal procedures in progress include repetition of procedures, mistrials, inconsistent court practice and the fact that many of the accused are still being tried in absentia. Inefficient trials marked by frequent and long interruptions and repetitions of procedures, along with an inconsistent policy on detention result in the apathy and disinclination among witnesses to take the stand, and even

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²⁴³ Tihomir Orešković, Mirko Norac and Stjepan Grandić have been sentenced for war crimes (liquidation of civilians at Lipova glavica) and given 15, 12 and 10 years of imprisonment. The first level verdict of the Municipal Court Rijeka from 2003 was approved by Supreme Court in 2004.

²⁴⁴ Tomislav Duić, Tonči Vrkić, Miljenko Bajić, Josip Bikić, Davor Banić, Emilio Bungur, Ante Gudić and Anđelko Botić have been sentenced (torture and liquidation of imprisoned civilians in Military Prison Lora) and given 8, 7 and 6 years of imprisonment. The first level verdict of the Municipal Court in Split from 2006 was approved by Supreme Court in 2007.

²⁴⁵ *Monitoring of War Crimes Trials; A Report for the Period from January to June 2008*, by the Centre for Peace, Non-Violence and Human Rights in Osijek, Documenta and Civic Committee for Human Rights; at <http://www.documenta.hr/eng/documents/report08.pdf>.

greater frustration of the victims and the injured persons. The worrying practice in the work of the State Attorney's Office has been the issuance of imprecise indictments against a large number of the accused persons, some of whom are not charged with a single specific crime. Consequently, investigations end up being conducted during the main hearing, and prosecutors repeatedly change the indictments (sometimes to the extent that none of the original incriminations remain included), which leads to dismissals of cases or acquittals. In more than a half of the war crime cases reported to the State Attorney's Office, the perpetrators have remained unknown. We urge that the role and capacity of special units for war crimes be strengthened, and pre-trial investigations and other investigating actions be intensified through increasing the capacity of the Ministry of the Interior both at the national level and the level of police departments.

Findings presented in a *Transitional Justice in Post-Yugoslav Countries* report still point to "the bias that has for years characterized the judiciary of the Republic of Croatia in trials for war crimes primarily concerns ... the application of unequal criteria, depending on ethnic background of suspects and victims, when deciding which offences will be prosecuted as war crimes".²⁴⁶

Recently, the State Attorney mapped all reported cases in Croatia. Data on the processing war crimes presented in the annual report of the State Attorney of Croatia²⁴⁷ shows that until 1 April 2008, 3,827 criminal proceedings have been started and 1,776 indictments issued. For the first time, data has been organized by particular situations (e.g., war crimes in Vukovar, war crimes in Osijek etc.) and not by name of suspected or indicted person. The total number of war crimes presented in this way (committed on Serbian and Croatian sides of the war in Croatia) and registered by the State Attorney is 703, for which proceedings have started regarding 301 reported war crimes. For 402 crimes perpetrators are not known and proceedings have not been started; 391 investigations are still ongoing; and 255 investigations have been interrupted. Some 645 suspects were indicted without verdict, and 615 perpetrators have been sentenced.

Since 2001, the highest judicial instances of the Republic of Croatia work on improvement of standards of war crimes prosecution by several measures:

- synchronizing the activities of the Croatian judiciary with the Statute of the International Criminal Court;
- analysing and revising current practice of the State Attorney, by its insistence on ceasing a practice of conducting trials in absence and by opening investigations for crimes committed against ethnic non-Croats and investigations of those accountable on the basis of command responsibility;
- the corrective role of the Supreme Court of the Republic of Croatia;
- setting the legal conditions and strengthening institutional prerequisites for witness protection and support; and
- strengthening the regional co-operation on war crime trials.

²⁴⁶ *Transitional Justice in Post-Yugoslav Countries, Report for 2007*, Humanitarian Law Center and Documenta (eds.), p. 8 (http://www.documenta.hr/dokumenti/trans_eng2007.pdf).

²⁴⁷ *Izješće o radu državnih odvjetništava u 2007. godini*, lipanj 2008.

During the last three years, between 23 and 35 first-instance trials for criminal acts against values protected by international humanitarian law have been conducted annually in Croatia. Despite the pressure exerted by a part of the public – and facing serious political resistance as well as obstructions within the state institutions – the war crimes which were committed by members of Croatian military units have also been brought to courts. Croatian Army generals have been among those charged for crimes pursuant to command responsibility, e.g., the case of war crimes in Medački džep, against Mirko Norac and Rahim Ademi, transferred to Croatia from the ICTY; the case of war crimes in Osijek against Branimir Glavaš *et al.*; the case of war crimes in Cerna against Tomislav Madi *et al.*; and the retrial in the case of war crimes in Paulin Dvor against Enes Viteškić.

Problems that have arisen and have been reported by human rights organisations²⁴⁸ are the following:

- negative consequences of the practice of conducting trials against accused persons in absence during the early 1990s;
- numerous reinstitutions of first-level proceedings due to verdicts based on insufficiently established facts;
- a significant number of committed crimes still has not been investigated or prosecuted; and
- insufficient support for witnesses and insufficient visibility and inclusion of victims in criminal proceedings.

The reported deficiencies point to the fact that the current achievements of the judiciary in conducting war crimes trials coincide with the peaking of the current capacity and what internal organization can presently allow. Therefore, the human rights organisations which monitor war crime trials advocate for:

- strengthening of the capacity and roles of the war crimes investigation centres;
- intensification of investigations;
- analysis of adjudication processes in the 1990s, especially verdicts brought in the absence of the accused and the cancellation of criminal proceedings through application of the General Amnesty Law;
- improvement of victims' support and position of victims in the criminal proceeding; and
- further development of regional co-operation between the judicial systems in war crimes trials.

Personally I am not convinced that criteria for prioritization should be proposed in a situation where crimes are neither fully documented nor investigated. A complete mapping of war crimes, although very much needed, was not yet done in Croatia. Unfortunately, a full overview of the human losses – disclosing the identity of each killed or missing citizen of Croatia – was not done either. The names of all victims on the different sides of the war in Croatia are not known.

In my opinion, a precondition for setting criteria would be the full establishment of relevant facts, including documenting the human losses and subsequent mapping of the war

²⁴⁸ *Praćenje suđenja za ratne zločine, izvještaj za 2007*, Centar za mir, nenasilje i ljudska prava Osijek, Documenta, Građanski odbor za ljudska prava, Hrvatski helsinški odbor.

crimes. Croatian institutions and society still have some way to travel to accept that all suspected war crimes, on different sides of the war, have to be investigated.²⁴⁹ Judging by the current judicial practice, achieving that goal seems closer now than in the 1990s, but it still does not seem to be within easy reach, although human rights organizations are insisting on achieving it in foreseeable future.

²⁴⁹ Support for prosecution of war crimes in Croatian society, at least on general level, is not insignificant. One of the findings of public opinion research on dealing with the past done by *Documenta* in 2006, showed that 61% of the interviewed persons were of the opinion that all war crimes should be prosecuted.

Human rights courts in Indonesia: a brief outline

Fadillah Agus²⁵⁰

Background

Indonesia is one of the largest countries in territory and population. The archipelago state which consists of more than 17,000 islands is now populated by more than 230 million people. There are more than 300 ethnic groups and more than 500 local dialects in this biggest country of South-East Asia. Indonesia is one of the initiators of the Non-Aligned Movement – it plays an active role in this movement.

Indonesia was under colonization by the Dutch for more than 350 years and during World War II was occupied by Japan for about 3.5 years. After a long struggle against the Dutch and Japan, Indonesia succeeded to proclaim its independence on 17 August 1945.

It is no wonder, given the long history of colonization, that the legal system of Indonesia is very much influenced by the Dutch legal system. The existing Civil Code, Penal Code and Military Penal Code come from the Netherlands. More recently, some Anglo-American legal systems have influenced Indonesian law, particularly in the fields of business, trade and commercial law. In addition, as there are many ethnicities and cultures, the legal system of Indonesia is also influenced by the so-called “Adat” law (local law which is born and developed within communities in particular areas and groups). Also, as the largest Muslim country in the world, there is a strong influence of Islamic law, particularly in the field of family law.

From independence up until now, the country has seen some insurgencies and separatism – ethnic as well as religious conflicts. The Aceh freedom movement was one of the famous insurgencies. It was settled by the Helsinki process. Another well-known conflict is that of East Timor which led to the establishment of the state of Timor Leste. There are still active separatist movements within the country, i.e., the ones in Papua and in the Moluccas. In addition, a religious conflict occurred in the Moluccas and Sulawesi, and an ethnic conflict (Madurese against Dayak) in Kalimantan. There was also a Communist insurgency in 1965 which led to hundred thousands killed, both on the side of the Communist Party and nationalist and Muslim groups.

Right after independence, Indonesia was led by the famous President Soekarno and his Vice-President M. Hatta. Following the failure of the Communist Movement in 1965, Soekarno stepped down from the Presidency and was replaced by Soeharto. The smiling General Soeharto led the country for more than 30 years. This period is known by the Indonesian

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people as the authoritarian regime of President Soeharto. The country was under the strong control of Soeharto. He used the military, the police and government agencies (particularly the intelligence) as tools to control the country. There are many accusations of human rights violations committed during Soeharto's regime.

Legal framework

President Soeharto was toppled by the reform movement in 1998. The latest president, Mr. Yudhoyono, was elected through a direct, peaceful election. The reform process which started in 1998 has been marked by greater interest of the people in human rights issues. The People Consultative Body (the highest institution in the country with jurisdiction to amend the Constitution) issued a decree on human rights. Then the country issued Laws 39 of 1999 and 26 of 2000 on human rights and the Human Rights Court. The National Commission of Human Rights (Komnas HAM) was also established right after Soeharto's fall. Since then, there has been a significant human rights movement in the country.

As opposed to human rights courts elsewhere in the world, the Indonesian Human Rights Court – regulated by Law 26 of 2000 – is close to being a Penal Court which has the power to give penal sanctions. According to Law 26, there are two types of human rights court: the permanent Human Rights Court which has jurisdiction to process cases of gross violations of human rights committed after the passing of the Law; and the Ad Hoc Human Rights Court which has jurisdiction to hear cases of gross violations of human rights committed before the issuance of the Law, meaning that the latter is in a way using a retroactive principle.

Retroactivity is normally not acceptable in criminal justice, but there are some exceptions. According to Law 26 of 2000, an Ad Hoc Human Rights Court has to be established by Presidential Decree after the recommendation by Parliament to the President.

As mentioned above, the Human Rights Court under Law 26 has jurisdiction over gross violations of human rights, i.e., genocide and crimes against humanity. No elements of crime are described under said Law. There is also no special procedural law for the Court; it applies the ordinary criminal procedural law. Komnas HAM is the fact-finding body of the Court. It takes the first step when there is an accusation of gross violations of human rights. The formal investigation and indictment will be made by the Attorney General's Office, and the case will be heard by five Judges (two career judges and three ad hoc judges).

Cases

Up until now, there have been three main clusters of cases processed before Indonesian human rights courts: the East Timor, Tanjung Priok and Abepura cases. The East Timor and Tanjung Priok cases were heard by the Ad Hoc Human Rights Court (because the alleged crimes occurred prior to the issuance of Law 26 of 2000), while the Abepura cases were heard by the permanent Human Rights Court as the charged offences occurred after the issuance of Law 26.

There have been 12 cases with 20 defendants before the East Timor Ad Hoc Human Rights Court. Most of the accused were from the Indonesian National Military (TNI). The other defendants were from the Indonesian Police (Polri) and civilians. All the indictments involved crimes against humanity, while the modes of liability used in the indictments were individual criminal responsibility and command responsibility.

The Ad Hoc Human Rights Court of East Timor was established pursuant to Presidential Decree Number 53 of 2001, which was strengthened by Presidential Decree Number 96 of 2001. These regulations constitute the legal basis to investigate human rights violations that occurred in East Timor. According to Presidential Decree Number 96 of 2001, the Court has jurisdiction over crimes committed in three areas (Dili, Liquica and Suai) between April and September of 1999. All tribunals have operated out of the District Court of Central Jakarta.

To date, all defendants have been acquitted. Six defendants were sentenced by the court of first instance, but then acquitted by the Appeals and Supreme courts. The more controversial case was the one against Major General Adam Damiri (Commander of the Regional Command of Bali and Nusa Tenggara), who was ordered to be released by the Attorney General.

Some say that the Court has failed to bring justice, particularly to the victims. However, the good intention of the government of Indonesia to process the cases should be appreciated. This was the first time that Indonesia tried such cases – the Human Rights Court itself had to learn by doing. The lack of capacity in the Attorney General's Office was the main reason that led to its failure in proving its indictments.

The Tanjung Priok case²⁵¹ was started by the arrest of members of Musholla (small mosque) As Saadah in the Tanjung Priok area, in North Jakarta. They were accused of damaging the motorcycle of Sgt. Hermanu because, according to members of Musholla, Sgt. Hermanu was entering the mosque without taking off his shoes (which is normal procedure for everybody). The police then transferred the four persons to the Military District Command of North Jakarta. Some days later, members of As Saadah, led by Amir Biki, came along to the North Jakarta Military District Command with the intention to ask for the release of their fellow members. On their way to the District Command, they were confronted by some ten military personnel led by Sgt. Mascung. The military personnel unexpectedly opened fire directly at the group, wounding 55 persons and killing 24. The leader of the group, Amir Biki, was killed. Without informing their families, the dead were buried by the military in several graveyards. Some of them did not have a gravestone. Those who were wounded were taken to the Gatot Subroto Military Hospital by military truck; others were treated at Koja Hospital and Suka Mulia Hospital before being transferred to Gatot Subroto Hospital. The wounded victims were transferred to several military posts in Jakarta shortly after the treatment and recovery. The military took them into custody and tortured them during the detention.

In 2000, Komnas HAM formed a commission for the inquiry of human rights violations in Tanjung Priok (KP3T). On 11 October 2000, KP3T released a report which stated that there were at least four severe violations of human rights which occurred during the incident. Those violations are summary killing, unlawful arrest and detention, torture, and involuntary disappearance. The whole series of incidents was the responsibility of perpetrators in the field and the commanders. Based on the report, there were at least 23 people who were responsible as field perpetrators and operational commander in the incidents. The suspects were divided into three categories: field perpetrators; operational commander in charge; and commander who did not take any action to prevent the violations.

Soon afterwards, Komnas HAM submitted its final report to the Attorney General's Office. The investigation by the Attorney General's Office was completed in July 2003. After 19 years, in September 2003, the Human Rights Court started its proceedings. The Court examined 15 defendants who were charged as field perpetrators and operational commander.

²⁵¹ Thanks to Ben Biran Ananda who help to make some research on the Tanjung Priok case.

The first Tanjung Priok trial was against defendant Sutrisno Mascung and ten military members, including Pranowo, R.A. Butar-Butar and Sriyanto. In 2004, the first instance sentenced Butar-Butar to ten years imprisonment. Mascung was sentenced to three years, and his members got two years. The prosecutor did not prove the guilt of Pranowo and Sriyanto. In the second instance in 2005, the judge acquitted Butar-Butar and Mascung. In 2005-06, the Supreme Court ordered the release of all defendants.

The judges at the first instance had included compensation for the victims in their judgment. This had in the end no effect as the Appeals and Supreme courts annulled the judgment.

The Abepura case was processed by the permanent Human Rights Court. The defendants were two members of the police; one was the commander of a special police task force (Mobile Brigade) and the other the Head of the District Police at Papua. Following demonstrations and incidents between students and the police, the police went to homes and arrested some of the students, most of whom came from particular tribes and areas in Papua. Torture occurred during the operation and at the place of detention in the police station.

Crimes against humanity and command responsibility were at the core of the indictment brought by the Attorney General's Office. The two police officers were acquitted by the judges, as they were of the opinion that the Attorney General had not proven that crimes against humanity were committed by the defendants. The judgment says that the element of systematic or widespread attack directed against the civilian population was not proven, so the judges did not continue with the modes of liability and ordered the release of the defendants.

Case selection and prioritization

The three clusters of cases discussed above – East Timor, Tanjung Priok and Abepura – show that no defendant has been found guilty by the human rights courts so far. This should not lead to the pessimistic conclusion that it does not make sense to try to improve human rights courts in Indonesia. There are some 20 cases that potentially qualify as gross violations of human rights which would fall within the jurisdiction of the human rights courts.

One needs to consider how the judicial system is working in the human rights cases. When there is an allegation of gross violations of human rights, Komnas HAM will make an inquiry if there is sufficient evidence (Article 91 of Law 39 of 1999). Based on Article 19 of Law 26 of 2000, Komnas HAM can start its inquiry if, based on the nature and scope of the alleged incidents, it can be reasonably suspected that one or more gross violations of human rights were committed.

Based on the case practice to date, we can identify some criteria used by Komnas HAM to select and prioritize cases:

- the pattern, scope and geographical range of crimes (East Timor and Tanjung Priok cases);
- the victim's approach and impact on the community (Tanjung Priok cases);
- the attention of the community towards the case, leading to political pressure (East Timor and Abepura); and
- the degree of involvement of the state apparatus.

Recently, Komnas HAM has used the Case Matrix (an ICC tool) as one of its supporting tools to select a case.

Based on the inquiry made by Komnas HAM, the Attorney General's Office conducts the investigation in the case. Article 12 of Law 26 of 2000 stipulates that the Attorney General is the investigator and prosecutor for gross violations of human rights. According to Articles 106 and 140 of the Code on Criminal Procedure, the investigation and indictment will be made by the Attorney General if there is sufficient evidence in the case. As mentioned above, there is no special procedural law that applies as a supplement to Law 26 of 2000. The ordinary criminal procedure law applies (Article 10 of Law 26).

One of the critical issues in cases involving gross violations of human rights is the criteria for selection and prioritization of cases. There are no written guidelines that have to be followed by Komnas HAM when it selects and prioritizes cases. Such guidelines would seem even more important for the Attorney General's Office. The East Timor and Tanjung Priok cases are good examples of cases where there were significant differences of opinion between Komnas HAM and the Attorney General's Office on selecting the case to be processed by the Court. There were substantial numbers of persons to be prosecuted. In the East Timor cases the Attorney General's Office reduced the number of cases that was presented by Komnas HAM for prosecution.

Laws 26 of 2000 and 39 of 1999 do not stipulate criteria for the selection and prioritization of cases. There is no regulation or guideline which has to be followed on this matter. In practice, the selection and prioritization of cases falls within the discretion of the Attorney General's Office. This can lead to intervention in the selection of cases based on political or security considerations. Usually there is misuse of a national interest consideration to influence the selection and prioritization of the gross violations of human rights cases.

There is therefore a need to develop guidelines or even regulation concerning the selection and prioritization of human rights cases that should apply to the institutions involved in the proceedings. Furthermore, Law 26 of 2000 should be amended to include the category of war crimes and special procedural provisions for human rights cases, as well as the elements of the crimes provided for in the Law.

The Republic of Serbia Office of the War Crimes Prosecutor has no strategy for prosecuting war crimes

Nataša Kandić²⁵²

The Republic of Serbia Office of the War Crimes Prosecutor was founded on 1 July 2003 when the Law on War Crimes was passed. In its five years of work, it has filed indictments against 91 individuals; 24 have been convicted in first instance proceedings; and five have been convicted in final proceedings.

I will try to present the work of the Serbian Office of the War Crimes Prosecutor in the context of a strategy for prosecuting war crimes and therefore point to the reasons or criteria the prosecution has set in the selection of cases for investigation and indictment. I seek to analyse whether the Office has priorities and a strategy in the prosecution of war crimes.

The *Ovčara* case

The Office of the War Crimes Prosecutor filed the first indictment on 4 December 2003, against 16 members of the Serbian Territorial Defence Unit and the “Leva Supoderica” volunteer unit for war crimes against prisoners of war committed on 20 November 1991 at the Ovčara farm in Croatia. There are serious indications that the prosecution selected the case of murder of 250 Croat prisoners of war for two reasons: (i) The Hague Office of the Prosecutor had already convicted three officers of the former Yugoslav Peoples Army (JNA) for the same crime and the prosecution could obtain relevant documents and organize an efficient investigation in a short period of time; and (ii) by initiating criminal proceedings against 16 immediate perpetrators, the Office of the Prosecutor attempted and partially succeeded in alleviating the criticism of the Serbian public caused by the arrest of the former JNA officers with the explanation that the trials of immediate perpetrators would show that the accused officers were innocent.

Even though the court adduced numerous pieces of evidence proving, among other things, the accountability of several JNA officers for the crime committed in Ovčara, the Office of the War Crimes Prosecutor has not yet indicted a single officer. The Serbian Supreme

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Court rendered a decision on 18 October 2006 reversing the War Crimes Chamber's first instance verdict of 12 December 2005 and returned the case for retrial. In the meantime, three more persons were indicted for the commission of the same crime – proceedings against these three individuals were joined with the main case. The national trial had not finished by the end of 2008, while the trial against the three officers conducted before the Hague Tribunal was completed by the first instance Trial Chamber: the primary accused was convicted to 20 years of imprisonment, the secondary accused to five years of imprisonment, and the third accused was acquitted of all charges.

The *Zvornik* case

In mid-2004, the Hague Tribunal Office of the Prosecutor transferred a partially investigated case of war crimes committed in Zvornik Municipality in eastern Bosnia and Herzegovina (BiH) to the Serbian Office of the War Crimes Prosecutor. This case required further investigation against seven individuals for war crimes against the civilian population. The indictment was filed on 12 August 2005 against eight individuals (one has deceased in the meantime). After the indictment was filed, the Humanitarian Law Center (HLC) and the Association of Family Members of the Killed and Missing in Zvornik Municipality asked for a meeting with the Office of the War Crimes Prosecutor. The meeting took place in December 2005 during which they protested that the indictment did not include the most serious crime after the genocide in Srebrenica: the banishment of the Muslim population from villages in Zvornik Municipality, separation of men from women and children on 1 June 1992, imprisonment of these men in the Technical High School in Zvornik, and finally the execution of approximately 700 prisoners. The Chief Prosecutor and the Acting Prosecutor promised that they would collect documents and decide on opening an investigation on the basis of this material. The HLC continued putting pressure on the Office of the War Crimes Prosecutor, using every opportunity in the media to mention that it demands that the investigation of the most serious crime after the genocide in Srebrenica, the execution of 700 prisoners, be initiated.

The trial of seven defendants in the case Zvornik I was completed on 12 June 2008 when the verdict of four accused was announced. The trial against the accused Grujić and Popović was separated by a trial chamber decision of 26 May 2008. The indictment against these two individuals – Branko Grujić, the former president of the Provisional Government, Crisis HQ, Mayor, and president of the War HQ in Zvornik, and Branko Popović, the former commander of the Zvornik Territorial Defence Unit – was announced on 22 October 2008. The indictment included the acts from the previous indictment as well as the acts of forcible separation and taking hostage of 600-700 Muslim civilians from villages in Zvornik Municipality who were executed in various manners after their detention. The request and constant pressure by the HLC and the Association of Family Members was fruitful and contributed to the initiation of a trial for one of the most serious war crimes committed in BiH.

