

INTERNATIONAL TRIBUNALS AND THEIR ABILITY TO PROVIDE ADEQUATE JUSTICE: LESSONS FROM THE YUGOSLAV TRIBUNAL

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I. INTRODUCTION

In 1994 and 1996, respectively, the International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR) were created by the United Nations Security Council to hold accountable those responsible for genocide, war crimes, crimes against humanity and other violations of international laws and norms. The genesis of the ICTY, created during the latter half of the war in Bosnia-Herzegovina, was seen by many as a half-hearted effort by some European countries and the United States to address the perpetration of atrocities in the Balkans without actually intervening to cease and prevent their continued commission. The ICTR, created only after the genocide had taken place in Rwanda, amounted to a *mea culpa* on the part of an international community that expressly refused to intervene during the slaughter of that country's Tutsi and moderate Hutu populations.

Despite the cynicism surrounding their creations, the *ad hoc* tribunals have accomplished more than most expected, or may have intended. The jurisprudence stemming from the ICTY and the ICTR will undoubtedly contribute to the development and expansion of international humanitarian law, and the creation and continued operation of both Tribunals, augers well for those seeking to establish mechanisms of accountability for egregious crimes that have all too often gone unpunished.

Despite the impact the ICTY and ICTR have had on the development of humanitarian law and the impetus their existence provided for the creation of other *ad hoc* courts in Cambodia, East Timor, and Sierra Leone and for the International Criminal Court (ICC), one must ask whether the existing *ad hoc* tribunals and those that will follow truly do address the need for justice, accountability, reconciliation and deterrence in their respective countries and regions. To that end, one could begin by asking the following questions:

- 1) To what extent have the tribunals held accountable those they were intended to prosecute? To what extent have they provided justice to the victims of genocide, war crimes, and "ethnic cleansing" in Rwanda and the former Yugoslavia?
- 2) To what extent have the existing tribunals affected civil society and contributed to truth and reconciliation in Yugoslavia and Rwanda?
- 3) Has the existence of the ICTY and ICTR deterred the commission of further crimes in the former Yugoslavia, Rwanda, and elsewhere in the world?
- 4) Are the existing tribunals exemplary of what the world wants to see in a permanent international criminal court?
- 5) To what extent have the experiences of the former Yugoslav and Rwandan tribunals affected formation of similar tribunals for Cambodia, East Timor and Sierra Leone?

The following remarks provide an admittedly brief and cursory overview of issues raised by each of the aforementioned questions, focusing on the former Yugoslav tribunal in this case.

II. TO WHAT EXTENT HAS THE ICTY PROVIDED JUSTICE, ELUCIDATED TRUTH, AND CONTRIBUTED TOWARD RECONCILIATION IN THE FORMER YUGOSLAVIA?

Unfortunately, the ICTY has been woefully deficient in these respects. Anyone who knows the facts of, and persons associated with, the commission of war crimes and crimes against humanity in the former Yugoslavia during the past decade cannot avoid the sad fact that the ICTY has been slow and inadequate in providing justice to the victims of the Balkan wars.

Few in the former Yugoslavia believe that the ICTY is going to prosecute those that deserve prosecution, that it will establish the truth of what happened during the war, or that it will serve as a vehicle or impetus for reconciliation among the various peoples of the former Yugoslavia. Even proponents of the ICTY in the former Yugoslavia are disillusioned by its performance.

The Tribunal is not a serious "issue" in the former Yugoslavia. Until recently, some of the governments in the region ignore it, while others cooperated. But the cooperation that does exist is driven, in large part, by the need to satisfy the international community so that the respective state can continue receiving foreign aid and continued membership in international and regional institutions. The people of the former Yugoslavia view the ICTY as an amorphous body in the Hague that was created by the international community to ameliorate its own guilt. They do not believe that the Tribunal is there to provide justice to them; it is "someone else's" tribunal.

Why has the ICTY failed to address the needs for justice, truth and reconciliation in the former Yugoslavia? One can point to several reasons.

