

The Role of the United Nations in the Prosecution of International War Criminals

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Prior to May, 1993 the topic of this address would have had little meaning. At that time, it was universally accepted that the only way the international community could prosecute war criminals was by establishing an international criminal court by way of treaty. For almost half a century, the several attempts by the United Nations (UN) to draft such a treaty failed. This failure was in spite of the 1948 Genocide Convention that officially recognized the need for an international criminal judicial body. Article Seven of the Convention calls for persons charged with genocide to be prosecuted either by domestic courts or by “such international penal tribunal[s] as may have jurisdiction” to do so.

Resolution, 260(III), adopted by the General Assembly in December, 1948 similarly acknowledged the need for an international court with criminal jurisdiction. The Resolution even called on the International Law Commission to investigate the possibility of creating such a body, including the set-up of a Criminal Chamber of the International Court of Justice. In 1950 the General Assembly set up a Special Committee to devise a draft statute for an international criminal court. Although the committee produced an original text in 1951 and a revised text in 1953, the document floundered in the General Assembly because of disagreement on a definition for the crime of aggression. In 1957 the General Assembly decided to defer the initiative indefinitely.

Even the criminal depravity of Pol Pot in Cambodia, Mengistu Haile Miriam in Ethiopia, and Saddam Hussein in Iraq did not move the international community to consider resurrecting attempts to establish an international criminal court. It was only when European criminals committed similar crimes in the former Yugoslavia that

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some of the leading nations, in the face of overwhelming international public criticism, decided to make use of the Cold War thaw and do something about the massive crimes committed in the Balkans.

It came as a surprise to the international community when in May, 1999 the Security Council of the UN decided to establish the International Criminal Tribunal for the Former Yugoslavia (ICTY). International lawyers had not contemplated that the powers of the Council under Chapter VII of the UN Charter could be used for such a purpose. Those powers were designed to enable the world body to take preemptory action and remove threats to international peace and security. For that purpose, the Charter gives the Security Council the power to order military interventions, embargos, and sanctions. In a very innovative move, the Security Council decided that those Chapter VII powers confer by implication the capacity to establish a war crimes criminal tribunal.

The Security Council could come to this determination only by making the crucial link between peace and justice. The Chapter VII powers could not have been used to establish the Tribunal without recognizing it as a mechanism for restoring peace in the former Yugoslavia. A similar determination was made in November, 1994 when the Security Council established the International Criminal Tribunal for Rwanda (ICTR).

This link between peace and justice, between the work of the Criminal Tribunals and stability in Yugoslavia and Rwanda is, jurisprudentially speaking, extremely interesting. The link clearly shows that, in the international realm, the criminal law has a different focus from that in the domestic arena. National criminal laws function primarily to punish perpetrators for violating societal norms encapsulated in the common law and in statutes, and thereby provide satisfaction to the parties most directly injured by the crime. Although other subsidiary functions of national criminal law have been proposed—for example, Jeremy Bentham suggested a utilitarian conception of criminal law as an instrument of social control—punishment and retribution remain the primary motivations of the domestic criminal justice system.

On the international level, however, the crucial link between criminal prosecution and the preservation of peace and stability shifts

the focus away from pure retribution, to notions of restoring the rule of law and justly establishing the truth, thereby preventing denials and revisionism. Clearly, punishing the perpetrators of international crimes and providing the victimized population with a sense of retribution does play an important role.

In establishing the ICTY, the Security Council correctly recognized that it had no law-making powers, as it was not a legislature. For that reason, the Security Council conferred upon its Tribunals the power to enforce only universally recognized criminal laws: violations of the Genocide Convention, crimes against humanity and war crimes that had become customary norms, and, in the case of the ICTY, grave breaches of the Geneva Conventions.

There has been much debate as to why the Security Council used its powers to set up the International Criminal Tribunal for the Former Yugoslavia. I would suggest that there were a number of reasons, including that at the end of the Cold War, Russia and China were prepared to agree to such a court being set up. In addition, the photographs of emaciated men behind barbed wire fences stirred the emotions of decent people world wide. Human rights organizations mobilized. And, most important of all, it was happening in Europe.

In the case of Rwanda, it was less complicated. Genocide had then recently resulted in the murder of more than 500,000 people in less than 100 days. At the time, Rwanda occupied one of the nonpermanent seats on the Security Council. The war crimes were committed in a situation of internal armed conflict. The precedent existed, and the Security Council readily embraced the idea. So keen were its members that when Rwanda objected to the way in which the Tribunal was being constituted and withdrew its support for the idea, the Council insisted that the process continue and the Tribunal was established over a single negative vote—that of Rwanda itself.

