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Historical Origins of International Criminal Law: Volume 5

Morten Bergsmo, Klaus Rackwitz and SONG Tianying (editors)

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Interacting with Academic Institutions

William A. Schabas*

No single individual has more responsibility for the survival and success of the International Criminal Court ('ICC') than its prosecutor. Exercise of poor judgment, essentially in choosing cases with which to proceed, will probably discourage ratification and may even provoke denunciation of the Statute. And it will comfort the Court's most vitriolic opponent, the government of the United States, which has challenged the creation of the independent *proprio motu* prosecutor as one of the ICC Statute's fatal flaws.

19.1. Choosing the First Cases

Many practical issues will influence the initial choice of targets by the prosecutor, and it is impossible here to even begin speculating about them. But there is an essentially political choice of great significance, namely, whether to give priority to states that are "unwilling" to prosecute or those that are "unable" to prosecute. For the sake of discussion, Colombia might be an example of the former, while the Democratic Republic of the Congo might be an example of the latter.

In targeting the unable, the prosecutor will be exposed to criticism that the Court is merely an additional institution by which the North lectures the South on how to do the right thing. The Court will be attacked as being neo-colonialist in orientation, and this may impact negatively upon the pace of ratification in many parts of the world. The alternative, of pur-

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suing the much harder and more challenging cases of the unwilling, which may throw important resources into resisting the intervention of the Court, may lead to frustration and a lack of genuine productivity. I do not have a firm position about which way the prosecutor should go, and believe that reasonable people can disagree about such matters. But I would like to suggest a scenario that justifies focusing upon the unable.

The term ‘complementarity’ has always seemed to be a bit of a misnomer, because what is really contemplated seems to be more of an antagonistic relationship between Court and national justice system. This is certainly the case with the unwilling. But as for the unable, can we not imagine an approach to the work of the Court that is less aggressive and more benign? In this way, prosecution of a handful of ‘big fish’ (the preamble, Article 1 and the various jurisdictional thresholds in Articles 6–8 suggest this focus, not to mention the power of the Court pursuant to Article 17(1)(d) to dismiss insignificant cases) would actually complement the work of domestic accountability initiatives.

There are many examples of attempts at transitional justice in states that appear to fit the unable paradigm: Cambodia, Rwanda, East Timor and Sierra Leone. In all of them, there have been efforts to marry international involvement with home-grown accountability mechanisms. Most of the literature has painted this as a relationship of conflict, with the Court proceeding to challenge measures judged insufficient, like truth commissions. But is there not another way to approach this? Accordingly, projects like a truth commission or the Rwandan *gacaca* courts would be viewed as one piece of the transitional justice package. The ICC would complete the national efforts by ensuring fully fledged trial of “those who bear the greatest responsibility”, to borrow the language of the Special Court for Sierra Leone.

Many observers will contrast the efforts of a country like Rwanda, which was uncompromising in its attempt to prosecute the *génocidaires*, and Sierra Leone, which offered amnesty, although it was sugar-coated with a truth commission. While the two are at opposite poles in some respects, on a practical level they have ultimately evolved towards the same type of solution: national mechanisms that fall short of criminal trials (as they are meant by Article 14 of the International Covenant on Civil and Political Rights), but crowned by a prestigious, international trial.

These cases of ‘internationalised’ trials are now being governed by a variety of hybrid approaches. The United States, in its efforts to sabo-

tage the Court, seems particularly keen on initiatives like the Special Court for Sierra Leone, which it can offer as an alternative. But can we not imagine a role for the prosecutor of the ICC in such cases. Rather than leave the initiative to the United States, or to the UN Office of Legal Affairs, the ICC prosecutor might seek out situations of transitional justice and attempt to find ‘complementary’ solutions that are not viewed as threatening or aggressive by the unable states. It might even take the form of prosecutorial initiatives targeted at states that are not yet parties, with a view to provoking Article 12(3) declarations or, ideally, ratification or accession.

Take the example of Burundi, not yet a state party. The Agreement for Peace and Reconciliation in Burundi, reached in Arusha on 28 August 2000, obliges the transitional government to call upon the Security Council to establish a commission of inquiry into genocide, war crimes and crimes against humanity. This is to be followed up, again according to the Agreement and on the rather safe assumption that the commission will find evidence of such crimes, by a further request from the government of Burundi that the Security Council establish an *ad hoc* international criminal tribunal.¹ This result is unlikely, given the costs involved in an *ad hoc* tribunal. But could the prosecutor not contact the authorities in Burundi and explore the possibility of some recognition of the Court’s jurisdiction by Burundi that would be seen as co-operative and ‘complementary’ rather than as a threat?

