LAWYERS IN A WORLD CRIMINAL COURT

The Honourable Louise Arbour[1]

I read with great interest the paper by Professor Constance Backhouse presented at the first colloquia on the legal profession held last year.[2] Professor Backhouse makes a very convincing case that professionalism has long been a proxy for power and exclusion, in particular exclusion based on gender, race, class, and religion. She concludes by posing the question: Are efforts to promote an ethic of professionalism doomed to failure? I don't propose to answer that question directly but wish to reflect on professionalism in the emerging forums of international criminal law where we have the opportunity to avoid past inequities and focus, instead, on defining shared principles of professionalism, divorced from culture, tradition, legal system, or professional background.[3]

From my experience, the creation, over the last ten years, of an Office of the Prosecutor in two *ad hoc* International Criminal Tribunals and before the International Criminal Court (ICC), as well as the efforts, led mostly by Canadian Elise Groulx to create an international criminal defence bar, offer considerable food for thought about the role of legal professionalism in the workings of a justice system.

---

[1]Justice of the Supreme Court of Canada. Appointed by the Security Council of the United Nations as Prosecutor for the International Criminal Tribunals for the former Yugoslavia and for Rwanda, Oct. 1996-Sept. 1999.

[2]Constance Backhouse, "Gender and Race in the Construction of 'Legal Professionalism': Historical Perspectives", First Colloquia on the Legal Profession, 20 October 2003, The Chief Justice of Ontario's Advisory Committee on Professionalism. Online: Law Society of Upper Canada <http://www.lsuc.on.ca/news/pdf/constance_backhouse_gender_and_race.pdf>.

[3]Draft Proposal of the Advanced Team of the International Criminal Bar for the International Criminal Court, *Code of Conduct & Disciplinary Procedure* (International Criminal Bar: 2003).

To some extent, history may show that the development of an international bar - and by that I don't mean an international association of national bar associations or of domestic lawyers - may also have been in part an exercise in power and exclusion: power because there was inevitably a struggle for the dominance of a particular legal culture; exclusion because as a dominant culture emerged, it left little room for those who would not or could not partake in its basic tenets. It is my hope, however, that the dominant historical record will show a cooperative search for professional norms that could fill the inevitable gaps of practising law in a new, challenging, and fragile environment, with an underdeveloped legal framework.

I say underdeveloped legal framework because, inevitably, the body of law in the mid 1990s that governed the enforcement of international humanitarian law was very rudimentary. The substantive law - the Geneva Conventions[4], the genocide convention[5], international customary law, the precedents of the International Criminal Tribunal at Nuremberg and Tokyo and the statutes of the International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR)[6]- did not constitute well developed jurisprudence. But even more so, the procedure and practice before an international criminal forum had to

---

[4]*Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 12 Aug. 1949, 75 U.N.T.S. 31; *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, 12 Aug. 1949, 75 U.N.T.S. 85; *Geneva Convention Relative to the Treatment of Prisoners of War*, 12 Aug. 1949, 75 U.N.T.S. 135; *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, 12 Aug. 1949, 75 U.N.T.S. 287; *Protocol I Additional to the Geneva Conventions of 12 August 1949*, 12 Dec. 1977, U.N. Doc. A/32/144, online: United Nations <http://www.genevaconventions.org/>.

[5]*Convention on the Prevention and Punishment of the Crime of Genocid*e, 9 December 1948, 78 U.N.T.S. 1021, online: <http://www.genevaconventions.org/>.

[6]*Statute of the International Criminal Tribunal for the former Yugoslavia*, as amended, 25 May 1993, Res. 827, S/RES/827 [hereinafter, *ICTY Statute*], online: United Nations <http://www.un.org/icty/legaldoc/index.htm>; *Statute of the International Criminal Tribunal for Rwanda*, 8 November 1994, Res. 955, S/RES/955, online: International Criminal Tribunal for Rwanda <http://www.ictr.org/ENGLISH/basicdocs/statute.html>.

be set up from scratch.

