Chapter 10

Case Preparation for the International Criminal Tribunal for the Former Yugoslavia

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Contents

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1. Introduction

Case preparation in the Office of the Prosecutor (OTP) of the International Criminal Tribunal for the Former Yugoslavia (ICTY) differs fundamentally from state jurisdictions. This chapter attempts to point out in an introductory manner some of those differences and how the OTP operates with a view to giving lawyers and investigators who are to serve international criminal tribunals and other international criminal jurisdictions an understanding of some of the challenges awaiting them. In the context of the present Manual, it is also seen as valuable for human rights monitors active in situations where an international tribunal has jurisdiction, to have a basic understanding of the work of one such international criminal tribunal. This situation may hold important consequences for the work of the human rights officer and reference is made to a statement issued by the ICTY on the matter of cooperation between non-governmental organisations and the ICTY (Annex 2).

Both the ICTY and International Criminal Tribunal for Rwanda (ICTR) are *ad hoc* Tribunals and not permanent courts with general territorial and temporal jurisdiction. The jurisdiction of the ICTY is limited to serious violations of international humanitarian law committed in the territory of the former Yugoslavia between the starting date set by the ICTY Statute and a date to be determined by the Security Council upon the restoration of peace. The ICTR jurisdiction is similarly limited to events which occurred the year of 1994 in the territory of Rwanda[1].

The immediate relevance of this chapter is therefore limited to the two Tribunals and the UNTAET process, the chapter being based on the legal infrastructure of the ICTY and our work experience for the OTP of the ICTY and the other international jurisdiction referred to. It cannot be ruled out that additional *ad hoc* tribunals will be established in the future. The permanent International Criminal Court could, upon proper establishment, become an important instrument in the efforts to curtail impunity for international crimes. The lessons learned through case preparation for the ICTY and ICTR will provide operational guidance and be of considerable value to actors in other international criminal jurisdictions. Those lessons reveal many of the differences and difficulties that face the investigators and prosecutors in comparison to the prosecution of cases in domestic jurisdictions.

2. Jurisdictional framework

The ad hoc Tribunals were established by Security Council resolutions and not by treaty. The Security Council determined that the situation in the former Yugoslavia constituted a threat to international peace and security[2]. It was convinced that by establishing an international tribunal as an ad hoc measure and by prosecuting persons responsible for serious violations of international humanitarian law, the Council "would contribute to the restoration and maintenance of peace"[3], and thus, it set up the ICTY jurisdiction "acting under Chapter VII of the Charter of the United Nations"[4]. On that basis the Council created "a subsidiary organ within the terms of Article 29 of the Charter, but one of a judicial nature"[5], thus avoiding the disadvantage incurred by the treaty approach "of requiring considerable time to establish an instrument and then to achieve the required number of ratifications for entry into force. Even then, there could be no guarantee that ratifications will be received from those States which should be parties to the treaty if it is to be truly effective"[6], as the Secretary-General formulated it. He was also of the view that the "involvement of the General Assembly in the drafting or the review of the statute of the International Tribunal would not be reconcilable with the urgen-

cy expressed by the Security Council in resolution 808 (1993)"[7].

The approach chosen by the Security Council had the advantage of being expeditious and was immediately effective as all states are "under a binding obligation to take whatever action is required to carry out a decision taken as an enforcement measure under Chapter VII"[8]. The Security Council itself decided explicitly that all states "shall cooperate fully with the International Tribunal and its organs in accordance with the present resolution and the Statute of the International Tribunal and that consequently all States shall take any measures necessary under their domestic law to implement the provisions of the present resolution and the Statute, including the obligation of States to comply with requests for assistance or orders issued by a Trial Chamber under Article 29 of the Statute"[9]. By using Chapter VII the Security Council created an obligation for all states to provide the ICTY with the necessary co-operation and assistance, pursuant to Articles 2 (6) and 25 of the United Nations Charter. Article 29 of the ICTY Statute outlined the general obligation on states to co-operate with the Tribunal's investigation and prosecution effort in its first paragraph, whilst, according to the second paragraph, states "shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber", concerning matters such as the identification and location of persons and the arrest or detention of persons. This means that under international law the Tribunal can issue legally binding orders to states, within the scope of its Statute and Rules of Procedure and Evidence, whatever the status of possible national implementation legislation may be. However, the practical reality of everyday OTP work requires considerable regular co-operation by states, a co-operation which is "essential to the effective functioning of the International Tribunal at every stage of its work, from the initial investigation to the enforcement of a final judgement"[10].

The *ad hoc* Tribunals are applying well--established international humanitarian law. The four categories of crimes included in the subject-matter jurisdiction of the ICTY Statute are genocide, crimes against humanity, grave breaches of the 1949 Geneva Conventions and violations of the laws or customs of war. The Secretary-General of the United Nations, who drafted the ICTY Statute and the accompanying report outlining major legal and organisational issues, was of the opinion that these parts of international humanitarian law are "beyond any doubt customary international law"[11]. Since the Security Council unanimously adopted the Secretary-General's draft Statute and report, it must be assumed that both the Secretary-General and the Security Council were of the view that in order to be on the safe side and to respect the principle of legality (*nullum crimen sine lege*) the applicable law should be narrowly defined to the four categories[12].

Articles 2 through 5 of the ICTY Statute regulate the material competence of the Tribunal. Article 4 deals with the crime of genocide, arguably the most serious crime of international law, by incorporating the relevant provisions of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. This widely ratified Convention is considered part of customary international law[13]. According to the definition of the crime in Article 4(2) the perpetrator must commit one or more of the genocidal acts listed "with intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such". The exact nature of this specific intent requirement has not been authoritatively interpreted by the preparatory works to the Genocide Convention or in case law. The genocidal acts listed are:

> "(a) killing members of the group;
> (b) causing serious bodily or mental harm to members of the group;
> (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
> (d) imposing measures intended to prevent births within the group;
> (e) forcibly transferring children of the group to another group".

Conspiracy to commit genocide, direct and public incitement to commit genocide, attempt, and complicity in genocide are made punishable by Article 4(3).

