

# Commentaries on the Establishment Of An International War Crimes Tribunal

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The following pieces are based on contributions to a seminar entitled “*Nuremberg to Bosnia: the Future of International Justice*” which was convened by Amnesty International, the Law Society of NSW, and two sub-committees of the United Nations Association of Australia (NSW), the Human Rights Committee and the Refugee Committee on 16 May 1996.

## Some personal observations on the practicality of implementing international justice and the experience of establishing a war crimes tribunal

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The Security Council, acting under Chapter VII of the Charter of the United Nations, by Resolution 827 of 25 May 1993, decided to establish the “International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991” (ICTY), and adopted its statute. This drastic step was taken only after it was realised that widespread ethnic cleansing in the form of genocide and crimes against humanity was actually taking place in Europe.

The Tribunal was entrusted with the difficult, yet extremely significant and important task of bringing to justice persons responsible for the atrocities and serious breaches of international humanitarian law which have been committed on the territory of the former Yugoslavia since the current conflict broke out in 1991. The realisation of a lasting peace in the Balkans depends on the victims and other aggrieved parties accepting that justice has been obtained, or that at least a

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significant and honest attempt to bring to justice those responsible for such crimes has been undertaken.

## **Difficulties facing the Tribunal**

The investigative tasks undertaken by the Office of the Prosecutor were enormous. The conflict had been occurring on a daily basis since 1991. There had been widespread violations of humanitarian law including mass murder, mass rape, torture, mutilation, terror etc. of innocent civilians as well as large scale destruction of property. There were countless innocent civilian victims who have survived the devastation only to be forced to flee their respective homelands.

It was the task of the prosecutor, based on a policy of impartiality to select the appropriate cases to investigate, to identify and locate relevant potential witnesses (not only in areas where the crimes have been committed but also in the many countries where they had settled following their migration or resettlement); and to interview those witnesses. Added to this was the further task of obtaining evidence to establish that such criminal offences amounted to either crimes against humanity, genocide, grave breaches of the Geneva Conventions, or violations of the laws or customs of war.

The initial strategy included the investigation of lower level persons directly involved in carrying out the crimes in order to build effective cases against the military and civilian leaders who were party to the overall planning and organisation of those crimes.

In relation to the number of potential witnesses available to establish the commission of these crimes, it is worth noting that there are over 400,000 refugees from the former Yugoslavia in Germany alone, and a large number of persons are potential witnesses. Further, refugees have spread throughout Europe and across the globe (for example, over 100,000 in the UK, 40,000 in Holland and 5000 in Australia). It was necessary for the Office of the Prosecutor to locate potential witnesses from these refugees wherever they were located. It was then necessary to conduct in-depth interviews with these potential witnesses to ascertain their relevance as well as their reliability and credibility as witnesses.

In many cases, some traumatised victims and witnesses required support not only during the investigation and trial process but also after court proceedings. The task of locating the victims and witnesses, particularly having regard to the large number, required considerable resources.

## **The Investigation**

It was the task of investigative teams to collect forensic evidence, ensure that appropriate chains of custody of exhibits were maintained, conduct searches, participate in mass grave exhumations, undertake local inquiries in areas where crimes had been committed, liaise with various local authorities and other investigative agencies, and to interview suspects.

In addition to gathering evidence to establish the commission of the crimes, it was necessary for the prosecutor's office to identify the perpetrators of the crimes and to gather sufficient evidence implicating them in the commission of the crimes. The prosecutor has the onus of establishing the guilt of the accused rather than the accused having to establish their innocence. In doing this the prosecutor had to establish the guilt of the accused beyond a reasonable doubt. This involves locating all relevant witnesses, not only those who implicate the accused in the commission of the alleged crimes, but also those witnesses who may be able to exculpate the accused.

Clearly it is not possible for the Tribunal to deal with all perpetrators of crimes over which the Tribunal has jurisdiction. In this regard, it will be the joint responsibility of the Tribunal and national courts to bring as many perpetrators to justice as is reasonably possible. It is just as clear that it may not be possible, for many reasons, for national courts to achieve any success in bringing individuals who carry the highest degree of responsibility for the commission of these crimes to justice. In such cases it will be necessary for the Tribunal to do so. That is the Tribunal's mandate. The success of the Tribunal will depend on the successful completion of significant prosecutions. It is probably one of the largest and most difficult investigative tasks ever given to, and undertaken by, an investigative body.

The resources necessary to investigate such criminal activity could be limitless. Indeed there were over 2000 people involved in the Nuremberg prosecutions at the end of World War Two, and that was a situation where the war had ended, many of the major suspects were already in custody and much of the documentary evidence had already been seized and analysed.