The late Justice Deschesnes, former Chief Justice of the Quebec Superior Court and one of the founding judges of the ICTY, contributed greatly to the enactment of the *Rules of Procedure and Evidence* [hereinafter "the Rules"] of the ICTY.[7] Before my own appointment as Prosecutor, I heard Justice Deschesnes describe the process of enacting these rules in a talk he gave to the criminal defence bar in Montreal in 1995. Guided by the terms of the *ICTY Statute*[8], itself enacted by a Resolution of the Security Council of the United Nations, and by the relevant international instruments, such as the *International Covenant on Civil and Political Rights*[9], the original eleven judges from all over the world, different legal traditions, and varied professional backgrounds, had to agree on what they hoped would be a comprehensive set of rules to govern the investigative process as well as trials and appeals before the tribunal.

Not surprisingly, the Rules had to be amended often and extensively as the work progressed to reflect the unforeseeable reality of practice before the ICTY.[10] For example, witness protection issues gave

---

[7] ICTY, *Rules of Procedure and Evidence*, as amended, 11 February 1994, IT/32/REV.28, [hereinafter "the Rules"], online: <http://www.un.org/icty/legaldoc/index.htm>.

[8] *ICTY Statute*, *supra* note 6.

[9] *International Covenant on Civil and Political Rights*, 16 Dec 1966, 999 U.N.T.S. 171, online: <http://www.hrweb.org/legal/cpr.html>.

[10] As of 2002, Revision 19 of the ICTY Rules was in effect: See Daryl A. Mundis, "The Legal Character and Status of the Rules of Procedure and Evidence of the *ad hoc* International Criminal Tribunals", (2001) 1 Int. Crim. Law Rev. 191 for a review of the interaction between the *ICTY Statute* and The Rules. Mundis at footnote 3 also cites

rise to a sophisticated system of sheltering the identity of witnesses from public scrutiny while giving the defence adequate notice to prepare properly for trial.[11] However, guidance often had to come from influences external to the framework of the rules. Put another way, the Prosecutor had to take the initiative to establish a practice or, if necessary, to advocate a change to the Rules, to respond to realities for which the law as it existed offered no guidance.[12]

What we can call "professionalism", therefore, came into play in the context of responding to unforeseen circumstances. Within the Office of the Prosecutor,[13] collective positions had to be articulated, applied, or advanced before the ICTY. These positions, as I stated above, could not emerge solely from

---

Virginia Morris and Michael P. Scharf, *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia*, (Irvington-on-Hudson, NY: Transnational, 1995) as an excellent discussion of the development of the Rules.

[11] The Rules, *supra* note 7. See for example Rule 75 A "Measures for the Protection of Witnesses" that states: "A Judge or a Chamber may, *proprio motu* or at the request of either party, or of the victim or witness concerned, or of the Victims and Witnesses Section, order appropriate measures for the privacy and protection of victims and witnesses, provided that the measures are consistent with the rights of the accused" balanced against Rule 66(A)(ii) that states: "Subject to the provisions of Rules 53 and 69, the Prosecutor shall make available to the defence in a language which the accused understands (ii) within the time-limit prescribed by the Trial Chamber or by the pre-trial Judge appointed pursuant to Rule 65 *ter*, copies of the statements of all witnesses whom the Prosecutor intends to call to testify at trial, and copies of all written statements taken in accordance with Rule 92 *bis*; copies of the statements of additional prosecution witnesses shall be made available to the defence when a decision is made to call those witnesses."

[12] The Rules, *supra* note 7. Note that Rule 6 sets out the procedure for amending the Rules and provides that the Prosecutor, along with any Judge or the Registrar, may make proposals for amendments that may be adopted if unanimously approved by the judges (Rule 6B) or at least nine Judges agree with the proposal at a Plenary meeting (Rule 6A). See also Mundis, *supra* note 10 at p. 194.

