

Punishment of War Crimes by International Tribunals

BY PATRICIA M. WALD

IN this essay I discuss my experience with war crime trials at the International Criminal Tribunal for the Former Yugoslavia (ICTY) in The Hague and what implications that experience may have for future international criminal tribunals, whether temporary or permanent. I will begin with a brief tutorial on the Yugoslav tribunal.

The Yugoslav Tribunal

The ICTY was established by a United Nations Security Council resolution in 1993 as a 14-member court on which no country could have more than one judge. The judges are nominated by their respective countries for four-year terms and elected by the UN General Assembly. Subsequent amendments to the ICTY statute have enlarged the court to 16 members and provided a corps of 27 *ad litem* judges who come to The Hague for one or two trials but do not enjoy all the privileges of full-time judges. The mandate of the tribunal is to prosecute and try individuals for war crimes, crimes against humanity, and genocides (as defined in the statute) committed on the territory of the former Yugoslavia since 1991. Indictments are brought by the prosecutor, who is chosen by the Security Council. The tribunal is authorized to impose prison sentences up to life but not the death penalty; sentences

are served within the prison systems of several nations with whom the tribunal has formal arrangements. The tribunal has no police force of its own and must depend on the cooperation of states and the Stabilization Force for Bosnia and Herzegovina (SFOR) for arrests, access to documents, and compulsory production of witnesses. The statute mandates such cooperation from all states but in practice cooperation is not always forthcoming. The tribunal is organized into three trial chambers and an appeal chamber, which also hears appeals from the International Criminal Tribunal for Rwanda (ICTR), located in Tanzania. Judges sit in trial panels of three on individual cases. The statute provides for an independent Office of the Prosecutor (OTP) and a registry to provide logistic support for the tribunal, such as filing, translation, defense services, press and public relations, legal assistance, and security. The ICTY currently has over 1,000 employees and an annual budget of more than \$100 million.

What has the tribunal accomplished in its nine years? It has indicted over 80 defendants publicly (along with an unpublicized number of secret indictments), completed the trials of over 30 people (of whom all but 2 have been convicted or pled guilty), and completed the appeals of 10 (of whom 7 are serving or are about to serve prison sentences; 3 defendants' convictions were reversed on appeal). Eleven defendants are currently on trial and 18 are in pretrial proceedings. The majority of those on trial or awaiting trial are in detention at The Hague, although a few are on provisional release to their home states.

Of course, the bare statistics do not tell the whole story. Apart from former Yugoslav President Slobodan Milosevic, who is now on trial, several other high-ranking military and civic leaders accused of war crimes or crimes against humanity committed during the conflicts in the 1990s involving Slovenia, Bosnia, Croatia, Serbia, and later Kosovo have been apprehended or voluntarily surrendered to the tribunal. These include General Radislav Krstic, commander of the Drina Corp, who has been found guilty of genocide in the Srebrenica massacres of as many as 8,000

young Muslim men in one week in 1995; Croatian General Tihomir Blaskic, found guilty of the dawn massacre of the village of Ahmici in which 100 Muslim inhabitants were slaughtered and their homes destroyed; General Stanislav Galic, who allegedly oversaw the shelling of civilians in Sarajevo; and numerous mayors and police chiefs of cities and villages in Bosnia who planned or implemented the expulsion of unwelcome ethnic groups from the territory and the imprisonment of thousands of civilians in inhumane conditions in the so-called collection centers that sprang up throughout Bosnia in 1992. It is unfortunately true that two of the most notorious indictees, President Radovan Karadzic of the Bosnian Serb Republic and Ratko Mladic, former commander of the Bosnian Serb army, remain at large, but it is nonetheless difficult to deny that a significant number of the civic and military leaders in the conflict—on all sides—who are accused of committing or permitting those under their supervision to commit crimes violating the laws of war, humanity, and genocide have been brought to The Hague to stand trial. Even critics of the tribunal would, I believe, admit that a strong signal has been sent that national leaders may not with impunity violate the laws of war and the rights of innocent civilians and not undergo the risk of substantial punishment. Except for the Nuremberg and Tokyo tribunals, which were held in the brief period immediately following World War II, and a few scattered national court prosecutions for war crimes undertaken in the interim 50 years, that risk was not present before.

