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Operational Aspects of Setting Up the International Criminal Court: Building on the Experience of the International Criminal Tribunal For the Former Yugoslavia

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Abstract

This Essay examines the practical experience of the International Criminal Tribunal for the former Yugoslavia ("ICTY") and, in particular, its Registry with regard to operational matters and its relevance within the setup of the International Criminal Court ("ICC"). While the first part is dedicated to the basic legal groundwork that forms the basis for the work of the ICC (including its financial regulations, a multilateral agreement on its privileges and immunities, and the agreement governing the relationship between the ICC and the United Nations), the second part deals with the more practical aspects of the question of how to start an international criminal court from an operational perspective. In my conclusions, I would like to revert to the practical experience the ICTY has gained so far and upon which the States Parties could draw when considering the different operational aspects of setting up this important new international judicial institution.

OPERATIONAL ASPECTS OF SETTING UP THE INTERNATIONAL CRIMINAL COURT: BUILDING ON THE EXPERIENCE OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA

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INTRODUCTION

This Essay examines the practical experience of the International Criminal Tribunal for the former Yugoslavia[1] ("ICTY") and, in particular, its Registry with regard to operational matters and its relevance within the setup of the International Criminal Court ("ICC"). While the first part is dedicated to the basic legal groundwork that forms the basis for the work of the ICC (including its financial regulations, a multilateral agreement on its privileges and immunities, and the agreement governing the relationship between the ICC and the United Nations), the second part deals with the more practical aspects of the question of how to start an international criminal court from an operational perspective. In my conclusions, I would like to revert to the practical experience the ICTY has gained so far and upon which the States Parties could draw when considering the different operational aspects of setting up this important new international judicial institution.

I. *THE BASIC LEGAL GROUNDWORK FOR THE ICC*

It is stating the obvious to say that the basic legal groundwork, in particular the financial regulations, the multilateral agreement on privileges and immunities, and the relationship

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1. The Security Council resolution on its establishment named the new court the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia, U.N. Doc. S/RES/827 (1993), *amended by* U.N. Doc. S/RES/1166 (1998); U.N. Doc. S/RES/1329 (2000) [hereinafter ICTY Statute].

agreement between the ICC and the United Nations, will greatly influence the way in which the ICC will be able to function. In this context, it will be useful to reflect upon the ICTY's more recent institutional history before discussing the operational practicalities of setting up the ICC.

When the ICTY was established, the United Nations started something new and quite unfamiliar to the organization. An administrative and operational infrastructure that had been built up over decades to primarily run bodies with secretarial functions and, later, to mount peacekeeping operations and operations to assist refugees, had to be used to set up an international criminal tribunal for war crimes committed by individuals.

One of the challenges that an international criminal process in respect of an accused individual holds is that it is a process that allows for little compromise. If a prosecutor suspects that a crime within his jurisdiction was committed, he must investigate, and, if a case presents itself, he must prosecute. If a difficult legal question arises during the proceedings, it must be fully dealt with by the judges of that institution. Once the process has started, internationally recognized human rights standards demand that an accused must have legal representation (paid for either by himself or assigned by the court in case of indigency). Moreover, an accused is entitled to get all information that concerns the criminal process—from investigation to prosecution in court—in his own language. Finally, the same internationally recognized human rights standards require that an individual who has been wrongfully accused or convicted be entitled to some form of compensation.

A criminal process—be it national or international—is, therefore, largely determined by material and procedural standards which must be met. That has been the reality of the ICTY, and, in particular, the Registry that under the ICTY Statute serves both Chambers and the Prosecutor.

In my opinion, the United Nations and its Member States can be proud of the way the administrative shoe was made to fit the judicial foot. However, it cannot be a surprise that the fit was not always perfect, simply because of the difficulties of matching the needs of an international governmental organization like the United Nations and international judicial institutions such as the *ad hoc* Tribunals.