[13] "The Office of the Prosecutor (OTP) operates independently of the Security Council, of any State or international organisation and of the other organs of the ICTY. Its members are experienced police officers, crime experts, analysts, lawyers and trial attorneys. The OTP conducts investigations (by collecting evidence, identifying witnesses, exhuming mass graves), prepares indictments and presents prosecutions before the judges of the Tribunal", online: United Nations <http://www.un.org/icty/glance/index.htm>.

legal requirements as they often had to be developed in light of a legal void. Ultimately, under the terms of the *ICTY Statute*, the Prosecutor was set up as an independent organ of the ICTY and was directed to neither seek nor receive instructions from any State nor from any other source.[14] The independence of the Prosecutor, therefore, served to delimit the parameters of our field of action. After that, the rights of the accused as expressed in the *ICTY Statute* and the Rules were the paramount consideration in developing a practice or a position.[15] Working within those limitations, we were also guided by the mission of the

---

[14] *ICTY Statute*, *supra* note 6 at Article 16 states:

1. The Prosecutor shall be responsible for the investigation and prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991.
2. The Prosecutor shall act independently as a separate organ of the International Tribunal. He or she shall not seek or receive instructions from any Government or from any other source.
3. The Office of the Prosecutor shall be composed of a Prosecutor and such other qualified staff as may be required.
4. The Prosecutor shall be appointed by the Security Council on nomination by the Secretary-General. He or she shall be of high moral character and possess the highest level of competence and experience in the conduct of investigations and prosecutions of criminal cases. The Prosecutor shall serve for a four-year term and be eligible for reappointment. The terms and conditions of service of the Prosecutor shall be those of an Under-Secretary-General of the United Nations.
5. The staff of the Office of the Prosecutor shall be appointed by the Secretary-General on the recommendation of the Prosecutor.

[15] The Rights of the Accused are set out in Article 21 of the *ICTY Statute*, *supra* note 6:

1. All persons shall be equal before the International Tribunal.
2. In the determination of charges against him, the accused shall be entitled to a fair and public hearing, subject to article 22 of the Statute.
3. The accused shall be presumed innocent until proved guilty according to the provisions of the present Statute.
4. In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality:

> (a) to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
>
> (b) to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
>
> (c) to be tried without undue delay;
>
> (d) to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
>
> (e) to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
>
> (f) to have the free assistance of an interpreter if he cannot understand or speak the language used in the

Tribunal, and a commitment to the "public interest", difficult as it was to identify who was meant by the "public", let alone how its interests would be best served.[16]

What I would like to explore further here is the difference between a position that is incorrect and one that is unprofessional. There are many instructive comments on that question in the recent decision of the Ontario Court of Appeal in *R. v. Felderhof*, an action against a former senior officer of Bre-X Minerals Ltd. for insider trading and authorizing or acquiescing in misleading press statements.[17] The dispute arose over the disclosure of documents by the Prosecution. Rosenberg J.A. described *Felderhof* as a "complex case involving experienced counsel who took very different views about the role of the prosecutor and the rules of evidence".[18] He emphasized that "[i]t is a very serious matter to make allegations of improper motives or bad faith against any counsel".[19]

International Tribunal;
(g) not to be compelled to testify against himself or to confess guilt.

[16] In harmony with the purpose of its founding resolution, the ICTY's mission is fourfold:

- to bring to justice persons allegedly responsible for serious violations of international humanitarian law
- to render justice to the victims
- to deter further crimes
- to contribute to the restoration of peace by promoting reconciliation in the former Yugoslavia,

online: United Nations <http://www.un.org/icty/glance/index.htm>.

[17] [2003] O.J. 4819.

[18] *Ibid.* at para. 86.

[19] *Ibid.* at para 93.

I would like to refer at some lenght to a case I dealt with at the ICTY, which, in my view, illustrates the very danger of confusing lack of professionalism with the taking of an erroneous position on the law, or on its application. At the end, my point will be simply this: there is a vast difference between being wrong and being unprofessional. If advancing vigourously a proposition that is eventually held to be incorrect were unprofessional, there would not be many litigators left. What then are the boundaries between correctness and professionalism? Outside civility and decorum, when is conduct properly characterized as unprofessional? My own experience suggests that the boundaries between the two are particularly blurred in a criminal practice before an international court, if only because the backgrounds and expectations of all involved are profoundly different and because the playing field is still insufficiently defined.