The *Scorpions* case

The Office of the War Crimes Prosecutor filed an indictment against the commander and four members of the Scorpions unit on 7 October 2005 for war crimes against the civilian population on the basis of video footage of the execution of six Muslims which the HLC obtained and handed over to the prosecution on the condition that it not file any indictment before the owner of the tape had left Serbia.

After the witness (the owner of the video tape) received protection by the Hague Tribunal and left Serbia, the HLC demanded that the prosecution initiate proceedings against members of the Scorpions who were shown in the tape killing unarmed Muslims. On 1 June 2005, one of the ICTY prosecutors – Mr. Geoffrey Nice QC – presented a part of the video footage showing the execution of six Muslims in the Milošević case before the Tribunal. The HLC decided to play the entire footage. Several TV stations broadcast the footage the same evening. That night the police arrested five members of the Scorpions. A Trial Chamber rendered a verdict on 10 April 2007, becoming final on 13 June 2008, except in so far as the defendant Aleksandar Medić was concerned.

The Tuzla column case

The Office of the War Crimes Prosecutor filed an indictment against the Bosnian Croat Ilija Jurišić on 9 November 2007 for using illegal means of fighting. He was charged with having ordered the attack on a JNA column despite the previously reached agreement between the representatives of the Tuzla military and civilian authorities, and is thus said to have utilized means of combat prohibited by international law. At least 92 members of the JNA were killed on this occasion and at least 33 wounded.

Ilija Jurišić was arrested at Belgrade Airport on 11 May 2007. Up until that moment he had been in Serbia on numerous occasions. The BiH Ministry of Justice demanded his extradition and transfer of his criminal case,²⁵³ recalling Article 30 of the European Convention on the Transfer of Proceedings in Criminal Matters, acceded to by Serbia and BiH. However, the Belgrade District Court War Crimes Chamber rejected this request and never forwarded any official document on its decision.

The Office of the War Crimes Prosecutor filed (and announced in the media) the indictment against Ilija Jurišić before the investigation was closed. On that day (9 November 2007), the BiH Office of the Prosecutor, upon the request of the War Crimes Chamber, examined witnesses in the case in the presence of an investigative judge from the Belgrade District Court War Crimes Chamber (Milan Dilparić) and the Deputy Prosecutor for War Crimes (Dragoljub Stanković).

The filing of an indictment before closing the investigation and the persistent refusal by the Serbian judicial authorities to transfer the case to the BiH Office of the Prosecutor that conducts an investigation into the same event, brings us to the conclusion that the Serbian Office of the War Crimes Prosecutor was influenced by political considerations and the need to show to the public that it does not prosecute Serbs only. The Serbian Radical Party and other extremely nationalistic parties and groups had attacked the prosecution on this basis on numerous occasions.

The Lekaj case

Anton Lekaj, an Albanian from Kosovo and a former member of the Kosovo Liberation Army (KLA), was arrested in Montenegro and transferred to Serbia on the basis of a Serbian Ministry of Interior warrant. The Office of the War Crimes Prosecutor filed an indictment against

²⁵³ “Any Contracting State which, before the institution or in the course of proceedings for an offence which it considers to be neither of a political nature nor a purely military one, is aware of proceedings pending in another Contracting State against the same person in respect of the same offence shall consider whether it can either waive or suspend its own proceedings, or transfer them to the other State”, Article 30 of the European Convention on the Transfer of Proceedings in Criminal Matters.

Lekaj on 7 July 2005 for crimes against Serb civilians. The final verdict of Lekaj was rendered on 6 April 2007. He was convicted to 13 years of imprisonment. The HLC demanded that the Office of the War Crimes Prosecutor transfer the case to UNMIK, but the Office of the Prosecutor claimed that it has the jurisdiction to prosecute individuals responsible for war crimes committed in Kosovo.

The *Morina* case

Sinan Morina, an Albanian from Kosovo, was arrested in Montenegro and he was transferred to Serbia on the basis of a Serbian Ministry of Interior warrant. As in the case of Lekaj, the HLC advised the Office of the War Crimes Prosecutor to transfer the case to UNMIK, but it firmly held its position that it has jurisdiction to prosecute war crimes committed in Kosovo.

It filed an indictment on 13 July 2007 for the attacks in July 1998 in Kosovo which resulted in deaths of a certain number of Serbs. The Trial Chamber completed the trial on 20 December 2007 with an acquittal, with the explanation that the indictment was general and that it was not proven that the defendant had committed what he was charged with.

As in the *Lekaj* case, there are indications that the Office of the War Crimes Prosecutor quickly filed an indictment in this case only to prove to the public and associations of victims' family members that it is able to serve justice for Serbian victims.

The *Bytyqi* case

The Office of the War Crimes Prosecutor filed an indictment for the murder of three Bytyqi brothers, Kosovo Albanians and US citizens, on 24 August 2006, under pressure from the US Department of Justice. The trial is conducted against two members of the Ministry of Interior who aided the commission of this crime and not against the masterminds or immediate perpetrators.

The *Orahovac* case

Two members of the Serbian Ministry of Interior (a reserve police officer, Boban Petković from Velika Hoča, and a regular police officer, Đorđe Simić from Orahovac) were indicted on 12 November 1999 for murder (Boban Petković) and complicity (Đorđe Simić). The Deputy Prosecutor of the District Prosecution of Požarevac, Dobrivoje Perić, filed the indictment. He was a prosecutor in the District Prosecution Office of Prizren prior to June 1999. The Trial Chamber, presided over by Judge Jovica Mitrović, sentenced Boban Petković to four years and ten months of imprisonment for two murders, while Đorđe Simić was sentenced for complicity to one year of imprisonment. The Supreme Court of Serbia reversed the verdict on 18 December 2001, ordering a retrial.

The District Prosecutor in Požarevac (Dimitar Krstev) amended the indictment on 19 February 2003 by indicting Boban Petković for war crimes against the civilian population pursuant to Article 142(1) of the Criminal Code of Federal Republic of Yugoslavia; and Đorđe Simić for complicity in such war crimes pursuant to Articles 142(1) and 24.

On 21 August 2003, the Trial Chamber President, Judge Jovica Mitrović, rendered a verdict finding Boban Petković guilty of war crimes committed against civilians and sen-

tenced him to five years of imprisonment and imposed a safety measure of compulsory psychiatric treatment in a medical institution. Đorđe Simić was acquitted.

On 25 May 2006, the Supreme Court of Serbia, deciding on appeals of the District Public Prosecutor in Požarevac and the defence counsel, reversed the verdict in its entirety and returned the case to the first instance court for retrial. The main hearing started on 5 December 2007 before the Prizren Trial Chamber located in Požarevac. The trial is in progress.

It is not possible to make a certain conclusion as to why the Office of the War Crimes Prosecutor was not interested in taking over this case. This is the only case in which witnesses and victims from Kosovo are not participating.

The *Rambo* case

The Hague Tribunal transferred this case to the Office of the War Crimes Prosecutor according to Rule 11*bis* of the ICTY Rules of Procedure and Evidence. Vladimir Kovačević, *aka* Rambo, is indicted for war crimes against the civilian population pursuant to Article 142(2) and (1) and Article 22 of the Criminal Code of the Federal Republic of Yugoslavia. As a JNA officer under the command of the convicted Admiral Miodrag Jokić and convicted General Pavle Strugar, he allegedly ordered soldiers in his unit to attack the Old Town of Dubrovnik by indiscriminate shelling in which two civilians (Pavo Urban and Tonči Skočko) were killed and three other civilians were wounded, six buildings were destroyed and 46 more buildings were damaged.

The trial had not started by the end of 2008 because the indictee was under medical treatment.

The *Slunj* case

Based on the evidence collected by the Republic of Croatia Attorney General's Office and on the basis of investigation conducted, the Office of the War Crimes Prosecutor of the Republic of Serbia indicted the Serb Zdravko Pašić on 8 November 2007 for war crimes against the civilian population (murder of a Croatian doctor) in the town of Slunj in Croatia. The District Court in Karlovac sentenced Zdravko Pašić *in absentia* in 2001 to 12 years of imprisonment. They also sentenced Milan Grubješić who is currently serving his sentence in Croatia.

The *Velika Peratovica* case

On the basis of the evidence of the Office of the Prosecutor of the Republic of Croatia and on the basis of investigation conducted, the Office of the War Crimes Prosecutor indicted the Serb Bora Trbojević for war crimes against Croat civilians (murder of five civilians) on 21 May 2008.

The *Lovas* case

The trial of a group of 17 Croatian Serbs for war crimes against Croatian civilians committed in October 1991 has been conducted before the District Court in Vukovar *in absentia* for years. The primary accused, Ljuban Devetak, contacted the HLC in 2005 for help in order to, as he said, prove his innocence. He expressed his willingness to be prosecuted before the Hague Tribunal or before the Court in Serbia while he finds the Court in Croatia biased. The

HLC conducted an interview with Devetak and forwarded it to the Vukovar District Court and the Office of the War Crimes Prosecutor of the Republic of Serbia, thus introducing them to Devetak's position.

The Office of the War Crimes Prosecutor started co-operation with the Office of the State Prosecutor in Vukovar, who in turn has turned over all the evidence they possessed. After investigation, the Serbian Office of the Prosecutor on 28 November 2007 indicted 14 individuals, former JNA, Territorial Defence and "Dušan Silni" (Dušan the Mighty) members, for war crimes committed against Croatian civilians (murder of 70 civilians) in October and November 1991 in Lovas, Croatia. This is the first indictment against officers and reserve members of the former JNA.

The *Suva Reka* case

On 25 April 2006, the Office of the War Crimes Prosecutor indicted eight members of the Serbian Ministry of Interior, including the Assistant Commander of the Gendarmerie, who was also a former commander of the Suva Reka Police Station, and the assistant of the aforementioned police Commander, for the murder of 49 members of the Berisha. This is the first indictment against a high-ranking member of the police (Gendarmerie Assistant Commander). It is interesting that the indictment covers only one event (murder of 49 members of the Berisha family), even though other murders and serious criminal offences were also committed at the same time for which there are indications that high-ranking members of the military of the Federal Republic of Yugoslavia were involved in their commission.

The *Podujevo* case

This is the second indictment against members of the Scorpions for war crimes committed against Albanian civilians. According to the first indictment from 2002, one member of the Scorpions was convicted on the basis of "insider" evidence and the children who survived, whose participation was facilitated by the HLC.

Three years after the final verdict of Saša Cvjetan (the primary accused), the Office of the War Crime Prosecutor indicted four more members of the Scorpions incriminated by the "insider" mentioned above.

The *Banski Karlovac* case

According to the Agreement on Cooperation in the Prosecution of Perpetrators of War Crimes concluded between the Croatian Attorney General's Office and the Serbian Office of the War Crimes Prosecutor, and pursuant to the Law on co-operation between the two countries in legal assistance in civil and criminal matters, the Office of the War Crimes Prosecutor took over the case and indicted Pane Bulat and Rado Vranešević for war crimes against Croatian civilians (murder of six civilians) on 16 April 2008.

The *Pakšec* case

On 9 June 2006, the Novi Sad District Public Prosecutor Veronika Vencel indicted Slavko Petrović, Petar Ćirić and Nikola Dukić for murder (Article 47(2) lines 4 and 6 of the Criminal Code of the Republic of Serbia) and rape (Article 103(2) and (1) of the Criminal Code of Ser-

bia) for killing four members of the Pakšec family in Croatia on 9 April 1992, and for forcing a woman of Serbian nationality to sexual intercourse. The trial was closed to the public.

The Trial Chamber presided over by Judge Zoran Drecun rendered its verdict on 19 October 2007 and found the indictee Slavko Petrović guilty of both charges and convicted him to 40 years of imprisonment. Nikola Đukić was sentenced to 30 years of imprisonment taking into consideration that he pleaded guilty. Petar Čirić was acquitted for the charges of rape and sentenced to 13 years of imprisonment. The appeal procedure was pending at the end of 2008.

Investigation and pre-trial proceedings

According to information from the Serbian Office of War Crimes Prosecutor, 13 investigations are pending, three of which relate to war crimes committed in Kosovo. Excluding 728 criminal complaints and 26 pre-trial proceedings for crimes committed by the KLA, ten pre-trial proceedings refer to crimes committed in Kosovo against Albanian civilians. Data indicates that Kosovo crimes are at the centre of attention of the Office of the War Crime Prosecutor. However, no information indicates which – if any – criteria have been used for the selection of cases and for the prioritization process.

Findings

The described cases unambiguously show that the Republic of Serbia Office of the War Crimes Prosecutor does not act independently, but rather files indictments under political pressure, and pressure imposed by victims' families and nationalist political parties (*Tuzla column, Lekaj, Morina, Ovčara*). The indictment in the *Zvornik I* case is the result of the Hague Tribunal's referral. Several indictments follow close co-operation with the Croatian State Attorney General's Office, which contributes to faster and more efficient prosecution of war crimes and the termination of in absentia trials in Croatia. At least three indictments are the result of investigations conducted pursuant to the HLC's activities (*Zvornik III, Lovas*) or on the basis of evidence collected by the HLC (*Scorpions*). The Office of the War Crimes Prosecutor was most willing to prosecute crimes in the cases of *Lovas* and *Suva Reka* – the indicted individuals are high-ranking members of the police and military.

It is also indicative that the Office of the War Crimes Prosecutor does not have criteria for the selection of cases to be investigated or for filing indictments. The prosecution of war crimes in Serbia is an *ad hoc* process and it greatly depends on the political circumstances in the country.

Part III:
**Key interests surrounding the use of criteria
for selecting and prioritizing core international crimes cases**

Danger of selective justice: all cases involving crimes under international law should be investigated and the suspects, when there is sufficient admissible evidence, prosecuted

Christopher K. Hall²⁵⁴

I am very honoured to have been invited to contribute to this publication following the seminar on 26 September 2008 organized by the Forum for International Criminal and Humanitarian Law, which was co-sponsored by my own organization and many others. It is a particular pleasure to acknowledge the role of Morten Bergsmo, who has dedicated most of his career to the cause of international justice and took the initiative under the Ethics, Norms and Identities Programme of PRIO to organize the seminar. The purpose of the seminar, to explore creative ways, consistent with due process, for states to fulfil their obligations to investigate and prosecute crimes under international law – a task far beyond the limited capability of international criminal courts to do – addresses the most important challenge we face today in the field of international justice.

Defining the problem

In my very brief remarks on this topic, I would like to strike a note of caution about the formulation of the issue to be addressed in this seminar, suggest a different foundation which guides the approach of Amnesty International to the problem of impunity, and propose some possible approaches that might be considered at the international and national levels to encourage states effectively to investigate and prosecute the enormous number of unresolved crimes under international law, not only in Bosnia and Herzegovina, but also throughout the world, and to provide reparations to victims. In doing so, I will note some of the activities that my organization has been undertaking to address this issue.

First of all, let me clarify that Amnesty International enthusiastically supports this initiative and welcomes the many insights in the paper on which this seminar is largely based.²⁵⁵ However, as I will explain in a moment, our organization believes that the problem should be formulated in a somewhat different manner. The program for the seminar takes as its starting point with regard to Bosnia and Herzegovina the “thousands of open case files involving allegations of core international crimes in the various prosecutors’ offices at the state and entity levels of the country”. I leave aside the omission from the concept of core crimes under international law (genocide, crimes against humanity and war crimes) of other crimes under inter-

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²⁵⁵ Morten Bergsmo, Kjetil Helvig, Ilia Utmelidze and Gorana Žagovec, *Some remarks on the handling of the backlog of core international crimes cases in Bosnia and Herzegovina*, 2008 (on file with the author).

national law, such as cases of torture, extrajudicial execution and enforced disappearance, since in the situations considered most of these crimes would also amount to one or more of the core crimes.²⁵⁶ Instead, our primary concern is the limitation of the definition of the problem to “open case files”. The number of such files is a matter of considerable political controversy, but one recent report suggests that there are approximately 16,000 suspects named in such files in Bosnia and Herzegovina.²⁵⁷ One is struck immediately by the vast disparity in numbers between the various prosecutors’ offices that can have no bearing on the degree of criminality in each area within their jurisdiction. It is clear that the number of persons responsible for crimes under international law in Bosnia and Herzegovina is considerably higher than indicated by the open case files.

The perspective of Kant

What should be done? Let me start by citing a somewhat surprising authority for an organization that has committed itself for the past three decades to the complete abolition of the death penalty – Immanuel Kant’s *The Right of Punishing*, a defence of capital punishment in his *Science of Right*, published in 1790 as part of the *Metaphysics of Morals*. If one can put aside for a moment the particular punishment that he defended, his insight more than two centuries ago into the concept of criminal justice has much to commend itself to us today with regard to crimes under international law. In that essay, he argued that criminal law was a categorical imperative and expressly rejected utilitarian justifications for punishment as a deterrent:

Juridical punishment can never be administered merely as a means for promoting another good either with regard to the criminal himself or to civil society, but must in all cases be imposed only because the individual on whom it is inflicted has committed a crime.²⁵⁸

Kant argued that justice was a fundamental value in itself: “For if justice and righteousness perish, human life would no longer have any value in the world”.²⁵⁹ To illustrate his view he gave the following famous example:

Even if a civil society resolved to dissolve itself with the consent of all its members – as might be supposed in the case of a people inhabiting an island resolving to separate and scatter themselves throughout the whole world – the last murderer lying in the prison ought to be executed before the resolution was carried out. This ought to be done in order that every one may realize the desert of his deeds, and that blood-guiltiness may not remain upon the people; for otherwise they might all be regarded as participators in the murder as a public violation of justice.²⁶⁰

²⁵⁶ In addition, these remarks do not address the question of the crime of aggression.

²⁵⁷ According to a reliable report, the War Crimes Processing Strategy, written by the President of Court of Bosnia and Herzegovina, Judge Meddida Kreso, notes that a total of 2,098 war crimes involving 16,152 persons have been reported to various prosecutor’s offices in Bosnia and Herzegovina. The largest number of reports, 1,037, had been filed with prosecutor’s offices in the Federation of BiH. The Bosnian Prosecutor’s Office had received 608 reports, and the *Republika Srpska*, 418. Another 35 reports involving 714 individuals have been forwarded to the Prosecutor’s Office in the District of Brčko. It is not clear whether some individuals have been reported to more than one prosecutor’s office.

²⁵⁸ Immanuel Kant, *The Science of Right*, in *Metaphysics of Morals* (1790) (W. Hastie, translator) (<http://eserver.org/philosophy/kant/science-of-right.txt>).

²⁵⁹ *Ibid.*

²⁶⁰ *Ibid.*

It is very difficult for us today to consider this example – or, indeed, some of Kant’s other writings on justice advocating particularly harsh penalties – as having anything to teach us. It comes as a shock that so soon after his near contemporary, Cesare Beccaria, had eloquently attacked in *On Crimes and Punishments* (1764) the harsh penalties imposed in Italy and elsewhere in Europe, that Kant advocated such cruelty. However, Kant’s great insight was that each criminal should be brought to justice and that whenever any criminal escaped justice – at least for a grave crime – society to that extent failed to fulfil its responsibilities.

The implications today for international justice of Kant’s views

What then does Kant have to teach us with regard to international justice today? If criminal justice is a categorical imperative and if society is implicated in the guilt of those who have committed genocide, crimes against humanity, war crimes, torture, extrajudicial executions and enforced disappearances if it has the power to investigate and prosecute them, but fails to do so, then society must ensure that they are brought to justice. When such crimes are committed, then the society concerned is not simply an island or even a state. These are crimes committed against the entire international community and it is the entire international community that must undertake every possible effort to ensure that no criminal is left free to live out his or her life in complete impunity.

Is this approach “realistic”?

The immediate response of those who espouse what they would call realism usually is that this approach is wholly “unrealistic”. Realists in this field, however, do not have a very good track record. Realists predicted that the International Criminal Tribunal for the Former Yugoslavia would fail and that it would try no cases as no state in or outside the Balkans would arrest and surrender accused persons. Fifteen years later, it has indicted a total of 161 persons, proceedings have been completed against 116 persons and 45 are undergoing pre-trial, trial or appellate proceedings (only two of whom remain at large).

When the United Nations General Assembly referred the International Law Commission’s Draft Statute for an International Criminal Court to an Ad Hoc Committee in December 1994, one government official told Bill Pace, who was to establish the Coalition for an International Criminal Court two months later, “[d]on’t worry, Bill, you won’t see this Court in your lifetime. Your children won’t see it in their lifetime and I doubt that your grandchildren will see it either”. Less than four years later, 120 states in Rome adopted the Statute for the International Criminal Court. Less than four years after that, the Statute entered into force and now 108 states have ratified it, the Court has issued 12 arrest warrants, and its first trial is to start in January 2009. Perhaps one would not be far wrong to say that the only realists are the idealists, since, in the long run, they are usually right.

What resources are required to bring all those responsible to justice?

This is a question that the seminar on 26 September 2008 and the planned follow-up seminar first half of 2009 seek to address. Where should one begin? There is some merit in the advice of the King of Hearts to the White Rabbit who asked the same question. He replied, “[b]egin at the beginning, and go on till you come to the end: then stop”. The beginning is mapping, in close consultation with civil society, the total number of crimes committed and the total number of suspects, then categorizing the types of crimes committed according to the difficulties

that are likely to be encountered in investigating them. In some cases, there will be no bodies; in others, no witnesses. Some cases will be massively documented; others will have only a single eye-witness. Some will involve complex hierarchies of command; others will be the next door neighbour now living in the victim's house. As this mapping exercise progresses, then estimates can begin to be made of the resources that would be required to prove each case, if it were to go to trial and then be appealed.

In the light of these considerations, there can be no rigid criteria for prioritizing – and I emphasize prioritizing, not selecting – cases for investigation. There will always need to be some room for judgement in applying any criteria to determine which crimes should be investigated first. For example, if a rigid application of a particular set of criteria were to lead to a disproportionate number of crimes committed against members of a particular ethnic or religious group to be given a low priority or to certain crimes, such as crimes of sexual violence against women, to be ignored, then those criteria need to be applied differently, modified or abandoned. That said, the following would seem to be a far from exhaustive list of appropriate criteria or, perhaps, more accurately, factors to consider, in determining priorities of crimes for investigation:

- age and health of the victim and his or her family (investigations should be completed with sufficient time to complete any prosecution in their lifetimes);
- age and health of the suspect (when known) (investigations should be completed with sufficient time to complete any prosecution in the suspect's lifetime);
- degree of access to evidence (material and witness testimony) in the forum's jurisdiction and to other evidence through mutual legal assistance;
- security of victims and witnesses during the investigation; and
- scale of the crime (number of victims).