I concede that this type of approach was not really imagined in Rome. But recent experiments at transitional justice in poor, developing countries like Rwanda and Sierra Leone suggest a fundamentally common approach by which national options are combined with international justice. A prosecutor who was friendly to such solutions might define such a Court – not one that nobody has yet imagined, but one whose contribution to accountability and the fight against impunity seems self-evident. Such a prosecutorial approach might well encourage ratification and accession in developing countries, and effectively challenge stereotypes about judicial imperialism.

Here too, then, Burundi’s efforts at accountability and transitional justice are conditional upon international involvement and support.

¹ Accord d’Arusha pour la paix et la réconciliation au Burundi, 28 August 1999, Article 7(10)-(11).

19.2. Relationships with Academic Institutions

There have been various efforts from universities, I think mainly in the United States, directed at providing research assistance to the Office of the Prosecutor. In practice, most of the work was done by law students. Presumably much of this work was fundamentally positive and helpful, but it drew upon researchers with little experience or background and this was no doubt reflected in the overall quality of the output. The prosecutor of the Special Court for Sierra Leone has apparently attempted to take this a step further, creating what he calls an “academic consortium” of law faculties that provide opinions and research as requested.

Without in any way challenging the validity of such efforts, may I suggest another approach to the academic community, and one that would engage not only with undergraduate law students but also with academics at the highest levels? The Office of the Prosecutor has an interest in seeing itself as part of the academic community. In this respect, it is quite unlike national prosecution services, which are focused essentially on the quotidian. Many of the professionals within the Office of the Prosecutor are themselves people with one foot in the academic community. They publish articles, attend conferences and so on; many of them are either coming from academic careers or going to them.

The Office of the Prosecutor should encourage such networking with academics, both informally but also formally. A budget should be set aside to facilitate participation by professionals at the Office of the Prosecutor in academic conferences (only a few weeks ago, a colleague at the Office of the Prosecutor of the ICTY informed me he could not participate in an important academic conference I am organising because no funding was available), and to encourage publication by them in journals, books and so on. The Office of the Prosecutor might also consider joining as a co-sponsor in conferences or training events, like the young penalists course at Siracusa or the summer course on the ICC in Galway. The relevant academic institutions would welcome this, and would probably recognise the value of even a modest contribution to the event in the form of travel expenses for one of the Office of the Prosecutor lawyers as adequate participation. Being able to list the Office of the Prosecutor as a co-sponsor would give their own events greater credibility. The Office of the Prosecutor could also encourage its own professional staff to take up temporary teaching positions, as guest lecturers, in the growing number of

courses in international criminal law being offered around the world. This already occurs to a limited extent, of course, but it is essentially a matter for individual initiative at present. It would be preferable if the Office of the Prosecutor took a proactive approach to such relationships.

The Office of the Prosecutor might create a position such as a visiting scholar or research fellow that would be reserved for an academic on leave. It too need not be a remunerated position. Many academics likely to be interested in such a position would have no serious difficulty obtaining funding for such leave. Of course, the position would need to be sufficiently important within the Office of the Prosecutor as to be truly attractive, providing such a visitor with the chance to work on cases, attend strategy and planning meetings at the highest level and even, in appropriate cases, to actually participate in courtroom work. Such a position would be prestigious for both the academic in question and for the Office of the Prosecutor. It would enhance the reputation of the Office of the Prosecutor *vis-à-vis* the judges and it would also contribute to the building of long-term relationships between the Office of the Prosecutor and academic institutions.

Finally, could the Office of the Prosecutor not organise a one or two-day academic seminar in The Hague to which recognised academics in the field would be invited? Those concerned would not at all be troubled at the suggestion that they were responsible for their own costs; this would seem to be quite normal (although the Office of the Prosecutor might throw in the coffee breaks and perhaps a reception). But the whole thing could be run on a very small budget, and quite informally. The sessions would consist of briefings from senior professionals in the Office of the Prosecutor about their work, ongoing files and so on. It would also provide academics with a chance for some quality time with the prosecutor himself.

In order to facilitate this type of contact and involvement, the Office of the Prosecutor should designate an individual with a title such as academic institution co-ordinator or something similar. The International Committee of the Red Cross has such a position, currently occupied by Antoine Bouvier. It need not be a full-time job, and might simply be a title of one of the lawyers with a particular interest in this area who would then become a focal point for this. This type of meaningful and profound involvement with academic life would, in the long run, provide the Office of the Prosecutor with imaginative intellectual input of a very different

nature than what it is likely to get from law students conducting research projects (whose contribution, I repeat, is not to be gainsaid, but it is of a different order).