The case that most dramatically illustrates this point is *Prosecutor v. Anto Furundzija*, a judgment of a Trial Chamber of ICTY rendered Dec 10, 1998.[20] The accused, Furundzija, was found guilty on the following two counts: a) torture[21] and b) outrages upon personal dignity including rape, as violations of the laws and customs of war, contrary to Article 3 of the *ICTY Statute*.[22] He was found to be a co-perpetrator in torture and an aider and abettor to the rape.

---

[20] (1998), Case No. IT-95-17/1 (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II), online: United Nations <http://www.un.org/icty/furundzija/trialc2/judgement/fur-tj981210e.htm>.

[21] *Ibid.* at para. 269.

[22] *Ibid* at para. 275.

The Trial Chamber found that the accused was a commander in a unit of the "HVO", the armed forces of the Croatian Community of Herzeg-Bosna, known as "The Jokers".[23] The principal witness against the accused was Witness A, whose identity was protected by court order. She was described in the judgement as "a married woman of Bosnian Muslem origin".[24] She was the subject of extensive sexual abuse, not all of it at the hands of the accused.[25] The conviction rested on specific allegations that Witness A was sexually assualted by another soldier while being questionned by the accused at the headquarters of the Jokers (torture), and was forced to have oral and vaginal intercourse with another man (a co-accused who was not yet arrested and therefore whose identity was not made public), while the accused Furundzija was present and failed to intervene.

Between the first court appearance of the accused and the commencement of the trial, several motions were filed by both the prosecution and the defence, essentially dealing with dislocure and witness protection issues. These were constant areas of tension in pre-trial procedures at the ICTY. The prosecution has extensive disclosure obligations under the Rules.[26] Under Rule 68, "[t]he Prosecutor shall, as soon as practicable, disclose to the defence the existence of material known to the Prosecutor which in any way tends to suggest the innocence or mitigate the guilt of the accused or may affect the credibility

---

[23] *Ibid.* at para. 65.

[24] *Ibid.* at para. 70.

[25] *Ibid.* at para. 89.

[26] The Rules, *supra* note 7.

of prosecution evidence." Under Rule 66(A)(ii), it must provide the defence copies of statements of all witnesses it intedns to call at trial no later than 60 days before the date set for trial.[27] The parties of course may apply to the court to be relieved of some of these obligations.[28]

In the course of the many motions dealing essentially with disclosure issues that were dealt with in that case, in a ruling in early June of 1998, the Trial Chamber declared that "it was appalled by what it considered to be conduct close to negligence in the Prosecution's preparation of the case"[29] On June 5, the Trial Chamber issued a "Formal Complaint" to the Prosecutor concerning the conduct of the Prosecution. On June 8, I, as Prosecutor, acknowledged the complaint and undertook to investigate the matter.[30] I asked the Deputy Prosecutor to compile the entire file regarding the disclosure process in the case.

Under the Rules of the tribunal, there was of course no such thing as a "Formal Complaint" by a Trial Chamber to the Prosecutor, nor any mechanism to respond to it. June 1998 was not a good month for the Prosecutor. The declaration, by the Trial Chamber, that the trial team's conduct in the Furundzija

---

[27]Rule 66(A)(ii), *supra* note 11.

[28]The Rules, *supra* note 7 at Rule 66 (C).

[29]The history of the disputes over disclosure of documents is summarised in *Prosecutor v. Anto Furundzija*, *supra* note 20 at para. 15.

[30]*The Prosecutor v. Anto Furundzija*, "Prosecutor's Response to the Formal Complaint of the Trial Chamber issued on 5 June 1998" (11 December 1998), Case No. IT-95-17/1 (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber) at para. 2.

case was "close to negligence" was disturbing enough. This declaration had been made without notice to the lawyers involved, one American and one British, with no opportunity to respond to the allegations, and no right of appeal against them.