Problem Areas for Future Tribunals

A Remoteness from the Places and People Most Affected

The ICTY has not been without critics. While I believe it has demonstrated its ability to hand down reasonably coherent judgments based on international humanitarian law and to midwife

constructive new developments in that area (such as the belated recognition of crimes against women committed in wartime as worthy of prosecution in their own right, as well as an overall ability to provide the fundamental guarantees of a fair trial to indicted war criminals), the ICTY's proceedings have been time consuming and expensive. Moreover, the ICTY has elicited criticism—particularly in the Balkans—for being too remote, both in geography from the locale and from the population affected by the wartime violations, and for not including any members of the ethnic groups involved in the Bosnian war as members of the court. However, the Rwandan court has several members from the African continent and is located in Tanzania, just across the border from Rwanda. Later temporary courts set up to deal with war crimes in East Timor and Sierra Leone are of a hybrid national-international character and draw a substantial number of their judges from the home countries involved and presumably many members of their staff as well. These courts are specifically designed to be eventually integrated into the national system of justice of the country involved—they are not, like the ICTY or the ICTR, creatures of the UN and principally financed by it. They are definitely transitional, operating under an arrangement with the UN and with the participation of international judges but relying on the country's own personnel and resources in the long run. The permanent International Criminal Court (ICC) is of course a different matter; it will be located in The Hague but will draw upon judges and personnel from among its more than 80 participating countries around the world. The ICC, again unlike the Yugoslav and Rwandan tribunals, will operate on the jurisdictional principal of complementarity—that is, the court will only take cases of violations of the law of war or crimes against humanity or genocide if the national authorities who would normally have jurisdiction either cannot or will not prosecute them. (In the case of the ICTY and ICTR, the international tribunals must first be given the opportunity to try the cases within their substantive jurisdiction but could remand them to national jurisdictions

under a rules of the road protocol if the international tribunal did not wish to prosecute.)

This trend toward bringing international courts closer to home both geographically and operationally comes from an increasing sense that to the maximum extent possible individual national court systems should handle such cases. That way the populations most affected—including victims—will feel closer to the process and it will be more transparent to them; it is also more likely to be less expensive and will have the additional benefit of catalyzing the judicial and organizational reforms necessary to create such a capacity in other parts of underdeveloped national court systems.

But there are counterindications to the national or even the hybrid solution in some instances. The crux of the matter is that often the relevant states are not capable of pursuing their own war criminals during or immediately after wars or internal conflicts. Their own judicial infrastructure has frequently been so damaged in terms of resources, personnel, and facilities that there is no possibility they can prosecute major war crimes in the immediate future. This was certainly true of Bosnia when the ICTY was established and to a degree it is still true. War crime prosecutions, especially against top leaders who have planned or executed countrywide strategies of abuse, are enormously complex, expensive, and lengthy. Many of the ICTY prosecutions, such as that of the Srebrenica genocide, followed five-year field investigations in which hundreds of witnesses were interviewed, thousands of documents seized or accessed, and exhumations of mass burial sites conducted and the scattered body parts of thousands of victims collected and analyzed, and their identification attempted. It would have been impossible for Bosnian authorities in the mid-1990s—or even now—to have conducted anything on this scale. And yet if these investigations had to wait until the recuperating war-torn countries had the facilities to undertake them, potential witnesses and documents would likely have been lost and graves vandalized or robbed.