Article 5 deals with the related but more generic crimes against humanity. They refer to "inhumane acts of a very serious nature, such as wilful killing, torture or rape, committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds"[14]. Other acts mentioned by Article 5 include extermination, enslavement, deportation, imprisonment and persecutions on political, racial or religious grounds. Crimes against humanity were first recognised in the Charter[15] and Judgement of the International Military Tribunal at Nuremberg and in a regulation of the Control Council for Germany[16].

Articles 2 and 3 deal with grave breaches of the 1949 Geneva Conventions and violations of the laws or customs of war respectively. The 1949 Geneva Conventions constitute core components of international humanitarian law by establishing a relatively detailed regime of protection for four groups of persons and property in time of armed conflict: wounded and sick members of armed forces in the field; wounded, sick and shipwrecked members of armed forces at sea; prisoners of war; and civilians in time of war. Each of the four Geneva Conventions contain provisions on so-called "grave breaches", which are particularly serious violations of the protection regimes of the Conventions. Persons who commit such grave breaches are subject to prosecution and punishment according to the Conventions. Article 2 of the ICTY Statute lists the grave breaches, including the prohibitions against

> "(a) wilful killing;
> (b) torture or inhuman treatment, including biological experiments;
> (c) wilfully causing great suffering or serious injury to body or health;
> (d) extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly; ...
> (g) unlawful deportation or transfer or unlawful confinement of a civilian;
> (h) taking civilians as hostages".

Article 3 on violations of the law or customs of war primarily refer to the 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land and the Regulations annexed thereto. These Regulations have become part of customary international law. The Secretary-General wrote about Article 3: "The Nürnberg Tribunal recognised that many of the provisions contained in the Hague Regulations, although innovative at the time of their adoption were, by 1939, recognised by all civilised nations and were regarded as being declaratory of the laws and customs of war. The Nürnberg Tribunal also recognised that war crimes defined in Article 6(b) of the Nürnberg Charter were already recognised as war crimes under international law, and covered in the Hague Regulations, for which guilty individuals were punishable"[17]. The list of violations in Article 3 is not exhaustive, but expressly includes the following acts:

> "(a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering;
> (b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity;
> (c) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings;
> (d) seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science;
> (e) plunder of public or private property".

Article 9 of the ICTY Statute establishes the important principles of jurisdictional

concurrence and primacy. Article 9(1) states that the Tribunal and national courts have concurrent jurisdiction. However, the Tribunal has jurisdictional primacy over national courts according to Article 9(2), and it may "at any stage of the procedure ... formally request national courts to defer to the competence of the International Tribunal in accordance with the present Statute and the Rules of Procedure and Evidence of the International Tribunal"[18]. In keeping with the overarching precept of respect for the rights of the individual, Article 10(2) provides the important jurisdictional rule that a person who

> "has been tried by a national court for acts constituting serious violations of international humanitarian law may be subsequently tried by the International Tribunal only if:
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> (a) the act for which he or she was tried was characterised as an ordinary crime; or
>
> (b) the national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility, or the case was not diligently prosecuted".

3. The process and organization of investigations

The preparation of a case for trial before an international criminal tribunal has, like every case in state jurisdictions, two main parts: the collection of the evidence and the solving of legal issues related to the indictment and the presentation of evidence in court. The process of collecting evidence includes investigation of the crime(s), establishing the background of the crime and its context, considering the victim's situation as well as the intent, conduct and personality of the alleged perpetrator, and shaping or focusing of the information and physical evidence collected into a trial evidence package. The legal issues involved in a case range from the evaluation of the specific acts committed by the suspect against the statutory elements of the offences alleged, to the determination of how the evidence collected can be presented to meet the evidentiary and procedural requirements of the particular legal system. Beyond those basic similarities however, the differences between an international tribunal and state jurisdictions of criminal justice show themselves in almost every aspect of the investigatory and prosecutorial processes.

At the investigation stage, the first concern in a state jurisdiction is to determine who committed the particular acts. The broader context in which the crime occurred might be of less importance. For cases being investigated by an international war crimes tribunal on the other hand, the identity of the perpetrator of particular acts is initially of secondary importance. Rather, it is the context in which the crime was committed that is the most significant issue, as it determines the jurisdiction of the court, the type of crime that can be charged, and the scope of the criminal responsibility in the military, police and political chains of authority. Under the ICTY Statute, for example, an individual killing can be a war crime, a violation of some other law or custom of war, a genocidal act, or a crime against humanity. For the last two categories of crimes in particular, the identity of the actual perpetrator of the killing is not necessarily of primary concern, but rather who was in charge of and is most responsible for the broader attack of which the crime was an integral part.

In a typical state criminal investigation the prosecution authorities (police and prosecutor offices) receive information about a specific alleged crime. Investigators are dispatched to the crime scene. Because of their authority in the system they have full access to and ability to control the crime scene and certain categories of persons who are essential to the investigation. Normally, there are identified victims and witnesses and in

many cases known alleged perpetrators. While it is not uncommon for one or more of these variables to be an unknown at the start of an investigation, it is extremely rare for all of the variables to be missing. This is to a large extent due to the ability of the prosecution authorities to control the various aspects of the investigation. Even when the state authorities are faced with a case where one or more of the variables are missing, they are still dealing with a specific crime or series of crimes and a single perpetrator or small group of perpetrators. At the ICTY the sheer scale of crimes committed and the numbers of victims and potential accused are staggering. The immediate difficulty this presents is where to begin an investigation. Should the primary criterion for initiating the investigation be a particular act or series of acts; should the focus be on geographic area; or on the military, police and political leaders who facilitated the attacks on civilians in the course of which war crimes were committed; or should we primarily look at the type of crimes committed, or at the degree of victimisation suffered by the different ethnic groups or sub-groups (e.g., women or children)?