On June 8, 1998, the trial began. Prosecution counsel were under considerable stress, aggravated by the pronouncement made against them a few weeks earlier. The prosecution case was narrow and focused. It lasted only four days. Several motions were argued after the close of the Prosecution's case; the defence began to present its case on June 15, lasting a day and a half. On consent, and as was contemplated by the Rules,[31] sentencing matters were also addressed before the close of the case. The hearings closed and judgement was reserved on June 22.

Shortly after the close of hearings, I left for Canada on a short holiday. I soon received a phone call from the Deputy Prosecutor. He had just found out that in the Furunzdija case, we had not disclosed to the Defence a redacted certificate and a statement from a psychologist at the Medica Women's Therapy Center in Bosnia[32] concerning treatment that Witness A had received at the Center after the events in issue in the case.

I decided that we had to notify the Defence of the existence of the documentary evidence and of

[31] *The Rules*, *supra* note 7 at Rule 86(C): "The parties shall also address matters of sentencing in closing arguments."

[32] The Medica Center specializes in helping women and children recover from wartime atrocities.

our position that it was not admissible in any event because its prejudicial effect outweighed its probative value, and we should seek a ruling to that effect from the Trial Chamber. The defence immediately moved to strike the evidence of Witness "A" in light of what it alleged was misconduct on the part of the Prosecution. On July 16, the Trial Chamber found that there had been serious misconduct on the part of the prosecution in breach of Rule 68, and it ordered the case re-opened.[33] It ordered the Prosecution to disclose to the Defence the content of the Medica documents and a re-call and re-examination of any Prosecution witnesses, including Witness A, but only on issues arising out of the disclosed documents. In addition, the Defence was given leave to tender evidence, including expert evidence, to address "the issues concerning any medical, psychiatric or psychological treatment or counselling that may have been received by Witness A" or any other issue related to the documents.[34]

In its July 16 Decision, the Trial Chamber reviewed the Response of the Prosecution to the Motion presented by the Defence.[35] The Prosecution stated the decision to withold disclosure was made by one of the Trial Attorneys resposible for the case,on the basis of a professional assessment of its content. That attorney concluded that "there was nothing about the material which distinguished Witness A's condition from any other rape victim" and that disclosure of the medical evidence would have been "a gross invasion

[33] *Prosecutor v. Anto Furundzija* (1998), Case No. IT-95-17/1-T (International Tribunal for the Former Yugoslavia, Trial Chamber) at para. 16.

[34] *Ibid.* at para. 21.

[35] *Ibid.* at paras. 10-15.

of the witness' privacy".[36] The Response stated that the decision was "not made in bad faith for an improper purpose, or to gain a tactical advantage".[37] Nevertheless, the Trial Chamber held that there had been "serions misconduct" on the part of the prosecution.[38] "The material clearly had the potential effect to affect the credibility of the prosecution evidence"[39] and its existence should have been disclosed. In the concluding paragraphs, the Trial Chamber held that there had been "a serious procedural error" on the part of the Prosecution.[40]

The case reopened on November 9, 1998 . Expert evidence was tendered by both parties on the effect of Post-Traumatic Stress Disorder on memory and Witness A was recalled. Judgement was again reserved and a conviction was entered on December 10, 1998.[41] The next day, I filed my response to the Formal Complaint issued by the Trial Chamber on June 5. I stated at the outset that:

> ...any Prosecutor required to respond to the findings of a Court is immediately placed in a difficult position. That difficulty is exacerbated in this instance, since the absence of established precedent and settled procedure makes it unclear to what extent the Trial Chamber's findings and its categorisation of the conduct in question are to be regarded as conclusive.

---

[36] *Ibid.* at para. 10.

[37] *Ibid.*

[38] *Ibid.* at para. 16.

[39] *Ibid.* at para. 17.

[40] *Ibid.* at para. 20.

[41] *Prosecutor v. Anto Furundzija*, *supra* note 20.

