
Volume 5 of the collection *Historical Origins of International Criminal Law* is the first one dedicated to the International Criminal Court. It focuses on the mandate and functioning of the International Criminal Court’s (ICC) Office of the Prosecutor (OTP). In particular, the volume gathers a series of experts’ essays and reports requested by the preparatory team of the OTP coordinated by Morten Bergsmo at the time of the Office’s establishment, between 2002 and 2003.1 These essays were aimed at identifying and proposing solutions to the main issues the Office could face in the foreseeable future. The volume is monumental in both its form — since it spans over more than a thousand pages, for 48 chapters authored by dozens of different contributors — and its substance. It indeed addresses multiple topics, from substantive to managerial issues faced in establishing the OTP, and is divided in four parts.

Part 1 (‘Building Capacity to Investigate and Prosecute Core International Crimes’), contains essays organized in three sections: investigation; prosecution; management, staffing and functioning. Part 2 (‘Thematic Expert Consultation Processes’) comprises three expert groups’ reports on three pressing issues: how to reduce the length of ICC proceedings; how to solve potential problems in the international cooperation regime, relevant to the fact-finding and investigative functions of the OTP; and the potential challenges arising from the implementation of the complementarity principle. Part 3 (‘Code of Conduct and Regulations of the Office of the Prosecutor’) and Part 4 (‘Budget of the Office of the Prosecutor’) reproduce and comment upon some documents that have been fundamental in shaping the Office, i.e. its draft Regulations, its Code of Conduct and its first budget.

The three editors undertook this editorial enterprise for two purposes. On one side, they wanted to provide an overview of how the OTP was built through the 2002–2003 preparatory works for the benefit of a wide public and, especially, of those involved in national prosecutions’ capacity building for core international crimes.2 On the other side, the book contributes to reconstructing the institutional history of the ICC, by addressing in particular the gap between the original aspirations of what the Court might have been and the configuration it eventually assumed.3 This volume’s added value lies in the choice to make the original material available. All chapters of Part I, submitted as part of an informal consultation process when the OTP was being created, were deliberately left unaltered and have not been updated in light of subsequent developments.

Several chapters in Part I focus on prosecutorial strategies, both in the section ‘Prosecution’ and in the section ‘Management, Staffing, Functioning’. Reflections about such strategies pre-date the OTP policy papers, prospects of which, in fact, were not even considered by the preparatory team as an important tool to ensure the quality of the Office’s work.4 Many of these reflections can still be very useful nowadays, especially in three areas: the Office’s internal organization; situation and case selection; and relationships with other international justice actors, inside and outside the ICC context.

First, concerning internal organization, Guariglia in ‘Policy and organisational questions’ (Chapter 16) highlighted the areas which, according to him, needed a ‘careful’ and ‘creative’ approach by the Prosecutor.5 Thus, he recommended the establishment of an ‘atmosphere of constructive multiculturalism’,6 the constitution of a stable team with the possibility of pursuing a career path...

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2 Ibid., at i.
3 Ibid., at ii.
4 Ibid., at 3.
5 Ibid., at 275.
6 Ibid., at 278.
within the Office for its members, an organization facilitating collective discussions (on legal and technical aspects) and a specific attention for the Appeals section. The centrality of these areas is confirmed by some of his fellow contributors. For instance, in his contribution on ‘Prosecutorial policy, strategy, and external relations’ (Chapter 17), Hall highlighted the importance of adopting a coherent strategy for all appeals proceedings, as part of a general need for the OTP to elaborate and follow clear and predictable guidelines in every activity it performs. Williamson, in ‘On charging criteria and other policy concerns’ (Chapter 24), made several recommendations concerning organizational criteria. In particular, he drew an ideal professional portrait of key actors in the Office — e.g. the Deputy Prosecutor or a Senior Legal Adviser — and provides hiring advice, affirming that the Office’s success will depend on the quality of its staff. Along the same lines Othman, in ‘Questions for the ICC Office of the Prosecutor’ (Chapter 39), stressed the importance of adequately constituting and training the OTP staff, paying particular attention to issues of evidence management, confidentiality and forensic expertise. Staker, in his ‘Observations on legal culture, legal policy and the management of information’ (Chapter 40), reiterated other contributors’ concern for the establishment of a strong work ethics in the OTP. He advocated in favour of developing a ‘consistent and principled Office of the Prosecutor position’ on every question the Office could face, in order to help it formulate coherent arguments before the Court and contribute to the establishment of an orderly ICC legal system. This result, in his opinion, could only be achieved by merging OTP staff members’ national legal cultures into a single international legal culture, by formulating a legal policy, by adopting standard operating procedures and by developing an efficient and reliable information management system. The considerable number of policy papers and strategic documents that the OTP has issued over the years shows that many of these concerns have not gone unheard.

Secondly, as it still is now, situation and case selection was already a core preoccupation for experts during the preparatory period of the OTP. Hall suggested the adoption and publication of clear guidelines for determining whether to open preliminary examinations and investigations and for selecting and prioritizing cases for prosecution. The OTP seemed to listen to him in its subsequent behaviour, as witnessed by the adoption of policy papers on preliminary examinations and on case selection and prioritization. Also Williamson foreshadowed some of the subsequent OTP policies and strategies, suggesting that prosecutions should focus on those most responsible (‘be patient and wait for the “big fish”’). However, he warned the OTP to be careful in its selection choices, which in the future may originate resentment and feelings of injustice. Similarly Schabas, in ‘Interacting with academic institutions’ (Chapter 19), alerted the OTP of the risk that its choices might be seen as unduly politicized and neo-colonialist. In light of the above, Guariglia advised the OTP to make an effort in lowering unreasonably high expectations for the Court’s impact and clarifying the Office’s principles for action, ‘[b]y openly formulating a selection policy, subject to scrutiny by the international community, based on the practical limitations of the Court and the values enshrined in the Statute’. In this regard McDonald and Haveman, in their contribution ‘On the exercise of prosecutorial discretion’ (Chapter 27), reminded that the exercise of prosecutorial discretion in situation and case selection is to be placed within the legal limits set in Article 53 ICCSt. In particular, Schrag (in ‘Substantive and organisational issues’, Chapter 22) considered that case selection choices based on the availability of sound evidence are those less prone to criticism for perceived politicization.

7 Ibid., at 326–330.
8 Ibid., at 410–411.
9 Ibid., at 415–417.
10 Ibid., at 626–627.
11 Ibid., at 631.
12 Ibid., at 311–316.
13 Ibid., at 321–324.
14 Ibid., at 417.
15 Ibid., at 418.
16 Ibid., at 377–378.
17 Ibid., at 285.
18 Ibid., at 499–504.
19 Ibid., at 395.
Thirdly, understanding the OTP’s prominent position on the international stage, experts identified relationships with other international justice actors as a key component of the OTP’s ultimate success. Thus, Hall gave extensive advice to the OTP on how to conduct interactions with other ICC organs, States, UN organs, civil society, victims and the general public.\(^{20}\) In the same vein, Othman underlined the need for the Office to establish connections with human rights bodies, to ensure the widest possible cooperation with states and to elaborate a precise media strategy.\(^{21}\)

Far from being an endeavour of ‘pure’ historical reconstruction, Volume 5 of Historical Origins of International Criminal Law is a valuable resource for understanding some of the main challenges with which the OTP has to deal nowadays. The editors are to be thanked for having provided access to such extensive preparatory materials, inviting readers to compare early conceptualizations about the OTP’s organization and functioning with their actual implementation 15 years later.

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\(^{20}\) Ibid., at 330–373.
\(^{21}\) Ibid., at 627–628.