In state investigations the question of scale is rarely an issue and the decision of where to focus an investigation is generally determined by known variables. When scale becomes an issue in state investigations and prosecutions, the prosecutor will normally select the charge or limited number of charges that present the best opportunity for conviction and are sufficient to satisfy the interests of society and the victims. This decision is made, despite the authorities' ability to influence most of the relevant factors, because experience tends to show that the broader the prosecution is, the more costly and time-consuming it is and thus, the greater the risk of failure. The question for the OTP, in the absence of any clearly corresponding precedent or sufficiently detailed mandate in this regard, is whether a discrete selection of charges is a viable approach for the crimes within our jurisdiction. To which extent is it a relevant consideration what the sentence would be for a limited number of charges? More importantly, does a limited prosecution, even if it means a greater likelihood of a conviction, truly address the needs of the victims or the interests of the international community in having indictments and trials reflect the degree of victimisation? Is any conviction or punishment the goal, or is the purpose of the OTP to try to prove the full nature and extent of the crimes that were committed and thus, uncover the victimisation caused? These were among the questions of investigation strategy to which the OTP had to develop answers at the outset of its work.

The organisational structure of the OTP is not immutable but is adapted to the changing needs of the work of the Office. During the first few years of the OTP's operative existence the basic structure under the Prosecutor and Deputy Prosecutor in the hierarchy has been the division into different sections. The Investigation Section was the section where most of the lawyers and all the investigators and analysts work. By far the largest section of the Office, it functioned in many ways as the engine of the OTP. Other sections were the Prosecution Section, the Legal Advisory Section and the Records and Information Section. The senior trial attorneys, the principal trial prosecutors who bring the cases to court together with co-counsel from the investigation teams, constituted the Prosecution Section. The Legal Advisory Section comprises a small group of international lawyers who give advice to the Investigation and Prosecution Sections on questions of international and comparative law. Later developments in the organisational structure involved the establishment of the Prosecution and Investigation Divisions. The lawyers were extracted from the former Investigation section and administratively placed in the general Prosecution Division.

The investigations are conducted by investigation teams in the Investigation Section. Each team is composed of seve-

ral lawyers and investigators assisted by analysts and administrative support staff. One team can have between five and twenty members. The senior lawyer on the team is the lawyer who works most closely with the case from the beginning of the investigation through the trial. That lawyer is responsible for the daily legal supervision during the entire case preparation process and normally drafts the indictment, drawing on the other lawyer(s) in the team. The leader of the team will normally be responsible, in consultation with the team legal adviser, for the preparation of a statement of facts or similar summary of the evidence which accompanies the draft indictment through the internal OTP review process and the submission to the confirming judge. In addition to the regular team structure, the OTP has an entity which, *inter alia*, conducts in-depth research for the investigation teams and projects on strategic, military, constitutional and document-related questions, providing an objective and unbiased in-house expertise on the former Yugoslavia. The advise given by this entity is tailored to the needs of team investigations or the broader investigation project of which the team is part. In some cases it outlines the foundation or framework of new investigations.

The collection of evidence is primarily done through witness interviews, on-site investigations of crime scenes, and searches for documents and other physical evidence in the field. Almost all of these typical investigative activities are conducted away from the headquarters of the ICTY in The Hague, during missions to the countries of the former Yugoslavia and elsewhere in the world where witnesses reside or other material is available. As a general rule during the first few years of OTP operation, both a lawyer and an investigator are present during the actual witness interviews, in addition to an interpreter. The lawyer normally plays an active role in the questioning of witnesses, especially when the witness is a so-called policy witness, i.e. a person who held a position of leadership in the former Yugoslavia and thereby obtained information on the role played by various civilian, military and police organs in facilitating the commission of war crimes. When trying to uncover the existence of a widespread or systematic attack on a civilian population or to what extent there has been government or quasi-government involvement amounting to state action or state policy in the attack, and the relevant facts are being reviewed to assess whether the doctrine of command responsibility can apply, there is very often such a convergence of different layers of legal criteria that the active presence of a lawyer during the questioning has proved to be necessary. Likewise, during searches for documentary evidence, the team members will often be confronted with the need to make on the spot selections from voluminous amounts of unfamiliar documentation in a foreign language under strict, imposed time limitations. It is helpful to have a lawyer present when the relevancy of documents is determined for selection purposes, as well as in the negotiations with the political or other authorities responsible for the archives who normally try to object to searches.

The investigator is always present during the interviewing process. He or she takes custody of all evidence collected during the mission and is responsible for the maintenance of the chain of custody, in addition to the normal duties of investigators in the course of field investigative activities. In terms of the actual statement-taking procedure, it is noteworthy that the elements of the crime of genocide and crimes against humanity are such that, from the outset of the questioning, one has to adopt an unusually broad standard of relevancy[19].

4. Some problems and issues encountered in the investigations

As soon as the necessary decisions had been made about the investigation strategy of the OTP, the numerous practical difficulties facing the Office became apparent. The first difficulty encountered is the limited ability of the OTP to conduct investigative operations at its own initiative (e.g., to locate and contact witnesses, conduct raids and court authorised evidence seizures or collections of documents, DNA samples, and scientific analysis of crime scenes). A second significant problem that faced our Office from the beginning is our limited access to many of the crime sites. Without the ability to visit the sites of the crimes, it is difficult to physically verify the accuracy of the witnesses' memories, much less conduct any forensic or scientific investigation of the crime scenes.

A short analogy for the conditions under which the Tribunal has had to operate may illustrate some of the problems faced, although it does not capture the serious nature of the crimes committed in the former Yugoslavia: A large bomb is detonated in a neighbourhood in New York City. An investigative team is assembled. They are not however, allowed to visit the crime scene. They are able to view some video and still photographs taken by the media, but these are very limited. The only other source of direct evidence is witness statements. The witnesses' names and identifying information are confidential. For those details, requests must be made to state and local officials and non-governmental organisations. Time must then be allowed for decisions to be made by those officials on whether and to what degree to co-operate. Once witness identities are known, the team must travel to several countries to interview the witnesses. All of the witnesses speak a language different from that of the investigators and come from a very different cultural background, so that every interview must be conducted through an interpreter and with a somewhat different approach than most of the investigators are used to. The event has left many of the witnesses so traumatised that they find it very difficult to speak about it. Others are much more concerned with finding missing family members than with identifying the perpetrators. Many are refugees and are preoccupied with finding employment and not losing the meagre things they have because their resident status may change. Others live in the area of devastation, without electricity, running water, or much in the way of food, clothing or other essentials. Their survival and that of their family is the primary concern, not bringing the perpetrators to justice. Into this enter the investigators with the mission to identify and bring the perpetrators to justice. The mission can be accomplished, but without the ability to go to the crime scene to conduct physical and forensic investigations it is a very difficult enterprise.