> As Prosecutor, I have responsibility for the conduct of this case. The criticisms voiced in the Formal Complaint relate to two distinguishable types of conduct, namely, the conduct of prosecution counsel as advocates, and the conduct of "the prosecution" as a party to the proceedings. The former concerns the behaviour of individuals appearing in court. It relates to their obligations and duties as officers of the courts and of the law. Typically the sanctions for breach of those duties and responsibilities lie with professional associations, with disciplinary bodies, and in certain circumstances within the contempt powers of the court itself. Responsibility in the latter sense is not the responsibility of individuals, but relates to the conduct of the party *qua* litigant. Failure by a party to observe legal rules is visited with different sanctions. Rule 5(C) of the Tribunal's Rules of Procedure and Evidence reflects the principle that appropriate relief should be granted during the course of the proceedings. Such sanctions provide a complete and proportionate remedy for the non-compliance in question. Examples are refusal to entertain late motions, exclusion of evidence, with the ultimate sanction against the moving party being to halt or dismiss the proceedings themselves. While the term "misconduct" can be applied to conduct of the first kind calling for additional corrective measures, it is less pat to describe those failures of a party for which failures the legal system itself provides remedies to avoid miscarriage of justice. In the context of this complaint, I believe that my responsibility is to advance the case for the prosecution in accordance with the law, and to do so through competent, professional counsel. [42]

Had the Prosecution committed "a serious procedural error" in not disclosing the Medica documents, or had there been "serious misconduct" on the part of the Prosecution? The Trial Chamber found both and seemed to use both expressions interchangeably. In my view "procedural error" and "serious misconduct" refer to two different concepts: the former, is an error of law; the latter, a finding of professional misconduct.

We sought advice on that point from the President of the International Association of Prosecutors,

---

[42] "Prosecutor's Response to the Formal Complaint of the Trial Chamber issued on 5 June 1998", *supra* note 30 at paras. 6-7.

Mr. Eamonn Barnes.[43] He advised that we contact the Crown Office of Scotland, where there is one of the world's longest standing systems of public prosecution that draws upon both common law and continental traditions. The Lord Advocate and the Crown Agent of Scotland gave an independent assessment of the conduct of the prosecution on the explicit understanding that we would make the findings public, which we did in filing the response to the Formal Complaint. They found an error of judgment in not disclosing, but no professional misconduct.

In drafting my response to the "Formal Complaint" made by the Trial Chamber against the Prosecution, I decided to go further to address the July 1998 Decision of the Chamber that characterised the decision not to disclose Witness A's Medica documents to the Defence as "serious misconduct".[44] This decision regarding evidence documenting the psychological trauma suffered by Witness A as a result of severe sexual violence was made in a legal environment which had not resolved the contentious issues around disclosure of victim's medical and psychological records. These issues lie "at the cutting-edge of a developing body of jurisprudence concerning the balancing of important competing public interests."[45]

Just how contentious is clear from the various *amicus* briefs by women's groups subsequently submitted on the disclosure of medical history of victims of sexual assault. In Canada, we have the benefit

---

[43]Director of Public Prosecutions of Ireland.

[44]"Prosecutor's Response to the Formal Complaint of the Trial Chamber issued on 5 June 1998", *supra* note 30 at para. 20.

[45]*Ibid.* at para. 21.

of the Supreme Court of Canada's decision in *R. v. O'Connor*[46] and subsequent amendments to the Canadian *Criminal Code*.[47] By contrast, the Rules of the ICTY provided little or no assistance on the approach to be taken in this international jurisdiction.

The Canadian experience is quite illustrative. It supports my argument that a decision not to disclose taken in good faith, on proper grounds, and representing an exercise of professional judgment on a difficult and novel issue may constitute an error of judgment but certainly does not amount to "misconduct" by any accepted definition of that term.[48]

In R. v. O'Connor, a bishop and former principal of a residential school was charged with sexual offences against students and employees. At trial, *O'Connor* sought an order that the Crown access and disclose the victims' medical, counselling, and other personal records. When the Crown refused, the trial judge issued a stay of proceedings that was overturned by the Court of Appeal. The case eventually came before the Supreme Court of Canada, and, as in the Furundzija case, a number of interveners argued that personal records should never be made available to the accused in criminal sexual assault proceedings.[49] The majority of the Court established a procedure for weighing the rights of the accused to a fair trial

---

[46][1995] 4 S.C.R. 411.