In the cases of other Balkan countries, most exhibited no desire to pursue war crimes until their internal politics changed, which was only several years after the ICTY began operations. In many of those countries, war criminals indicted at The Hague were still "homeland heroes." I was recently in Sarajevo at a conference dealing with the training of counsel who practice before both the ICTY and domestic courts in war crime trials. There the UN representative for the Federation of Bosnia-Herzegovina, appointed pursuant to the Dayton Accords, said publicly that the federation simply did not yet have the resources or the substantive law in place, or even the fundamental training program for investigators or prosecutors to take over the job of prosecuting the bulk of war crimes. Bosnia as well as other countries in the region have to pass new laws to define war crimes in their national codes and to provide for the protection of victim-witnesses; they have to train prosecutors and defense counsel to perform new functions in investigating and prosecuting novel theories of criminal responsibility. Some war crimes are in fact being prosecuted already in a few courts in the federation, but the national system cannot take over the bulk of the Hague-type prosecutions for at least a few more years—and even then it will need an infusion of resources to do an adequate job. A report on the situation in the Bosnian Serb Republic similarly predicts a two-year minimum before prosecutors and courts can take over any sizeable number of trials and adds that political ambivalence toward such prosecutions is still a fact of life in that region. Croatia under its new government has begun some important war crime prosecutions, but this has been a development of only the past year or so.

Numerous estimates have been made of how many potential war crime prosecutions are involved in the Bosnian and Kosovo conflicts; they range from 20,000 to 50,000. Assuredly, neither international nor domestic courts can handle all or even most of them in the near future, if ever. And that may be one of the sad legacies of any war. But the Bosnian situation indicates that a realistic look must be taken of the particular situation in each coun-

try that has been involved in an international or internal conflict to assess its capability to pursue justice for victims of war crimes before relegating all war crime prosecutions to a national court. In some cases that would be the equivalent of denying accountability altogether to the gravest violations of international humanitarian law.

I recognize that war crime tribunals are not the only answer or necessarily the best one in every situation—truth and reconciliation commissions have played a valuable role in countries in the transition from war and tyranny to peace and democracy; and hybrid international-national tribunals have proved useful in others. My point is that there are many situations where a war-torn country cannot pursue accountability for war criminals through its own system in the aftermath of war and some form of international war crimes tribunal may be the only realistic alternative. I am satisfied that this was the case when the ICTY was set up. After listening to hundreds of witnesses who suffered hideous assaults on their bodies, minds, and souls yet found the courage to come to The Hague to testify against their accused violators, I cannot imagine that the majority of them would have testified willingly in their local courts, which in many cases were located in villages and towns still populated and in some areas dominated by forces sympathetic to the alleged wrongdoers. I am convinced the ICTY filled a critical void that no national courts were prepared or able to fill. It is crucial, however, that the international community monitor and support the new hybrid experiments and, as is happening in Bosnia, also aid the good-faith attempts by recovering countries to undertake these prosecutions. I doubt we will see again the ICTY or ICTR models and the ability of the ICC to function may well depend on the capability of the countries themselves to be the primary line of prosecution and trials.

Reserving International Courts for the Major Perpetrators

When the ICTY was first established, it had nobody to try and that remained the case for a few years. During that time, many

indictments were brought against mid- and lower-level war crimes perpetrators, and they continued to clog the pipelines even after the more serious violators began to be apprehended. I am told that, although the Rwandan tribunal has rendered fewer verdicts than ICTY, it has concentrated more on the national leaders of the genocide. And the planning for some of the newer hybrid courts includes limiting them to the highest level of military and civic leaders who plan, initiate, and are in charge of executing large-scale violations—the generals who knowingly and purposefully shell civilians and who approve the executions of prisoners of war and civilians; the civic leaders who establish and maintain concentration camp-like centers of interrogation and abuse. The ICTY, of course, was established while the war was still ongoing. And even after the Dayton Accords were signed, Serbia, Croatia, and the Bosnian Serb Republic were unwilling to cooperate fully in turning the leading figures in the war over to the tribunal. This is in contrast to Nuremberg, where all 24 of the major Nazi defendants were sitting in the dock on the opening day of trial. But to the extent that tribunals are set up in cooperation with the countries involved, who presumably will cooperate in tracking the main suspects down, the aim—in the view of many—should be to try the top echelon as soon and as expeditiously and transparently as possible so that the national recovery process—including truth and reconciliation processes—can get on with its business. The longer the war crimes trials go on, the harder it is to do justice: to get witnesses and evidence, to make an impact on the people who suffered most, and even to deter future violators. The goal should be to try a few dozen of the top perpetrators immediately and then, when possible, put the rest into a national system. The decision in each conflict represents a delicate balance that cannot be predetermined by any blanket rule or preference.