The effectiveness of the OTP investigations is excessively reliant upon the willingness of individual states to live up to their obligations under Article 29 of the ICTY Statute. The level of co-operation has almost been as varied as the number of states. Some have not only allowed the OTP investigators full and free access to conduct hundreds of interviews and other investigative actions on their territory, but have actively assisted investigations by providing technical, scientific and logistical support. In comparison, other countries have forced the OTP to follow requirements of traditional mutual assistance agreements and, as a consequence, have effectively prevented the OTP from conducting any substantive interviews on their territories for a long period of time. Although the detrimental effect of these policies on the investigations can never be fully determined, it is undoubtedly substantial. As to the successor states of the former Yugoslavia, it is problematic that we have to rely on their co-operation to a considerable extent to conduct effective on-site investigations, with witnesses and in other ways, given that none of the parties to the conflicts are merely disinterested observers. On a general level, insufficient manpower and financial resources have hampered the investigative work significantly in the early years of the OTP's existence. International travel is expensi-

ve, but without it, the OTP would not be able to gather sufficient evidence to pursue cases.

When the investigators and lawyers of the OTP meet with witnesses from the former Yugoslavia they are faced with several difficulties. The first is the fragile situation which many of the witnesses find themselves in. The vast majority of the witnesses are refugees from the former Yugoslavia or persons living in territory still tense with no, or very limited, common support system or societal protection as victims. As a consequence, their continued survival as refugees in a country will in some cases be of more concern to them than the fact that they are victims of war crimes who may be able to contribute to our work. Co-operation with the Tribunal can in some cases bring hardships such as the possible threat to the personal safety of the witnesses, their family and friends. Additionally, any travel which the refugees must undertake outside the area in which they reside in order to assist the Tribunal in its investigations or to testify can in certain cases jeopardise their refugee status and thus, requires special arrangements with the host countries. Many of the witnesses are traumatised or distrustful of international agencies' ability to handle their security and other problems. Some of them are entirely unfamiliar with basic court requirements and the way trials are conducted, especially with limited time, interpretation problems, and lack of adequate support facilities.

The working languages of the *ad hoc* Tribunals are English and French, and both languages are used in all official proceedings. All staff members in the OTP, however, must be fluent in English and must be able to prepare written statements and mission reports in English. English is, out of necessity, the primary operating language in the investigations, although many members are also fluent in French. The overwhelming majority of victims and witnesses approached by the OTP are from the former Yugoslavia and speak Bosnian/Croatian/Serbian. The language and cultural differences among the investigator or lawyer, the interpreter and the witness are often substantial. Virtually every interview with these witnesses must be conducted through an interpreter. One inevitable effect of this process is that the witness statements can contain inadvertent errors or misunderstandings. To ensure that interviews are accurate and representative of the witnesses' experiences, it is essential that the investigators, lawyers and interpreters become familiar with the influence of local cultural values and norms on language usage. These influences can vary within regions of the same country.

Almost none of the investigators and lawyers working for the OTP of the ICTY had expert knowledge on the former Yugoslavia and the military conflicts at the time they joined the Tribunal. This has affected the speed of progress in the investigations. Not only did the investigators and lawyers have to master to an operational degree the elements of the offences within the subject-matter jurisdiction of the ICTY, but they were confronted with a new and highly complex factual context, with a difficult recent and almost impenetrable past. Beyond constituting a threat to international peace and security, the armed conflicts in Croatia and Bosnia and Herzegovina have stirred up considerable controversy in the international community, reflecting the intense hatred, prejudice, manipulation and propaganda among the parties to the conflicts. The parties have, in varying degrees, used incorrect or misleading information in a systematic and persistent manner, which, together with conflicting geopolitical and other interests, has influenced the states' contradicting versions of what transpired in the former Yugoslavia since 1991. The ICTY is impartial and independent in theory and practice. Political considerations are by necessity irrelevant to the work of our Office, even if there is a tendency among observers to interpret every public act of the OTP in political terms. Through OTP indictments, the so-called Rule 61 hearings as well as the actual trials, our

Office is undoubtedly contributing to the reconciliation process in the former Yugoslavia by introducing judicial objectivity to the evaluation of events. It is challenging for investigators, lawyers and analysts to penetrate the vast amount of misleading factual information and gain a balanced threshold understanding of the conflicts. Such a qualified understanding is essential for professional evaluation of information and policy evidence which correspond to legal requirements of the potential charges, which reflect the most serious crimes known in international law. As a general experience it is only after considerable reading of background literature and several months of field work involving exposure to the region, people and witnesses, are investigators and lawyers who work for our Office able to make well-informed, effective and independent contributions to our activities.

It is taken for granted in state criminal investigations that there is a basic understanding of unwritten norms regarding contact with the authorities that conduct the investigation. When interviewed by investigators or lawyers, witnesses and suspects normally understand the role of the professionals involved and the meaning of the particular language used by them. There are also basic cultural norms known by almost everyone in a national society, if not always followed by them. Such cultural standards, needless to say, differ dramatically between countries. Working in an international criminal jurisdiction considerably increases the challenge of precision and accuracy in language. Most potential witnesses are more than pleased to follow precise directions from the investigator or lawyer in the interviewing process, which should emphasise the need to distinguish carefully between what they have seen themselves from information learned from other persons they trust or information which appears to them to be clearly established. The significance of being able to converse directly with witnesses and not through interpreters in the development of an investigation cannot be overestimated in this regard.

