

An Experiment in International Criminal Justice: The Philosophy, Methodology, and Working of the International Criminal Tribunal for the Former Yugoslavia

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The subject of my talk today is the working of the International Criminal Tribunal for the former Yugoslavia (ICTY), based in The Hague, The Netherlands. In 1990, the first multiparty elections were held in the Federal Republic of Yugoslavia. The parties were basically organized on ethnic lines, which shortly led to conflict between different ethnic groups. Several Republics started to break away from the Yugoslav federal structure. It began in Slovenia, where there was a brief armed clash, with some allegations of war crimes. Slovenia and Croatia declared their independence from Yugoslavia in 1991. Later, fighting erupted in Bosnia and Herzegovina between ethnic Serbs, Muslims and Croats, amid allegations of large-scale crimes and atrocities.

The ICTY was established in May 1993 by United Nations Security Council Resolution 827, which gave us jurisdiction over crimes committed in the territory of the former Yugoslavia since 1991. The jurisdiction was to cover the period beginning on January 1, 1991; the Security Council set no end date for our mandate, which is ongoing until peace is established — a condition to be determined by the Security Council, which was to decide on the date when the mandate would end. Within the territory of the former Yugoslavia, no geographical restrictions were imposed on us — our territorial jurisdiction extends to the entire territory of the former Yugoslavia.

The Tribunal was set up under Chapter VII of the Charter of the United Nations, which states that the Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression, and shall take measures to maintain or restore international peace and security. Initially this meant either military intervention — the use of peace-keeping forces — or the imposition of sanctions. The establishment of the ICTY marks the first time in the history of the UN that the Security Council created an organization to take measures to maintain international peace by supplying criminal justice. The Security Council was very worried about the allegations of massive crimes committed during the conflict — mass rapes, mass murders, crimes of different kinds in the detention camps, mass deportations, and so on. The UN Secretary General, whom the Security Council had asked to come up with the Statute for the Tribunal, was both conservative and cautious in his approach, ensuring that only those crimes that were already unquestionably governed by customary international law were included in the Tribunal's Statute.

The Statute contains four articles that give us jurisdiction over different crimes:

Article 2: Grave breaches of the Geneva Conventions of 1949, which include:

- Willfull killing
- Torture or inhuman treatment
- Extensive destruction of property, not justified by military necessity
- And other measures regarding the treatment of prisoners of war and civilians

Article 3: Violations of the laws or customs of war, which include:

- Employment of poisonous weapons

- Wanton destruction of cities, towns, or villages, or of undefended towns, villages, dwellings, or other buildings
- Destruction of cultural monuments and plunder

Article 4: Genocide, which includes various acts, for example murder or deliberately inflicting on a group conditions of life calculated to bring about its physical destruction, committed with the intent to destroy, in whole or in part, a national, ethnical, racial, or religious group as such.

Article 5: Crimes against humanity. These are crimes committed in armed conflict, whether international or internal in character, and directed against any civilian population:

- Murder
- Extermination
- Enslavement
- Deportation
- Imprisonment
- Torture
- Rape
- Persecutions on political, racial and religious grounds
- Other inhumane acts

Article 7.1 of the Tribunal's Statute gives us jurisdiction over individuals — the first time in human history that an international body has been given that authority. The Tribunal's jurisdiction extends to people who are responsible either as individuals or through a command responsibility that they may have had during the conflict.

The grave breaches of the Geneva Conventions mentioned in Article 2 include but are not limited to "willful killing; torture or inhuman treatment," and "extensive destruction ... of property not justified by military necessity" — for example, the shelling of a town full of civilians, over a number of days, in the absence of a clear military need. Other measures regarding the treatment of prisoners of war or civilians are detailed in the Statute.

Violations of the laws or customs of war include the "employment of poisonous weapons," the "wanton destruction of cities, towns, or villages," the "attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings," the destruction of cultural monuments, the plunder or deliberate destruction of churches, mosques, and so on.