Now, of course, for a wide variety of reasons, in all legal systems, not all crimes result in trials of suspects. Therefore, the next stage will be to estimate the percentage of crimes that will probably never be solved or will be unlikely to be solved in the near future, but which should be given eventually to a cold cases team. After that, consideration can be given to a wide variety of innovative techniques to conduct criminal proceedings in a way that will minimize the resources needed to complete them in a manner consistent with due process. Finally, a long-term action plan should be developed in a transparent manner in close consultation with civil society to investigate and, where there is sufficient admissible evidence, prosecute all suspects over several years. In prioritizing which of those cases should be prosecuted first, then the same criteria suggested for prioritizing investigations could be taken into account.

Innovative techniques to reduce the resources needed to complete proceedings

I am certainly not an expert in the administration of criminal justice systems. I simply wish to note here a range of measures that could be used to conduct criminal proceedings with the least resources in the fastest possible way which is still fully consistent with due process. None of what I suggest is entirely novel – all have been used before in international or national courts somewhere, but some of the steps will be new for some legal systems.

Some of the proposed techniques include:

- *Plea bargaining.* This is the most promising method for reducing the resources needed to a manageable level. In some jurisdictions, such as the United States of America, 90% or more of all serious criminal cases are resolved by plea bargaining.²⁶¹ One form of plea bargaining should be avoided when crimes under international law are involved. Such crimes are so grave that the prosecutor should not offer, and the court should not grant, complete immunity from prosecution in return for co-operating in the investigation and prosecution of other such crimes, but, instead, the reward for such co-operation should be mitigation of punishment. Such co-operation is considered as a legitimate factor to be taken in deciding whether to mitigate punishment for genocide, crimes against humanity and war crimes in Rule 145(2)(a)(ii) of the Rules of Procedure and Evidence of the International Criminal Court²⁶² and in Article 7(2)(a) of the International Convention for the Protection of All Persons from Enforced Disappearance.²⁶³ Of course, appropriate safeguards need to be in place, perhaps similar to the safeguards used in practice in the International Criminal Tribunals for the former Yugoslavia and for Rwanda or spelled out in Article 65 (Proceedings on an admission of guilt) with regard to an analogous procedure.
- *Precedent.* This is a useful approach used particularly in common law countries to avoid duplication of resources by preventing the re-litigating of exactly the same legal issues time and again once the highest court has decided the issue, subject to exceptions in the interests of justice, for example, demonstrating that the factual situation in the subsequent case was sufficiently different to require a different legal conclusion. Issues where precedent could avoid needless duplication of judicial resources include the existence of an armed conflict in the particular geographic area concerned and the nature of the armed conflict (international or non-international).
- *Judicial notice.* This is another useful tool to avoid wasting valuable court time in proving such matters as who was the official in a particular post on a certain date.
- *Use of video conferencing facilities.* This tool, subject to appropriate safeguards could increase the evidence-gathering capability of the legal system in civil and criminal proceedings by permitting victims and witnesses to participate from secure locations abroad and avoid the cost of transporting them to the seat of the court, with all the delays and security concerns entailed.
- *Joint trials.* If the court exercises effective control of the proceedings to avoid delays and to protect the right of each accused be presumed innocent, then joint trials can speed up proceedings.

²⁶¹ In *Santobello v. New York*, 404 U.S. 260 (1971), the US Supreme Court explained that plea bargaining was not only constitutional, but “an essential component of the administration of justice”.

²⁶² Rule 145(2)(a)(ii) provides that “the Court shall take into account, as appropriate: (a) Mitigating circumstances such as: ... (ii) The convicted person’s conduct after the act, including ... any cooperation with the Court”.

²⁶³ Article 7(2)(a) provides:

Each State Party may establish:

- (a) Mitigating circumstances, in particular for persons who, having been implicated in the commission of an enforced disappearance, effectively contribute to bringing the disappeared person forward alive or make it possible to clarify cases of enforced disappearance or to identify the perpetrators of an enforced disappearance.

- *Effective court management.* There is an increasing wealth of talent and expertise at the international level in administering the investigation and prosecution of crimes under international law, much of which can be used to develop equally effective administration of criminal proceedings at the national level. In particular, there is a long list of very sensible and sometimes innovative techniques for reducing the length of criminal proceedings based largely on the experience of the International Criminal Tribunals for the former Yugoslavia and Rwanda that was proposed by a number of experts for consideration by the Prosecutor of the International Criminal Court.²⁶⁴ They are far too many to reproduce here and not all of them are relevant to national criminal proceedings, but they are well worth study.
- *Extradition agreements with other states.* Of course, it would be most effective if all states were to agree to draft, adopt and ratify a new multilateral treaty providing for extradition of persons suspected of crimes under international law, as Amnesty International has repeatedly recommended. However, pending the adoption of such a new treaty, states should make the adoption of bilateral treaties governing such crimes a priority, strategically focusing on states where suspects are likely to be found. The failure of states, such as East Timor (Timor Leste) and Sierra Leone, to do so has severely limited their ability to investigate and prosecute crimes under international law.
- *Mutual legal assistance agreements with other states.* Of course, it would be most effective if all states were to agree to draft, adopt and ratify a new multilateral treaty providing for mutual legal assistance regarding crimes under international law, as Amnesty International has repeatedly recommended. However, pending the adoption of such a new treaty, states should make the adoption of bilateral treaties governing such crimes a priority, strategically focusing on states where suspects are likely to be found. The failure of states, such as East Timor (Timor Leste) and Sierra Leone, to do so has severely limited their ability to investigate and prosecute crimes under international law.

Political will

The absence of political will has been one of the main reasons that states have not played a more effective role in the investigation and prosecution of crimes under international law. Even if all the tools for justice are present, such as an experienced and well trained police, prosecutors, judges, defence lawyers and representatives of victims and effective legislation, the absence of political will can defeat attempts to investigate and prosecute crimes under international law effectively and expeditiously. The adoption of the steps above can help to make it easier for political officials to give the necessary resources and support to investigations and prosecutions by making it clear that the costs of fulfilling the categorical imperative are not astronomical. However, other steps may also be needed in many countries to be taken to remove political control of prosecutions and extraditions, leaving these matters to professionals.

²⁶⁴ Informal expert paper: *Measures available to the International Criminal Court to reduce the length of proceedings*, 2003 (http://www.icc-cpi.int/library/organs/otp/length_of_proceedings.pdf).

A note about Amnesty International's role

Finally, let me note a few of the things that Amnesty International is doing to strength national efforts to investigate and prosecute crimes under international law. First, it has been campaigning for more than a decade since the adoption of the Rome Statute in July 1998 to persuade states not only to ratify that treaty, but also to enact effective implementing legislation defining crimes under international law as crimes under national law and incorporating principles of criminal responsibility and defences in national law in a manner consistent with the strictest standards of international law.

Second, it has been building links to police and prosecutors to encourage them to treat these crimes with the same degree of seriousness as other grave crimes, such as money laundering, drug trafficking, cyber crime, terrorism and trafficking in persons and has made extensive recommendations to that effect at meetings of Interpol and the European Network of Contact Points.

Third, the organization has been pressing states to implement rule of law programs modelled on the UN rule of law program for UN agencies to implement.

Fourth, Amnesty International is publishing, having started in October 2008 (in connection with the tenth anniversary of the arrest of President Augusto Pinochet in London) a *No safe haven series* of 192 papers on universal jurisdiction in each UN member state indicating what is and is not possible and making detailed recommendations for reform of law and practice.

Fifth, it has been calling for states to adopt new multilateral international extradition and mutual legal assistance treaties.²⁶⁵

Conclusion

We look forward to working with the organizers of this seminar to develop and implement these ideas to ensure that the best part of Kant's vision of justice can finally become a reality.

²⁶⁵ Statement to Interpol in Lyon, 16 June 2005: <http://amnesty.org/en/library/asset/IOR53/007/2007/en/domIOR530072007en.html>; Statement to European Union, 20 November 2006: <http://www.amnesty.org/en/library/asset/IOR61/013/2007/en/dom-IOR610132007en.pdf>; Statement to Interpol in Ottawa, June 2007: <http://www.amnesty.org/en/library/asset/IOR53/006/2007/en/dom-IOR530062007en.pdf>.

**The time and resources required by criminal justice for atrocities
and *de facto* capacity to process
large backlogs of core international crimes cases:
the limits of prosecutorial discretion and independence**

Ilia Utmelidze²⁶⁶

Introduction

The existing principles of international law place an obligation on the state to take action against mass atrocities that still victimize thousands and even millions of individuals worldwide, and to hold accountable those responsible for committing these acts. However, several challenges make this task extremely difficult and invites for a discussion on what can be done to assist these processes.

This paper will present some of the problems that any justice system, especially of countries in transition, would face trying to deal with the consequences of large-scale victimizations and existing backlogs of core international crimes. Furthermore, it will be argued that criteria for selecting and prioritizing – combined with other relevant tools and strategies – could be the most sensible way forward to address the backlog of core international crimes in order to make meaningful progress towards full accountability. Moreover, the paper will also discuss possible commonalities as well as differences between the concept of case selection and prioritization criteria and existing practices of prosecution.

Obligation to prosecute

Core international crimes²⁶⁷ – by their very nature and the severity and scale of victimization they often cause – are thought to be a threat to international peace and security, to shock the conscience of humanity and to bring untold sorrow to mankind. The consequences of such atrocities are not only affecting individual countries concerned, but the world as a whole.

In the aftermath of World War II and later of the Cold War, understanding of this fundamental interest led to a variety of positive political and social processes across the globe. As a result, a set of a new international rules and regulations have evolved. This new part of international law is aiming to make illegal certain categories of conduct both during wartime

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²⁶⁷ For the purposes of this seminar, the term “core international crimes” refers to genocide, crimes against humanity and war crimes.

and in other situations of conflict, and to make persons who engage in such conduct criminally liable. Concurrently, these norms also give authority or even impose the obligation upon states to prosecute and punish such crimes.

The publications of the most highly regarded experts in the field offer rather convincing evidence that states have an obligation to process²⁶⁸ core international crimes. First of all, there are several key international conventions that clearly provide for such an obligation. Of particular note are the Four Geneva Conventions of 1949 and the Convention on the Prevention and Punishment of the Crime of Genocide 1948.²⁶⁹

Articles 49, 50, 129 and 146 to the four Geneva Conventions of 1949²⁷⁰ respectively provide that the High Contracting Parties must enact criminal legislation for all individuals having committed crimes qualifying as “grave breaches”²⁷¹ under these Conventions. Furthermore, with respect to these individuals, “[e]ach High Contracting Party shall be under the obligation to search for (these) persons ... and shall bring such persons, regardless of their nationality, before its own courts”.

Article IV of the Genocide Convention 1948 also prescribes a duty to punish persons responsible for committing genocide, “... whether they are constitutionally responsible rulers, public officials or private individuals”.

Moreover, there are solid arguments suggesting that the 1998 Rome Statute of the International Criminal Court has, among other things, substantively contributed to the shaping of new customary international law or the crystallization and refinement of previously existing norms. The preamble of the Statute provides “... that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes”.²⁷² This principle within the Rome Statute can substantially contribute to the position that customary international law not only establishes permissive jurisdiction over perpetrators of crimes against humanity and other crimes, but an obligation to process these crimes.²⁷³

The key objective of the principle of universal jurisdiction – which has been “... nowadays acknowledged in the case of international crimes”²⁷⁴ – is to ensure that there is no safe haven for those who have committed core international crimes. The principle of universal jurisdiction with its clear purpose to close impunity gaps can also be seen as a reinforcement

²⁶⁸ The state obligation is considered to include: duty to prosecute or extradite; the non-applicability of statutory limitation to these types of crimes; non-application of any immunities up to and including Heads of State; the non-applicability of the defence of “obedience to superior orders” (save as mitigation of sentence); the universal application of these obligations whether in time of peace or war; their non-derogation under “states of emergency”; and universal jurisdiction over perpetrators of such crimes. See M. Cherif Bassiouni, *International Crimes: Jus Cogens and Obligatio Erga Omnes*, 1996.

²⁶⁹ As of September 2008, 194 states were parties to the Geneva Conventions, whereas 141 states were parties of Genocide Convention.

²⁷⁰ The Geneva Conventions virtually applies to the entire community of states due to the high number of contracting states.

²⁷¹ Articles 50, 51, 130 and 147 of the four Geneva Conventions define “grave breaches” as ... “wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly”.

²⁷² The sixth preambular paragraph of the ICC Statute.

²⁷³ Many authors agree that customary international law provide for a duty to prosecute crimes against humanity. However, there is also a viewpoint suggesting that there is no consistent state practice which would support this doctrinal point.

²⁷⁴ The ICTY in *Prosecutor v. Tadić*, Case No.: IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 62.

of the view that states, by adopting the principle, accept the obligation to process core international crimes as a general rule.

However, as the international recognition of the principle of state obligation to prosecute these crimes is growing and the willingness to end impunity is increasing, both at international and national levels, the question still remains *how to ensure full accountability for core international crimes*.

The ground for this question is the existing gaps between legal expectations and legal reality, the frustration of victims, political scepticism, and some degree of disappointment in the donor community behind both international and domestic processes to deal with core international crimes.

Structural obstacles

A key distinguishing feature of core international crimes is that they as a general rule occur outside the context of normally functioning societies, when there is total or partial failure of the rule of law and respect for human rights. As a consequence, these situations usually victimize thousands or even millions of individuals who may be killed or disappear, brutally and systematically tortured and raped, forcefully displaced and even ethnically cleansed, religious buildings desecrated and thousands of households devastated.

Examples of such situations demonstrate that achieving even some small measure of accountability for these atrocities is very challenging and time- and resource-consuming. First of all, substantive progress normally requires a certain political and social transformation, a transitional process that can facilitate a clear political commitment to accountability and to end of impunity.

Consistent and genuine political will often requires international support and persuasion. The same applies to re-building or the building-up of domestic institutional and legal mechanisms to address mass violations of human rights which may amount to core international crimes. The requisite *de facto* capacity and technical ability to process these crimes, understanding their complexity and the need for specialized approaches can represent a serious challenge for justice systems in transition.

Core international crimes have to be processed with a clear understanding of the relevant laws and an appreciation of trial management skills, as well as a strong commitment to due process and fair trial principles. Any justice system's disregard of rule of law and the human rights of victims as well as those of the perpetrators can undermine the legitimacy of the procedure and turn justice into a political process or even blatant revenge.

International law can provide other forms of accountability like international or internationalised tribunals that usually limit their focus on the most high-ranking or notorious perpetrators, which in itself can be considered an immense step towards ending impunity. It can give further impetus to greater accountability processes. Through their national criminal jurisdictions, other states can contribute in a direct way to processes of accountability. However, the lion's share of responsibility and effort to bring justice will always rest on the domestic institutions of the territorial states where the actual atrocities were committed.

It is vital to develop independent, impartial and efficient judiciaries in these countries, with the ability to understand the complex goals involved and have a clear strategy to address the challenge of limited resources and competing demands. However, one should keep in mind that it would require long-term commitment and broad support from domestic and often

international actors to strengthen and develop national capacity to deal with the core International crimes.

Backlog of cases as a common phenomenon and the role of case selection and prioritization criteria

A functional justice system that meets at least the minimum requirements of independence, effectiveness and fairness does not by default remove the full challenge that the processing of core international crimes cases involves.

It is a common phenomenon in countries which find themselves in this situation that their justice systems accumulate a large universe of unresolved investigation and case files, with many suspects and incidents that are often not properly recorded and documented. There are typically a high number of complex criminal acts as well as time-gaps from the commission of these crimes until legal proceedings are initiated. There may also be issues linked to the available human resources.

Such backlogs of cases can represent a fundamental challenge not only to newly reformed and established justice systems, but also to the jurisdiction of the most resourceful and developed countries.

The existing examples indicate that there is no quick fix of backlog situations. There is no single remedy that can resolve the problem of a large backlog of cases in an immediate and responsible manner. It is therefore unavoidable that some cases will be completed before the justice system in question is able to process other cases.

Since resolving cases in a certain order is an unavoidable fact, it seems both sensible and legitimate to suggest the development of a more formalized and regulated system of case selection and prioritization criteria – rather than disregarding this fact.

Clearly defined case selection and prioritization criteria, designed as a part of an overall plan of action for justice systems²⁷⁵ to address the legacy of mass atrocities, can play a crucial role in ending impunity and contribute to better and more comprehensive accountability for core international crimes.

First of all, well crafted case selection and prioritization criteria can be instrumental for the process of streamlining institutional, legal and financial resources in order to ensure that the justice system will achieve maximum results.

The absence of a clear vision of where resources needs to be mobilised can lead to uncertainty and hesitation within the justice sector and result in delayed justice or *de facto* impunity for perpetrators. Contrary to this, countries that undergo complex transitions can use case selection and prioritization criteria as a catalyst to jumpstart meaningful accountability processes.

Core international crime processes widely recognise the legitimate interest of victims and the general public to know how justice is done. In this regard, formalised case selection and prioritization criteria can be used as a tool to explain to the public in a clear and transparent manner why some cases will have to be processed before others. If case selection and prioritization criteria are based on considerations such as gravity of crimes, seniority/level

²⁷⁵ An action plan or strategy may also cover issues like the establishment of a comprehensive overview of the backlog of cases, the need for assessment and resource planning, defining the institutional machinery within the justice system that can tackle the backlog, etc.

of responsibility of perpetrators, proportional representation of overall victimisation²⁷⁶ and/or more practical consideration, there is an acute need to explain this to the general public.

Understanding factors that define the order of cases can potentially minimize false expectations and help to build public confidence in the justice institutions. Any system for selection and prioritization of cases must be fair and should be perceived as fair by victim groups as well as the general public. The existence of formal criteria can help justice systems to demonstrate impartiality and fairness in this regard, in an open and transparent manner. This will help the overall strengthening of justice institutions in transition and to make them less susceptible to undue influence on case selection from outside and within the system.

Case selection and prioritization criteria and the limits of prosecutorial discretion

Case selection and prioritization criteria have both clear differences and similarities with how justice systems operate in more conventional situations. The general principle that applies in situations of ordinary crime can be characterised as “first comes, first served”. In other words, the cases are normally dealt with as they have been reported to the respective authorities.²⁷⁷ However, depending on the legal tradition, there are also differences in how cases are advanced along the procedure stages of the justice system.

In many national jurisdictions the prosecutors are obliged to fully investigate every single reported crime and bring it forward to the national judiciary based on the principle of ‘first comes, first served’. However, other jurisdictions recognize the prosecutor’s broad discretion to initiate and conduct criminal prosecutions. With the presumption that criminal prosecutions are undertaken in good faith and in a non-discriminatory manner, a prosecutor has broad authority to decide whether to investigate, grant immunity, or permit a plea bargain, and to determine whether to bring charges, what charges to bring, when to bring charges, and where to bring charges.²⁷⁸

Analysing essential inconsistencies and similarities between the notion of case selection and prioritization and these two traditional concepts of prosecution is the question that probably still needs further analysis. However, there are some self-evident issues that can be already identified and discussed.

As mentioned above, situations of core international crimes are quite different from the everyday routine of a justice system. The breakdown of the justice machinery makes it rather difficult to find objective ways to identify the crimes that have been reported first and therefore put forward first. Crimes may not have been properly reported and recorded. In some extreme situations victims have been denied access to justice.

²⁷⁶ The concept of proportional representation of victimisation provides that cases are selected and prioritized based on actual scale and nature of victimisation rather than political, ethnic or religious affiliation of perpetrators or victims.

²⁷⁷ There seems to be exceptions to these general rules, especially when observing so-called high profile cases like high level political cases; corruption, organized crimes and terrorism cases; some cases linked to sexual violence; and cases associated with racism and xenophobia.

²⁷⁸ It is important to note that for example in the legal system of the United States, it has been recognized that there are certain limitations to the prosecutor’s discretion. The judiciary has a responsibility to protect individuals from prosecutorial conduct that violates constitutional rights. Such conduct usually involves either *selective prosecution*, which denies equal protection of the law, or vindictive prosecution, which violates due process. See *U.S. v. Redondo-Lemos* (the court has a duty to closely scrutinize evidence of invidious discrimination); *Yick Wo*, 118 U.S. at pp. 373-74 (arrest and prosecution of Chinese laundry owners violated equal protection when similarly situated non-Chinese laundry owners not arrested or prosecuted); *U.S. v. Andersen* (claim of selective prosecution must be supported by evidence that the prosecutor based the decision to charge on ‘factors such as defendant’s race, sex, religion, or exercise of a statutory or constitutional right’).

Moreover, the specificity of core international crimes provides that the same patterns of victimization can be dealt with as compartmentalized criminal acts or viewed as an overall mega criminal enterprise in its entirety. Breaking down one such overall situation into smaller cases and using the principle of ‘first comes, first served’ can prove to be difficult or even impossible. Furthermore, applying the principle of ‘first comes, first served’ or even ‘first committed, first processed’ in a mechanical manner can lead to paradoxical situations. The consequence can be that a person without any significant role in the overall victimization process can face the full criminal process first, for example for stealing a car, whereas persons masterminding and carrying out genocide will have to wait for years before the respective justice systems have time and resources to address their criminal conduct.

The concept of case selection and prioritization probably has more in common with the practices of those legal systems that provide for broad prosecutorial discretion. In these jurisdictions it is common practice to make decisions on whether cases should go to full trial or be subjected to other procedural steps.²⁷⁹ Case selection and prioritization criteria used in the context of core international crimes are nevertheless based on more multifaceted standards and may require more formalised mechanisms of enforcement than what is normally the case in such jurisdictions.

Factors like judicial efficacy and economy as well as overall resource management entail an active role for not only the prosecution. The judiciary has an important role to play through the development of its jurisprudence or even more directly by engaging in formalizing selection or prioritization criteria. It also has an obligation to guarantee the fairness of the criminal process and respect for the principle of equal protection of the law. Importantly, to be effective, case selection and prioritization criteria may require that the judiciary reviews their proper application, for example in connection with the confirmation of charges. A more active judiciary may limit prosecutorial discretion. But prosecution services still play the key role in the entire process of case selection and prioritization.

Avoiding inter-institutional misunderstanding in this regard is another strong argument in favour of the establishment of more formalized criteria for case selection and prioritization as well as a mechanism for their enforcement.

Conclusion

Honouring the international commitment to ensure meaningful accountability for core international crimes is challenging. It requires broadly-based political and popular support – as well as long-term, thorough institutional- and capacity-building processes. The nature, severity and scale of these crimes also necessitate a search for innovative solutions which respond more adequately to existing challenges. Case selection and prioritization criteria – as part of an overall plan to streamline and accelerate justice processes – can be an indispensable tool to ensure thorough and comprehensive accountability for core international crimes.