Another practical issue faced by the OTP relating to the interviewing of witnesses, which is not even a consideration in state jurisdictions, is what form witness statements or interviews should take. In a Prosecutor's Office which includes personnel from more than thirty countries, all of whom are accustomed to conducting operations in accordance with the requirements of their respective state systems, even an apparently simple issue as how to take a statement or deciding what form the statement should take can prove challenging. Most of the personnel at the OTP are very experienced; many represent the top echelon of law enforcement and prosecution personnel in their respective countries. Naturally, everyone brings with them a bias for their particular system. The natural predilection is to shape the conduct of investigations to what they are accustomed to and comfortable with. It is no small feat to bring such a group to a consensus on how such issues should be resolved.

With such and other issues as a backdrop, the process of the investigations by the OTP of the ICTY started with the review and analysis of reports and other materials from the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992), and from governments and NGOs. By and large this material fell into two categories: it was designed to either present a general or overall picture of the conflicts in the former Yugoslavia, or to address certain characteristics of the conflicts, depending on the character or interest of the particular organisation or group preparing the report. Many of the reports were, however, prepared from the perspective of establishing a historical record of what occurred in order to either answer to, or influence the actions of, some group of decision makers, as opposed to the more exacting process of establishing a legally sufficient case for prosecution.

The review process in the OTP began in June and July of 1994, when the Office

first started substantive work. Faced with the overwhelming nature of our mandate and the scale of atrocities, with a staff at the time of only four investigators and eight lawyers (including the Acting Deputy Prosecutor and two international lawyers who had worked for the Commission of Experts), the decision was made to start the investigations partly based on a study prepared by the Commission of Experts which presented a fairly complete picture of the conflict as it had occurred in Prijedor Municipality in Bosnia and Herzegovina. The study consisted of a factual description and several hundred witness statements which we considered a potential basis for developing a comprehensive case covering many of the crimes within our jurisdiction against the local perpetrators. It held the promise of providing a solid foundation for determining how far up the political, police and military chains of authority criminal responsibility could be legally established.

The most significant problem facing the OTP at the time it started its work with the Prijedor investigation, and one which still applies in some areas of the former Yugoslavia, was no access to the crime sites. As stated above, without the ability to visit the area of the crimes there was no way to physically verify the accuracy of the witnesses' statements, much less conduct any forensic or scientific investigation of the crime scenes. As a result the OTP embarked on a strategy of interviewing key witnesses to the crimes and witnesses who could corroborate or verify certain aspects of the key witnesses' testimony, such as descriptions of physical locations or identifying details about victims or perpetrators. That meant interviewing hundreds of witnesses in order to ensure that the most accurate picture possible was developed through the witness evidence. Fortunately, some access has been gained later to areas previously off limits, enabling investigative teams to photograph and analyse many of the crime scenes, which reduced the number of witnesses necessary for the trial.

5. Preparation of an investigated case for prosecution

In domestic trials the legal principles and parameters are well-defined and established. Every aspect of the ICTY OTP investigatory, prosecutorial and judicial processes, the application of legal theories included, is a pioneering effort, even if we can draw some guidance from the Nuremberg judgements. For example, the legal elements of the charged crimes provide the foundation for any prosecution. In any state jurisdiction the prosecutors, the defence attorneys and the judge know from their days as law students what the elements of many offences are. They can look to legislative code provisions and well-developed case law for an exact description of the elements of the crimes and frequently the types and combination of proof necessary to satisfy the requirements. The prosecution can rely on prior cases to evaluate the status and development of its case and whether it is squarely within established precedents or within a reasonable or recognised exception.

In contrast, for the OTP one can not say that there were crystal clear definitions of all the offences under its jurisdiction when the Tribunal started working. There are sufficient descriptions of these crimes in the relevant international legal sources from which the crimes were incorporated into the Statute to meet the fundamental requirements of the principle of legality (*nullum crimen sine lege*), but none of those instruments were actually drafted with the clear intent to fulfill the requirements of an operative criminal code. The drafters of and signatories to those instruments, the Genocide Convention excluded, seem to have been considering their possible application within the established national criminal justice systems, which can be problematic when they have to be applied by an international jurisdiction. The OTP must necessarily look to additional sources of international humanitarian law for guidance in the interpretation, including recognised international law experts and commentators.

The lack of clearly established elements of all the offences is just one of many substantive legal and procedural questions that the OTP faces as it investigates some of the most egregious violations of international humanitarian law. Most of these questions are factors taken for granted in state prosecutions because they represent basic procedural and substantive components of a well-established system: what should an indictment look like both in form and substance; what are the requirements for a sufficient charge; do multiplicity or duplicity apply to charges; how are specific acts to be plead in the indictment; does the evidence which supports the charge(s) and the names of the prosecution's witnesses have to be stated in the indictment, as is the requirement in some state jurisdictions; what identifying details or other information regarding the accused must be in the indictment? Similar to the problem of witness interviews or statements, these issues are dealt with differently in their form, terminology and substance in various state jurisdictions. Once again, the OTP is forced to bring together disparate perspectives to develop a system that is not only based on and consistent with the ICTY Statute, Rules of Procedure and Evidence and general principles of criminal law, but also provides all observers of the Tribunal with aspects or concepts they recognise and have confidence in. Our Office is guided by the principle that justice must not only be done, but must also be seen to be done. On a practical level, we face a number of additional problems in the trial preparation of cases, one serious example being limited funds to do proper witness proofing before trial. This is particularly problematic if a considerable time transpires between the initial witness interview and the trial presentation of the evidence.