A. *Lack of Factual Knowledge and Strategic Vision at the Outset*

When the ICTY was being formed, the international community focused on the Tribunal's Statute and its Rules of Evidence and Procedure, while glaringly ignoring factual and operational requirements of the Tribunal. Similarly, when staff began arriving during the early days of the Tribunal, little effort was made to thoroughly and objectively assess the facts and personalities relevant to the wars in Croatia and Bosnia, and to craft an informed investigative strategy based on that information. The following criticisms levied against the Tribunal stem, in large part, from the international community's and Tribunal staff's failure to recognize and address the need for: a) educating staff and management as to the facts, personalities, and opposing views relevant to the wars in the Balkans; and b) crafting an investigative

strategy that would identify and, if necessary, revise areas and topics of investigation, targets for potential indictment, and evidentiary requirements for a successful prosecution.

I preface the following remarks by pointing out that I do not, by any means, intend to create the impression that all sides are equally to blame for the commission of war crimes and crimes against humanity in the former Yugoslavia. Rather, I highlight criticisms often heard by the Serbs, Croats, Bosniaks and others *vis-à-vis* the Tribunal's track record to date.

To the people of the former Yugoslavia and the victims of its wars, the Tribunal has taken too long to indict too few responsible for the crimes committed in their countries during the past decade. Many people in the former Yugoslavia who are not necessarily hostile to the ICTY have asked, "Why have you indicted him but not her? Why are you focusing on such minor figures without having addressed notoriously egregious abusers and leadership figures? Why are you looking at 'minor' crime scenes and seemingly ignoring other minor and major crime scenes?"

Similarly almost all informed, objective observers of the Balkans in the past decade are befuddled as to why the ICTY has not prosecuted crimes committed in obviously abusive areas but has often focused on less-significant sites and persons, and why has it taken so long to indict those that have been indicted. For example:

- 1) The ICTY has appropriately indicted persons associated with the commission of crimes in detention camps in northwestern Bosnia, the siege of Sarajevo, the massacre of approximately 7,000 Muslim men in and around Srebrenica, and the systematic rape of women in Foca. However, arguably the most systematic and egregious pattern of "ethnic cleansing" took place throughout eastern Bosnia particularly in the Zvornik, Bratunac and Bijeljina municipalities in April and May 1992 but public indictments stemming from these crimes have not been issued. Moreover, evidence also points to the direct participation of agents of the Republic of Serbia and its then president, Slobodan Milosevic, in this region and at that time. However, Milosevic and his accomplices notably Jovica Stanisic, Mihalj Kertes, and Frenki Simatovic have not been indicted for their direct involvement and sponsorship of "ethnic cleansing" throughout the Balkans. Although Milosevic has been indicted for crimes committed in Kosovo in 1998-1999, his responsibility for the "ethnic cleansing" of non-Serbs in Croatia and Bosnia from 1991 to 1995 is glaringly absent from the Office of the Prosecutor's (OTP's) list of indictments. Similarly, Croats complain that with the notable exception of Vukovar and very recently Dubrovnik, crimes committed by agents of the so-called Republic of Serbian Krajina, the

- Yugoslav Army and the government of the Republic of Serbia during the 1991 war in Croatia have been ignored by the Tribunal.
- 2) Arguably the most egregious crimes committed by ethnic Croatian troops were perpetrated by Bosnian Croat forces in and around the Mostar area in Herzegovina. These troops were supported by agents of the Croatian government in Zagreb and its then president, Franjo Tudjman, and defense minister, Gojko Susak, both of whom are now deceased. Despite this fact, the OTP has chosen to focus on crimes committed by Croats in central Bosnia that have resulted in prosecution of relatively low- or mid-level figures while ignoring the culpability of higher-level and arguably more culpable counterparts in Hercegovina and their sponsors in Zagreb. Indeed, Tudjman, Susak and their lackey in Hercegovina, Mate Boban, have all died as “heros” in the eyes of many of their countrymen and women. At the time of their deaths, little attention focused on their responsibility for the commission of war crimes in Croatia and Bosnia, and they will never be called account because they died before the Tribunal acted. Similarly, Serbs who fled after the Croatian government’s offensive to re-capture the “Krajina” region in 1995 only to have their homes and villages torched and their elderly and disabled family members killed often complain as to the lack of indictments against Croatian military, police or civilians responsible for those crimes.
 - 3) With the exception of crimes committed in the Celebici detention center, Bosniak-perpetrated crimes against Serbs and Croats in eastern Bosnia and Hercegovina have not been addressed via an indictment. Despite evidence of Bosniak-perpetrated crimes committed against Croats in the Jablanica-Konjic pocket, and against Serbs in and around Sarajevo and in small pockets in eastern Bosnia, the Tribunal has only been able to muster one related indictment in seven years.