²⁷⁹ For example, the prosecution may decide to grant immunity or permit a plea bargain.

Part IV:
**Characteristics of effective criteria for the
prioritization of core international crimes cases**

Some introductory remarks on the characteristics of effective criteria for the prioritization of core international crimes cases

Mirsad Tokača²⁸⁰

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 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.

²⁸⁰ **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. Tokača 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.

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.

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 implementation 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

zation 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.

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.

**Essential qualities of prioritization criteria:
clarity and precision; public access; non-political and confidence-
generating formulations; equal and transparent application;
and effective enforcement**

Claudia Angermaier

Introduction

In order to define the essential characteristics of case prioritization criteria, it is important to consider the purpose served by these criteria. Case prioritization criteria may have a benefit at the internal level, meaning for the work of the prosecution office, as well as at the external level, for instance vis-à-vis the public.

The purpose of case prioritization criteria

At the internal level criteria serve as guidelines for the decisions of individual prosecutors. They ensure that such decisions follow the overall prosecutorial strategy of the prosecutor's office. More importantly, however, they ensure that decisions are in consistency with the fundamental principle of equality before the law. Overall they therefore enhance the quality of prosecutorial decision-making. Finally, they may allow for a rational allocation of limited resources.

At the external level they provide a basis for justifying the prioritization of certain cases *vis-à-vis* victims, other interest groups and the public at large. They may prevent the perception that decisions are taken arbitrarily. This is also particularly important for the individual accused. Criteria thus also serve as a basis for holding the prosecutor accountable for his or her decision to prioritize a certain case for prosecution. However, they may also serve as a protection tool against various external actors that seek to influence the prosecutor's decision regarding the prioritization of cases. The requests of such actors to prioritise a specific case for prosecution can be evaluated against the defined and publicly available prosecutorial case prioritization criteria. If requests are not in conformity with these criteria, they can be rejected as impermissible political interferences with the work of the prosecution office. This has been described as second-order accountability.²⁸¹ Overall, the prosecutor's independence in his or her decision-making therefore may be strengthened. Moreover, such transparent and rational decision-making enhances the legitimacy of the prosecution office.²⁸²

²⁸¹ A.M. Danner, *Enhancing the legitimacy and accountability of prosecutorial discretion at the International Criminal Court*, (2003) 97 *AJIL* 3, 510, 512.

²⁸² See *ibid.*, 535 *et seq.* for a discussion of the concept of legitimacy as both actual and perceived legitimacy.

Essential qualities of case prioritization criteria

Clarity and precision are essential qualities that case prioritization criteria should have for them to function effectively at the internal level. It is only when the content of criteria can easily be understood that they can be readily applied by individual prosecutors. These qualities are therefore important for ensuring that criteria function as clear guidelines for the work of prosecutors. Furthermore, the criteria may not be inherently biased or formulated in biased terms; otherwise the application of such criteria will lead to a violation of the principle of fairness and equality.

There should be a balance between too vague and too narrow a description of the criteria. If the criteria are formulated in very broad terms, there may be too much leeway in their application. This entails the risk of treating similarly situated cases very differently. On the other hand, too narrow a definition may render the criteria inapplicable because they lack the required flexibility to be applied to different cases.²⁸³

It does not, however, suffice to merely adopt criteria and hope for an equal and consistent application. Rather there needs to be some form of review mechanism. This could take the form of an internal review within the prosecution office but may also be affected by an external review, for instance a review by the judiciary. Through an effective enforcement system the consistency and equality of application can be ensured. Furthermore, a fundamental prerequisite for an objective prioritization of cases is an objective and comprehensive investigation of all facts; otherwise it is likely that a skewed result will be achieved.

The issue of equal application is not only relevant at the internal level but is essential to ensure the legitimacy of the prosecutor's actions *vis-à-vis* the public and in particular the victims. In relation to the prosecution of core international crimes the charge that decisions are politically driven is quickly made. Without a set of publicly available criteria it is more difficult to respond to such a charge. In order to provide accountability but also provide protection against political pressure, the criteria need to be formulated in clear, non-political and confidence-generating terms.

The United Nations Guidelines on the Role of the Public Prosecutor (1990)²⁸⁴ stipulate:

In countries where prosecutors are vested with discretionary functions, the law or published rules or regulations shall provide guidelines to enhance fairness and consistency of approach in taking decisions in the prosecution process, including institution or waiver of prosecution.²⁸⁵

Similarly, the Recommendations of the Council of Europe on the Role of Public Prosecution in the Criminal Justice System (2000)²⁸⁶ state:

²⁸³ See also *ibid.*, 549 *et seq.*

²⁸⁴ *Guidelines on the Role of Prosecutors, Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders*, Havana, 27 August to 7 September 1990, UN doc. A/CONF.144/28/Rev.I at 189 (1990), reprinted in E. Myjer, B. Hancock and N. Cowdery (eds.), *Human Rights Manual for Prosecutors*, International Association of Prosecutors (Nijmegen: Wolf Legal Publishers, 2003), p. 141.

²⁸⁵ *Ibid.*, para. 17.

²⁸⁶ Recommendation Rec(2000) 19 of the Committee of Ministers to Member States on the Role of the Public Prosecution on the Criminal Justice System, adopted by the Committee of Ministers on 6 October 2000 at the 724th meeting of the Ministers' Deputies, reprinted in E. Myjer, B. Hancock, and N. Cowdery (eds.), *Human Rights Manual for Prosecutors, op. cit.*, p. 147.

With a view to promoting fair, consistent and efficient activity of public prosecutors, states should seek to:

[...]

– define general principles and criteria to be used by way of references against which decisions in individual cases should be taken, in order to guard against arbitrary decision-making.

b. The above-mentioned methods of organisation, guidelines, principles and criteria should be decided by parliament or by government or, if national law enshrines the independence of the public prosecutor, by representatives of the public prosecution.

c. The public must be informed of the above-mentioned organisation, guidelines, principles and criteria; they shall be communicated to any person on request.²⁸⁷

The adoption of a set of criteria is, however, not sufficient; only if the decision-making of prosecutors is actually governed by these criteria, can they enhance the public's confidence in the prosecutor's work.

²⁸⁷ *Ibid.*, para. 36.a.

Gravity of crimes and responsibility of the suspect

Xabier Agirre Aranburu²⁸⁸

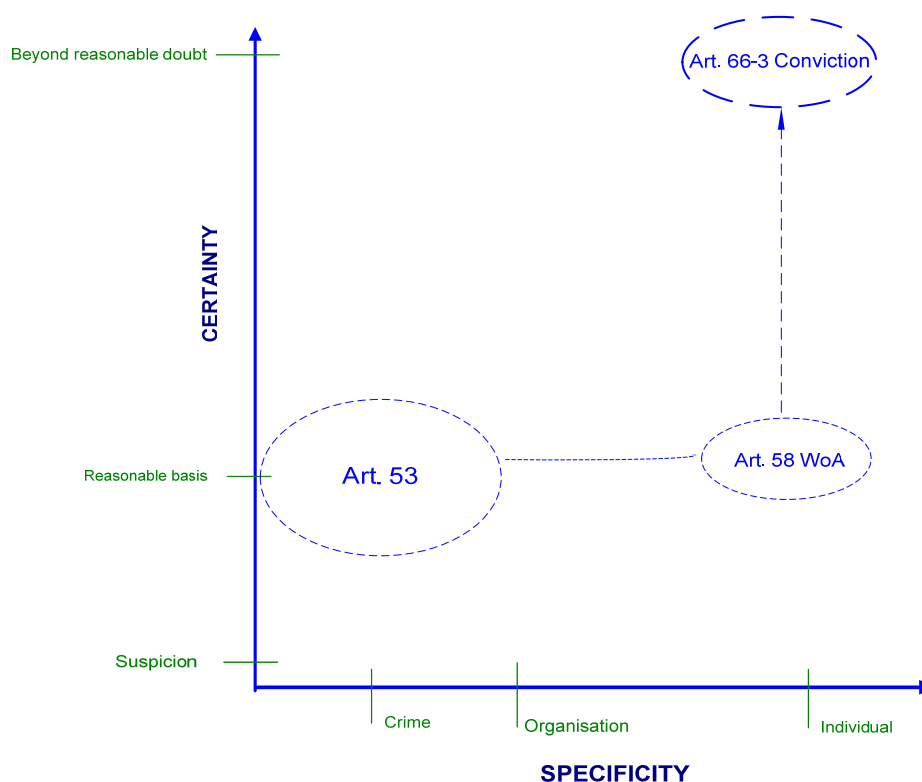
1. Introduction: definition and elements of a case

The meaning of “case” is not the same in different national and international systems, and even within the same system the usage of the term is not always consistent. For the purpose of the investigation and prosecution of core international crimes (war crimes, crimes against humanity, genocide) the most common understanding is that a case comprises the whole of facts and charges attributed to one or several accused jointly, as stated in an indictment or warrant of arrest. A case is formed by the following elements of fact and law:

- a) the facts or criminal events;
- b) the suspect or accused;
- c) the charges, i.e., the legal characterization of the facts;
- d) the mode of responsibility; and
- e) the standard of evidence (depending on the phase of development of the case).

To select a case then implies selecting the above elements, either at the same time or, what is most common, gradually. The process is based always on a combination of legal and factual judgment, which will require a combination of inductive and deductive thinking (from the specific facts to the legal inferences and vice versa) and a dialogue between the officers focused on the facts and those focused on the law. This process grows along two main scales of certainty and specificity. The scheme below shows the correlation of these two parameters and the corresponding phases of the legal process (illustrated with references to the Statute of the ICC, but the process and milestones are similar in most systems of criminal law).

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Certainty. The question is “how sure” the actor (prosecutor or judge) is about the alleged facts. The lowest level “suspicion” requires a merely vague notice of the crime (*notitia criminis*) that is deemed sufficient to trigger some analysis or collection of evidence. The second level of “reasonable basis” is reached when the prosecutor (who is by definition a reasonable person using logical methods) believes the allegations. The third and highest level is meant to indicate absolute certainty about the alleged facts by the judges.

Specificity. The scope of relevant facts may be initially very broad, comprising all crimes that have been reported and fall within the formal scope of jurisdiction. The next step to narrow down the scope is to identify the entities that were instrumental to the crime (institutions, armed groups, armies, political parties, networks, etc.): this is not a legal requirement but it is the most logical step in the analysis because core international crimes are usually the result of some form of collective action through established groups or institutions. The final and most specific stage refers to the identification of a particular accused, within the scope of the investigated crimes and organizations.

At the initial stage what needs to be selected is a case *hypothesis* rather than a case as such. Just like in scientific methodology, the hypothesis is the provisional explanation of the facts that shall be subject to investigation and then consolidated in to a thesis, which will be the case.

The design of a solid case hypothesis (logically consistent, objective, clearly defined, factual and legally sound) is fundamental for a successful selection and investigation. Using a standard format for designing case hypotheses will help to advance more promptly and efficiently. The case hypothesis must flow as a syllogism, i.e., a logic proposition whereby a chain of factual premises leads to the conclusion of responsibility of the accused in question.

The main premises of fact that the hypothesis must cover are usually: a) status of authority or role of the suspect; b) structure of the organization instrumental to the crime and subordinated or associated to the suspect; c) pattern and modus operandi of the criminal events; and d) conclusion on mode of responsibility. Rather than a vague idea or “common knowledge”, it is advisable to formulate the case hypothesis in written form, circulate it and subject it to the investigating team, first for review, and then as the framework that shall direct the investigation.

2. The gravity of the crimes

International criminal law (ICL) was conceived and developed to deal with crimes of the highest gravity.²⁸⁹ In the words of the ICC Statute, these are “the most serious crimes of concern to the international community as a whole” and past “unimaginable atrocities that deeply shock the conscience of humanity” (Preamble). The ICC Statute further mentions a requirement of “sufficient gravity” for case selection and admissibility (Article 17(1)(d)).

The requirement of gravity is clear in the origin of each of the core crimes: each one includes qualifiers of gravity in its legal definition that operate as restrictors to limit their application to extraordinarily grave conduct. Concerning war crimes, “grave breaches” are differentiated from “other, presumably less grave violations”, particularly for international armed conflicts (after the 1949 Geneva Conventions and their Additional Protocols of 1977).²⁹⁰ The ICC Statute includes an advisory provision for the “particular” consideration of war crimes “when committed as part of a plan or policy or as part of a large-scale commission”, mirroring similar qualifiers of gravity in the definition of crimes against humanity (Article 8(1)).

“Crimes against humanity” were created mainly as a reaction to the holocaust (i.e., the systematic and racist murder of millions of civilians), and it is clear that the references to “widespread” or “systematic” were designed to limit the scope to crimes against civilians that were extraordinarily grave because of the vast scale or methodical commission. The ICC Statute has further emphasized the element of systematicity by requiring that the “attack” must result from a higher State or organizational policy (Article 7(2)). Concerning genocide the most significant qualifier of gravity (and usually the most difficult element of the crime to prove in a court of criminal law) is the specific intent to destroy one of the protected groups.

While some qualifiers of gravity are built-in as elements of the legal definition of the crimes, a further analysis of gravity will be necessary beyond the formal test of legality. For example, only a “widespread” (or “systematic”) attack on civilian population may constitute a crime against humanity, but some crimes against humanity may be more “widespread” than others, or some acts within the “widespread” pattern are graver than others and hence should merit selection or prioritization.

Therefore, the focus on crimes of the highest gravity is a fundamental principle of ICL that should not be undermined with its use for relatively minor offences or frivolous prosecutions.²⁹¹

²⁸⁹ Note on terminology: “seriousness” and “severity” are frequently used as synonyms of gravity in the relevant law and commentaries.

²⁹⁰ F. Kalshoven and L. Ziegfeld, *Constraints on the Waging of War*, Geneva, ICRC, 2001, p. 80.

²⁹¹ For an extensive analysis of the issue in the ICC context, see the report *The Gravity Threshold of the ICC*, by the War Crimes Research Office of the Washington College of Law, American University (March 2008) available at <http://www.wcl.american.edu/warcrimes/icc/documents/WCROReportonGravityMarch2008.pdf?rd=1>.

2.1. Substantive gravity of the offence

The first question that needs to be addressed is whether some offences are graver than others.²⁹² In most national and international systems there is a hierarchy of gravity between the offences, so that, for example, offences against life and physical integrity may be considered graver than offences against property (it is graver to kill than to rob a person). The penalty attributed to different offences is the clearest indicator of their perceived gravity (whether those penalties are codified in a criminal code, or developed through judicial decisions).

Regarding core international crimes there is not such a thing as a codified set of penalties. There is only some emerging case law and developing empirical research on sentencing, and the investigating authorities may be reluctant to take a position on whether some offences are graver than others because they may see this as constraining their discretion.

It is safe to regard offences resulting in deliberate death of protected persons as gravest (murder or extermination as a crime against humanity, wilful killing or attack on civilians as a war crime, killing as an act of genocide). This is the case in most national systems. Furthermore the right to life is the first one consecrated in the Universal Declaration of Human Rights (Article 3) and every international crime initiates the enumeration of constituent offences with reference to those resulting in death.²⁹³ As a matter of methodology, killings are often the best indicators for crime pattern analysis because the information available is usually of better quality and lesser ambiguity (killings attract a lot of attention, bodies or forensic evidence may be available, and the elements of the crime are generally less ambiguous than other offences).

Rape is also considered a crime of the highest gravity in most national systems and in the emerging international jurisprudence. Hence the selection of cases primarily focused on rape by, among others, ICTY (Foča, Furundžija) and by ICC (Bemba).

Attacks against peacekeepers have been considered as particularly grave crimes by international tribunals for reasons akin to those of the national systems when dealing with violence against police or other public officers: attacking them affects their ability to protect and threatens the society as a whole. Hence the charges for using peacekeepers as hostages and human shields by ICTY (in the case of Karadžić and Mladić) and the case for an attack on a base on African Union peacekeepers by ICC (in the Darfur investigation).

In addition to the legal criteria, opinion surveys may help to adjust the assessment of gravity to the needs of the victimized population. For example, a recent survey conducted in Eastern DRC (Democratic Republic of the Congo) confirmed that killing was the highest priority for the local population (92% demanded accountability), followed by rape (69%) and looting (41%).²⁹⁴ As one of the participants in the seminar mentioned, this may trigger some dilemmas of “cultural relativism vs. international law”. In the reality the perception of the victims is unlikely to contradict substantially the criteria of international law when dealing with massive violence.

²⁹² This is about the underlying offences of the crimes. Regarding the core crimes as such (war crimes, crimes against humanity and genocide), the prevailing opinion in jurisprudence is that there is no hierarchy of gravity among them. Victims and public opinion do usually consider genocide the gravest, and alternative characterizations may be the cause of disappointment or a feeling of “under-estimating” the gravity of the crime (see for example the reaction of Bosnian victims to the acquittal on genocide charges in the Krajišnik and other ICTY cases).

²⁹³ As in ICC Statute, “killing members of the group” as an act of genocide (Article 6(a)), “murder” as a crime against humanity (Article 7(a)), followed by “extermination” Article 7(b)), “wilful killing”, “violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture” as war crimes (Article 8(a)(I) and Article 8(c)(i)).

²⁹⁴ *Living in Fear. A Population-Based Survey on Attitudes About Peace, Justice, and Social Reconstruction in Eastern Democratic Republic of Congo*, August 2008, see at <http://www.ictj.org/images/content/1/0/1019.pdf>, pp. 40-41.

2.2. Quantitative aspects

The number of victims is a basic parameter to define the gravity of the crime. The judges of the UN international tribunals have referred consistently to this key aspect of gravity (in the context of sentencing). Quantitative estimates of large numbers of victims in the context of war or mass violence require complex methodology and are often open to controversy in the trials as well as in the public opinion. The two main strategies are basically counting reported victims or estimating them based on samples and extrapolations. Both approaches have been accepted by judges and ideally the best result would come from combining and complementing them.

The table below is an example of counting reported victims from the Peruvian Truth Commission showing their chronological distribution for a period of 20 years.²⁹⁵ The very sharp peaks around 1983-85 give a clear indication of the periods of gravest crime.



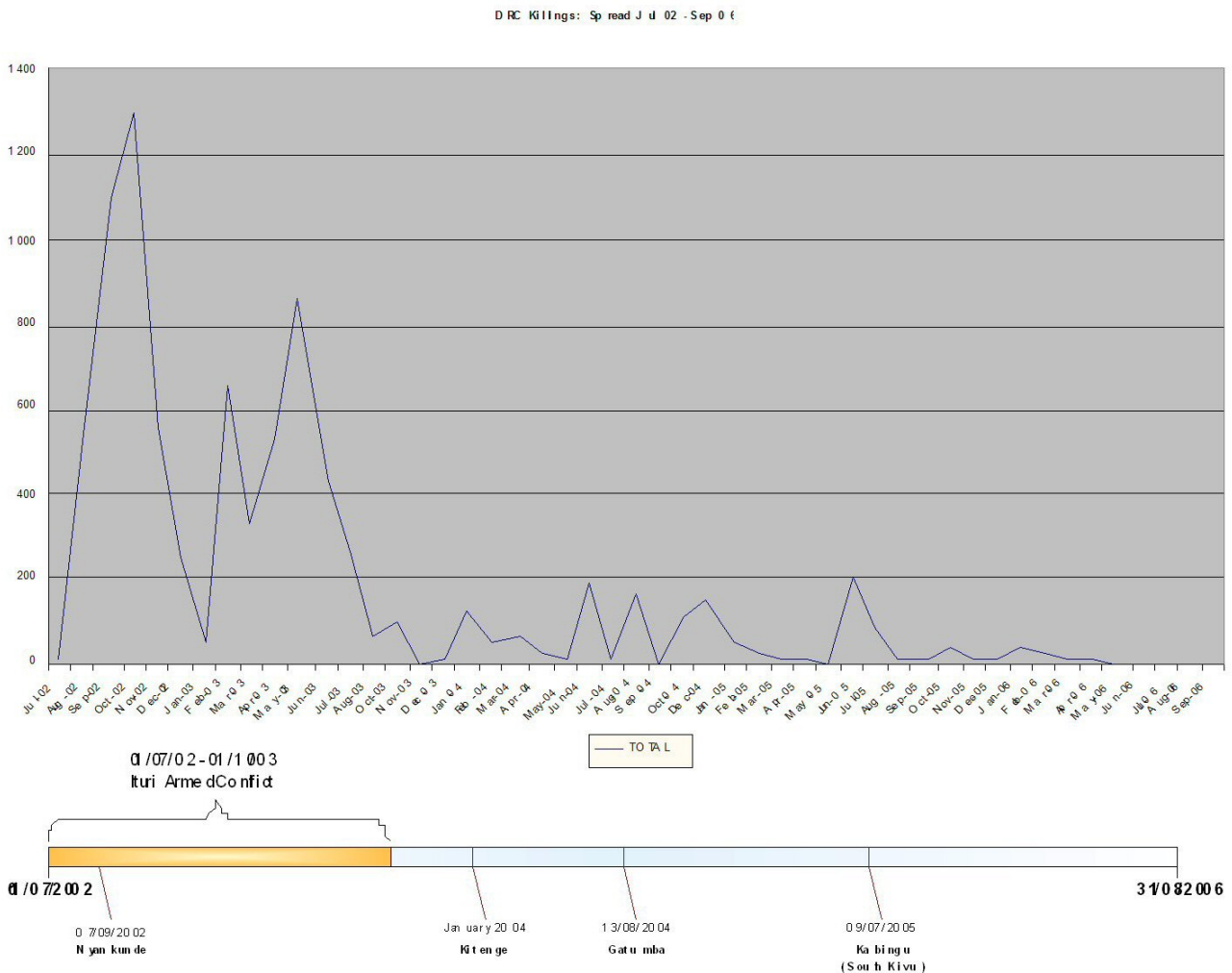
A limitation of this method is that it only covers the *reported* victims, and so it is likely to under-represent the real figures (assuming that all reports were truthful). Usually this method is most helpful to identify the periods and areas of gravest crime (assuming that there are no significant biases on the chronology and geography of the sources), rather than to assess the overall figures of victimization. Other limitations of this kind of analysis may be related to the quality of the underlying data (definition of the operational concepts, accuracy, completeness, etc.).