Genocide is a serious crime, and takes a lot of investigative and legal effort to prove. But it does have certain definable components: it includes various acts, such as murder or "deliberately inflicting on a group conditions of life calculated to bring about its physical destruction." These acts must be "committed with the intent" — this intent is very important, and legally very hard to prove — "to destroy, in whole or in part, a national, ethnical, racial, or religious group." You will note that this does not include a political group. To be categorized as genocide, the crime must be committed against a national, ethnical, racial, or religious group, and the intention has to be proved.

Before we can investigate violations of the Geneva Conventions and of the laws or customs of war, we have to prove the existence of an international armed conflict. Only then do these prohibitions come into effect. For crimes against humanity, on the other hand, the need to show that the conflict is international is removed — there still must be an armed conflict, but it need not be international in character. Crimes against humanity are those "committed in armed conflict, whether international

or internal in character, and directed against any civilian population." They include "murder, extermination, enslavement, deportation, imprisonment, torture, rape, persecutions on political, racial and religious grounds," and "other inhumane acts" that are also defined in the Statute.

Isolated cases of murder or rape here and there do not fall under our jurisdiction; rather than crimes against humanity, those are criminal cases to be prosecuted under the laws of the country where they occur. Two components must be proven in order for us to prosecute crimes against humanity: first, the offenses must be widespread; second, they must be systematic. If rapes, for example, are committed in thousands, over a large area, over a number of months, that crime may be described as widespread and systematic. And only when crimes are widespread and systematic can we take them on.

As I said, Article 7.1 of the Statute authorizes us to prosecute individuals — any "person who planned, instigated, ordered, committed, or otherwise aided and abetted in the planning, preparation, or execution of a crime." We prosecute leaders, but it is rare to find a president or a general holding a gun and shooting someone. That kind of open-and-shut case is highly unlikely to fall in our lap. What we normally come across, investigate, and prove is that such a person was involved in a conspiracy to commit a crime, or failed to prevent one. In fact Article 7.2 of the Statute explicitly asserts, "The official position of any accused person, whether as Head of State or Government" — be it president, premier, minister — "or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment." Similarly, Statute 7.3 continues, "The fact that any of the acts referred to ... were committed by a subordinate does not relieve his superior of criminal responsibility."

These concepts of command responsibility are very important. As I said, you rarely have a smoking gun. It is through other actions, and the widespread, systematic nature of the crime, that we can prove someone's knowledge. The first requirement is to prove that the person in command was actually in command, whether *de jure* or *de facto*. In these kinds of conflicts we often find that a person is *de jure* the general, say, but is actually not in command at all; some relatively low-level person, perhaps a major in the intelligence service, may *de facto* have more power than the general does. So we have to investigate who actually had power during the conflict. We have to prove that a person had the power of command, that he was in a position to take action against his subordinates, that he had knowledge of crimes being committed. If crimes are committed over a long period and the person had access to daily information flowing up and down the chain of command, then he has an element of knowledge. Knowledge, command, and then the failure to prevent those crimes from occurring — or, if the crimes have already occurred, the failure to take action against subordinates — if all of these can be proved we can charge that person under Article 7.3, that is, command responsibility.

Not unlike the Westminster model of government, the Tribunal is a single unit with three components: the Chambers, the Registrar, and the Office of the Prosecutor. My own office is in the Office of the Prosecutor. The Chambers consist of fourteen judges, who are elected by the General Assembly of the United Nations from a list submitted by the Security Council. Recently, because of the large number of pending cases, a certain number of *ad litem* judges have also been approved and are set to join the Tribunal in the future.

The Registry services both the Chambers and the Office of the Prosecutor. The Registrar is appointed by the UN Secretary General in consultation with the President of the ICTY. There is a Deputy Registrar, who is responsible for court work and for a detention facility at Scheveningen in The Hague. We have a Chief of Administration, who is responsible for personnel, budget, procurement, and financial matters.