Like Nuremberg, the prosecutors have concentrated on the leaders and those responsible. Investigations were commenced on a wide basis to establish what actually occurred — to prove it was a systematic attack against civilians — to prove cases against the leaders. This is particularly difficult if there is no documentary trail, no access to crime scenes, victims or witnesses. An added difficulty is that the prosecutor must establish that the various criminal acts, for example murder, rape, imprisonment, torture, deportation etc., amount to genocide, crimes against humanity, grave breaches of the Geneva Conventions or violations of the laws or customs of war.

Putting it simply, the prosecutor must prove that the offence was committed pursuant to a policy. In the case of genocide, the prosecutor must establish that the crimes were committed with the intention to destroy a national, ethnic, racial or religious group. In the case of crimes against humanity, the prosecutor must prove that the criminal acts were committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds.

Further, in cases involving grave breaches of the Geneva Conventions and violations of the laws or customs of war, the prosecutor must also prove that the criminal acts were committed in the course of an international armed conflict. There

have been times during the current conflict when it has been clear that the conflict was international in character, but there have also been times when the conflict appeared to be internal, in which case it is difficult for the prosecutor to prove that the crimes amount to grave breaches of the Geneva Conventions.

### **The need for change**

A more coordinated approach, managed by the UN, involving Government, NGOs and the media would avoid fragmentation, duplication of effort, and loss of valuable evidentiary material. Early deployment of UN multi-skilled investigation teams to the scene of such atrocities would overcome many of these major problems. It would also send a clear message that such violations will not be tolerated by the international community.

A more pro-active approach to the collection of evidentiary material would avoid the exclusive reliance on materials submitted by external sources to develop cases for investigation, and would minimise the trauma for victims and witnesses subjected to multiple interviews. Some victims and witnesses were interviewed by the media, governments, immigration/refugee officials and police prior to giving evidence to the Tribunal. To subject victims and witnesses of such atrocities to this type of process must be avoided in any future investigation.

### **A permanent Tribunal**

When crimes being committed by a state constitute genocide, crimes against humanity or other serious violations of international humanitarian law, the international community cannot just stand by and allow such breaches to continue or go unpunished.

Unfortunately the international community has in many instances taken no action, being either unwilling or unable to establish the rule of law at the international level. The international community has established an impressive array of modern international humanitarian laws aimed at protecting citizens, however this has not been enough and, with a few isolated exceptions, the international community has not taken adequate steps to set up an effective enforcement mechanism to complement the existing set of international humanitarian laws.

There have been signs that the international community is moving in the right direction. The criminal trials held at both Nuremberg and Tokyo constitute the only examples in history where leaders of criminal regimes were apprehended as war criminals and were made to account for their criminal acts. They were not just ordinary criminals, they were the leaders who sought to dominate the world by terror, using genocide and crimes against humanity as major tools to achieve their objectives.

Following the Nuremberg example, one clear option for the international community would have been to set up a permanent international criminal court which would have the ability to enforce its decisions, judgments and order, or to have them

enforced. If this could have been achieved, victims of crime would more readily accept that the rule of law was being effectively applied and that justice was being achieved. In many societies and situations this could have brought about an end to the cycles of violence which have been erupting as new generations seek to obtain justice or revenge for past crimes which have gone unpunished.

Clearly it is essential to build on the legacy of Nuremberg. The fact that there have been horrendous atrocities in almost every corner of the world, including the former Yugoslavia and Rwanda, is due to the lack of effective deterrent for gross criminal behaviour at the state level. This pattern of violence and criminal behaviour will continue until there is a strong deterrent in place to prevent or limit the commission of such crimes.

The international community, through the Security Council has now taken positive steps towards the internationalisation of criminal law by setting up the ad hoc international tribunals for the former Yugoslavia and Rwanda. In many ways the international media should accept a great deal of the credit for this, by being present during the conflicts and bringing into our homes such shocking images of human rights abuse. Hopefully with the success of the two ad hoc tribunals the international community will be able to take the next step, the creation of a permanent international criminal court.

In order for the ad hoc tribunals to prosecute persons responsible for serious violations of international humanitarian law, the international community must insist on the surrender of all accused persons so that trials can take place. To achieve this objective member states of the United Nations need to pass enabling legislation — the majority have at this stage failed to do so. An alternative to allowing the ad hoc tribunals to continue would be to transfer their jurisdiction and proceedings to a permanent criminal court. This would then provide a mechanism to deter gross criminal behaviour at the international or state level and at least there may be a way to prevent or limit future acts of genocide and crimes against humanity.