A similar model was used in 2004 by the Office of the Prosecutor of the ICC for the initial analysis that led to the selection of the first cases in the DRC investigation. Killings were used as the main indicator because of the inherent gravity of the crime, the relatively better quality of the information (more accuracy on the figures, locations, dates and attributions than other crimes) and because killings were considered a valid indicator of the broader pattern of

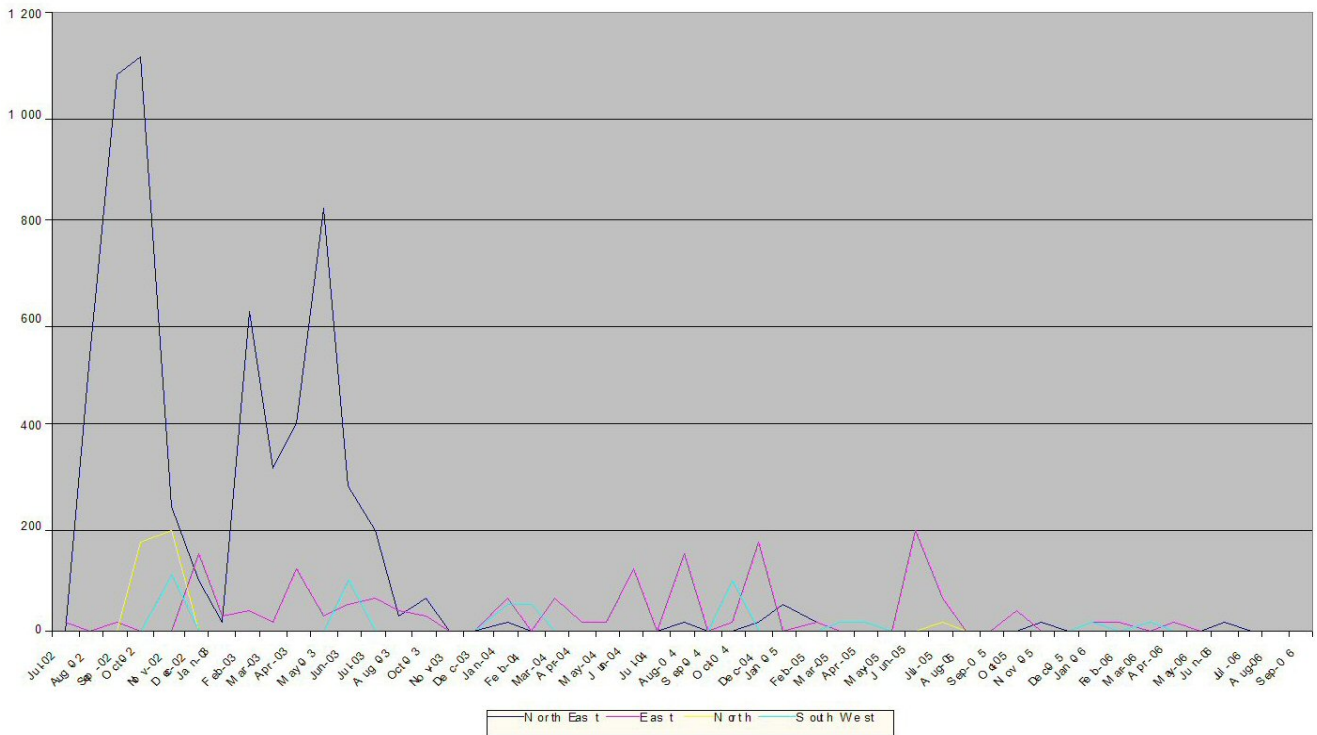
²⁹⁵ *Final Report of the Peruvian Truth and Reconciliation Commission*, Chapter II “El despliegue regional”, p. 107, see <http://www.cverdad.org.pe/ifinal/index.php>.

multiple crimes (killings were usually committed in association with rape, destruction, expulsions, etc.). The legal definition of murder/killing was utilized (under Articles 7 and 8 of the ICC Statute), so that deaths of combatants in war actions were excluded. The sources of the information comprised mainly the UN, as well as some NGOs and media, all of them subject to critical source evaluation (to control possible biases in the sources) and correction of duplications (what is known in different systems as “false collaterals” or “circular reporting”, i.e., the same incident reported by different sources under different names or aggregate categories). In case of conflicting or ambiguous information, ranges of minimum and maximum figures were used for the number of victims of the incident. The figures were inputted by reported incident, and then aggregated by months to produce the table. The underlying dataset has been then updated until 2008 (for new incidents as well as for new data on old incidents) to monitor trends.

The first table below shows the chronological distribution of reported killings for the whole of the DRC. The second table, based on the same data, shows the chronological distribution by regions within DRC. The chronological line between the two tables shows key events in order to visualize correlations. The resulting pattern analysis indicates the regions and periods of gravest crime, and their correlation with the armed conflict.

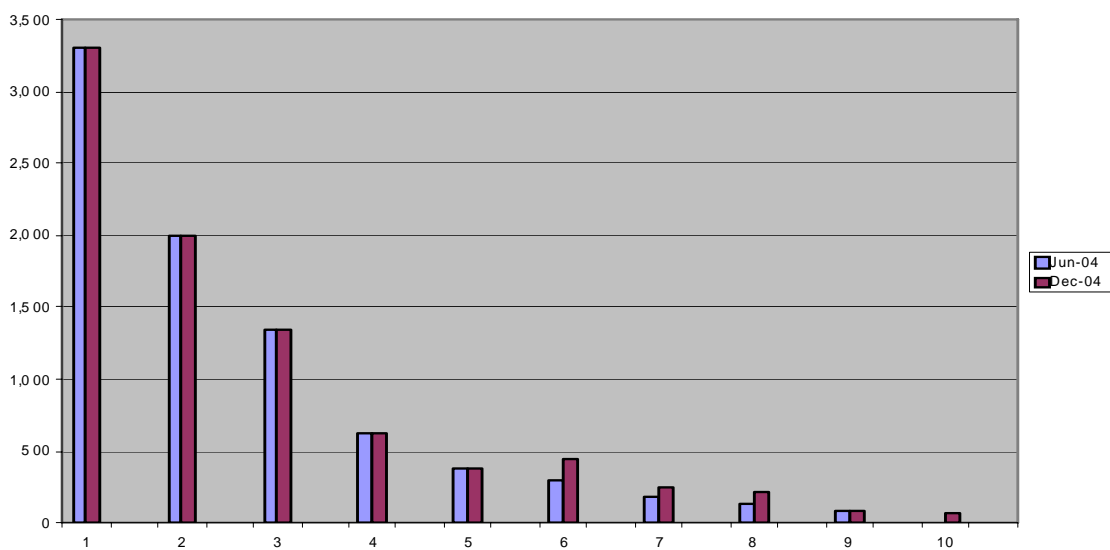


DRC Killings by Sectors : Spread Jul 02 - Sep 06



The data on reported killings were also analyzed by entities (armed groups or institutions), with the result of the table below. Of the ten entities whose members had reportedly committed relevant killings, two featured with a significantly higher profile (nos. 1 and 2 in the table). These were actually the two main entities in the armed conflict in Ituri in the period 2002- 2003 and they were selected for the first two cases to be investigated in the DRC.

DRC Killings by Groups Nov. 2004



This analysis requires first to define the identity of each of the entities, the boundaries of their membership. Often a given armed group of institution is described with different names by different sources (victims or others). Sometimes the attribution is vague or based on generic characterization (for example in Bosnia “Chetniks” for all Serb forces or “Ustasha” for all Croat forces, or in the DRC “Rwandan rebels” for a series of groups, etc.). Consolidation tables will need to be designed to control these terminological variations and translate in the most objective way the reported categories into a consolidated entity, within a given temporal and geographic context (or translating *emic* into *epic* information, as linguists and anthropologists would say).

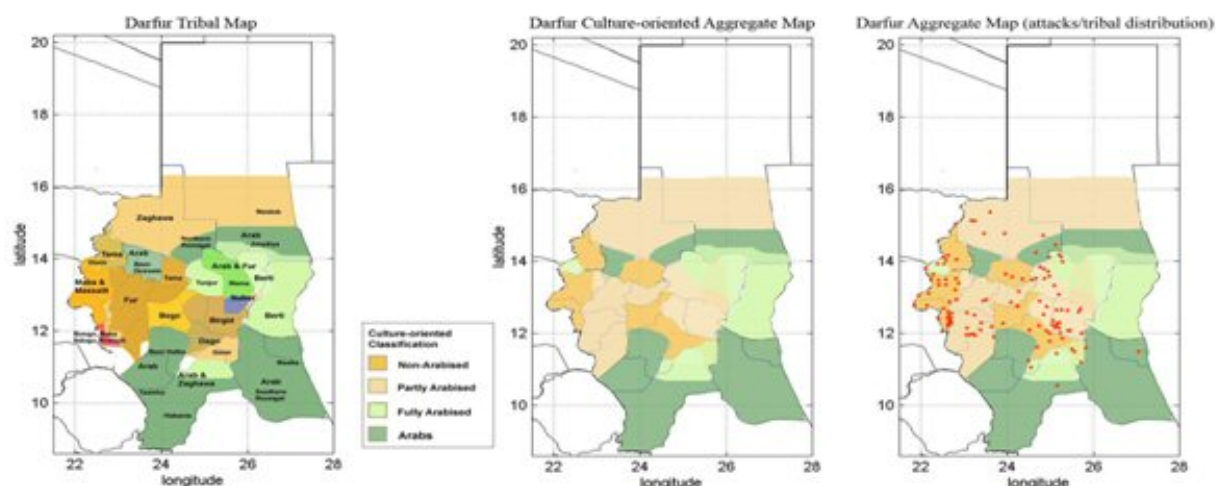
To produce the descriptive statistics and graphs is not that difficult (the examples above were produced with basic Excel and Visio applications). What is difficult is to design the right parameters (with the right criteria of substantive law and jurisdiction), to identify the right sources and evaluate them correctly (taking into account all kinds of potential biases), to collect the adequate mass of data, and to complete the inputting with sufficient accuracy and consistency (all of the above within usually short deadlines). For that matter it is necessary a deal of team work (including investigators, analysts and prosecutors), good database design (including clear written protocols, as well as possibly prototypes testing) and proper quality control.

Along with the in-house analysis of the crime data, the opinion of different researchers with extensive field experience was gathered through a series of open non-leading questions. These experts validated the findings regarding the periods, areas and entities with highest profile of crime.

The same model was used for subsequent investigations by the ICC OTP. For Northern Uganda the crime pattern analysis focused on killings and abductions, in response to the reality of the crime in this particular situation. For the first two Darfur cases tables of this kind were filed before the judges as annexes to the Applications for a Warrant of Arrest, showing the crime pattern (focus on killings and forced displacement) and correlation with key phases of the conflict and other events. For both Northern Uganda and Darfur the analysis showed a much higher crime profile for one of the parties of the conflict (the Lord’s Resistance Army and the forces associated to the Government of the Sudan, respectively), which were selected indeed for investigation.

Crime mapping techniques may help to identify the “hot spots” or areas with highest concentration of crime. The maps below are an example of analysis of this kind conducted by the Office of the Prosecutor of the ICC at an early stage of the Darfur investigation (2005, internal draft working version). A crime database similar to the one explained above (see the DRC example) was developed and geographic coordinates were assigned to each reported incident resulting in a significant number of killings. Geographic and ethnographic information was collected and collated to build a layer showing administrative divisions and approximate presence of the tribes.²⁹⁶

²⁹⁶ An updated and animated version of this map (to show chronological evolution, built on Flash software) was submitted before the judges as an annex to the Application for a Warrant of Arrest for the second Darfur case and further used for public communication in 2008.



As explained before, to produce the graphic output is not the most difficult part of the exercise (in this case produce with Matlab and ArcGIS software). What is most difficult is to have the correct database design, gather the right data, and input it correctly. Specific difficulties may arise from the poor geographic data (including lack of official toponyms, and issues of transliteration).

The plotting of the crime data on the layer of geographic information shows particularly grave concentrations of crime and correlations with certain tribal areas. For the most complete objective analysis it is also advisable to take into account other elements, such as overall distribution of population and population density, distribution of military formations and objects, roads and other strategic assets.

2.3. Qualitative aspects

Judges consider a set of aggravating (and mitigating) circumstances for sentencing purposes, which usually refer to qualitative aspects of the conduct of the accused, the profile of the victims or the context of the crime. These circumstances are deemed to be assessed at the end of the trial, and they are specific to the individual suspect and the evidence presented before the judges. At a more general level they may also provide guidance for an assessment of gravity at the investigation stage. These are the most common aggravating circumstances for core international crimes, as provided by treaty and case law:

- a) *Reoccurrence or persistence.* Repeated or continuing commission of the crime, or prior conviction for a similar crime (Rule 145(2)(b)(i) of the ICC Rules of Procedure and Evidence).
- b) *Abuse of power.* For State officials or other actors with a position of power, to abuse the trust vested on them by the national or international community to commit a crime (ICC Rule 145(2)(b)(ii)). This has been repeatedly highlighted by international judges that relate the level of the accused in a power hierarchy to the gravity of his or her responsibility.
- c) *Victim vulnerability.* Taking advantage of the particular vulnerability of the victim because of their defenceless or weak condition (ICC Rule 145(2)(b)(iii)). This is particularly relevant for offences against children.
- d) *Particular cruelty.* Causing unnecessary pain on the victim (ICC Rule 145(2)(b)(iv)).

- e) *Discriminatory intent*. On racial, ethnic, national, religious, political, gender, socio-economic, linguistic or other grounds considered offensive to the values of diversity, equality and underlying peaceful coexistence (ICC Rule 145(2)(b)(v)).
- f) *Impact*. When the action has a broader or long-term impact beyond the immediate victim or damage (including violence on peacekeepers, magnicide, long-term trauma, economic deprivation, or environmental damage).
- g) *Iniquity*. Special efforts or machinations (long-term, sophisticated) in the planning or execution of the crime that indicate a particularly evil disposition.
- h) *Specific notice*. When the accused fails to react upon specific and qualified notice of the crime and the resulting damage.

Some of these circumstances may be equivalent to elements of the legal definition of the crimes or modes of responsibility: still, as explain above, these aspects require factual analysis beyond the formal legal test to determine degrees of gravity among multiple crimes or within a broad pattern of crime.

2.4. Gravity and mode of responsibility

It is fair to assume that some modes of responsibility or mental elements are graver than others. It is clear that, all other circumstances being the same, it is graver to pursue deliberately an act of violence than to allow it to happen out of negligence (unless notorious tolerance before subordinates becomes deliberate instigation). The ICC Statute does suggest such a scale of gravity when limiting the responsibility to cases in which the perpetrator “means to engage in the conduct” and “means to cause that consequence or is aware that it will occur in the ordinary course of events” (Article 30 “Mental Element”). The ICC Rules of Procedure and Evidence further refers to the “degree of intent” as a sentencing factor (Rule 145(1)(c)).

To be the principal perpetrator of the crime (the primary causal actor) should be considered as graver than being an accessory contributor (an accomplice), and to order or instigate a pattern of crime should be considered as graver than executing a part of it. Among deliberate contributions to a crime some may be graver because they are fundamental to achieve the result, and others may be less decisive and so less grave. Hence the reference to “degree of participation” as a sentencing factor in the ICC Rules of Procedure and Evidence (Rule 145(1)(c)).

While these are valid considerations of gravity, they are suspect-specific and it will be difficult to make a valid assessment at an early stage of case selection: it often takes a full investigation to determine the precise mental element and mode of responsibility of the perpetrator.

3. The level of responsibility of the suspect

3.1. Origin and definition

There is a long tradition in the prosecution of core international crimes of focusing on a limited number of senior leaders. The main trials of Istanbul in 1919 for the massacres of Armenians dealt with 19 leaders, including the top State authorities.²⁹⁷ After World War I, the commission on war crimes established as part of the peace agreements recommended trials for

²⁹⁷ G. Lewy, *The Armenian Massacres in Ottoman Turkey: A disputed Genocide*, Salt Lake City, Utah UP, 2005, p. 76.

“persons of authority” and “civil or military authorities”.²⁹⁸ The Nuremberg IMT (International Military Tribunal) trial was designed for the “Major War Criminals of the European Axis”, defined in Article 1 of the London agreement as “war criminals whose offenses have no particular geographical location whether they be accused individually or in their capacity as members of organizations or groups or in both capacities”.²⁹⁹ This provision was meant for higher leaders accountable for crimes across the territory of multiple states.³⁰⁰ They were also referred to as “the leaders of the European Axis and their principal agents and accessories”.³⁰¹ Similar provisions defined the personal jurisdiction for the IMTFE (International Military Tribunal for the Far East, at Tokyo).

A certain international custom of selecting senior suspects has developed also from multiple and more recent national experiences. In 1975, the Greek judiciary put to trial the 20 top leaders of the military junta that had sponsored systematic persecutions and torture during their dictatorial regime. In 1979, the government of Cambodia tried (in absentia) the two most senior leaders of the Khmer Rouge regime, which were regarded as “ringleaders” of their “clique” and planners and instigators of genocide.³⁰² In 1983, the government of Argentina focused on “a small group of people who had promoted and conducted state terrorism, as well as those who had executed the most cruel and perverse acts”. The “deliberative capacity”, ranks and command within the military regime would be the basis of selection for the senior suspects, which led to the trial of the nine top leaders of the Argentine military juntas in 1985.³⁰³ In the 1980s, several German and French senior officers were selected for prosecution by the French judiciary because of crimes against humanity.³⁰⁴ In 1992, the Berlin prosecutor indicted the former head of State of the GDR (German Democratic Republic) because of being a “key figure in everything that happened” with “unlimited influence” on the border control system that ran “like a clockwork” and resulted in the shooting and killing of a number of fugitives.³⁰⁵ In 1994, the Ethiopian Federal High Court started the trial of the former head of state and other 54 senior officers for genocide and crimes against humanity. In 1996, the Genocide Law of the Republic of Rwanda included in the top category of perpetrators (category 1 of 3) the “planners, organisers, instigators, supervisors and leaders” and the “persons who acted in positions of authority” at different levels (along with “notorious murderers” and perpetrators of sexual violence). In 1998, the Spanish judiciary indicted the former head of State and the armed forces of Chile for ordering killings, torture and other crimes.³⁰⁶

The Statute of the SCSL (Special Court for Sierra Leone, 2002) specifically limits the jurisdiction of the Court to “persons who bear the greatest responsibility” but with a broader

²⁹⁸ S. Glueck, *War Criminals: Their Prosecution & Punishment*, New York, Alfred A. Knopf, 1944, p. 21.

²⁹⁹ Agreement by the governments of the USA, France, UK and USSR “for the Prosecution and Punishment of the Major War Criminals of the European Axis”, 2 August 1945.

³⁰⁰ For the first definition of this concept see Declaration on German Atrocities (Moscow declaration), 1 November 1943.

³⁰¹ Executive Order 9547 of 2 May 1945, by President Harry S. Truman.

³⁰² See H.J. De Nike, J. Quigley and K.J. Robinson. (eds.), *Genocide in Cambodia: Documents from the Trial of Pol Pot and Ieng Sary*, Philadelphia, Pennsylvania UP, 2000.

³⁰³ C.S. Nino, *Radical Evil on Trial*, New Haven, Yale UP, 1996, p. 64. For an account of the trial by Luis Moreno Ocampo based on his direct experience, see L. Moreno Ocampo, *Cuando el Poder Perdió el Juicio*, Buenos Aires, Planeta, 1996.

³⁰⁴ See S. Chalandon and P. Nivelle, *Crimes contre l'Humanité: Barbie, Touvier, Bousquet, Papon*, Paris, Plon, 1998.

³⁰⁵ A.J. McAdams, *Judging the Past in Unified Germany*, Cambridge, Cambridge UP, 2001, p. 35. The case against former President Honecker was preceded by two cases on lower ranking officers.

³⁰⁶ Auto de Prisión by investigating judge Baltasar Garzón of 18 October 1998.

meaning, including references to the national law and the peace process, in the following terms (Article 1(1)):

The Special Court shall, except as provided in subparagraph (2) [peacekeepers], have the power to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996, including those leaders who, in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone.

The defence in the case of Moinina Fofana before the SCSL challenged the indictment on the grounds that the accused was not among those “bearing the greatest responsibility”. Fofana was indicted together with two other top leaders of the CDF (Civilian Defence Forces) and, according to the indictment (as it was confirmed by the judges), he was second in command at the top of the military hierarchy. The defence argued that the concept of “persons who bear the greatest responsibility” is rather vague, but in any event the accused did not fall within any of the two possible interpretations, which were: a) “The leader of the parties (or the states) that had the greatest responsibility for the (continuation of the) conflict and the threat to the establishment and implementation of the peace process in Sierra Leone”; b) “Those individuals who were responsible for the majority of crimes committed during the conflict in Sierra Leone”.³⁰⁷

In his response, the prosecutor rejected the two interpretations proposed by the defence, but he did not propose any definition of his own, claiming instead that the issue remains within his legitimate discretion. On the specifics of the case the prosecutor re-stated the status of command of the accused (which had not been contested by the defence) and his allegation that “the Accused committed the specific crimes with which he is charged”.

The judges referred to the *travaux préparatoires* of the Statute to suggest a broad interpretation of the concept, and so they decided to support the discretion of the prosecutor and to dismiss the challenge from the defence. In the *travaux préparatoires* quoted in the decision, some guidance is given to define the concept:

While those “most responsible” obviously include the political or military leadership, others in command authority down the chain of command may also be regarded “most responsible” judging by the severity of the crime or its massive scale. “Most responsible”, therefore, denotes both a leadership or authority position of the accused, and a sense of the gravity, seriousness or massive scale of the crime. It must be seen, however, not as a test criterion or a distinct jurisdictional threshold, but as a guidance to the Prosecutor in the adoption of a prosecution strategy and in making decisions to prosecute in individual cases.³⁰⁸

[...] the draft Statute, as proposed by the Security Council, does not mean that the personal jurisdiction is limited to the political and military leaders only. Therefore, the determination of the meaning of the term “persons who bear the greatest responsibility” in any given case falls initially to the prosecutor and ultimately to the Special Court itself. [...].³⁰⁹

³⁰⁷ *Decision on the Preliminary Defence Motion on the Lack of Personal Jurisdiction Filed on Behalf of Accused Fofana*, 3 March 2004.

³⁰⁸ Report on the establishment of a SCSL by the UNSG, para. 30, S/2000/915, 4 October 2000.

³⁰⁹ Letter from the UNSG to the President of the Security Council, para. 2, S/2001/40, 12 January 2001.

The competence of the Extraordinary Chambers in Cambodia (ECCC) is also limited by its Statute to “senior leaders of Democratic Kampuchea and those who were most responsible”. This language suggests, however, that the “senior leaders” and the “most responsible” might be different categories, i.e., the leaders could be prosecuted just because of their status.