In the months following the establishment of the ICTY, the Security Council, with the cooperation of the General Assembly, appointed the eleven Tribunal judges. In the fall of 1993, the Security Council appointed the first Chief Prosecutor, the then-attorney general of Venezuela, Ramon Escovar-Salom. He took his office in the Hague in January, 1994 and after three days resigned to accept the position of Minister of the Interior in his home country. Approximately nine months after the ICTY had been established, it

was still without a prosecutor, effectively preventing investigation of any cases. By then, however, the judges already were hard at work settling the rules of procedure and evidence, and were already concerned that there were no trials, even in the pipeline.

The Chief Prosecutor of the ICTY, according to its statute, is required to be appointed by the Security Council on the nomination of the Secretary-General. Between January and June, 1994, Secretary-General Boutros Boutros-Ghali nominated eight people for the position, but each of them was vetoed. Five such nominees were vetoed by Russia, presumably because they came from NATO member countries. In desperation at the end of June, Boutros-Ghali decided to look for a South African. Nelson Mandela had been recently inaugurated as the first democratically elected head of state and it was felt that no member of the Security Council would wish to veto a nominee who carried his support.

My nomination was made in light of my then-recent position as chairman of the Commission of Inquiry into Political Violence and Intimidation, a Commission which brought to light important “third force” activities by elements of the South African security forces who were opposed to democratic change. Mandela supported my nomination and, as a result, it was unanimously approved by the Security Council only thirty-six hours later.

I assumed, in my innocence and ignorance, that the ICTY, having been established by unanimous resolution of the Security Council and followed by my own similar approval, would have sufficient funds for me to carry out my mandate. I was wrong. In fact, there were almost no funds at all, and it was only at the beginning of 1995 that the Tribunal’s budget was approved by the General Assembly. This lack of funding seriously delayed setting up a functioning Office of the Prosecutor. We were starved of both human and material resources. The result was frustration for the victims in Bosnia for whom the Tribunal was truly established and serious erosion of the credibility of the institution.

The funding problem was a direct consequence of the refusal by the United States to pay its UN dues. All organs of the world body were severely lacking money and every dollar given to us was a dollar less for another UN organ. In 1995 the UN’s financial crisis was so severe that the Secretary-General ordered that no UN official

was to travel until further notice. This created a crisis in the Office of the Prosecutor. Our investigators became office-bound and literally had no work to do. Thankfully, we found a solution in drawing on money from the Tribunal's trust fund, but the situation was far from ideal.

Another serious problem which I faced in setting up the office in the Hague related to the recruitment of suitably experienced experts in the relevant fields. Being a UN office, it was important to ensure that there was an appropriate geographic and gender balance. Not surprisingly, the employment procedures in the UN are cumbersome and time consuming. The rules were not made with Criminal Tribunals in mind as there had never been any similar institution in the history of the organization.

The problems were exacerbated in the case of the ICTR. When the Security Council resolved to establish the Rwanda tribunal it decided that the Chief Prosecutor of the ICTY should also hold that position for the ICTR. It was difficult enough to persuade suitable people to come and work for the ICTY in the Hague. It was another matter entirely to persuade similar people to relocate to Kigali in the aftermath of a genocide. The security situation was such that the UN refused to allow spouses or other family members to accompany employees of the tribunal.

While on the one hand, the refusal of the United States to pay its UN dues led to grave problems for the Tribunals, on the other, the United States played a crucial role in taking steps to ensure that the two Tribunals were able to begin their work. It was Madeline Albright, as the U.S. Ambassador at the UN, who was primarily responsible for the donation of human and financial resources, resulting in many millions of dollars of support for the Tribunals. If not for that assistance, in all probability, the Tribunals would have failed.

I have described only a few of the many delays in establishing the two Tribunals. Yet I have done so in order to demonstrate how necessary it is to have a permanent international criminal court. There are serious war crimes to investigate. Thus, it is not acceptable that several years must pass before a UN ad hoc tribunal can begin its work. Justice must not be delayed. Aside from being inefficient, it is grossly unfair to expect victims of those horrendous crimes to wait

before the wheels of justice begin to turn. Therefore, while the role of the UN in setting up the ad hoc tribunals has been fundamentally important, the route chosen for their establishment is not an efficient or desirable one.

Indeed, the most serious threat to the credibility, and indeed the very essence, of the Tribunals has come from politically inspired delays in the arrest of indicted war criminals. The most visible and publicized of these failures of the international community to support the Tribunals have been in respect of the arrest of major Serbian leaders who were indicted by the ICTY—Milosovic, Karadzic and Mladic.

The case of Karadzic is the most unfortunate. When he was indicted on charges of genocide and crimes against humanity in July, 1995 UN troops in Bosnia could have undoubtedly arrested him. The same is probably the case for Mladic, who was indicted for the same war crimes. The troops in Bosnia did not arrest these suspected war criminals simply because the Pentagon military leaders were not prepared to risk American lives. Yet what were American troops, armed and in uniform, doing in Bosnia if they were not prepared to take risks in the performance of their duties? The great tragedy is that if these wanted war criminals had been arrested in 1995, some of the tragic events which occurred since then, especially in Srebrenica and in Kosovo, may have been avoided.