Consistency in Law and Procedural Fairness

The ICTY and the ICTR have been instrumental in the development of vital concepts of international law—ranging from

whether an international conflict is necessary to the invocation of certain provisions of The Hague and Geneva Conventions to what is included in war crimes, what can be identified as the “customary” law of war, what constitutes genocide, and many more issues that had heretofore been the domain of treatises and diplomats. We all know from domestic experience how often it is essential that a statute be interpreted by courts in order to apply its provisions legitimately to a variety of different factual situations. The same is true for international law: for example, until the tribunals appeared, the Genocide Convention, which was drafted in 1948 (and ratified by the United States in the mid-1980s) had been interpreted only by a few national courts, and not always consistently. It required interpretation to apply its provisions to situations like the ethnic-cleansing campaigns in the Balkan wars. The ICTY (along with the ICTR) has produced a substantial corpus of coherent international law on war crimes and crimes against humanity as well as genocide—something that a few random decisions in national courts could not. It is only by accretion of case law interpreting ambiguous parts of treaties or “customary law” that coherent, consistent, and predictable norms of law are established that can govern the future behavior of leaders in wartime. A second example of the tribunal’s contribution in this regard is its path-breaking decisions regarding the status of rapes, sexual violence, and sexual enslavement as crimes of war and crimes against humanity when committed in the context of a widespread campaign against civilians. An estimated 20,000 rapes were committed in wartime Bosnia as part of a campaign of terrorism against civilians or inside the prison camps. For the first time in history an entire war crimes prosecution at the ICTY was devoted to crimes against women. From my reading of the international journals, the commentators generally agree that the advent of the tribunal has ushered in a giant step forward in the elucidation and clarification of what international law means and requires in time of war.

There is, however, some concern arising as to the need for consistency between the several international and hybrid tribunals in their interpretation of the same conventions or “customary international law” doctrines. The ICTY has on occasion rejected certain rulings of the International Court of Justice (ICJ), such as the ICJ’s “effective control” test for when one country controls an organized military group—not part of its regular army—fighting in another country to the degree that the first country can be held responsible for the illegal behavior of the military group. The ICTY and the ICTR have also given different interpretations of the requirements for proving rape. Until recently there have been no binding precedents for any of the courts except, in the case of ICTY, the decision of its own appeals chamber. And, of course, national courts trying international humanitarian law violations are free to interpret that law as they see fit. Differences in interpretation can significantly affect the outcomes of trials—on one visit of my ICTY chamber to Croatia, we were besieged by assurances from the minister of justice on down that the tribunals’ expansive definition of the test for command responsibility—the responsibility of a superior for war crimes committed by his subordinates that he did not himself participate in or order—would never be followed by Croatian courts on their own. Earlier negotiations over a Cambodian tribunal reportedly foundered on whether the international or national law would apply and the Sierra Leone agreement with the UN ultimately rejected a proposal that it specifically follow the rulings of the appeals chamber of the ICTY/ICTR (although it will adopt the rules of procedure of the ICTR). While it is unlikely that all these international courts—or even the hybrid ones—will ever adopt uniform interpretations of all aspects of relevant law, closer cooperation and exchange of ideas between them does seem necessary to prevent the spread of the idea that international law has no consistency and is mainly what the judges involved in each case say it is.

The tribunal has also pioneered the creation of procedural rules for an international court composed of judges who speak