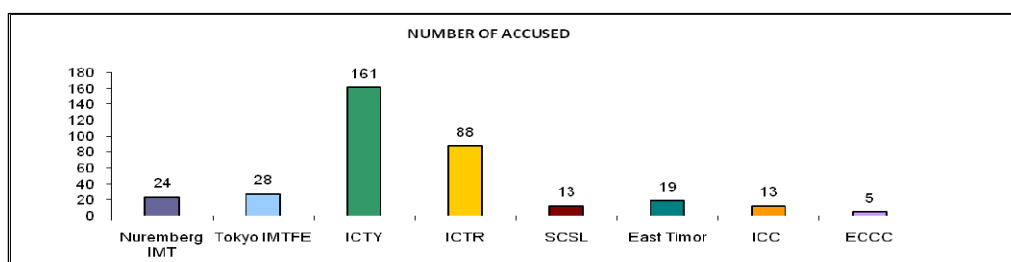
This trend, as well as the experience of the UN *ad hoc* tribunals, led the Prosecutor of the ICC to decide in 2003 that “as a general rule, the Office of the Prosecutor should focus its investigative and prosecutorial efforts and resources on those who bear the greatest responsibility, such as the leaders of the State or organisation allegedly responsible for those crimes”.³¹⁰ The ICC judges have expressed their support for this policy by the Prosecutor.

The elements for a definition suggested by the SCSL and other sources above remain still rather open, and they may be problematic in saying too much in some aspects and too little in others. It is excessive to cast suspicion on leaders just because of their formal status without qualifying clearly what circumstances justify a presumption of individual responsibility. It is not appropriate to exclude from the definition issues of causation (primary causation vs. accessory responsibility) and degrees of participation. Bringing the gravity of the criminal acts as such into the definition of degrees of responsibility (as suggested at SCSL) may lead to confusion. The practice of using broad theories of liability (common purpose or joint criminal enterprise) is not the best help to differentiate the “most responsible” from the rest. Unclear doctrine on causation in some legal systems is an additional difficulty.

In conclusion, a more clear definition should understand that the greatest responsibility for core international crimes corresponds to those persons who were the primary causal actors (as opposed to accessory actors) for the pattern or incident of crime as a whole by means of ordering, incitement or notorious tolerance. Senior leaders should be presumed to be most responsible for the crime if: a) there was a hierarchical structure in place, whether civilian, military, economic or other; b) that structure was instrumental to the crime as a matter of policy; and c) the leader had effective control or influence on the structure in the relevant period and area. Instigators of the crime should be presumed to be most responsible for the crime, regardless of their hierarchical status, if they effectively led a substantial segment of the leaders or direct executioners to commit the crime.

3.2. Practice

To what extent have the international tribunals focused on the most responsible? To address this question, first note the important differences in the number of accused. The ICTY has prosecuted a much higher number of individuals than any other international tribunal (161), followed by ICTR (88) and then all others in much smaller figures (see table below, figures as of July 2008).



³¹⁰ Paper on some policy issues before the Office of the Prosecutor (September 2003), p. 7, see http://www.icc-pi.int/library/organs/otp/030905_Policy_Paper.pdf.

The question can be addressed from two perspectives: first, to identify all known clusters of “most responsible persons” and check whether their members were selected for prosecution or not; second, to review all persons that have been actually selected for prosecution and verify their level of responsibility. The data of ICTY have been analyzed using both methods.

Concerning the first approach, the table below shows the 15 main reported clusters of allegedly “most responsible persons” (leadership groups) within the jurisdiction of the ICTY and an assessment of whether they were selected for prosecution or not (in a meaningful way, not necessarily every member of the group). The groups are identified by reference to a particular pattern and period of crime. Some groups may feature more than once because reportedly they were responsible for multiple patterns of crime, at different points of time (such as the leadership of the FRY for Croatia 1991, BiH 1992-95 and Kosovo 1999).

	PERIOD	LEADERSHIP GROUP	SELECTED
1	1991	Republic Serbian Krajina	YES
2	1991	Federal Republic Yugoslavia (Belgrade)	YES
3	1991	Republic of Croatia	YES
4	1992-95	Republika Srpska	YES
5	1992-95	Federal Republic Yugoslavia (Belgrade)	YES
6	1992-95	Republic of Bosnia and Hercegovina	YES
7	1993-94	Republic of Herceg-Bosna	YES
8	1993-94	Republic of Bosnia and Hercegovina	YES
9	1999	Federal Republic Yugoslavia (Belgrade)	YES
10	1995	Republic of Croatia	YES
11	1995	Republic Serbian Krajina	YES
12	1999	Kosovo Liberation Army (Albanians)	YES
13	1999	North Atlantic Treaty Organization (re. Kosovo)	NO
14	2001	Republic of Macedonia	YES
15	2001	National Liberation Army (Albanian Macedonian)	NO

It is clear that the ICTY prosecutor did select for prosecution almost all the relevant leadership groups. Only two of the 15 clusters were not selected, two of them in the relatively lower range of crime gravity.³¹¹

Concerning the second approach, a scale has been defined to assess the profile of responsibility of each accused in five levels, from the top level of highest authorities, to level 5 for executioners without any authority or role beyond their immediate actions.³¹² According to this scale less than 1/3 of the ICTY accused belong in the two top levels (11% in level 1 and 16% in level 2), while level 3 comprises 28% and the two lowest levels make 45% (30% level 4 and 15% level 5).

The data of the ICTR show a similar share: less than 1/3 of the accused belong in the two top levels (2% in level 1 and 28% in level 2), while level 3 comprises 27% and the two lowest levels make 40% (42% level 4 and 1% level 5).

Significant differences appear when comparing two of the main municipalities investigated by ICTY, such as Prijedor and Srebrenica: in the former a number of low level perpetrators were indicted, while in the latter indictments focused on senior officers (with the exception of Erdemović). There are also significant differences in the level of indictees in relation to certain types of offences; rape and sexual violence have originated relatively lower level indictees and convictions (like Furundžija and the Foča case), while crimes related to artillery attacks on cities have originated higher level indictees (like in the indictments for the shelling of Zagreb, Dubrovnik and Sarajevo).

In conclusion, the ICTY did select many persons that were apparently most responsible (including the most notorious top leaders), but also many more that were not. A review of years of practice at the ICTY OTP suggests that those “lesser responsible” were selected for a number of reasons (often contributing jointly to a single selection):

- a. Arrest opportunities (beginning with Tadić, the very first case) in a context of limited cooperation and difficulties to obtain any arrest.
- b. Notorious perpetrators in areas of very grave crime (like Jelisić in Brčko).
- c. Expectations of national (mainly Bosnian) authorities, victims and NGOs.
- d. Investigative value to build the higher cases (such as Erdemović for Srebrenica) in a context of difficulty to obtain key insight evidence.
- e. To address particularly grave types of offences (like Furundžija for rape).

³¹¹ The prosecutor’s decision not to investigate NATO officers referred mainly to allegations of disproportionate or indiscriminate aerial bombardment that resulted in damage of dual-purpose (civilian-military) facilities and the death of several hundreds of civilians in Serbia in 1999. It was a controversial decision, much criticized by the victims, the Serbian authorities and opinion leaders, and a sector of academia and NGOs. The crimes allegedly committed by members of the NLA in Macedonia seem of relatively lesser gravity, in the overall scale of crimes within the ICTY jurisdiction (this gap has raised questions about impartiality, since crimes of similar gravity committed by Macedonian forces were selected for prosecution, but this is a different issue).

³¹² Definitions for each level: 1 = Top authority. Highest authorities at the top of the organized structure. Head of State, Prime Minister, top military commanders, president of a major political party. Leading instigator of the relevant pattern of crime as a whole; 2 = Individuals immediately subordinated or accessory to the top level. Deputies with command authority to level 1 individuals, ministers, senior advisors, or instigators affecting a large part of the pattern; 3 = Regional leaders, Corps commanders, Commander or head of a branch or institution, Police Chief, military zone commander, Brigade commander, instigator at the regional level; 4 = Lowest authority. Any person superior to or instigating one or more immediate executioners; 5 = No authority. Immediate executioners.

- f. Because the officers in charge of the case had got the evidence (including evidence files submitted by UN and national agencies) and nobody restricted their discretion.

A more strict focus on the “most responsible” could have released resources and speeded up the most important cases (Milošević was indicted only after six years of the establishment of the tribunal) and probably it would have limited to less than half the total number of 161 accused.

The death of senior suspects is another aspect that has affected to some extent the ability of the ICTY to focus on higher levels. This is particularly the case with forces of the Republic of Croatia and its surrogate so-called Republic of Herceg-Bosna, several of whose senior suspects passed away before the prosecutor managed to indict them.³¹³

The data of the SCSL and ECCC show a higher profile of their accused (with total numbers being much smaller). For SCSL 92% of the accused belong in the top two levels, 8% (which is just one accused) in level 3, and there is none in the lowest levels. For the five accused of the ECCC, four would belong in top two levels (which is 80%) and 1 in the third level, with none in the lowest levels. This is consistent with their statutory competence.

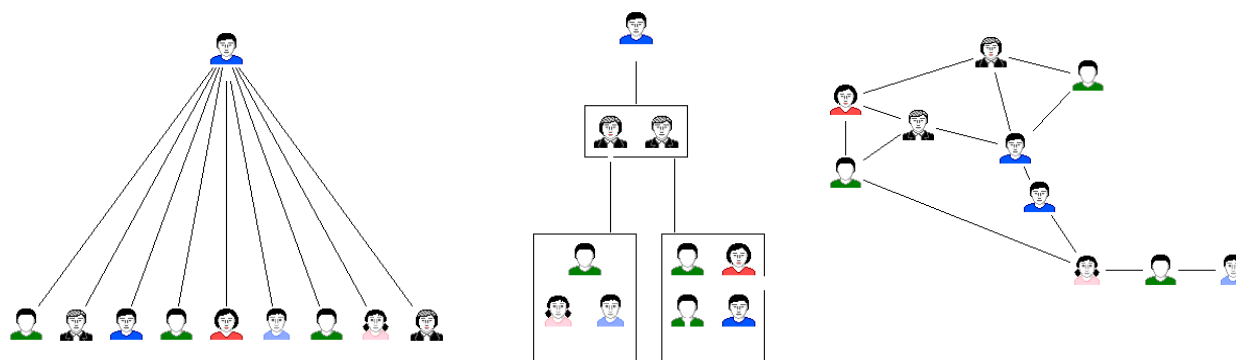
The ICC also shows a high profile for those accused in the first five years of work and within four different situations (the DRC, Northern Uganda, Darfur and the Central African Republic). Some 77% of the accused belong in the top two levels (46% in level 1 and 31% in level 2), 23% in level 3, and none in the lowest levels. This is consistent with the policy adopted by the Prosecutor in 2003.

3.3. Analysis of structures

To identify the most responsible is not always self-evident. Assumptions based on formal hierarchy are often valid as hypotheses, but they cannot be regarded as axiomatic. The true authority of leaders may vary depending on the type of political structure (the President of the Republic have very different powers in Italy or in France), territorial structure (a federal state and a centralized state may work very differently), the strength of the institutions (while international crimes often take place in the context of weak or collapsed institutions) or simply organizational changes over time.

Consider the following types of organizational structures, in which the same 10 individuals are organized in different ways:

³¹³ Among them the President of the Republic of Croatia, Franjo Tuđman, his Minister of Defence, Gojko Šušak, and the President of the so-called Republic of Herceg-Bosna, Mate Boban. Their suspect status is apparent by their mention in indictments, evidence and public arguments put forward by the Prosecutor in public for a number of related Croat and Bosnian-Croat cases. The Nuremberg IMT had a similar problem with the death of Hitler, Himmler and Goebbels prior to any indictment.



A – Charismatic

B – Bureaucracy

C – Network

Types A and B represent the classic distinction between charismatic and bureaucratic authority (Max Weber). In the charismatic structure the leader links directly with the mass of his or her subordinates, while bureaucracies are based on a hierarchy of echelons subordinated to a central authority. For both types of pyramidal structures, identifying the most responsible may not be too difficult, at least at the formal level (but see the requirements mentioned in the definition of most responsible, in section 3.1. above).

Type A links are characteristic of cases of public incitement of the crime, such as Streicher (Nuremberg IMT), Akayesu (ICTR) or Brđanin (ICTY). Type B links are the basis for theories of “organized power apparatuses” (Roxin) and the many cases about military commanders (from Jodl and Yamashita to Krstić). It is most difficult in type C links to identify those most responsible because authority may be shared horizontally. Then there may be mixed types (like the Lord’s Resistance Army, which looks like A + B under Joseph Kony’s charisma and military echelon) and associations of different types (like C+A networks of local militias, or B+B tactical groupings of conventional military units).

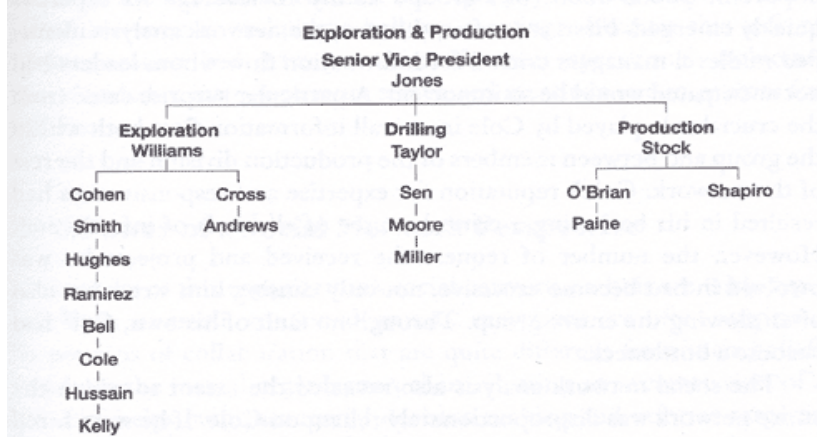
Beyond the formal (*de jure*) view of the structure, the critical question is to establish its real (*de facto*) functioning. The two diagrams below show the same organization, first according to its formal definition, and then according the network analysis of its real functioning.³¹⁴

³¹⁴ From R. Cross and A. Parker: *How Org Charts Lie*, excerpt from their book *Hidden Power of Social Networks*, available at <http://hbswk.hbs.edu/archive/4171.html>.

FIGURE 1-1a

Formal Versus Informal Structure

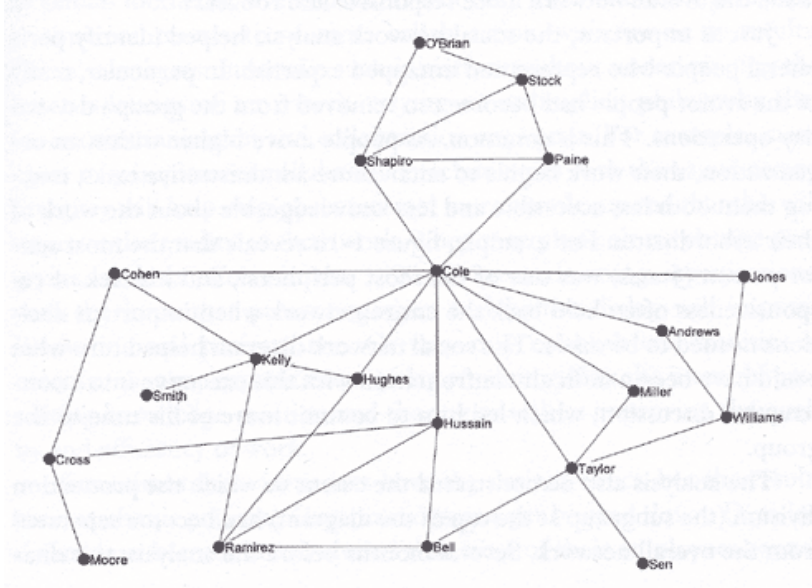
FORMAL ORGANIZATIONAL CHART



Note: This example has been substantially disguised at the request of the organization.
 Source: Figures 1-1a and b from R. Cross et al., "Knowing What We Know: Supporting Knowledge Creation and Sharing in Social Networks," *Organizational Dynamics* 30, no. 2 (2001): 100-120. © 2001, reprinted with permission from Elsevier Science.

FIGURE 1-1b

Informal Structure as Revealed by Social Network Analysis



In this example, the most senior officer at the top of the formal structure (Jones) actually has a peripheral role in the informal structure, while the central roles are played by officers that have formally lower positions. This type of discrepancy is not rare and the matter of much analysis and investigation when dealing with core international crimes. To shed light on the internal functioning of a structure, we may resort to the study of constitutional and other laws and regulations, to thorough interviewing of insiders (who may well contradict among themselves), analysis of archives and communication records, various diagramming tech-

niques and advance software (such as i2). A check-list of the main elements to investigate a structure would comprise the following categories:

	CATEGORY	DEFINITION
1	Formal status	Formal establishment and mandate of the structure.
2	Doctrine	Ideology, group identity, guiding principles and objectives.
3	Uniformity	Standards of organization, external signs and procedures.
4	Authority	Ability to issue and implement plans, orders and instructions.
5	Communications	Ability to transmit information effectively within the structure.
6	Personnel	Number of members, and ability to manage them (fungibility).
7	Weaponry	Weapons and ammunitions utilized or available to the structure.
8	Finance	Economic system, including income, assets, payments and trade.
9	Logistics	Support system for supplies, transport and infrastructures.
10	Territory	Geographic deployment and territorial control or influence.
11	Discipline	Including internal discipline and criminal justice).

These categories may need to be specifically analyzed in reports (with proper analytical drafting and sourcing standards), chronologies, organizational charts (time-specific, duly sourced and following proper diagramming conventions), maps, etc. Such systematic analysis, based on the awareness about different types of structures and their formal-informal contradictions, should be the basis for the most objective and accurate identification of those most responsible.

3.4. Suspect-driven vs. offence-driven investigations

Suspect-driven investigations are those in which the accused is selected from the outset, and this choice determines the whole development of the investigation. Offence-driven investigations are those in which the choice of the criminal events drives the investigation, while the selection of the accused takes place at a later and better informed stage.

Suspect-driven investigations are rather common when dealing with core international crimes. They are often preferred by the investigating authority because they are seen as faster and easier to manage. A suspect-driven strategy may be perfectly legitimate if the information available at the initial stage justifies objectively the choice (for example, a fairly compelling prima facie case led to a fully suspect-driven investigation for Eichmann). Nevertheless, this approach carries a risk of missing the broader picture and developing what cognitive psychologists call “confirmation bias” (to collect and interpret evidence selectively to confirm a

premise), towards incrimination of the chosen suspect. Confirmation bias is certainly a very common problem in criminal investigations that may affect the quality of the findings and that judges may consider detrimental to the fairness of the process.

Experience shows that the best techniques to control the risks of suspect-driven investigations are: a) to develop parallel lines of investigation or analysis on the offence and on the suspect, hence keeping some space for analysis beyond the suspect; b) to focus on the organizational structures as a middle ground, which should help to assess most objectively the role of the suspect; and c) to subject the findings to internal review by an independent panel of officers that have not been involved in the investigation and should not suffer from “confirmation bias”.

4. Conclusions

Based on the lessons learned and best practices from international tribunals, the use of the criteria of gravity and highest responsibility for selection of prioritization of cases would be best guaranteed by the following principles:

- a. Determine the substantive offences that are regarded as gravest (such as possibly killing and rape) and develop the selection process mainly around them.
- b. Define clear parameters of gravity, including quantitative and qualitative aspects (number of victims, manner, specific intent, etc.) and considering sentencing criteria.
- c. Adopt an explicit hypothesis of the case as the outline for selection and investigation.
- d. Adopt a clear definition of “most responsible”, focusing on the primary causal actors and presuming that they are the same as senior leaders only under certain factual circumstances.
- e. Beware of the existence of multiple types of power structures, discrepancies between their formal definition and real functioning, and variations over time and space.
- f. Utilize systematically analytical techniques, including crime pattern databases, statistics, standard indicators check-lists, mapping, chronologies, network analysis, etc. to determine both gravity and highest responsibility.

Beware of the risk of confirmation bias in suspect-driven investigations and take measures to control it.

Post-conflict criminal justice: practical and policy considerations

Vladimir Tochilovsky³¹⁵

In post-conflict situations where the national resources are exhausted and the judicial system is significantly weakened or even ruined, the national institutions have to deal with a flood of cases from the conflict. In Bosnia and Herzegovina, for instance, several thousand cases of this category remain unresolved.³¹⁶

There are some quasi-judicial measures to reduce the burden on the post-conflict criminal justice system. In some cultures, they apply traditional “summary” justice (such as *gacaca* courts in Rwanda). It was reported that the *gacaca* courts were to clear a backlog of hundreds of thousands of genocide-related cases in Rwanda.³¹⁷ It would take hundreds years to resolve all these cases through the regular judicial process.

Truth and reconciliation commissions with the authority to grant amnesty for the low and middle level perpetrators is another form of dealing with the flood of complaints and cases. In the former Yugoslavia, however, the attempts to set-up such commissions have been unsuccessful so far.

There are thousands of those who were involved in the conflict; those who contributed to the unlawful acts by being a part of the military, police or similar institutions (soldiers, camp guards, policemen, etc.) and who do not have blood on their hands. This category of low and middle level suspects may be considered for amnesty.

There exist some factors that reduce the scope of national investigations in states on whose territory crimes have occurred. Unlike international tribunals, domestic prosecutors do not need to gather information to develop their knowledge and understanding of the political, military and security structures of the parties to the conflicts. Likewise, unlike international counterparts, local prosecutors do not need to acquire knowledge of the historical and political background to the conflict. Nor is there a need to build knowledge on the area of the conflict. Much less, if any, translation and interpretation are required.

³¹⁵ **Vladimir Tochilovsky** is a trial attorney in the ICTY since 1994. He has more than thirty years experience in the field of criminal justice. He has authored numerous publications on international criminal justice and criminal procedure. He holds a Ph.D. from Kiev National University. He participated in the early stages of the development of the International Criminal Court, as an official representative of the ICTY to the Preparatory Committee. The views expressed herein are those of the author alone and do not necessarily reflect the views of the International Tribunal or the United Nations in general.

³¹⁶ *Bosnia and Herzegovina: Local Courts Face Obstacles in War Crimes Trials. Slow Progress May Create Impunity Gap for Many Perpetrators of Grave Crimes*, available at <http://hrw.org/english/docs/2008/07/10/bosher19272.htm>.

³¹⁷ See, for instance, *Perspectives on Progress and Reconciliation*, available at <http://media.www.ksgcitizen.org/media/storage/paper223/news/2001/02/12/International/Rwanda.Revisited-28363-page2.shtml>; *Prevent Genocide International, News Monitor for March 1-15, 2005*, available at <http://www.preventgenocide.org/news-monitor/2005mar1.htm>; *Rwandan to Resurrect Traditional Justice System*, available at <http://www.globalpolicy.org/intljustice/general/2002/0617ga.htm>.