## Options for improving the enforcement of international justice, and the establishment of a permanent international criminal court

Helen Durham<sup>3</sup>

*I don't want pity, what I want is justice. We are not victims of an earthquake, we are victims of the human hand, the hands of the powerful. This can be stopped. The only way is to stop this with the help of free countries and to denounce these actions.*<sup>4</sup>

History indicates that humans have an innate ability to treat each other appallingly, from Cambodia to Argentina, South Africa to Vietnam, the former Yugoslavia to Rwanda — survivors of human rights abuses demand acknowledgment and redress for the acts they have suffered. In the face of such requests — what should the international legal community do?

The concept of a permanent international criminal court has been debated for the last 50 years. Indeed the first draft for such a mechanism was in 1951, and in August of this year the United Nations will be discussing the International Law Commission's 1992 Draft Statute for an international criminal court.

There is a plethora of legal, intellectual and emotional arguments as to why an international criminal court should be created. There is also an understanding from those who advocate the creation of an international criminal court, of the depth of complex difficulties involved in such a proposal — the issue of sacred state sovereignty and the technical problems bound to occur (be it funding, the apprehension of suspects, or even the implementation of sentences). However the acknowledgment of difficulties should provide the spice of caution, not the destruction of the recipe.

Whilst it is important to aim high, unrealistic notions of success are dangerous. Yet on the other hand our society comfortably accepts the concept of a domestic criminal legal system being useful, without expecting such a system to totally eradicate crime. I believe Ms. Madelaine Albright put this theory very succinctly, when talking about the ad hoc tribunal for the Former Yugoslavia:

The Tribunal will not revolutionise human behaviour . . . but it will at least place the force and prestige of international law squarely on the side of the victim. It will enhance the prospects for a durable peace. It will add a measure of caution to the scales in the minds of would be aggressors.

<sup>3</sup> International Legal Advisor to the Australian Committee for the Investigation of War Crimes.

<sup>4</sup> Statement from a survivor of torture — Victorian Foundation for Survivors of Torture 2/9/95.

As well as impacting on the minds of “would be aggressors”, the creation of an international criminal court could play a crucial role in the lives of survivors of abuse and victims’ families. Access to justice, domestically or internationally, is not just a social issue, but a critical factor in the healing process for many individuals who have experienced the reality and horror of unbridled violence. I am not referring to justice in the sense of each individual specifically being heard by such a court, rather symbolic justice. The handing down of the status of the crime experienced by a survivor is valuable. For example, women in a survivor’s centre in Zagreb informed the Australian Committee of Investigation Into War Crimes that whilst it was too late for them, a ruling that rape is a war crime would be an important verification that what they experienced was illegal and should not have happened and should not happen again.

Justice does not demand revenge, just as peace does not demand forgetting.

In a time of rapid globalisation and interconnection, in a time of increased media and technology (we have no excuse, we cannot say that we did not know what was going on in the former Yugoslavia or Rwanda, an excuse that society could and did use in World War II), in a time of the law having to grapple with sophisticated and complex concepts of international trade and finances, surely it is time that the international community did create a permanent criminal court — warts and all — and at least attempted to grapple (with caution) with issues of abuse.

Let us look back at what use international courts and tribunals have been put to in the past. In August of 1945, the four major victorious allies of World War II in London agreed upon the Charter for an International Military Tribunal. This tribunal was empowered to try the major German officials accused of war crimes. Not long after this, a similar tribunal was established in Tokyo to try Japanese officials accused of war crimes. These two tribunals, Nuremberg and Tokyo, were the first such bodies and for a long time they were the last.

In retrospect there is much criticism of these “victor’s” courts — especially of Tokyo — for the lack of due process. Indeed the rules of evidence and procedure for the Nuremberg trials were only three and a half pages long. However the impact of these tribunals upon the concepts of international law, especially humanitarian law, was vast and cannot be underestimated. Indeed the Statute for the Tribunal for the former Yugoslavia as well as the Draft Statute for the proposed international criminal court, rely heavily upon the 1945 London Charter.

The tribunal for the former Yugoslavia was the first international criminal body to be established not by the victors, but rather by a resolution of the Security Council — resolutions 808 of February 1992 and 827 of May 1993. Similarly, the tribunal for Rwanda was created by the Security Council using powers under Chapter 7 of the Charter of the United Nations.