[47]R.S. C. 1985, c. C-46, ss. 278.1-278.9.

[48]"Prosecutor's Response to the Formal Complaint of the Trial Chamber issued on 5 June 1998", *supra* note 30 at para. 20.

[49]Jennifer Koshan, "Disclosure and Production in Sexual Violence Cases: Situating *Stinchcombe*", (2002) 40 Alberta L. Rev. 655 at 659.

against a third party's right to privacy. This procedure placed the burden on the accused to establish the relevance of the records sought to be disclosed. If the accused succeeds on that point, the judge must balance the salutary and deleterious effects of production- whether denying the production "would constitute a reasonable limit on the ability of the accused to make full answer and defence"[50] while taking a number of factors into consideration, including the dignity, privacy, or security interests of the third party.

Since *R. v. O'Connor*, the *Criminal Code* provisions dealing with production of records in sexual offences have come into force,[51] expanding the list of factors to be taken into account before production is ordered. Consideration must now be given to society's interest in reporting sexual offences and in encouraging counselling of survivors, and the effect of production on the integrity of the trial process.[52] The provisions were upheld as constitutional in *R. v. Mills*.[53]

The Canadian experience of lengthy professional debate and "dialogue" between the Courts and Parliament on the issue of disclosure of third party medical records in cases of sexual offences emphasises my point that in the absence of direction, many Prosecutors would not have disclosed third party records to the defence and that action would not constitute misconduct. Indeed, Professor Koshan of the University

---

[50] *R. v. O'Connor*, *supra* note 46 at para. 30.

[51] *Criminal Code*, *supra* note 47. The provisions came into force on 12 May 1997.

[52] *Ibid.* at s. 278.5(2).

[53] [1999] 3 S.C.R. 668.

of Calgary, in a comprehensive survey of post *Mills* lower court decisions in production applications, concludes that there is still a great deal of variation in trial court decisions whether to order disclosure or not because of the level of discretion that is left to trial judges who decide on the merits of production on a case-by-case basis.[54]

The *Furundzija* case came to ICTY three years after *O'Connor* was decided in Canada. The original decision not to disclose the medical records of the victim in that case, and my subsequent overruling of that decision when it came to my attention, were made in a legal environment in which one inevitably draws from one's own legal tradition, and from a sense of professional responsibility that is very much the product of that tradition. Some of us, working in the international criminal environment, were more adversarial that others. Most of us automatically applied rules and followed practices that we were comfortable with. Only when these attitudes and practices appeared strange to others, which was often, did we have to justify them.

A small example. We had another trial involving several accused. A prosecution witness was testifying in chief. At the lunch recess the witness told prosecution counsel that he recognized one of the accused as one of the participants in the crime, which he had not been able to do beforehand. After lunch, the prosecutor informed the defence and then proceeded to ask the witness if he could identify any of the accused, which he did. The defence objected vigoroulsy on the basis of non-disclosure. When the court

[54] Koshan, *supra* note 49.

was told of the circumstances, the defence claimed that the Prosecutor was in breach of rules of professional conduct by speaking to his own witness while the witness was still on the stand under oath.

The court put the matter over to the next morning for submissions. The Rules, not surprisingly, were once again silent on the desirability of speaking to a witness while they were in the midst of their examination-in-chief. In the Office of the Prosecutor, we had a lively debate as to which practice we should advocate, not only for this case, but as a precedent for the conduct of all cases. The views of lawyers trained in common law systems, based on their own national pratices, ranged from: " I would be disbarred if I did" to " I would be disbarred if I didn't". The Canadians, of course, took the middle ground: " It's OK while the witness is in chief, but a no-no while he's in cross". Meanwhile the members of the team trained in the civil law tradition are still trying to figure out what the fuss was all about.