However, given the scope of investigations of war-related crimes, national prosecutors and investigators cannot investigate and prosecute every crime and every perpetrator within reasonable time. If there is no amnesty and no quasi-judicial mechanisms available to reduce the burden on the system, the prosecution has to prioritize cases. Indeed, there should be public awareness of the prosecution policy in this regard. Such transparency may prevent possible allegations of selective prosecution based on ethnicity or nationality of the perpetrators. If the criteria cannot be made public, then there may be something wrong with the criteria.

One may question the applicability of the selection criteria used in international tribunals to national jurisdictions. It makes sense to set up selection criteria in international jurisdictions. The international tribunals cannot and are not supposed to prosecute each and every perpetrator. Accordingly, only the selected cases are prosecuted. It is different with national jurisdictions. There is a public expectation that, while the international tribunals concentrate mostly on the high level perpetrators, the national institutions will prosecute all other cases generated by the conflict. However, if states are to prosecute each case in this category, then it makes no sense to set criteria for the selection of cases. What is necessary is to rank the cases for investigation.

Where international tribunals are involved, the national jurisdictions investigate mostly, if not only, the cases against low and middle level perpetrators. Most of the top level perpetrators are to be indicted and prosecuted at the international level. Accordingly, there are not many options with regard to ranking the cases on the basis of the level of the perpetrators.

Apparently, those who contributed to the unlawful acts by being a part of the institutions (camp guards, soldiers, policemen, etc.) and do not have blood on their hands, shall be given the lowest priority.

The plea agreement institute may be one of the options for this category of accused to reduce the burden on resources. Moreover, this mechanism may turn a lower level perpetrator into a valuable witness. However, the public does not easily accept plea agreements in war related cases, especially in civil law jurisdictions.

The setting of priorities concerns primarily the gravity of the crimes rather than the position of the suspect. The highest priority should be set for the cases with the most serious crimes. In other words, it is not the actor who is at issue, but the crimes themselves. A case should be given priority because of the person's links to serious crimes. In this regard, the prosecution must identify the suspect's role and extent of direct participation in the alleged incidents, and the authority and control exercised by the suspect.

Status of evidence is another factor for ranking cases for investigation. In particular, one looks at the availability of witnesses and other evidence, as well as any work already done in relation to the case, especially by the international tribunals.

The possibility of arrest of the suspect is another aspect to consider in this regard. The cases where the suspect is in custody shall also be given priority. The ECHR has emphasised that the fact of detention is a factor to be considered in assessing reasonableness of the length of the proceedings when the right to be tried within a reasonable time is at issue.³¹⁸

Another way to reduce the burden on post-conflict criminal justice is trial-oriented investigation. As the experience of the *ad hoc*-tribunals shows, given the complex subject matter of war related cases, investigations are more efficient and productive if the prosecution theory

³¹⁸ See *Jabłoński v. Poland*, Judgement, ECHR, 21 December 2000, para. 102; *Abdoella v. The Netherlands*, Judgement, ECHR, 25 November 1992, para. 24.

is identified as early as possible. Investigations should be monitored in terms of how the case will be presented in court, so that the relevant evidence is collected and time is not wasted. From the outset, the investigators must be aware of the elements of potential offences and theory of liability.

There is no universal and magic remedy to deal with the flood of potential cases in territorial states. To reduce the burden, some of the post-conflict states apply such means as summary justice and amnesty. If such means are not available, then the cases should be ranked for the investigation. The priority should concern mostly

- the seriousness of the crimes rather than the position of the suspect;
- the availability and status of evidence; and
- the possibility of arrest of the suspect.

A trial-oriented investigation also contributes to reducing the burden on the judicial system.

Part V:
Prioritization criteria and
the international criminal justice agenda

The interaction between international and national criminal jurisdictions: developments at the ICTY

Serge Brammertz³¹⁹

The reconstruction of fragile post-war societies is a lengthy, complex and often uneasy process. Justice, at the national and international level, is essential to the process of reconciliation and strengthening of the rule of law. International criminal institutions have been established to prosecute those most responsible for serious crimes. These tribunals should complement and support the process at the domestic level and thus cannot be separated from initiatives taken at that level.

I will address this relationship, focusing on the work at the ICTY. I will discuss international justice and the importance of national justice; the evolution of the ICTY's interaction with national prosecutors; the Office of the Prosecutor's (OTP) commitment to support national justice; and the efforts to reduce backlogs of war crimes cases in Bosnia. I will finally evoke the future of the ICTY and consequences for national justice in the region.

1. International justice and the importance of national justice

I believe that justice is best served when it is carried out at the national level, through national courts and other domestic judicial mechanisms. This gives the societies impacted by the commission of atrocious crimes ownership of the judicial processes and proximity to the victims.

However, in war-torn societies, or post-war situations, national institutions may be too weak, unable or unwilling to deal with the prosecution of those responsible for serious violations. In those situations, as it was the case in the former Yugoslavia during the 1990s, the international system should play an important role to ensure that justice is done.

Efforts to put in place an international criminal justice system must be accompanied by capacity-building measures to strengthen the domestic judiciary in order to successfully conduct national prosecutions. This work includes building an effective judicial system, setting in

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place required legislation in accordance with international standards, supporting national civil society initiatives and reaching out to the public by explaining the judicial process. An international tribunal can and should contribute to the development of the national justice system.

2. Working with national prosecutors in the former Yugoslavia: towards the development of a true partnership

The interdependence between the international tribunal and national judicial authorities is obvious considering that both are dealing with war crimes cases stemming from the same armed conflict. Good co-operation between the OTP of the ICTY and prosecution services in the countries of the former Yugoslavia is not only mutually beneficial but essential to successfully address the vast number of cases.

a. Interaction in the early years and the creation of the Rules of the Road Project

The ICTY's relationship with legal systems in the former Yugoslavia has been late in developing. In the early years of the ICTY's existence, the focus was on the trials in The Hague. There were few mechanisms available and the national systems in the States of the former Yugoslavia were still too fragile to conduct complex war crimes trials.

Official contacts between the OTP and national judicial authorities in Bosnia and Herzegovina basically started only after the creation of the Rules of the Road Project. The Rules of the Road Project was established in 1996 and funded by outside donors. The project was established after the signatories of the Dayton Accords, agreed in Rome to establish a mechanism which would prevent persons being arrested on war crimes charges unless a case against them had been reviewed by the OTP and found to be consistent with international legal standards. The OTP analysed the level of evidentiary material provided in local investigation files and issued its recommendation as to whether a *prima facie* case of war crimes existed. With the creation of the State Court of Bosnia and Herzegovina, the review function was transferred in October 2004 to the State Prosecutor's Office of Bosnia and Herzegovina.

Although the Rules of the Road Project can be considered as a first important step in the co-operation between the OTP and national prosecutors in Bosnia and Herzegovina, prior to 2004 both the transfer of knowledge and expertise and the engagement of local judicial authorities were limited.

b. The completion strategy and transfer of cases and investigative material from the ICTY to national judicial authorities

The completion strategy put in place by the Security Council mid-2002 entailed that the ICTY focus its efforts on "the most senior leaders suspected of being most responsible for crimes within the ICTY's jurisdiction". All new investigations were to be completed by the end of 2004 and all trials were normally to be completed at first instance by 2008. This brought with it the obligation to transfer "intermediate and lower ranked accused" to competent national jurisdictions and the need to formalise this process.

As a result of the completion strategy resolutions, the ICTY developed a legal framework (Rule 11*bis*) to transfer cases in which an indictment had been issued. A Tribunal's Referral Bench would examine the case to be transferred while making sure the local court is in a position to accept the case. The local court must be able to ensure fair trials while respecting international standards. The Office of the Prosecutor monitors trials and reports to the Referral Bench. The OTP has concluded an agreement with the OSCE, which has the expertise and resources on the ground, to monitor the trials of transferred cases and send progress reports on a

regular basis to the OTP. At this date, 13 accused have been transferred to Bosnia, Croatia and Serbia under Rule 11*bis*. In three cases, the transfer was denied by the Referral Bench.

In addition to the transfer of indicted cases, the OTP also directly works with national prosecutors by handing over other files and investigative material that have not led to indictments at the ICTY. The material is handed over, in highly organised format, from one prosecutor's office to another with no further oversight from the OTP. Although there is no more formal relationship, unlike with 11*bis* cases, national prosecutors keep OTP staff informed on their work. The OTP will stay informed about progress in such cases and could report progress in its contacts with the Security Council and with governments. Moreover, NGOs, international and regional organisations keep following work in these cases. To date a total of 12 "cases" were transferred to the region (eight to Bosnia and Herzegovina, two to Croatia, two to Serbia – involving a total of 21 suspects). We intend to transfer nine more cases involving a total of 27 suspects.

c. Requests for assistance from national prosecution offices to the ICTY

Over the last couple of years, specialised war crimes units in prosecution services and war crimes chambers are tackling the vast number of crimes committed during the conflict in the former Yugoslavia in the early 1990s. On a regular basis, the OTP receives requests for assistance from national judicial authorities involved in this work – be it prosecution, defence or trial chambers. The OTP is making as much of its more than 7,000,000 pages of different collected material available. This includes witness statements, documents, video and audio material. In the past two years, the OTP has been handling an average of five requests per week.

It should be noted that there are limitations to this form of co-operation because of confidentiality restrictions to protect vulnerable or sensitive witnesses. As a result, the ICTY identified the need for outside parties to access such restricted material and amended its Rules of Procedure and Evidence accordingly. The recently adopted Rule 75(H) provides an avenue for access to such restricted material.

d. The establishment of a Transition Team in the OTP and the development of a professional partnership with national prosecutors

Taking into account the needs and urgency of the completion strategy, in 2004, a Transition Team was created within the OTP, consisting of former members of the Rules of the Road project as well as additional OTP staff – combining crucial knowledge and expertise. The Transition Team is in charge of facilitating transfers of cases and files and interacts with prosecutors in the region on a quasi daily basis. Not only will it respond all formal requests for assistance, it assists prosecutors in conducting searches, provides technical assistance and know-how.

Initially, the ICTY focused entirely on its own cases while there were few mechanisms and opportunities available to engage in the region on various levels. Recent developments, triggered by the Completion Strategy, such as the transfer of cases and the creation of an OTP transition team have ameliorated the situation. As mentioned earlier, this could only happen after 2003-04 with the creation of a war crimes chamber in Bosnia and Herzegovina, the war crimes prosecutor's Office in Serbia and focus of the State Prosecutor on war crimes in Croatia.

In the past four years, the interaction with national prosecutors has evolved and has, I can say, become a true partnership. Today, we are almost on a daily basis in touch on various issues. National prosecutors are being given access to information, documents and databases we possess. We also share expertise and know-how. We are regularly in touch, either at the

level of State Prosecutors and War Crimes Prosecutor or at the working level of prosecutors working on specific cases.

3. The ICTY OTP's support of national justice

The ICTY was established by the Security Council as a measure to restore peace and security and to promote justice and reconciliation in the region. The establishment of the ICTY and the strengthening of local justice should therefore be seen as complementary when facing the challenge of restoring justice in the Western Balkans and therefore bringing justice to the victims. The UN and other international actors, including the ICTY have a real interest in seeing that process run smoothly.

The OTP is strongly committed to continue to support the efforts at the local level. In January 2008, when I assumed duties as Prosecutor of the ICTY, I listed the priorities of my Office. One of those was the interaction with the prosecutors of the region and the aim of building true partnerships with colleagues in Belgrade, Sarajevo, Zagreb, Podgorica and Skopje.

For the years to come, during the Tribunal's existence, this will remain a key priority of my Office. We will therefore continue to strengthen these relationships in order to allow partners at the national level to continue the work. The success of the ICTY, now in a completion strategy, will also depend on the ability of national courts to take on cases and material made available by the ICTY and the prosecution of cases in the region selected on the basis of objective criteria and respecting international standards.

4. Addressing the "impunity gap": efforts to reduce backlogs of war crimes cases and efforts to improve regional co-operation in the former Yugoslavia

There are still thousands of persons responsible of war crimes – lower level and mid-level, which have not been brought to justice. This results in an impunity gap, which needs to be addressed. The backlog of cases in Bosnia and Herzegovina is a serious challenge to the justice system in that country and to the international community. The mapping, the making of an inventory and prioritising of war crimes cases is therefore of fundamental importance. We will closely follow this process and strongly encourage national prosecutors to urgently take all necessary measures to reduce the backlog of cases. We also encourage States in the region to improve their co-operation in judicial matters.

The OTP, with partners, such as the OSCE and EU, supports initiatives to strengthen the judiciary in the Western Balkans to successfully complete war crimes cases and thereby address the impunity gap. Thus, for instance, in the summer of 2008, at a regional conference of war crimes prosecutors, it has been agreed that a database of all war crimes cases in the countries of former Yugoslavia should be created. The database is crucial for the efficient prosecution of crimes and exchange of information, especially in countries with a large number of registered crimes and perpetrators. The inventory of cases was expected to be ready by the end of 2008. This is of utmost importance not only for those countries in the region involved but also for the partners, including the EU and all other States and organizations that are prepared to develop legal assistance programmes for the States of the former Yugoslavia.

We are also working with international and regional organizations, such as the EU and the OSCE, to intensify regional co-operation in judicial matters. Crimes may have been committed in one State while the victims, witnesses or the accused reside in different countries.

Considerable legal impediments continue to exist in the laws and constitutions of all States in the region, prohibiting extradition of nationals or the transfer of judicial proceedings for serious crimes. This also results in an “impunity gap”, whereby perpetrators are not brought to justice. The OTP has supported national prosecutors from the region and supported initiatives to develop pragmatic mechanisms for co-operation. However, further efforts are needed to remove all barriers and the impunity gap which allows war criminals to avoid justice.

Finally, we are currently discussing with the European Commission and other partners the possibility of funding positions of experts from the region, to work in The Hague in our offices. Such a programme should help these prosecutors to have direct access to our files and develop skills and know-how and allow them to continue our work, even after we have finished our work.

5. The future of the ICTY and consequences for national justice

The Tribunal is now in its final years of operation. Discussions are on-going at the Security Council about the mechanisms that need to be put in place when trials are completed. Provision must be made for trials to take place in case the two remaining fugitives – Ratko Mladić and Goran Hadžić - have not been arrested and tried by the ICTY by the time all other trials finish. It is fundamental that they be tried at the international level, preferably by the ICTY in a downsized form.

Another important aspect is the interaction with and support to domestic trials that needs to continue. Domestic prosecutors will have to access archives and documents, even after the Tribunal has closed. The residual structure that is envisaged should ensure that they have access to these files and material. Not only should prosecutor have access to information, they should also have access to the know-how that has been developed over the past years. The international community, civil society should therefore ensure the compilation and availability of all information and know-how that has been acquired at the ICTY to make sure it is passed on to local prosecutors. We therefore support best practice projects, which should be available in particular to other international courts and national prosecutors.

6. Conclusion

The Security Council has mandated the ICTY not only to try persons responsible for serious violations of international humanitarian law but also to transfer cases and work closely with the region.

The OTP has over the years stepped up its interaction with national prosecutors. Today, one of the most important aspects of the Tribunal’s work is this professional relationship, which should enable national prosecutors to continue the work of the OTP after the completion of its work.

We have made good progress over the past years. I am fully aware that there is more work that needs to be done. I therefore, together with the UN, the EU, other partner-organisations and civil society, remain strongly committed to the strengthening of the judiciaries in the region.

Remarks on prioritization criteria from the perspective of the U.S. war crimes programme

Clint Williamson³²⁰

At the time of the seminar of the *Forum for International Criminal and Humanitarian Law* on selection criteria in Oslo on 26 September 2008, I was the U.S. Ambassador-at-Large for War Crimes Issues. Let me give a brief overview of what this office does. My position is unique in the world in that the United States is the only government that maintains a position at the ambassadorial level that focuses exclusively on war crimes issues. My office has responsibility within the State Department for monitoring situations where widespread atrocities are occurring or have occurred in the past, for formulating U.S. Government policies to address those crimes, and for monitoring transitional justice mechanisms such as international, hybrid, and domestic war crimes tribunals. And, as the title suggests, I have a diplomatic role, engaging other governments on our policies and generally advocating for greater accountability for war crimes.

In my lecture at the *Forum* seminar late September 2008, I addressed where U.S. policy stood at the closing days of one administration, as we prepared to transition to another. On most aspects of international justice policies, there is a fairly broad bipartisan consensus. The narrowing of the gap between political parties has taken place over time and to a large extent because the views of the Bush Administration have evolved over the last eight years, but particularly during the second term.

As many of you are aware, the Bush Administration came into office in 2001 implacably opposed to the international Criminal Court – the ICC – and frankly, somewhat suspicious of the whole concept of international justice. There are no doubt some in the administration and some in Congress whose views have not changed since 2001 and who remain very wary

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of international tribunals. I would suggest though, that this is not the prevailing view and it is not reflected in day-to-day policy.

That said there are some differences of opinion within the US Government and between the United States and other governments. Sometimes these differences manifest themselves in surprising ways as we have seen in Security Council deliberations on Sudan – an issue I will come back to in a few minutes.

The fact that this is even an issue of discussion, though, shows just how far we have come. As you know, the rebirth of international justice is a fairly recent phenomenon. The decision to set up the ICTY in 1993 marked the beginning of this era. At that time, very few people could have foreseen the growth and development of this field that has occurred over the last 15 years. I certainly did not when I started work at the ICTY in May 1994. I could not have imagined the growth of the ICTY, nor the fact that we would see the ICTR, the SCSL, the ICC, the Cambodia court and others created in such a short period. I think very few could have imagined that we would see sitting heads of state indicted but we have now seen Slobodan Milošević, Charles Taylor, and Saddam Hussein brought to trial. Most recently we have had a process initiated against Omar al-Bashir and we may one day see him in The Hague. While I would not go so far to say such trials are now routine, there is an expectation that did not exist 15 years ago, that even national leaders will be held accountable when they orchestrate and oversee large-scale atrocities.

This represents a huge change. As this change has come about, the United States has played a significant role. Some might say that the U.S. role has not always been a positive one and I would be the first to concede that I have not always agreed with positions taken by the U.S. Government over the last 15 years. I would argue, though, that on balance the US engagement has been much more positive and beneficial than it has been negative and detrimental.

Going back to 1993, the United States was the strongest proponent for the creation of the ICTY and pushed hard for its establishment by the UN Security Council. Lawyers from the State Department and Justice Department drafted much of the tribunal's statute. In an effort to jump-start its operations, the U.S. seconded around 20 lawyers, investigators, and analysts to the court in 1994, of which I was one of the first to commence service. In the aftermath of the genocide in Rwanda, the U.S. again played a pivotal role in the creation of the ICTR. Since that time, the U.S. has contributed around USD 500 million for the operation of these two institutions alone.

The position as Ambassador-at-Large for War Crimes Issues was established in 1997 to ensure co-ordinated U.S. support for these courts. Since that time, my predecessors and I have done a tremendous amount of diplomatic outreach on behalf of the tribunals, engaging governments that are subject to the jurisdiction of the courts – urging them to co-operate, to arrest fugitives, and to provide evidence. Likewise, we have worked closely with allies to ensure that the international community remains unfired in support of these tribunals. Also, we have from very early on provided any assistance we could in the form of evidence or witness testimony that would aid the prosecution or the defence cases. And, since the office of Ambassador-at-Large was first created in 1997, its role has expanded to cover the other courts established subsequently: the SCSL, the ECCC, the Bosnian State Court, the Iraqi High Tribunal and the ICC.

The U.S. actively promoted the establishment of these institutions and has provided political, diplomatic and financial support to most of them and to a number of domestic initiatives dealing with war crimes issues around the world. As I just indicated, though, U.S. politi-

cal and financial support has not been universal. While we worked for many years to see the ECCC established, we have nevertheless had misgivings about corruption and other problems at that court. A concerted effort has been made over the last year to address those problems and we have now decided to start funding the court.

A more contentious issue has been the U.S. position on the ICC. While initially open to the proposal to create the ICC and an active participant in the negotiations on the Rome Treaty, the U.S. veered away from the court and from most of our allies on this issue, culminating in the un-signing of the Rome Treaty in the early days of the Bush Administration.

This position has at times, overshadowed the very positive role the U.S. plays in international justice issues, as I laid out a moment ago. In relation to the ICC, though, the US is not in the same place it was in 2001. Many of the concerns expressed about the ICC at that time and put forward by the Clinton Administration during the Rome negotiations, still remain. These cannot be easily overcome. That said, the openly hostile position taken toward the court in the first years of the Bush Administration has largely disappeared. The policy advocated by some at that time, of not just non-participation but active opposition to the court has faded away. Instead, you have seen since 2005 a shift toward more positive engagement with our allies regarding the court and with the court itself, achieving the *modus vivendi* promoted by Javier Solano. The rhetoric on all sides is much more constructive, less accusatory.

But, it goes beyond the tone of the language being used; this shift has translated into actions. The decision to allow the Darfur investigation to be referred by the UN Security Council to the ICC, support for the Charles Taylor trial at the ICC, and the expressed willingness to share information with the court in the same way we do with the other tribunals, are indications of the changes that have taken place.

Ultimately all of this reflects the now-accepted position that the ICC is the appropriate forum for some cases and in fact will be the only accountability mechanism available in certain situations. I think there was some grudging acceptance of this fact when the U.S. abstained on the Security Council resolution referring the Darfur case to the ICC – the US was not going to block the referral but there was still not a full embrace of the court exercising its jurisdiction in this case.

How far we have come since then was made evident by a recent vote in the UN Security Council on the renewal of the mandate for the UN Peacekeeping Mission in Darfur, UNAMID. In the vote on 31 July 2008, the U.S. abstained because language was inserted in the resolution which we felt undermined the work of the ICC and the pursuit of accountability in Darfur. The resolution passed 14-0 with the U.S. abstaining. In our explanation of vote statement, we made very clear that we were absolutely supportive of UNAMID being extended and that the sole reason we were abstaining was because of the inclusion of language that was not supportive enough of the ICC's work. We also stated explicitly that Sudan had to fulfil its obligations and co-operate with the ICC. For those who have been attentive to past Security Council resolution and the language that the US has used in relation to the ICC generally, this is a significant change.

I do not want to imply that all of the U.S. concerns about the ICC have been resolved – they have not. But, I think the way this played out shows that gap between the U.S. and our European allies on this issue has narrowed, and over the last few years, this has been the single most notable point of disagreement on international justice issues. We have generally been in lock-step on most other matters, so seeing us speak with the same voice – or in this case, with the US being even more supportive of the ICC than our European partners – is a positive thing. In fact, since the 31 July 2008 vote, I have been very involved in discussions with the

UK and France – our P-3 partners – trying to ensure a co-ordinated approach by our governments on this matter. The U.S. feels strongly that the prosecution should move forward and at this time we have seen nothing that would justify an Article 16 deferral by the Security Council.