The OTP has developed an internal review procedure for draft indictments which aims at eliminating factually or legally deficient charges. This system replaces to a large extent the so-called independent barrister arrangement of some state jurisdictions. The main rule on charging standards is found in Article 18(4) of the ICTY Statute which provides that the Prosecutor shall "prepare an indictment containing a concise statement of the facts and the crime or crimes with which the accused is charged under the Statute ... *upon a determination that a* prima facie *case exists*" (italics added). Rule 47(A) of the ICTY Rules of Procedure and Evidence elaborates: "If in the course of an investigation the Prosecutor is satisfied that there is *sufficient evidence to provide reasonable grounds for believing that a suspect has committed a crime* within the jurisdiction of the Tribunal, he shall prepare and forward to the Registrar an indictment for confirmation by a Judge, together with supporting material" (italics added). It is against these legal standards that the indictments are prepared. As stated above, the indictment is normally drafted by the senior lawyer in the investigation team which has been investigating the case, in close co-operation with the other lawyer(s) and members of the team and the senior trial attorney allocated to the case. As the senior trial attorney becomes head of the trial team when it is formed, his or her evaluation of whether one should proceed with an indictment carries considerable authority, although the team legal adviser, having supervised the investigation from its inception, normally has a comprehensive grasp of the evidence. When the drafting and internal team review is concluded, the draft indictment with supporting material is evaluated by a general OTP review to which all lawyers working for the Office are invited to participate. As many as 20-25 lawyers, who have been provided with and reviewed the relevant material, can participate in such reviews, which tend to be very thorough and can sometimes last several days. In most cases a number of changes are made in the draft indictment following the review.

Subsequently, the draft indictment and the supporting material is subject to further assessment by the responsible senior trial attorney before being presented to the Deputy Prosecutor and Prosecutor. Following the approval and signing by the Prosecutor, the indictment is submitted together with supporting material to the Registrar who forwards the matter "to one of the Judges currently assigned under Rule 28, who will inform the Prosecutor of the date fixed for review of the indictment", cf. Article 47(C). Article 47(D) continues: "On reviewing the indictment, the Judge shall hear the Prosecutor, who may present additional material in support of any count. The Judge may confirm or dismiss each count or may adjourn the review". The senior trial attorney, team leader or team legal adviser may be involved in this final stage of the review process as well. The confirming judge will normally issue an arrest warrant upon the confirmation of the indictment. After confirmation the indictment can, according to Rule 50, only be amended "with leave of the judge who confirmed it or, if at trial, with leave of the Trial Chamber". The same leave requirement applies to withdrawal of the indictment after confirmation (Rule 51). The indictments must be made public according to Rule 52 unless a judge or Trial Chamber finds, in consultation with the Prosecutor, that it should not be disclosed "until it is served on the accused" or that it is required in order to "to give effect to a provision of the Rules, to protect confidential information obtained by the Prosecutor, or is otherwise in the interests of justice" (Rule 53).

In terms of the actual presentation of evidence in the Trial Chambers, there are few definitive rules and, of course, no established precedent upon which to rely. There are a few rules in the Rules of Procedure and Evidence governing the production and presentation of evidence before the trial chambers. In the first case heard by the Tribunal, the *Tadi´c* case, there was little comfort for the prosecution in what would otherwise appear to be liberal rules governing the admissibility of evidence. Even seemingly liberal rules have their limits and without the benefit of any precedents or substantive guidance from the judges, the prosecution had to be conservative in its planning and account for possible contingencies. In the absence of any clear indication of how trial chambers would view certain categories of evidence in terms of admissibility or relevancy, it was difficult for the prosecution to determine what avenues of potential evidence to focus on and which to forego. Furthermore, despite the seemingly expansive rule of admissibility, judicial interpretation often tracked conventional approaches in domestic jurisdictions.

Notes

[1] Since the establishment of the ad hoc Tribunals, there have been several initiatives to start international investigation and prosecution of serious violations of international humanitarian law. Such mechanisms have been established as part of the United Nations' transitional administration in East Timor and interrim administration in Kosovo. Efforts have also been made to have similar criminal justice prosesses in Cambodia and Sierra Leone.

[2] Cf. Security Council resolution 827, 25 May 1993, fourth preambular paragraph.

[3] Ibid., sixth preambular paragraph.

[4] Ibid., final preambular paragraph.

[5] Cf. UN document S/25704, 3 May 1993, paragraph 28.

[6] Ibid., paragraph 20.

[7] Ibid., paragraph 21.

[8] Ibid., paragraph 23.

[9] Cf. Security Council resolution 827, op. cit., operative paragraph 4.

[10] Cf. Virginia Morris and Michael P. Scharf: An Insider's Guide to The International Criminal Tribunal for The Former Yugoslavia, page 311

[11] Cf. UN document S/25704, op. cit., paragraphs 34 and 35.

[12] Ibid., paragraph 34. See Security Council resolution 827, op. cit., operative paragraphs 1 and 2.

[13] See the International Court of Justice's Advisory Opinion of 28 May 1951: Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, International Court of Justice Reports, 1951, page 23.

[14] Cf. UN document S/25704, op. cit., paragraph 48.

[15] See Article 6, second paragraph, (c) of the Charter of the International Military Tribunal annexed to the 8 August 1945 London Agreement between the four allied Governments for the Prosecution and Punishment of the Major War Criminals of the European Axis.

[16] Law No. 10 of the Control Council for Germany, cf. Official Gazette of the Control Council for Germany, No. 3, page 22; see Military Government Gazette, Germany, British Zone of Control, No. 5, page 46 and Journal Officiel du Commandment en Chef Francais en Allemange, No. 12 of 11 January 1946.

[17] Cf. UN document S/25704, op. cit., paragraph 42.

[18] Rules 9 and 10 of the Rules of Procedure and Evidence regulate deferrals.