Many of the aforementioned criticisms address the relative paucity of indictments of high-level officials in the former Yugoslavia. Although recent indictments of additional Bosnian Serb civilian and military leaders significantly addressed responsibility for war crimes within the Republika Srpska leadership, similar civilian and military officials affiliated with the Republics of Serbia and Montenegro, the Republic of Croatia, the Croatian Community of Herceg-Bosna and the Republic of Bosnia-Hercegovina have not been indicted. Some of these persons live peacefully throughout the Balkans, and some have run for, or hold, high-ranking public office in their respective countries/entities. Others remain in positions of power at the municipal and local level, thereby preventing the return of displaced persons to their homes.

Still others are being promoted within their own governments. In the case of Serbia, Montenegro, and to a lesser extent Bosnia-Herzegovina, persons who should at the very least be investigated for their involvement in the commission of crimes throughout the 1990s, serve as advisers and ministers to present governments in each of these republics. The Tribunal is mandated to investigate and, if appropriate, indict such persons, but it has to date failed to do so.

In addition to its spotty record on leadership-level indictments, the investigations, indictments and prosecutions of lower-level individuals are viewed by some as arbitrary. Thousands of villages were torched and thousands of people were killed in scores of massacres over a five to six year period. Yet the OTP has only focussed on some (e.g., Ahmici) but not other massacres (e.g., Gospic, Skabrnje, Grabovica, etc.). What criteria, it is often asked, are used to determine what cases get investigated and who gets indicted? To many victims of the war in the former Yugoslavia and to those who have followed that war closely, there is little logic to the OTP's investigative focus and little justification for the time it has taken to indict those that have, eventually, been indicted.

These are legitimate questions that people in the former Yugoslavia have asked and for which they are entitled to an answer. Unless these matters are addressed by the ICTY, there will not be an accurate historical record of the war and the establishment of "truth" will have failed. To date, the historical record reflected by the Hague's indictments and jurisprudence does not accurately reflect what transpired during the war. Nor do the ICTY indictments adequately reflect the figures primarily responsible for the crimes committed therein. At best, the ICTY has established a partial historical record with significant gaps *vis-à-vis* the facts of the war and responsible perpetrators of the war's attendant crimes.

Future *ad hoc* tribunals and the ICC should learn from the early oversights made by the Tribunal that have continued to plague its progress and efficiency. Namely, before a tribunal embarks on investigation and indictment of war crimes, crimes against humanity and genocide in a given area, concerted efforts must be made to educate staff and management about the facts of and personalities affiliated with the given region, and the interpretations and sensitivities of various parties and/or groups *vis-à-vis* the issue under investigation. Thereafter, a strategy must be crafted that reflects the "big picture," namely the factual reality of the war, conflict, genocide or criminal behavior at issue. Finally, a preliminary but detailed identification of potential targets, appropriate avenues of investigation, and type and quality of evidence necessary to bring the case to court must be undertaken. Only then should investigations commence, necessary resources be allocated, and indictments be written.

B. Problems with the Determination of Targets

Was it realistic to expect a Hague-based Tribunal to address crimes committed at all levels (from heads of state to local murderers and looters) in three separate conflicts that involved a vast array of different state and quasi-state actors?

As noted above, the Tribunal did not clearly determine who it wanted to investigate and possibly prosecute, and what was the best avenue through which to achieve those goals at the outset. The Tribunal should have focused on investigating, indicting and prosecuting leadership figures, and egregious perpetrators and “notorious” offenders. Instead, the ICTY’s initial focus had been on camp guards and low-level “hoods” with few clear connections to the true power-brokers of the war and the crimes perpetrated at their behest and/or with their active assistance. This has resulted in use of resources to complete investigations and prosecutions of low-level perpetrators, while many, but admittedly not all, of their superiors retain their positions of power and attendant privilege.