My point in going through all of this is not to imply that every difference of opinion between the U.S. and every other government or with all of the courts has been resolved. There will be always be differences of opinion – we see this every day among governments inside the European Union, not just with the U.S. – but in the area of international justice, those differences have become much less significant over the last three years.

So, as we prepare to transition to a new administration in Washington, I do not think you will see stark policy changes from where we are now on international justice issues. I should note also here that when I refer to international justice, I am focusing on accountability issues, not the broader area of international law, where you will likely see some pretty significant changes. As to international justice, though, there will obviously be some changes in emphasis and some shifts here and there, but my guess is that nothing will change drastically. Regions that are impacted by ongoing atrocities – places like Darfur and the Democratic Republic of Congo will continue to feature prominently – as will new crises that emerge in places like Georgia, Somalia, Burma, Zimbabwe and Kenya, places where there have been concerns over the last year regarding atrocities.

One of the biggest challenges we will face over the next two or three years is ensuring that the ICTY, ICTR, and SCSL complete their work successfully. We will continue to be very supportive, but the degree of political engagement necessary to allow these tribunals to operate smoothly is likely to increase. I mentioned earlier the financial and political investment the U.S. has made into these courts. Particularly in relation to the ICTY and ICTR, where everything will have to be managed through the UN Security Council, we will likely confront more challenges.

Some members of the Security Council have been insistent that the ICTY and ICTR complete their work in accordance with the schedule laid down previously by the Council – i.e., trials completed by the end of 2008 and appeals by the end of 2010. We have known for some time that there would be some slippage in these dates and there has been a tacit understanding among Security Council members that some flexibility would be required. This is even more necessary now with the recent arrest of Radovan Karadžić, whose trial at the ICTY will not even start until 2009. The patience of some members is running out, though, so getting consensus on the Council, which has been difficult but achievable up until now, may become more problematic as we look ahead into 2009 and beyond. We will confront this very soon as we try to finalize agreement on the residual and legacy mechanisms that will have to be established once the tribunals close.

In a related matter to ICTR and ICTY completion goals, the next administration will almost certainly inherit the problem of fugitives – individuals indicted by those courts who still remain at large. The numbers have decreased significantly and with the recent arrest of Karadžić, only two fugitives remain for the ICTY. One of those is Ratko Mladić, who like Karadžić, was one of the most culpable people in the Balkan wars. It is unthinkable that he escape justice, just as it is unthinkable that Felician Kabuga – the financier of the Rwanda genocide – escape with impunity.

Another matter related to completion is the need to develop domestic capacity in Rwanda and the Balkans. We have been working intensively on this for the last few years and this will continue in the years ahead.

Finally, one last area that I think will be a priority for the next administration will be in enhancing U.S. capabilities and global co-operation in the area of genocide prevention and response. And, while I use the term “genocide” here, this really encompasses mass atrocities of any kind. There has been a lot of discussion about this issue over the last couple of years, driven in part I believe by the frustration that many people have felt at the inability to do something about Darfur. I think everyone recognizes, though, that more can be done to improve our approach to genocide prevention and response and there is bipartisan support for this idea. So, again, no matter which party wins the election, I think this will be a priority for the next administration.

Some progress has been made, but there are four areas in particular where I believe we can and should do a better job: monitoring potential atrocities, implementing preventative measures, immediately responding to on-going atrocities, and planning for potential accountability mechanisms.

An obvious first step towards the prevention of genocide is the accurate and precise monitoring of areas where atrocities may potentially occur. In this regard, the United States has developed a fairly comprehensive monitoring system, given our current resources devoted to this issue. Policy-makers receive in-depth and timely information on potential atrocities.

A successful system of monitoring atrocities is dependent on officers in the field having a clear sense of the warning signs of potential atrocities and knowing what to report and when. Many officers are trained to focus reporting on political or other issues; many may miss important warning signs of impending atrocities because they do not know how to see them. We need to do more to ensure that diplomats, intelligence officers, and aid and development specialists are attentive to warning signs. This should become integrated into regular reporting responsibilities; these types of reports should not be anomalies. Officers heading to posts where atrocities are most likely to occur should receive more thorough training on what warning events merit reporting and further follow-up. Once reported back to Washington, information has to be channelled into accurate pieces of analysis that weigh all factors. This analysis then needs to find its way to the right policy-makers.

In this information gathering process, there is a major role for NGOs, not just human rights monitors, but also relief organizations and others that often maintain a larger and more geographically robust field presence than governments can in conflict zones. Their input of information strengthens the system of reporting and monitoring. I find this to be an invaluable tool and, for this reason, since I have been in this position as ambassador, I have met on a monthly basis with a number of NGO’s working in the human rights field to get their thoughts and to have frank discussions about crisis areas around the world. We have sought thereby to broaden the scope of information gathering.

The U.S. Government monitoring system has worked fairly well. Nevertheless, gaps remain. More can be done. In order to make use of this effort to track early warning signs we must develop a system of tools to address problems that are identified at the earliest point possible. Policy-makers must do a better job listening to their analysts and integrating prevention concerns into their general political calculus. This is one area in which I believe, despite some progress, the United States still lags. We have not adequately assembled a toolbox of responses to different warning signs.

To provide a few examples, in advance of any specific incident, we could develop a range of strategies that could be pulled off the shelf to deal with cases that we believe might potentially lead to atrocities. Among these could be a press strategy to counter hate-speech, the assignment of a team to strategize about how to engage local leaders diplomatically, or a

strategy for diplomatic efforts to build international consensus for action before events spiral out of control. These are all things that the United States does presently, when faced with potential impending incidents. However, our efforts to date have been reactive, *ad hoc* responses to specific crises. We have not looked at these tools through the lens of prevention and focused on developing best practices.

The next area where I believe we can enhance our ability to deal with atrocities is in the field of immediate response. Over and over again, post-conflict stabilization and reconstruction operations are organized in an *ad hoc* fashion. I once heard Senator Biden describe it like this: “Every time we go into a post-conflict or peacekeeping situation, we do it like it’s the first time it’s ever happened, and when we shut it down, we act as if it’s never going to happen again”. As a consequence, plans often focus on short-term political expediency at the expense of permanent solutions. Better advanced planning – having a concrete co-ordination mechanism in place to deploy the necessary personnel given the nature of the conflict – will help build in longer-term considerations to stabilization operations.

However, we also need to be careful not to be too rigid in our co-ordination. We must not sacrifice our flexibility to respond to various crises in an effort to seek broad consensus or a one-size-fits-all approach to planning and co-ordination. Each country and each conflict is different. Each requires a different response.

One concrete example of the need for long-term planning, one that falls within this judicial area, regards securing evidence of atrocities. In the immediate aftermath of a conflict, there is often a short window when certain types of evidence are easily accessible that could later be useful in prosecutions. Oftentimes, obtaining that same information at a later date is difficult or impossible. It is therefore imperative that future post-conflict stabilization operations include in them individuals who are qualified and capable of preserving the evidence necessary to support ensuing accountability processes.

During my time at ICTY, I personally participated in efforts of this sort in Bosnia and Croatia in 1995 and in Kosovo in 1999 and then with the U.S. Government in Iraq in 2003. In none of these instances, were resources adequate to deal with the scale of the problem we faced.

During the Kosovo conflict, we had a sizeable team of investigators and lawyers in Albania and Macedonia, but no where near what was needed to deal with the crisis situation as hundreds of thousands of refugees flooded across the border, many with pertinent information on crimes that we would later prosecute. When the war ended, I went into Kosovo itself with the first NATO troops in June 1999, and within days, we were being inundated with reports of mass graves. Although we had done a lot of pre-planning and had arranged a multi-national group of forensic teams, NATO did not have the resources to secure all of the grave sites and we could not deploy the forensic teams quickly enough. Nor did we have the ICTY resources on the ground to adequately prioritize mass grave sites or to secure incriminating documents before they were destroyed or just pilfered.

Likewise, in Iraq, after Saddam’s fall, people who were free for the first time to go find their loved ones started digging up mass graves all over the country, buildings with crucial records were looted, and so on. These, unfortunately, are not isolated incidents. Most interventions have been under-resourced and not adequately supported by military forces to deal with the issue of war crimes.

Recently, the United States has begun to tackle this general problem through the creation, in the State Department, of the Office of the Coordinator for Reconstruction and Stabili-

zation – known by its acronym S/CRS. I was very involved in this initiative during my time at the White House and my interest in this issue stemmed directly from the experiences I have just recounted. I put forward a proposal to create sort of a U.S. Government equivalent of UN DPKO, that could enhance U.S. participation in UN peacekeeping missions, NATO missions, or interventions by the U.S. and other interested states. Because of my direct experience, I felt strongly that the most robust component of a civilian response mechanism should be in the rule of law area, recognizing that one of the most pressing concerns, from the outset of any mission, would be dealing with war crimes.

The U.S. efforts to create this sort of capability have not gone on in isolation however. A number of other governments, including the UK, Germany, and Canada, have undertaken similar initiatives over the last few years. The more governments that do this, the better. It is also vitally important that these types of undertakings not be limited just to North America and Europe. Having strong regional actors in Latin America, Asia, and particularly Africa will strengthen any framework that is created. The more robust framework there is for response, and the more diverse it is, the more it will benefit the UN, the ICC and other international, hybrid, and domestic justice initiatives.

That brings me to the last component of a genocide prevention/response strategy and that is in the area of accountability. It is often necessary to focus resources on post-conflict justice for years following a conflict. From our experience in the Balkans, in the Great Lakes region of Africa, in Cambodia, and elsewhere, it is clear that the full resolution of conflicts can take years beyond the conclusion of hostilities. Coupled with the fact that a prior case of violent conflict is one of the strongest indicators of risk for future conflict, it becomes increasingly apparent that long-term follow-through in dealing with past conflicts is itself a tool of genocide and atrocities prevention. Thus, it is a critical element in our broader strategies for stabilization of regions in conflict.

The U.S. approach to accountability, interestingly, tracks very closely with the ICC's approach of complementarity. Our first preference, like the ICC's, would be for domestic institutions to deal with crimes committed in a given conflict. Recognizing, though, that in many post-conflict settings, it may be impossible for reasons of lack of political will, inadequate capacity, or ethnic bias to rely on domestic capabilities, we would then turn to some sort of mixed international-domestic process.

This could take the form of a hybrid court like SCSL or ECCC, of inserting international judges and prosecutors into existing courts, as in Kosovo, or by providing technical or financial support as was done in Iraq.

The final option is a fully international process, which would presumably now be the ICC – I cannot imagine any new international *ad hoc* tribunals like ICTY or ICTR being created. Although a new administration may emphasize one of these areas more than others, I feel certain that the same general approach will be pursued.

Right now, the U.S. contributes close to \$100 million a year into transitional justice processes, through the various tribunals and a number of domestic initiatives. It is critical that we continue to maintain this level of support and I'm sure that will be the case with the next administration.

We need to do everything we can to bolster these mechanisms, whether we are talking about viable options for accountability or tools for prevention and response. In so doing, we can continue moving in the direction of a robust framework for preventing and addressing genocide.

Having all of these tools available makes it much easier for a government to respond to genocide or mass atrocities. At the end of the day, though, no matter how solid a structure we create, the effectiveness of our efforts will ultimately be determined by the exercise of political will. The will to speak out and call a genocide what it is, the will to use diplomatic and, in some instances, military means to address it, and the will to throw the government's full support behind efforts to ensure accountability for perpetrators.

The legacy that we have inherited, from Nuremberg to the work that is done today in the tribunals, this continuum of confronting genocide puts incredible pressure on political leaders to act. It makes it more difficult for anyone to credibly say that they do not know these sorts of things are happening and to just do nothing. This is the first step to actually having the words "never again" come to mean what they say.

Making justice meaningful for victims

Richard Dicker³²¹

1. Identifying and explaining criteria to affected communities

For justice for the worst crimes to have an impact in post-conflict societies, its processes must be transparent and understood by those most affected by the crimes being tried. The prosecutor's selection of cases is particularly important to that end, as it offers victims their first "benchmark" to assess how the criminal justice system can be used to address their suffering. The seminar of the *Forum for International Criminal and Humanitarian Law* on 26 September 2008 focused on the merits of establishing criteria for case selection and for prioritization of cases to be processed in the criminal justice system.

The benefits of adopting and implementing such criteria in post-conflict societies where widespread war crimes, crimes against humanity, and, in some situations, genocide have been committed are numerous. Developing a policy can help maintain a sense of internal coherence in the work of the prosecution and can assist in the better management of what may be limited available resources. Establishing a clear policy for prosecutions can help insulate prosecutors from pressure from outside groups to pursue cases that fall outside of the prosecutor's mandate to try the most serious crimes. It can also help protect prosecutors from allegations of bias, particularly in ethnically polarized communities, that could otherwise undermine their credibility and effectiveness. Increased transparency about how cases are selected and prioritized can also promote predictability in the process and can contribute to managing expectations of what can be achieved through the criminal justice process.

However, the criteria underlying the policy for case selection and prioritization are really only as successful as the extent to which they are understood by the victims, the communities affected by the crimes, and the general public. Communicating non-confidential elements of the criteria with affected communities and the general public is, therefore, absolutely essential. Even the most objective of criteria can be interpreted differently by different groups of victims, thus highlighting why it is necessary to explain key elements through a vigorous outreach and communications strategy to help avoid or counteract misunderstandings that may emerge.³²² This is particularly important for international tribunals that conduct proceedings

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³²² Establishing and explaining to the public the criteria used in the selection of country situations for investigation can further protect judicial authorities from broader allegations of bias. For instance, the International Criminal Court's focus on Africa to date has led to criticism that the continent is the court's main "target", with the prosecution strategy being intentionally geographically-based. Underlying this criticism is the perception that the ICC is a biased court designed to try African perpetrators because they are believed to be politically and economically "weak", despite the fact that three of the

hundreds, and sometimes thousands, of miles from where the crimes have taken place. But it is not limited to international tribunals.

In Bosnia, for example, there is a widespread perception among members of each of the three main ethnic communities that their community suffered the most during the war, and consequently an expectation that the crimes against their community will be prioritized for prosecution. This state of affairs highlights the need for a strong outreach and communications program to manage expectations and to counteract attempts by extreme nationalist politicians and others seeking to manipulate or undermine the responsible courts' work for their own ends.³²³ Indeed, many nongovernmental organizations and victims' groups recently interviewed by Human Rights Watch stressed that it was difficult to get information regarding trials before the cantonal courts in the Federation and the district courts in the Republika Srpska for crimes under international law and that this lack of information fed rumours and speculation.³²⁴ Based on our research, we believe that more efforts are needed to educate victims and the general public in Bosnia through widespread dissemination of accurate information, in accessible forms, about the work of the Bosnian War Crimes Chamber and the cantonal and district courts.

The efforts by officials of the Special Court for Sierra Leone offer an inspiring example of how complex and difficult legal concepts can be explained to affected communities. The Special Court's Office of the Prosecutor, together with other court officials, made significant efforts beginning early in the court's mandate to explain to Sierra Leoneans the court's statutory mandate to pursue those "bearing the greatest responsibility" in its selection of perpetrators.³²⁵ Undoubtedly, this was a difficult issue to tackle in the villages and towns of Sierra Leone, where many victims of crimes were still living in close proximity to those individuals that they believed had perpetrated horrific abuses against them. This was among many of the important initiatives aimed at making the court accessible and at increasing awareness of its activities among ordinary Sierra Leoneans.

2. Consistent application of the criteria identified: promoting transparency in practice

Articulating the criteria for case selection and prioritization is an important first step, but it is not sufficient for effectively inspiring public confidence in efforts aimed at ending impunity for war crimes, crimes against humanity, and genocide. The criteria that have been identified and publicized must be consistently applied in practice. Inconsistencies can feed negative perceptions about the prosecution's efforts, which can damage the credibility of efforts to promote accountability overall.

The work of the International Criminal Court (ICC) in the Democratic Republic of Congo offers insight into the kind of negative perceptions that can emerge because of a per-

four country situations under ICC investigation were voluntarily referred and a fourth was referred by the United Nations Security Council. For a more detailed discussion of this debate, see Human Rights Watch, *Courting History: The Landmark International Criminal Court's First Years*, 1-56432-358-7, July 2008, <http://hrw.org/reports/2008/icc0708/>, pp. 44-45.

³²³ Human Rights Watch, *Narrowing the Impunity Gap: Trials Before Bosnia's War Crimes Chamber*, vol. 19, no. 1(D), February 2007, <http://www.hrw.org/reports/2007/ij0207/>, p. 45.

³²⁴ Human Rights Watch, *Still Waiting: Bringing Justice for War Crimes, Crimes against Humanity, and Genocide in Bosnia and Herzegovina's Cantonal and District Courts*, 1-56432-341-2, July 2008, <http://hrw.org/reports/2008/bosnia0708/>, p. 60.

³²⁵ Human Rights Watch, *Bringing Justice: the Special Court for Sierra Leone – Accomplishments, Shortcomings, and Needed Support*, vol. 16, no. 8(A), September 2004, <http://www.hrw.org/reports/2004/sierraleone0904/>, p. 33.

ceived failure to follow established criteria for case selection. The Rome Statute identifies gravity as one of the key thresholds that must be satisfied for a case to be tried before the ICC.³²⁶ The ICC's Office of the Prosecutor (OTP) has also indicated that gravity is the guiding factor in its selection of cases.³²⁷ In this context, the ICC OTP's narrow charges against Thomas Lubanga and Bosco Ntaganda – relating only to child soldier recruitment – led to many damaging perceptions about the court: Lubanga and Ntaganda are senior officials in the Union of Congolese Patriots militia in the Ituri district of north-eastern Congo, whose forces are believed to be responsible for committing a range of horrific crimes including murder, torture, and rape. Charges relating to these crimes are not reflected in the indictment.

Many of those we spoke with in Ituri in 2007 expressed the opinion that these charges are not “serious” given the extent of the atrocities committed in Ituri, and especially since all Ituri-based militias have used children as soldiers.³²⁸ These doubts have raised questions about the ICC's relevance among communities affected by Lubanga and Ntaganda's other alleged crimes and have contributed to rumours that the ICC must have pursued them for other “political” reasons. This has led to speculation that the ICC is biased.³²⁹ These questions illustrate that the perception of inconsistent application by the OTP of the primary criterion for case selection – gravity – threaten to undermine the overall impact of the ICC's work in eastern Congo.

Related to the problems that flow from perceptions regarding the inconsistent application of criteria is the matter of legitimacy. Human Rights Watch believes that the legitimacy of criminal justice depends in large part on the actual and perceived impartiality of the judicial institution. To preserve this key principle, any criterion identified for case selection and prioritization must be applied equally to investigate all individuals or groups suspected of committing international crimes, regardless of ethnic or political affiliation. Indeed, an important factor that gives the Special Court for Sierra Leone real legitimacy is its having charged the leaders of three militias, including one that was actively on the side of the government in the course of the civil war there.

We saw the importance of emphasizing impartiality – and regularly communicating this to members of affected communities – in the context of the ICC's work in Uganda. The situation in northern Uganda was referred to the ICC by President Museveni to investigate abuses committed there by the Lord's Resistance Army, a group at war with the government.³³⁰ However, there are also allegations that crimes falling in the jurisdiction of the ICC have been committed by members of the Ugandan armed forces (the Ugandan People's Defense Forces). The OTP has made efforts to clarify that its investigation is not limited to al-

³²⁶ Rome Statute of the International Criminal Court (Rome Statute), U.N. doc. A/CONF.183/9, 17 July 1998, entered into force on 1 July 2002, Art. 17(1).

³²⁷ ICC OTP, *Criteria for Selection of Situations and Cases*, draft policy paper on file with Human Rights Watch, June 2006, pp. 5-6.

³²⁸ While the ICC's charges against Lubanga and Ntaganda have raised the profile of and, therefore, awareness about crimes related to child soldiers, our research suggests that more efforts are needed to contextualize and humanize these crimes over time.

³²⁹ At the time of our mission to Ituri in 2007, only Thomas Lubanga had been arrested. As a result, there were rumours that the real reason he had been taken into custody was that he was being held responsible for killing “white people” (that is, United Nations peacekeepers). There were also rumours that the ICC's arrest warrants required further “confirmation” from the Congolese government and, hence, that the court was only going after “(President) Kabila's enemies”. See Human Rights Watch, *Courting History*, pp. 64-65.

³³⁰ “President of Uganda refers situation concerning the Lord's Resistance Army (LRA) to the ICC”, ICC Press Release, 29 January 2004, http://www.icc-cpi.int/pressrelease_details&id=16&l=en.html (accessed 6 November 2008).

leged perpetrators from one group and has stressed the impartiality of its investigation.³³¹ Nonetheless, representatives of civil society and community-based organizations that we interviewed in Kampala and northern Uganda in 2007 consistently criticized the ICC's failure to investigate and prosecute abuses by the Ugandan armed forces or to explain why this was not being done. Despite additional outreach efforts by the ICC to affected communities in northern Uganda overall, more could be done to clarify and better convey the key messages about the ICC's approach to alleged crimes by Ugandan army personnel. As a result, the prosecutor's work there was perceived by many as one-sided and biased.³³²

Human Rights Watch can appreciate that the focus and substance of investigations are confidential and cannot be shared with the public. Nonetheless, there are a number of objective, non-confidential factors that the Prosecutor's Office could better and more frequently explain to local communities to preserve the ICC's credibility. For example, the OTP could improve efforts to explain its policy regarding the gravity threshold in selecting cases, as well as its inability to investigate crimes that fall outside of the ICC's temporal jurisdiction. This is significant as it is believed that some of the most serious abuses allegedly implicating Ugandan armed forces were committed prior to 2002. Of course, no amount of explanation will eliminate all of the criticism of the court's work, particularly in a polarized society. But providing clear explanations would go a long way to better inform affected communities and to counteract some of the negative perceptions that, if left unaddressed, can damage the credibility of the ICC.

3. Conclusion

The criminal justice process in relation to the worst crimes must be understood by victims and affected communities to be meaningful and, therefore, effective. Developing criteria for the selection and prioritization of cases involving war crimes, crimes against humanity, and genocide is essential. However, just as important as developing the criteria, is how the criteria are used and explained. Inconsistencies on any of these fronts will likely undermine efforts to make an impact in the struggle against impunity for the worst crimes.

³³¹ "Prosecutor of the International Criminal Court opens an investigation into Northern Uganda", ICC Press Release, 29 July 2004, http://www.icc-cpi.int/pressrelease_details&id=33&l=en.html (accessed 6 November 2008).

³³² Human Rights Watch, *Courting History*, pp. 41-42.

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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 a separate Forum seminar on abbreviated criminal procedures. 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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