[19] All participants in the active evidence collection process must have good word processing skills as laptop computers are used to record the witness statements

ANNEX 1: Some recommended literature

The ICTY has published a collection of the texts making up the legal infrastructure of the Tribunal, including the Statute and the Rules of Procedure and Evidence: Basic Documents (ISBN: 92-1-056701-3; UN Sales Number: E/F.95.III.P.1). This is a very useful reference tool. The annual Yearbook is also a handy collection of official Tribunal documents. All three titles are in both English and French. Virginia Morris and Michael P. Scharf have written and compiled commentary on Tribunal law: An Insider's Guide to The International Criminal Tribunal for The Former Yugoslavia (1995, Transnational Publishers, Inc.; ISBN: 0-941320-92-8; two volumes). Morris and Scharf were involved in the setting up of the ICTY on behalf of the United Nations Office of Legal Affairs and the United States Department of State respectively. M. Cherif Bassiouni has prepared a voluminous study called Commentaries on the Law of the International Criminal Tribunal For the Former Yugoslavia, together with Peter Manikas (1996, Transnational Publication, Inc.; ISBN: 1-57105-004-3). The publication contains a considerable amount of information on the law of the Tribunal and has become a useful source. Bassiouni was the last Chairman of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992).

ANNEX 2: Cooperation between non-governmental organisations and the international criminal tribunal for the former Yugoslavia

Office of the Prosecutor, ICTY,
The Hague, 25 September 1995.

Introduction

The Office of the Prosecutor of the United Nations International Criminal Tribunal for the former Yugoslavia has been operational since July 1994.

Since that time, the Prosecutor and his staff have investigated crimes, prepared indictments and obtained warrants of arrest. To date, forty-three alleged war criminals have been indicted and one trial has started, while many other investigations leading to forthcoming indictments are on-going.

Taking into account that the war is still raging in the former Yugoslavia, and that many areas are not accessible to the UN investigators, these initial results are certainly beyond general expectations and should be regarded as a concrete affirmation of the role of the Tribunal as a future deterrent against war-crimes.

The Tribunal was established by Security Council resolutions 808 (of 22 February 1993) and 827 (of 25 May 1993) under Chapter VII of the Charter of the United Nations and accordingly created a binding obligation on all Member States to assist and cooperate fully with the Tribunal. The Prosecutor's Office has the dual role of investigating and prosecuting persons responsible for serious violations of international humanitarian law, as defined in the Statute of the Tribunal, committed in the territory of the former Yugoslavia since hostilities broke out there in 1991.

A long time was required to give strength to the new judicial organ and to assemble an international team made up of lawyers, criminal investigators, intelligence analysts and other specialists. All efforts would have been in vain if the international community, represented to a large extent by Non--Governmental Organizations (NGOs), had not firmly believed in the Tribunal as an instrument in the system of collective security and that it must be supported and sustained thereby creating a coalition for justice in the international society. Relief and humanitarian aid organizations, along with human rights activists and their associations, have contributed greatly to the establishment of the International Tribunal.

Following the outbreak of hostilities in the former Yugoslavia in 1991, NGOs played an important role in focusing the world's attention on the perpetrated atrocities and overwhelming suffering of the civilian populations. They also voiced the need to establish a lasting peace and to take appropriate action to brin-g to justice those responsible for the atrocities.

The Prosecutor's Office of the Tribunal recognizes the significant role that NGOs have also played in relation to carrying out investigations into the atrocities in the former Yugoslavia and is anxious to establish cooperative arrangements with all those NGOs involved in information gathering. To this end, a number of issues should be clarified regarding the policies of the Prosecutor's Office and the many ways in which NGOs and the Prosecutor's Office can cooperate.

Policies relating to investigations and prosecutions

The Tribunal has a concurrent jurisdiction with national courts in relation to war crimes and crimes against humanity committed in the former Yugoslavia since 1991. In appropriate circumstances the Tribunal can exercise primacy over national courts.

All States conducting investigations and prosecutions (in respect of persons located within those States who have allegedly been involved in war crimes or crimes against humanity committed in the territory of the former Yugoslavia since 1991) have been requested to advise the Office of the Prosecutor of that action. This is to avoid any duplication of effort in relation to any particular investigation or prosecution, and so that the Tribunal can properly exercise its jurisdiction in appropriate cases and circumstances.

The Prosecutor's Office acknowledges that most States are determined to cooperate with the Tribunal in this regard, however, there may be occasions when, due to oversight, the Prosecutor's Office is not notified of such investigations or prosecutions.

To assist the Tribunal in the performance of its mandate, and in particular in relation to whether the Tribunal should exercise its primacy over State courts, it would be helpful if NGOs could forward to the Prosecutor's Office particulars of any known investigations or prosecutions taking place in national courts, particularly those taking place within the former Yugoslavia, relating to alleged war crimes, crimes against humanity or other breaches of international humanitarian law committed since 1991.

Trial observers

In relation to prosecutions which are not undertaken by the Tribunal and which take place in the national courts of States, it may be possible for NGOs to assist the work of the Tribunal by sending trial observers to trials and to report their observations to the Prosecutor's Office.

For example, it may be possible for NGOs to act as observers at certain national or State trials/prosecutions and submit reports of those observations to the Prosecutor's Office. In accordance with well established practices, trial observers could be tasked to evaluate, among other things, the openness of the trials and the fairness of the proceedings. It is also well established that trial observers should be trained, experienced lawyers of standing, familiar with the jurisdiction within

which the trial takes place. Trial observers should be impartial, trustworthy and should have knowledge of international human rights standards, as pertinent to criminal trials.

Any NGO in a position to assist the Tribunal by providing trial observers, particularly in the territory of the former Yugoslavia, should contact the Prosecutor's Office as soon as possible to discuss logistics as well as matters of coordination. The Prosecutor's Office is in a position to provide a full briefing to all trial observers acting on its behalf before their mission as well as a letter of introduction.

The role of NGOs in interviewing potential witnesses

Some NGOs have been engaged in interviewing the victims of atrocities, including those who have fled from the war zones as refugees. While recognizing the important work of NGOs in this area, the Tribunal has taken full responsibility for future in-depth interviewing of the victims, witnesses, and refugees for the purpose of obtaining information from those persons regarding war crimes or crimes against humanity. All of these persons are potential witnesses in future prosecutions before the Tribunal and, accordingly, great care needs to be taken not to contaminate the evidence that these witnesses may give.

The Prosecutor's Office must assess the reliability of the testimony and credibility of the persons it intends to call as witnesses. This means that the Prosecutor's representatives must interview all potential witnesses to enable such assessments to be carried out.