One must obviously prove that a crime took place before one can hold an individual responsible for having perpetrated that crime or ordered the commission thereof. As a result, there are those who argue that one must first prosecute low-level offenders to prove that a crime base existed before one can hold a civilian or military superior responsible for such crimes. I have no quarrels with this general principle.

However, an international tribunal faced with thousands of war crimes cases and with limited resources should only be expected to prosecute mid- and high-level war criminals. Such persons can be divided into two categories: a) those who qualify as “notorious offenders,” namely persons who have systematically perpetrated large-scale and particularly egregious crimes (*e.g.*, Milan Lukic); or b) those who may be linked in the chain of command leading to the pinnacle of command and responsibility. Prosecutions of camp guards, and even some military officers, are not necessarily the best avenue to build a case against heads of state, paramilitary leaders, interior ministry officials, and intelligence officials that orchestrated, or encouraged, the commission of war crimes in the field.

Crimes of vast scale such as Srebrenica should have been prosecuted. However, an international tribunal’s determination to investigate and/or prosecute one massacre over another massacre of similar proportion and character should be determined by whether or not that investigation and/or prosecution will lead to additional evidence of criminal behavior by persons higher up the chain of command.

This is not to say that the camp guards, local police officers and individual civilians who murdered, tortured, raped, or otherwise brutalized disarmed

combatants and civilians should go unpunished. Insofar as international tribunals, third-party governments or local officials can conclusively develop a case of such individual culpability and provided that such investigations are done in accordance with due process requirements, such low-level war criminals could be tried: a) in a third country where due process requirements will be respected; b) by a "mixed" tribunal of international and local jurists either in the country where the crimes were perpetrated or in a third country; or c) by the courts of the country of which the perpetrators is a citizen, provided such courts are objective, and can provide due process guarantees to the defendant and protection for victims and witnesses. However, it would be premature to expect the countries of the former Yugoslavia to "try their own" and, given the present political climate, such low-level individual perpetrators should be tried in a third country. But it is not realistic to expect an international Tribunal charged with investigation of three separate wars over a ten-year period to be able to investigate, indict and prosecute all those responsible for war crimes. Priorities must be set, tasks appropriately delegated, and resources and energies apportioned accordingly.

C. The Tribunal's Lack of Deterrent Effect

The existence of the Tribunal during the latter half of the war in Bosnia in 1994 and 1995, in the aftermath of the Croatian government's offensive to recapture the Krajina region in 1995, and during the armed conflict and war in Kosovo in 1998 and 1999, seemingly had little impact on the level of atrocities committed therein. Most glaringly in Kosovo, Serbian and Yugoslav forces undertook methods of "ethnic cleansing" that were virtually identical to those employed by these same forces and their agents during the war in Croatia and Bosnia.

The Tribunal had been in existence for over four years when the armed conflict in Kosovo began, and it was clear to the Serbian and Yugoslav leadership that the Tribunal was actively investigating and indicting persons affiliated with that leadership *vis-à-vis* their alleged and actual commission of war crimes in Croatia and Bosnia. Yet, the conduct of the Yugoslav Army, the Serbian Interior Ministry, and the leadership of Slobodan Milosevic indicate that they paid little, if any attention, to the Tribunal before or during their military campaign in Kosovo.

The lack of the Tribunal's ability to arrest those it indicts, and the international community's reticence or inability in doing so, is probably the most significant factor that emasculates any deterrent effect supporters of the Tribunal hoped to achieve. Indeed, Milosevic, his generals, intelligence officials, and political envoys appear to have paid little heed to the possibility of their indictment and arrest at the time they were planning or prosecuting the

war in Kosovo. Although they may be concerned for their fate now that some of them have been indicted and removed from power, there is little reason to believe that the Tribunal's existence and operation played any role in preventing or alleviating the commission of atrocities in Kosovo.