So we have the past and the present, but what of the future of international justice? At the United Nations in August 1996, discussions will begin concerning the Draft Statute of the proposed international criminal court. The International Legal Commission’s Draft Statute for such a court was developed in 1992 and whilst there

have been small changes since this time, the fundamental principles have remained the same. Briefly, the five major principles of the proposed international criminal court are:

- The court should be established by treaty;
- The court should only have jurisdiction over private persons, as distinct from states;
- The court's jurisdiction should be limited to crimes already articulated by international treaties in force and not connected to the Draft Code of Crimes against peace and security of mankind;
- The court should not have compulsory jurisdiction, rather jurisdiction should be consensual, thus supplementing rather than substituting national criminal systems; and
- The court should not be a standing full time body, rather the treaty would allow it to be called into operation as soon as it was required.

Naturally, there is some debate about each of these principles.

## **The Treaty**

In the past we have had two tribunals (Nuremberg and Tokyo) created by victorious powers and two in the present created by a resolution of the Security Council. However the proposed court would be created through treaties — so individual states would have to ratify the court. For many of those involved in the drafting process it was felt that only a treaty formed court would assure a sufficient degree of international support to allow the institution to work effectively — and as much is created in international law through treaties there is a sense of consistency.

However, there is a very valid fear that those states who perpetrate the worst atrocities will merely thumb their nose at the international criminal court and refuse to sign. The requirement of state ratification also impacts upon the rest of the structure of the proposed court in relation to the strength of power it has as an institution. It is a bit like getting a recipe right, that fine pragmatic balance — if it is too sweet everyone will sign, however it will do no good — if it is too bitter (or stodgy healthy like Mother's rock-cakes), no-one will ratify and a very virtuous, principled structure will be left empty. So this is a very important issue to keep working on.

## **Jurisdiction over private persons**

This area has little controversy and is consistent with previous tribunals. Whilst states will not be taken to the international criminal court, officials of states acting on behalf of states will be liable.

## Jurisdiction over recognised treaty crimes

This means that the court is not creating international law. Instead it will be consolidating existing provisions. Article 20 of the Draft Statute lists crimes within the jurisdiction of the court. These are:

- The crime of genocide
- The crime of aggression
- Serious violations of the laws and customs applicable in armed conflict
- Crimes against humanity
- Crimes established under, or pursuant to, the treaty provisions listed in the Annex which constitute exceptionally serious crimes of international concern.

As well as these listed crimes the court is able to implement relevant national laws. Crimes (a) to (d) are general, customary international law.

Article 20(e) refers to crimes listed in the Annex. These include grave breaches of the *Geneva Conventions* 1949 and the *Additional Protocols*, and also crimes such as apartheid, torture, drug trafficking and the safety of civil aviation. Concerns have been raised that a number of important crimes, such as environmental crimes, are neither listed in the sections dealing with general international law, nor the Annex. However the Annex is not exhaustive and it would be reasonable to presume that once the court was in operation, new areas of law could be added.

## Consensual jurisdiction and national criminal systems

Currently there is only compulsory jurisdiction for the crime of genocide and matters referred by the Security Council. All through the Draft Statute there are strong provisions for co-existence of national criminal jurisdiction. State sovereignty is well catered for.

## Not a full time body

This is proposed due to fears over issues of limited resources and the high quality of judges required. Concerns have been raised about this flexible scenario, however the matter is practical and could be changed once the court was in existence.

## Other issues

The Draft Statute limits the prosecutor's authority to initiate investigations and proceedings to only two situations: when a state has lodged a complaint and when the United Nations Security Council has referred a situation involving a threat to peace and security. There is no provision for the prosecutor to initiate investigations and begin prosecutions based on information from other sources such as victims, their families and non-government organisations (such as Amnesty international).

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Furthermore, unlike the ad hoc tribunals there is no capacity for non-government organisations or non-state bodies to submit *amicus curiae* briefs.

This is very serious for a number of reasons — restricting only States to have the capacity to initiate cases places grave limitations on the strength of the court (for example, Australia is unlikely to take Indonesia to the court for violations against East Timor). Furthermore, considering the limited resources likely to be available for research and investigation, the exclusion of groups such as Amnesty International, who have been documenting human rights abuses for a very long time is, frankly, ludicrous. The need to find creative and informal ways to allow NGOs and other non-state parties to play a role in the proceedings is essential.

There are hurdles to overcome and as individuals interested in international justice we must be vigilant and push to change and extend the boundaries (be they formal or informal) wherever possible. The proposed court is currently merely a mixture of ideas waiting for debate, and finally for the actual cooking. Now is the time to push for change, carefully balancing the trade-offs between the respect for state sovereignty and effectiveness, and between pragmatism and fierce idealism.