Concern has again mounted with regard to the arrest of Milosovic. His spectacular ousting by Vojislav Kostunica in the September, 2000 presidential elections has, unfortunately, decreased the prospects of bringing him to justice. Kostunica, eager to preserve the tenuous stability that emerged since his election victory, has declared that he will not arrest Milosevic for war crimes or even for the apparent electoral fraud that almost denied Kostunica the presidency. Western governments, who are formally committed to getting Milosevic to the Hague for prosecution, clearly endorse Kostunica's approach. The Federal Republic of Yugoslavia has been readmitted to the UN without any demand for the surrender of Serbs indicted for war crimes. The result is further damage to the ICTY and the progress of international justice.

Despite the difficulties encountered by the two International Tribunals, they have achieved important successes. In my view, the

most important success is the demonstration that international courts can hold fair trials. That fact was by no means accepted or assumed when they began their work. The policy in the Office of the Prosecutor, certainly during my term of office, was that the goal in any prosecution was that the trial would be judged as having been fair to the defendants. If we succeeded in winning a conviction, then so much the better. The assistance rendered to defense teams by the American Bar Association played a crucial role in ensuring that the first trials in the Hague were fair by international standards.

Additionally, the tribunals advanced humanitarian law. Prior to the beginning of the judges' work on the ICTY and ICTR, humanitarian law was all but an academic subject. Unenforced laws stagnated, and it was to the great credit of the International Committee of the Red Cross that humanitarian law continued developing. That development was accelerated by the Tribunals. Today, the gap between international armed conflict and internal armed conflict, which had been narrowing, has all but disappeared. Systematic mass rape, for the first time, has been recognized widely as a war crime. These developments would not have occurred but for the work of the two Tribunals.

There is no longer impunity for war criminals, as has been clearly demonstrated by the ICTR in its conviction of Jean Kambanda, former Prime Minister of Rwanda and the first head of government successfully prosecuted for genocide. Moreover, I believe that it is unlikely that Pinochet would have been arrested in London but for the existence of the tribunals. Karadzic and Mladic remain hunted, and Milosovic cannot travel outside Serbia. Other war criminals also cannot travel freely. Some of them are no longer able to seek medical treatment in European hospitals due to fear of arrest. National borders and sovereignty are no longer able to protect leaders, whether political or military, who commit gross human rights violations against their own people.

The most important consequence of the UN prosecutions of war criminals, however, has been the impetus given to the movement towards establishing the International Criminal Court (ICC). Again, it is ironic that without the efforts of the United States, it is unlikely that the Rome diplomatic conference of June and July, 1998 would have convened. The irony lies, however, in the United States

distancing itself from the treaty that was so successfully negotiated in Rome.

There seems to be something schizophrenic about the United States government and Congress. The United States completely condemns the commission of war crimes, but at the same time guards its sovereignty so vigorously that it refuses to embrace the Rome process and join with the rest of the international community in subjecting itself to universal rules of justice.

At the Millennium Summit of the UN General Assembly last September, the world's leaders drafted a declaration in which they committed themselves to a host of values, principles, and to reinvigorating the UN through pursuit of those values and upholding those principles.¹ But while the declaration is a truly inspirational document, it is a little disappointing from the perspective of humanitarian law.

In several places, the Declaration commits leaders, both individually and acting as representatives of the international community, to "strengthen respect for the rule of law." This promise is made, however, primarily in the context of ensuring compliance with the International Court of Justice. No mention is made of respecting obligations arising from the Security Council resolutions which established the ICTY and ICTR. The Declaration is similarly silent on the ICC. This is a great pity because, as the final article of the Declaration acknowledges, the UN is "the indispensable common house of the entire human family, through which we seek to realize our universal aspirations for peace, cooperation and development."² As such, the impetus towards respect for, and enforcement of, the laws of war and the concomitant prosecution of war criminals should come from the UN.

The ICC will likely become operational in the next two or three years. It is all but certain that the United States will not play a role in that endeavor. Article 13(b) of the Rome Treaty relating to the Security Council could become crucial. This provision holds that the Council, acting under Chapter Seven of the UN Charter, may refer a

1. G.A. Res. 2, U.N. GAOR, 55th Sess., Agenda Item 61(b), U.N. Doc. A/Res/55/2 (2000).

2. *Id.*

situation to the ICC. In that event, the ICC would have powers similar to those conferred upon the ICTY and ICTR.

It is my hope, therefore, that the UN, with the support of as many countries as possible, including the United States, will find a way to extend its commitment to the rule of law into the arena of humanitarian law and thus ensure the creation of a workable International Criminal Court to safeguard international peace and dispense international justice.