In trying to envisage what the ICC will look like and how it is to be run in the most efficient manner, the ICTY would see, based on its experience, an institution that in its administration should have the notion of "flexibility" as the cornerstone of its *modus operandi.*

As a practical example, I would like to recall the voluntary surrender of ten accused on one day in October 1997—which happened towards the end of the ICTY's budgetary cycle. All but one accused claimed indigency and requested assignment of defense counsel. As I indicated above, it is in the nature of a criminal judicial process that lack of budgeted funds cannot preclude consideration, and, if the appropriate rules are complied with, approval of such a request. Another example is the sudden eruption of the crisis in Kosovo, only two and a half months after the approval of our annual budget for 1999, where the ICTY was suddenly faced with an acute and fairly considerable need for funds, manpower, equipment, and the reinforcement of quite specific expertise. There again, it was in the nature of the criminal judicial process that investigations had to commence without delay, before much of the potential evidence was contaminated or destroyed.

In both situations, there was an acute need to act quickly and to manage funds and assets in light of the tasks assigned to the ICTY. The Kosovo crisis required a sudden expansion of the ICTY's field operations. Means had to be found to do this, allowing for a similar decrease when the work was completed. The sudden increase in October 1997 in the amount of persons in detention meant that, almost overnight, the holding capacity at the detention facility of the ICTY had to be enlarged considerably, legal aid expenditure had to be substantially increased, and that, with very little lead time, assets and expertise had to be directed towards creating more courtroom capacity.

The ICTY has also experienced that financial regulations and rules which strive for full transparency—in itself an essential aim—do not always correspond with the sometimes delicate circumstances under which vulnerable witnesses called by the court need their financial arrangements taken care of. We have found that many of the assumptions on the basis of which travel arrangements are made for staff and other persons on mission for the ICTY, rarely apply to this category of persons. Many of our witnesses are victim witnesses who have suffered greatly as a re-

sult of war. They have lost family members, housing and property, and are often unemployed. Few of them have traveled by air before, let alone to another country. Many are also refugees or internally displaced persons, trying to put their lives back together in very difficult post-conflict circumstances. Some are at risk, in view of the testimony they give. In some cases, these witnesses do not even have valid travel documents and have expressed fear to approach their national authorities to obtain such documents. It has proven to be very difficult for the Registry to ensure full confidentiality and to obtain all the relevant documentation when arranging services such as travel, temporary housing, and medical services for such sensitive witnesses while, at the same time, fully complying with the established financial practices of the United Nations.

Accordingly, in light of these experiences, I would like to reiterate the point made by Judge May in his address to the Plenary of the Preparatory Commission on March 20, 2000, that it is crucial that the financial regulations and rules of the ICC, as well as its procurement rules, include specific provisions applicable to victims and witnesses and their unique needs. To his appeal, the need for adequate and clear arrangements in the agreement on privileges and immunities should be added, taking into account that many witnesses and victims will not be willing to travel and testify without a family member, a friend, or some form of legal representation with them.

Along the same vein, the ICTY has found that the privileges and immunities designed for, and customarily granted to, U.N. staff members and State representatives do not always easily translate into a well-defined legal status that can enable a defense team to work effectively. We have been faced with the difficult question of having to determine who is part of that defense team and, once that has been determined, which privileges and immunities each member of that team require. Similar questions of scope can also be asked regarding the special legal status to be accorded to other categories of persons strange to the U.N. mold: counsel other than defense counsel (for instance, a legal representative of a victim); accused; and even suspects. To this category of strangeness, representatives of nongovernmental organizations ("NGOs"), which provide essential services or other assistance to the ICTY, should also be added.

Each of these categories of persons has an essential role in

the criminal process, and the ICTY found it to be of the utmost importance that their legal status is defined as clearly and explicitly as possible.