The Office of the Prosecutor — the structure is presently under review — consists of the Prosecutor, currently Carla Del Ponte of Switzerland, and the Deputy Prosecutor, currently Graham Blewitt of Australia. There is a Chief of Investigations and a Chief of Prosecutions. Under the Chief of Investigations are four Investigation Commanders and various field offices. The Chief of Prosecutions heads the Prosecutions Division, which consists of a number of Senior Trial Attorneys, Legal Advisers, etc.

There are a number of investigation teams, each with a team leader. The investigators are generally police officers while the legal staff, of course, are lawyers, who act as legal advisers during investigations and as co-counsels when the cases go to court. Then there are analysts and language staff, because the work is done in English or French but the language of the region might be Serbian, Croatian, Bosnian, or Albanian. Each team also has administrative staff, secretarial staff, etc.

We also have analysts of different kinds — criminal analysts, military analysts, historians, research officers, etc. — who examine the role of people most responsible for the crimes; explore questions of command structure, orders of battle, excessive use of force, and so on; and go into historical issues, such as the constitution of the former Yugoslavia, government and army staffing, and other matters, some of which lead into questions of *de jure* and *de facto* power.

We begin an investigation by identifying a crime base. When I joined the Tribunal, in the beginning of 1995, it was still in its infancy, and we hadn't yet fully explored and understood the massive scale of the crimes we would be investigating, and which crime we should investigate and which we should not. One of our starting points in the beginning had been the report of the Commission of Experts on the Former Yugoslavia, which had been set up by the UN. Then there were reports from various agencies, like that of the UN High Commissioner for Refugees (UNHCR), the International Committee of the Red Cross (ICRC), and other groups, as well as from NGOs, newspapers, television, other media, and so on. Meanwhile some of our own investigations had also started. The conflict was still continuing; it wasn't easy to work in the former Yugoslavia just then. But the doors slowly opened. Our first witnesses were refugees in different parts of the world — Europe, America, Australia, Asia — and we went there to interview them and get their accounts. And so a base was established of individuals and groups involved in the crimes, people who had planned, organized, or implemented the conduct. We had to identify individuals on whom to focus the Tribunal's resources.

In our investigations as in any other large-scale investigation, there is a preliminary research phase, and then once the crime or crimes are fully identified there is the investigation phase — interviewing witnesses, collecting evidence relating to them, working with forensics and other sources. The indictment process follows. At the end of the investigation, the evidence that has been collected is put before a group of lawyers from all over the world in the ICTY, who spend days going over every aspect of the case to decide whether it meets the rigorous international standards that would allow us to go ahead with the prosecution. Often they send the case back for more investigation — the evidence isn't enough. This is a long process. Once the review committee is satisfied that we have enough evidence for an indictment, we go ahead. It also happens that we are told we don't have enough evidence, and we either drop the case or keep investigating; but if we do have enough evidence, the case goes to the Prosecutor, who signs the indictment, and then it goes to a judge, who confirms the indictment. The trial is held by a Trial Chamber of three judges. As I said, there are fourteen permanent judges. They divide into three Trial Chambers of three judges each, plus an Appeals Chamber of five judges. Right now *ad litem* judges are also coming on board, making for many additional Chambers to dispose of the pending cases.

Once people are indicted we trace them — this is the intelligence phase. Sometimes the international military forces also get involved in arresting them. Once arrested and brought to The Hague, in the pretrial phase, they are detained in prison and make appearances in court. Case managers are appointed, and then, during the trial itself, there is investigative support should more work need to be done.