Here, one would not consider these issues matters of"profesisonalism" but matters of law. In the context of the emerging discipline and practice of international criminal law, many procedural issues must, by default, be handled on the basis of a professional sense of what the process is about and how justice is better served. There again, clashes of traditions and expectations come into play, with the search for the truth tolerating fewer procedural obstacles in some systems than in others.

Accusations, or at least impressions of unprofessionalism, are easily formed, and hard to dismiss. This is because our ethical responses are governed primarily by the legal framework within which we

operate and then by the traditions which have come to constitute the "dos and dont's" of our own professionnal lives.

When we work in an international context where the legal framework is by necessaity expressed in very general terms and where the tradition of practice is virtually non-existent, there is an almost irrisistible temptation to equate professionalism with familiarity. If we do, and if we cannot bring ourselves to rethink our position from first principles, we risk duplicating an environment similar to the one described by Professorf Backhouse in her paper last year. An environment dominated by the legal culture of those whose first language is English and whose legal system provides a ready-made answer to everything. We can therefore export an idea of "professionalism" that appears to equate professionalism with sophistication but leaves little room for those who are seeking the same justice but in a different way. Professionalism by cultural hegemony is not a desirable formula for the development of an indigineous body of criminal practice before international courts.

This is true of the pratice of prosecutors and of the expectations and rulings of judges. It is also true of the aspirations of the defence bar, which is still attempting to find its place in an environment where its existence in an organised form was systematically ignored. The International Criminal Bar, created almost exclusively because of the vision and drive of Montreal lawyer, Elise Groulx, adopted at its General Assembly in Berlin in March 2003 a "Code of Conduct and Disciplinary Procedure" to apply to counsel

appearing before the International Criminal Court.[55] The Code was presented to the ICC in May of last year.

It is not my purpose to comment on the content of any of the provisions of that Code of Conduct, but I was struck by the statement of objectives that was summarized in its presentation to the ICC as follows:

> Our objective was to draft a Code of Conduct consistent with the *Rome Statute* of 1998 and the *Rules of Procedure and Evidence* as well as with fundamental principles of the legal profession that could be accepted and followed by counsel from all cultures, traditions and legal systems and professional backgrounds.

This, in my view, is the challenge facing the professional lawyer moving to a practice before an international criminal court, either as a judge, as prosecutor, or as defence counsel. There is no dishonour in being wrong, assuming one is otherwise diligent. I believe that we can safely promote integrity, honesty, and candour as universal trademarks of advocacy. If Canadians have anything in particular to contribute along that line I would suggest that the willingness to recognize errors and to correct them is the ultimate guarantee of justice. It should not be the hardest thing for a true professional to do, but it often is.

Allow me a final example. In preparing my response to the Formal Complaint lodged by the Trial Chamber against my Office in the *Furundzija* case, I debated with my colleagues how far we could go

---

[55] *Code of Conduct & Disciplinary Procedure, supra* note 3.

and how frank we could be in criticising the court for having initiated the complaint in that form in the first place. There was no right of appeal from the allegations/findings contained in the complaint, nor was there any procedure for anyone to respond to our decision to file a public response. We couched my response in the following terms. I will let you be the judges of its "professionalism":

> Lastly, I must express my concern that the Trial Chamber chose to deliver, especially on the eve of the trial, a public Formal Complaint without any prior notice to me, and without having given those personally affected an opportunity to make submissions. All courts possess an inherent right to control how cases proceed before them and to criticise the parties appearing before them. Yet such a Formal Complaint as this is provided for nowhere in the Rules of Procedure and Evidence, and may well be without precedent in established domestic jurisdictions. If such a complaint is intended to be unanswerable, it is unfair; if it is meant to be answered, it must be made at an appropriate time, when an opportunity to answer exists. I believe that my response is not timely, but I will urge the Judges of the Tribunal, as its collective rule-making body to give serious consideration as to whether such a complaint procedure should formally be incorporated into the Tribunal's procedural mechanisms or formally be disapproved.[56]

To my knowledge, neither was done.

[56] "Prosecutor's Response to the Formal Complaint of the Trial Chamber issued on 5 June 1998", *supra* note 30 at para. 23.