different languages and come from different legal cultures. This is a difficult task and I do not suggest that the ICTY has achieved final success in this area. The ICTY's rules of procedure and evidence reflect a mix of the common law adversarial mode of trial with which we are familiar in this country and the civil law inquisitorial mode practiced on the European continent. The mix of these two modes is difficult to pull off and entails trial and error; the ICTY's rules have been amended many times since 1994. Nonetheless, they represent a substantial starting point for future courts, ad hoc or permanent. I suggest some form of international criminal court will be around for the foreseeable future, and it is unlikely that any one country's system will be adopted exclusively, but rather that parts of one system will have to be melded with parts of another. Although those of us from a particular country are most comfortable with our own procedures, as judges on an international court we must always ask the basic question: Are the court's procedures basically fair and conducive to a legitimate trial, even if they do not represent our own personal preference? Although I have many problems with the ICTY rules, I can still answer that basic question in the affirmative. Defendants are guaranteed, under Article 20 of the ICTY statute, virtually the full panoply of rights included in the International Covenant on Political and Civil Rights: the trials are public (though they may be closed for testimony implicating a state's security or for extreme cases of danger to a witness); the defendant receives notice of charges in his own language; he also receives the right to counsel, a right not to incriminate himself, and advance receipt of more of the prosecution's evidence than is provided in our own *Federal Rules of Criminal Procedure*, along with a right to present his own witnesses and evidence and a right to appeal. In my experience, the judges with whom I have sat have been impartial and thoroughly independent. (As an aside, I should note that the internal criminal rules of some national courts in the region I have visited are far less in accord with our notions of due process; were I or someone close to me to be

brought before a court outside the United States, I would prefer the ICTY to some of those I have seen in the region). The proceedings of the ICTY are televised for public consumption in the Balkans.

The tribunal has also produced a protocol for witnesses who are in danger of retaliation in their home territories. This protocol, which allows them to testify with some comfort, includes a special "victim witnesses unit" that arranges for their travel and lodging in The Hague (sometimes escorting them there personally), provides in appropriate cases for pseudonyms, voice and face distortion, and in extreme cases, for closing the proceedings. Over 1,000 witnesses have come to The Hague, almost half of whom would not do so without some protection or assistance, and they could not have been forced to because of the absence of binding subpoena power on the part of the tribunal. This witness protocol is being adopted in several national systems for the first time as they implement their own war crime prosecutions.

Still, more attention needs to be focused on the right balance between the requirement of live witness testimony that the defendant can cross-examine and the problems the tribunals encounter in retrying the same background facts and context in several trials arising out of the same episodes. The ICTY has moved back and forth in this dilemma—for a period moving in the direction of more flexibility in letting written statements, depositions, transcripts, and the like into the record but more recently in the trial of Milosevic allowing the former president the right to cross-examine all prosecution witnesses. At bottom, as I noted earlier, the problem for a judge is always the question: Does this trial meet fundamental fairness requirement even if the procedures used are not the ones I prefer? Justice, after all, is dispensed in many forms throughout the world. But the absence of any hard and fast rules such as we have in the United States about what kind of evidence may come into the record makes that job harder. There have been a number of acquittals at the tribunal and I presided over one appeal—the first one, I admit—that over-

turned three convictions on the basis of unreliable evidence. Overall, I believe those accused usually get their component of due process, although a few of the evidentiary rulings might make an American defense counsel blink.

I do want to say, however, that judges must constantly be on their guard against unconscious assumptions of guilt. The victims' tales of suffering and the outrageous treatment they have undergone are searing; they cry out for vindication. The dilemma for the judge is to accept that these hellish things took place, but always to focus on the issue of whether this man in the dock did them? Memories fade, key witnesses often will not come forward and cannot be forced, and the witnesses who do come often tell stories that differ from earlier statements made to investigators in the field. The press and victim NGOs usually expect convictions; but there is need to remember Justice Robert Jackson's caution at Nuremberg:

I am not troubled as some seem to be over problems of jurisdictions of war criminals or of finding existing and recognized law by which standards of guilt may be determined. But all experience teaches that there are certain things you cannot do under the guise of judicial trial. Courts try cases but cases also try courts. You must put no man on trial before anything that is called a court . . . if you are not willing to see him freed if not proven guilty (Taylor, 1992: 44-45).

The crimes are so heinous there is far more pressure than in ordinary cases to forget this cardinal tenet of judging.

More attention also needs to be given to the development of a competent and ethical defense corps that can provide vigorous defense services away from home in an unfamiliar system even when they do not come from a legal or ethical culture common to the rest of the players in the courtroom.