The Prosecutor's power to investigate derives from Article 18 of the Statute.. "The Prosecutor shall initiate investigations ex-officio or on the basis of information obtained from any source, particularly from Governments, United Nations organs, intergovernmental organizations and non-governmental organizations." The Prosecutor "shall have the power to question suspects, victims and witnesses, to collect evidence and to conduct on-site investigations" — with on-site investigations" meaning local interviews of witnesses, or forensic investigations of mass graves, of which, as you must know, there have been a number in the former Yugoslavia. "In carrying out these tasks, the Prosecutor may, as appropriate, seek the assistance of the State authorities concerned" — there is mutual cooperation. In fact Article 29 of the Statute asserts that states are obliged to cooperate with the Tribunal, and Rule 39 of the Rules of Procedure and Evidence gives the Prosecutor power to seek their cooperation. Should the state refuse to cooperate, the Prosecutor can ultimately report the matter to the President, who reports it to the Security Council. This kind of refusal is of course the extreme case. Then it is up to the Security Council to take any measure necessary.

We also cooperate a great deal with international organizations like UNHCR and ICRC, various NGOs, and the different UN military forces. These agencies have been closely involved in the former Yugoslavia, and often have access to documents and information that can be very valuable to us.

The military force supplied by the UN to help to stabilize Bosnia-Herzegovina is called the SFOR; in Kosovo it is KFOR. In Bosnia-Herzegovina we have cooperated a great deal with the SFOR. When, say, a Trial Chamber or a judge in The Hague has granted us a search warrant for a location somewhere in the field, a military establishment or a political office perhaps, the SFOR provides us the necessary security and support in searches and seizures. Exhumations are an important part of our work, and in areas where we are under threat, the SFOR provides security for us. It also renders assistance in other matters. We are definitely dependent on international military forces like the SFOR to affect arrests. We share intelligence with them, mostly on the indicted, as also in other matters of investigation. Many areas in the former Yugoslavia are mined, and must be demined before we start an exhumation or any other field operation. At this point we have our own contractors in place in Bosnia, who do the demining for us, but the KFOR gave us demining support in Kosovo last year.

We have field offices in different countries in the former Yugoslavia — in Sarajevo in Bosnia-Herzegovina, Belgrade in the Federal Republic of Yugoslavia, Zagreb in Croatia, Banja Luka in Republika Srpska, Skopje in Macedonia, Pristina in Kosovo. We also have a forensic facility, Helba Camp, at Visoko in Bosnia-Herzegovina.

In 1999, the forensic operations in Kosovo were done entirely through gratis assistance, that is assistance provided to us free of charge by different countries. About four hundred forensic specialists participated, from fourteen countries — Austria, Belgium, Canada, Denmark, France, Germany, Iceland, Luxembourg, The Netherlands, Spain, Sweden, Switzerland, the United Kingdom, and the United States. That year the need was sudden, and we did not have our own teams. In 2000, however, we established and set up our own forensic teams in Kosovo. Kosovo was entirely new territory for us, and our operations there had to be carefully planned, because forensic work on such a large scale had not been done at the international level before. The UN and other organizations had established some basic protocols on investigations, but we had to set up our own mortuary and field proto-

cols. Extensive discussions were held with the UN administration in Kosovo and various international groups. Several organizations put together their combined brains and efforts in making our forensic operations in Kosovo a success. There was close cooperation and working protocols, on a daily basis, between us and the Victim Recovery and Identification Commission (VRIC); the Transcultural Psycho-social Organization (TPO); the Organization for Security and Cooperation in Europe (OSCE); the United Nations Interim Administration Mission in Kosovo (UNMIK); and the KFOR. All these organizations assisted us tremendously in our work. We also requested assistance from all 189 Member States of the UN; the Prosecutor sent out a letter, and many countries responded. We had to set up an infrastructure, to take care of this massive international deployment of experts, including the setting up of morgue facilities at Orahovac in Kosovo.