II. *HOW TO START AN INTERNATIONAL CRIMINAL COURT FROM AN OPERATIONAL PERSPECTIVE?*

Once the basic legal groundwork is laid, it is important to ensure that the ICC, from this stage onwards, possesses a so-called "engine room," fully equipped to tackle the operational questions of how to start an international criminal court. In this regard, I would like to note that, unlike other treaty-based international organizations such as the Organization for the Prohibition of Chemical Weapons ("OPCW"), the Preparatory Commission of the ICC has not opted for the institution of a "Provisional Secretariat," which would be mandated to decide on such operational issues from the date of ratification onwards. In the case of the ICC, that is the day of the last ratification ("Day One"). The importance for the ICC to start preparing itself operationally as of Day One cannot be emphasized enough, especially in view of the likelihood that NGOs might bring cases before the ICC as early as that date. The fact that the election process and the installation of the main high officials of the ICC (namely the Judges, the Prosecutor, and the Registrar) could take between six and eight months from Day One should not distract from the fact that a basic administrative structure will already be required before that time, namely as early as Day One itself.

As a representative of an organization faced with many of these questions when it started operations eight years ago, and as an individual who is now involved in dealing with some of the omissions which occurred at that time, I feel the particular need to share our experience with the ICC at the earliest possible stage. These remarks, however, should be understood with the full realization that the ICC will, in certain respects, be different from the two *ad hoc* Tribunals, and that therefore not all the "dos and don'ts" which applied to the ICTY will be fully relevant for the ICC.

My first remark is to once again stress the imperative need for *flexibility* as an inherent cornerstone of an organization in the making. In engine terms: a motor which can be maintained cost effectively while waiting to be used when the need arises

(often unexpectedly), to carry cargo and to climb uphill roads. This notion of flexibility should also be supplemented with the word *scalability*, to indicate that the flexibility required should enable the ICC to scale its operations upwards and downwards as dictated by circumstances and also on short notice.

From the day of its establishment onwards, the ICTY possessed a basic administrative system and people trained to work within that system, namely the U.N.-internal rules and regulations. These were financial, procurement, recruitment, and staff rules, which helped, for instance, enable the hiring and payment of individuals who could subsequently commence the lengthy process of negotiating a lease for a building. There were basic systems in place to deal with the most rudimentary security concerns the ICTY was faced with, even though that system did not in any way take into account the specific information security requirements required by a judicial institution with many sensitive witnesses and highly confidential material.

The system at the disposal of the ICTY was not perfect, but it did enable the ICTY to direct its resources and start work on the additional, ICTY-specific systems that needed to be put in place. These systems included a court-archiving system, rules of detention, rules governing the assignment of defense counsel, regulations regarding visits to and communication with detainees, model agreements on enforcement of sentences and relocation of witnesses, investigation protocols, information security directives, security directives and protocols for staff in the field, codes of conduct for defense counsel, procedures and protocols for the handling of evidence, a framework within which to deal with claims by wrongly accused or convicted persons, and, as a final example, a code of ethics for interpreters.

It is my strong recommendation that such systems are set up for the ICC before it is asked to face the challenge of its first case, giving due consideration to the fact that it will take time and effort to put those systems in place.

As stated above, the ICTY availed itself of the U.N. rules and procedures relating to personnel, such as recruitment and staff rules, the U.N. Joint Staff Pension Fund, and the U.N. Administrative Tribunal. However, the ICTY subsequently found that these arrangements do not sufficiently allow the ICTY to address the challenges of the labor market from which an international

criminal court must recruit—something that will also affect the sustainability of the ICC in the long run. For instance, a large segment of the ICTY's workforce, the lawyers, are merit-oriented, job-mobile individuals, who leave a national prosecutorial, judicial, or academic career, or a position within a law firm, to work in the area of international criminal law for three to five years, only to move on to other things thereafter or to get called back to serve their own government once more. Such employees require flexibility regarding the pension and health insurance scheme in which they can participate, and job classification systems, which fully take their experience into account.

The ICC will also have to consider that some of the essential expertise it requires will be rare—few pathologists have experience with the exhumation of mass graves in war zones—and such expertise will need to be obtained and put to the use of the ICC in a flexible way, which meets the demands of the labor market.

A second more general point concerns the *types* of individuals who are initially recruited. The importance of having highly competent, experienced, sufficiently senior staff in place right from the beginning cannot be emphasized enough. The ICTY would warn against thinking that there would not be all that much work in the beginning and that therefore recruitment at a lower, more junior level would suffice. The direct opposite is true. We would advise that, after having identified the key legal and administrative functions that are required, recruitment at a *top-level* take place.