Accordingly, any interviewing of potential witnesses by persons not in the Prosecutor's Office, could jeopardize, hinder, or interfere with investigations being carried out by the Prosecutor's Office. Such interviewing could contaminate witnesses or evidence and thus may prejudice the chances of mounting a successful prosecution. Although the Prosecutor's Office has assumed the responsibility of undertaking in depth interviews with potential witnesses, the Prosecutor's Office also seeks the assistance of NGOs in the identification of all potential witnesses.

Screening guidelines

The identification of potential witnesses is an extremely important task and is an area where NGOs can provide vital assistance to the Prosecutor's Office. All efforts in this area must be coordinated with the Prosecutor's Office and accordingly, before any action is taken to embark on an exercise of interviewing victims or refugees from the former Yugoslavia, or to continue any existing program of interviews, NGOs are requested to first contact the Prosecutor's Office for advice on how future activities can be undertaken.

NGOs in a position to assist the Prosecutor's Office in the identification of potential witnesses are requested to provide the Prosecutor's Office with the following type of information:

- The full name of the victim/witness/ refugee;
- All relevant personal particulars of the individual;
- The village, town, district, or area in which the person was living when the conflict first occurred;
- Whether the person witnessed any particular crimes or offences (details not to be taken);
- The name of any village, town, or area where the person witnessed any criminal activity;
- Whether the person is prepared to be interviewed by the Prosecutor's representative;
- The present address or whereabouts of the person, how long that person intends to remain there, and whether any forwarding address is known.
- All NG0s involved with or coming into contact with refugees, witnesses, or victims from the former Yugoslavia are invited to contact the Prosecutor's Office to establish a cooperative working arrangement, to expand upon the above-listed guidelines, and to establish proper lines of communication.

Request for material relating war crimes

Member States and NGOs have been requested to provide assistance and cooperation in relation to the investigations being undertaken by the Prosecutor's Office. In particular, Governments, International Organizations and NGOs are asked to forward to the Tribunal any material in the form of evidence, statements, affidavits, reports, or other data in their possession relating to the crimes committed in the former Yugoslavia.

Request relating to refugee information

In relation to refugees from the former Yugoslavia, Governments were requested to forward advice concerning refugee numbers, the extent to which particulars and records have been kept of such refugees, whether refugees have been interviewed by governments or on their behalf, whether any particular refugee is a potential witness to crimes occurring in the former Yugoslavia, and the ability to trace particular refugees.

Governments were also advised that the Prosecutor's Office would welcome copies of any information, evidence, or statements relating to the commission of war crimes or crimes against humanity, which had been gathered or obtained by or on behalf of each Government from the refugees.

NGOs are likewise requested to provide the Prosecutor's Office at the earliest opportunity with the current whereabouts or location of refugees from the former Yugoslavia and in particular any material taken from such refugees during interviews relating to the commission of war crimes or crimes against humanity.

Furthermore, the Prosecutor is equipped, through a special unit of his Office, to receive highly sensitive and confidential information which will not be disclosed without the consent of the person or entity providing it. This means that Governments, Intergovernmental Organizations and NGOs, as well as individuals voluntarily assisting the Prosecutor, are able to provide classified information which under no circumstance will be disclosed to the defence or other third party. This information will be treated in the strictest confidence by the Prosecutor and will be used solely to research and generate new evidence.

Other ways in which NGOs can assist the tribunal

In addition to the matters already raised in this statement, there are other ways in which NGOs can assist the work of the Prosecutor's Office. As an example, these include:

- Providing medical, psychological and social support to victims and potential witnesses;
- Motivating and assisting victims to come forward to provide statements;
- Assisting the ICTY representatives in arranging visits with potential witnesses and making the necessary preparations;
- Undertaking specific research projects and preparing reports;
- Assisting the Prosecutor's Office with setting up its library and archives;
- Undertaking public relations projects at the direction of the Tribunal;
- Providing interpreters and translators to assist the work of the Prosecutor's Office;
- Providing technical support and expert advice.

General invitation

The prosecutor and his deputy have met with representatives of a number of NGOs and are anxious to meet with others who may be in a position to assist the tribunal. Meetings, for coordination purposes, are often organized with the participation of a number of NGOs.

Additional suggestions are welcome on other ways in which assistance can be extended to the Tribunal by any NGO,

and NGOs are invited to make comments about the issues raised herein.

Accordingly, all NGOs which may be able to assist the Tribunal in its important and difficult role are invited to contact the Prosecutor's Office in The Hague in relation to any of the matters raised in this statement. The Tribunal's External Relations Officer, Mr. Donato Kiniger-Passigli, is the contact person for coordinating the assistance requested by the Office of the Prosecutor and he will maintain a constant dialogue with those NGOs offering their cooperation to the Tribunal.

Morten Bergsmo is a legal adviser in the Office of the Prosecutor of the International Criminal Tribunal for the Former Yugoslavia. *Michael J. Keegan* is a former legal advisor to the Prosecutor's Office. They were among the initial lawyers in the Prosecutor's Office. Bergsmo was earlier seconded legal adviser to the UN Commission of Experts Established Pursuant to Security Council Resolution 780 (1992). He has also served as an advisor to the UNTAET War Crimes prosecution service. Keegan is a military prosecutor from the United States, who was a member of the Tadi'c trial team. He is currently with the Department of Justice, Washington, D.C.. The views expressed in this chapter are those of the authors and do not necessarily reflect the views of the United Nations. The authors thank Terree Bowers, Danesh Sarooshi, Alan Tieger and Eric Østberg for their comments.

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The Manual on Human Rights Monitoring has been developed at the request of the United Nations High Commissioner for Human Rights. The Manual is integral to the generic training provided to members of the NORDEM Stand-by Force when preparing them for human rights field operations. This is a revised edition (2001) of the Manual which was first published in 1997. The new edition includes two new chapters (5 and 11), two rewritten chapters (1 and 6) and the remaining chapters are updated according to events and new developments in the field of human rights since 1997.

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