The mortuary staff is internationally constituted and includes forensic pathologists, scene-of-crime officers (police officers), photographers, anthropologists, radiographers, and evidence analysts. The field staff includes archaeologists, anthropologists, scene-of-crime officers, surveyors, soil experts, etc. We also have support staff — project managers for both Kosovo and Bosnia-Herzegovina, logistics officers, forensic engineers, plant operators, mechanics, storemen, computer people, and so on.

In 2000 we had 159 forensic experts in Kosovo and 105 in Bosnia-Herzegovina. They came from twenty-seven countries: the United Kingdom, France, Colombia, The Netherlands, Poland, Belgium, Denmark, Canada, Argentina, Egypt, South Africa, Ireland, Guatemala, the United States, Switzerland, Italy, New Zealand, Sri Lanka, Finland, Germany, Portugal, Spain, Norway, Peru, Barbados, Austria, and Australia. In addition to the staff I have mentioned, a number of countries provided teams — ten in all, from Austria, Belgium, Canada, Denmark, Finland, France, Sweden, Switzerland, the UK, and Germany — to work gratis, and these teams included 300 experts who also did forensic work on behalf of the ICTY.

As of March 15, 2001, we have publicly indicted ninety-eight individuals. In addition there are some sealed indictments. Thirty-six people are in custody at the detention unit in The Hague.

The people on trial include politicians, military generals, camp commanders, and sexual violators. Dario Kordic, who was sentenced recently, was a politician; General Radislav Krstic was a commander of the army of the Republic of Srpska. Miroslav Kvocka, Milojica Kos, Mladen Radic, and Zoran Zigic — all of them relate to the Omarska detention camp trial. And then there are sexual offenders — again, this is perhaps the first time in history that systematic, widespread sexual crimes have been investigated and prosecuted in the international arena. Radomir Kovac, Dragoljub Kunarac, and Zoran Vukovic are some examples of the sexual offenders we have prosecuted.

The convictions the Tribunal has produced include Dusan Tadic, the first person arrested — he had been a camp guard. The convicted persons belong to all ethnic categories — some are Serbs, some are Croats or Bosnian Croats, and some are Muslims. Indeed, crimes were committed by all ethnic groups. Different sentences have been awarded for different degrees of criminal responsibility. Tihomir Blaskic, for example, a Croatian general — he has had the heaviest sentence: forty-five years. And Dragoljub Kunarac, one of the sexual offenders in the Foca rape case, was sentenced to twenty-eight years. Goran Jelusic was sentenced to forty years. As I said, there is often no smoking gun, but sometimes one turns up: there is a photograph of Jelusic using a pistol to kill a civilian. Some of the convictions of persons in positions of authority resulted from charges involving the responsibility of command. A person may not have committed any murder or rape himself, but if he was in charge of people who committed such crimes, and had knowledge of the crimes being committed but failed

to prevent them or to punish his subordinates, he has command responsibility, a very important concept, as I said before. The ICTY has also acquitted some people and they have gone back home. Zejnir Delalic and Dragan Papic are examples of this.

As of October 2000 the ICTY had 1,200 staff members from seventy-five countries. In 2001 we have a budget of \$96,443,900. As of March 2001 our President is Judge Claude Jorda of France; our Vice-President is Judge Florence Ndepele Mwachande Mumba of Zambia; our Prosecutor is Carla Del Ponte; our Registrar is Hans Holthuis of the Netherlands; and we have judges from Australia, the United Kingdom, Portugal, Malaysia, Egypt, Guyana, Colombia, Morocco, Jamaica, the United States, Italy, and China.

Gurjot Malhi. An Experiment in International Criminal Justice: The Philosophy, Methodology, and Working of the International Criminal Tribunal for the Former Yugoslavia. In: Okwui Enwezor, Carlos Basualdo, Ute Meta Bauer, Susanne Ghez, Sarat Maharaj, Mark Nash, Octavio Zaya (ed.): Experiments with the Truth. Documenta11_Platform2. Hatje Cantz Verlag, Ostfildern-Ruit. 2002, pp. 195-203.