Finally, in this regard, let me say something about sentencing of war criminals. I was not entirely happy with the sentencing procedures at the ICTY; the statute gives no guidance except to bar

capital punishment and instruct that the judges look to the practices of the courts of the former Yugoslavia. Tribunal jurisprudence has said that the gravity of the offense is the main criteria in sentencing and individual circumstances of the defendant may be looked at for mitigation or aggravation. The tribunal refuses to adopt any “sentencing tariff”—that is, setting out norms or ranges for particular crimes—this refusal extends even to deciding whether broad categories such as crimes against humanity or crimes against the law of war are more egregious. I have never been a fan of the federal sentencing guidelines in the United States since, in my view, they impose a straightjacket on a judge’s discretion. But I worry that no norms and too wide variations among sentences will undermine confidence inside and between international courts. Sentencing can never and should never be a science, but my ICTY experience led me to conclude there are presently insufficient norms or guidelines to control sentencing discretion. So far the heaviest sentence rendered at the ICTY is the 46 years given to General Krstic, who was found guilty of the Srebrenica massacres (at the ICTR, life sentences have been given). This as well as other sentences have been criticized from both sides as being too heavy or too light. How close they should parallel sentences issued by the courts of the nations involved is another area of tension; in general, ICTY judges have not felt compelled to follow national practice. Some kind of manual or forum on sentencing—not controlling individual sentences but listing relevant criteria and past practice—would be useful.

The procedural aspect of sentencing also bothered me, since the court had to hand down the sentence at the same time as the verdict. This means that the defense and the prosecution have to put material relevant to sentencing in the record before they know which crimes, if any, the defendant will be convicted of and what range of sentence he will receive (the court may render one sentence on all counts or separate sentences on separate counts). This timing is prejudicial—particularly to the defense—and does not bear repeating in future tribunals.

I should add here that sentences are served in the penal systems of a half dozen countries—mostly in northern Europe (including Britain, Finland, and Norway)—and that any commutation or parole according to that system must be decided upon by the president of the tribunal, taking into consideration the gravity of the crime, treatment of similarly situated prisoners, demonstration of rehabilitation, and cooperation with the prosecution. But this creates a real correctional dilemma. In most enlightened prison systems, a career plan is made for a prisoner as soon as he begins serving his sentence to provide incentive for good behavior and eventual reintegration into society. The ambiguity of any release date for tribunal prisoners poses problems in that respect—apart from the obvious problems with any integration into prison life due to language differences. Indeed, the tribunal will be out of operation altogether by the time most of these prisoners finish their sentences, and some provision must be made for deciding their future at release time. Planning is said to be ongoing for this, but nothing much has yet been revealed as to what that planning entails.

Organizational Efficiency

I am not going to say much about how international tribunals could be better organized except to note my worst problems at the ICTY were with the importation of UN bureaucracy attitudes—especially in the selection of personnel and their accountability and responsibilities. I suppose I was spoiled by my prior experience in the federal courts, where legal assistants work directly for judges, who in turn run their own administrative offices. And I have often said that assignment of judges to complex trials should take account of their prior experience in criminal procedure and in courtroom proceedings. All judges, while valuable, are not fungible in what they can do best. The tribunal judges were nominated by their individual countries and varied widely in their background, energy, and particular competencies. Nominating countries should prioritize criminal justice knowl-

edge and experience as well as international law. It may be that the need for international tribunals to be faster and cheaper will generate more efficiencies of their own, which would not be a bad result.

Conclusion

International tribunals have become an important part of the landscape. They hold the promise of making international humanitarian law enforceable. But they are not cheap and the beginning models may not be the best. Temporary ad hoc tribunals can bridge the gaps between war and the recovery of national judicial infrastructures capable of taking over the prosecutions. They are likely to be more modest than the ICTY or ICTR in length of time and numbers and kinds of offenders targeted. The unique role of the permanent ICC operating in tandem with national courts is a fascinating subject in need of continued attention and monitoring. It is clear, however, that the international tribunals remain controversial at home as well as in some other parts of the world. We must learn and apply to future courts the lessons of the original tribunals—the mistakes to be avoided as well as the successes that should be preserved. Only in that way will the species survive.

References

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