In organizational terms, it will provide the ICC, from Day One onwards, with a capacity to establish systems, protocols, and training mechanisms to deal responsibly with the surge of activities that an exercise of jurisdiction in accordance with Article 13 of the ICC Statute[2] will necessitate. Those systems and protocols, together with the subsequent training will be the foundation upon which adequate preliminary fact finding and analysis, a successful investigation, and, thereafter, a prosecution will be built. In blunt financial terms, the initial recruitment at the ap-

2. Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9* (1998), art. 13, *available at* http://www.un.org/law/icc/statute/romefra.htm [hereinafter Rome Statute].

propriate level of seniority is an investment that will save money later. It will give room for the executives of the organization to set up required management and work structures themselves, without being tied to detailed configurations which have been pre-determined.

The logic of the ICC Statute dictates that, unlike the ICTY, it will not be possible to have the most senior administrator, the Registrar, in place when the Judges and the Prosecutor have been elected. That same Statute has also given that Registrar a different position within the organization as compared to the Registrar of the *ad hoc* Tribunals.

For the Presidency and the Prosecutor to be able to work, a minimum degree of infrastructure needs to be available immediately after they have been elected. Some common services should therefore be made available to both the Office of the Prosecutor and the judiciary, which will enable them to fulfill the responsibilities in accordance with Articles 42, 38, and 43 of the ICC Statute,[3] respectively. Within the separate powers assigned to them, they need to be able to share building management facilities, start to recruit, pay salaries, use phones and computers, purchase goods, and the like. Those common services would have to be provided in close cooperation with the host State, which will be making certain contributions to that infrastructure as part of its bid.

In the current stage of the start-up process, it would be of some value to refine in some more detail the level of understanding as to facilities being part of those common services and facilities outside this common structure. In this connection, the ICTY stands ready to share its hard-won specialized experience in these areas. These areas include computer systems, the requirements for a building, the minimum security requirements, the technical equipment required for a court room, the records management tools available on today's market, the ways and means of providing adequate language services for the ICC's work, and many more. Cost effectiveness demands that the right decisions are made in the first year, necessitating adequate information of the specific operational requirements of an international criminal court.

In addition, one might try to conceive ways of getting in

3. Rome Statute, *supra* note 2, arts. 38, 42, 43.

place, as soon as possible after Day One, an able and experienced individual who could start building up a core group of specialists in the various court-related areas. Over time, this group would expand into a common services unit, headed by the above-mentioned manager. A limited startup budget, set aside at the first Assembly of States Parties could be considered as a basis in this regard. The interim head of common services could provisionally apply some administrative and financial rules previously agreed to. Subsequently, and after the election of the Judges, the Prosecutor, and the Registrar, the common services infrastructure could be used to allow the senior management team to set up the final structure within their respective fields of responsibility, using the common services as a common tool.

CONCLUSION

Both *ad hoc* Tribunals possess some years of experience in translating statutory requirements of an international criminal court into a practical, cost-effective, and manageable organizational structure. The ICTY was called upon to share its experience in the informal meetings of the various working groups of the Preparatory Commission and gladly complied with these requests.

In this regard, the ICTY feels the need to once again stress the importance of the time factor in the ICC's operational planning, in particular the above-mentioned scenarios related to Day One. The ICTY views the recent concrete steps taken by the host State of the ICC with regard to identifying interim premises and other operational matters as most encouraging. The proposed interim premises are located in close vicinity of the ICTY, which will allow, where possible, an easy sharing of expertise and resources—for instance, shared use of the ICTY's legal library by officials of the ICC in the startup period.

I am confident that further cooperation, in full recognition of the different structures and requirements of the ICC, will actively contribute to its swift setup in operational terms and ensure that the ICC will soon be able to commence its core tasks, namely, to guarantee lasting respect for and the enforcement of international justice, as stated in the Preamble of its Statute.