Moreover, victims and others who claim—sometimes illegitimately—to be acting on their behalf have resorted to revenge killings to achieve justice they believe they have been denied. The abuses that took place against Serbs following the Croatian offensive to re-take Krajina and after the withdrawal of Yugoslav forces in Kosovo only highlight the lack of deterrence on all sides in the conflict. Croats and the Albanians seeking to “avenge themselves” against those Serbs who may or may not have committed atrocities against them, against members of their family, or against members of their ethnic group, did so by committing atrocities against Serbs who remained in Krajina and Kosovo after Serbian and Yugoslav forces withdrew from those areas. In the case of Kosovo, members of the Roma population and others who were viewed as having collaborated with the Serbs were also attacked and murdered by Albanians. Revenge was not sought against the perceived perpetrator but against any member of the same ethnic group as the perceived perpetrator. The Tribunal's goal of providing individual rather than collective justice has clearly not yet been met.

D. The Need for Outreach

Although the Tribunal's inability to deter future atrocities is largely due to the fact that it cannot arrest those it indicts, its inability to act as a vehicle for reconciliation or to be respected in the Balkans is due, in large part, to its lack of outreach to the peoples of the region. Although the Office of the Registrar has an outreach staff in Zagreb and parts of Bosnia, this staff usually amounts to one person in one or two locations in the Balkans and focuses on disseminating general information about the Tribunal. Conversely the Office of the Prosecutor has made little effort to communicate with the public of the former Yugoslav countries despite the fact that one of its primary goals is to provide justice to the victims of the region.

The Office of the Prosecutor cannot and should not disclose any information concerning the details of its respective investigations. However, this does not mean that it should completely absent itself from public fora in the region. The Tribunal staff is reluctant and often prohibited from giving interviews on even the most innocuous subjects. However, the time, resources and effort needed to conduct war crimes investigations and prosecutions is not understood in the Balkans and, with a few very rare exceptions, no one from the Tribunal has made an effort to explain what a forensic investigation, an exhumation, document analysis, and translation of a foreign language entails.

These are all neutral subjects that could be addressed to help foster understanding and at least tolerance for the Tribunal, rather than the hostility with which it is faced in many parts of the region.

For example, although Croatia's recent support for the Tribunal and its willingness to re-examine its role during the 1990-1995 period has dramatically improved since Tudjman's death and the subsequent election of a new government, the nascent willingness to re-assess its past is due in large part to internal factors rather than the Tribunal. Croatia's new president, Stipe Mesic, its prime and deputy prime ministers, Ivica Racan and Goran Granic, respectively, and members of the independent press have played a major role in calling for accountability on all sides. But the Tribunal has played little role in Croatia's re-assessment of its recent history and reconciliation with its remaining Serbian population.

In most places around the world, the United Nations and other internationals who are sent to an area to help the local population, are perceived as arrogant, ignorant and imperialist. In many instances these perceptions are unjustified or instigated by governments or quasi-governmental entities or rebel groups in a given area. However, it is also a sad fact that many internationals are disdainful or ignorant of the culture, history and sufferings of the local population they are supposedly there to protect or for whom they are purportedly working to provide justice.

Thus, where feasible, future Tribunals should make provisions to employ an outreach staff that will explain their work generally to the public in a given country either via the media, symposiums, conferences, and town hall meetings throughout the country and not just in capitol cities. Outreach should also include informal and semi-regular contact with victims and the family of victims in order to dispel the often wide-spread cynicism that international staff are more interested in their salaries than in the suffering of others. If feasible, such outreach staff should include persons who are fluent in the respective language(s) and dialect(s) of a region and others familiar with the area and its history and culture.

III. TO WHAT EXTENT CAN INTERNATIONAL TRIBUNALS ACCOMPLISH THEIR MANDATES?

It was once highly unpopular to argue that war crimes trials should take place in the country in which they were perpetrated. There are credible reasons for this. In some countries, local courts are politicized and controlled by the very agents that perpetrated or ordered the crimes they are called upon to adjudicate; there is an obvious lack of due process in many such countries; persons genuinely responsible for such trials will never stand trial and those who are members of the "enemy" group will never get a fair trial.

These are all valid reasons and, in the case of the former Yugoslavia, I agree that it would have been ludicrous to expect the peoples of the former Yugoslavia to try members of their own ethnic and national group while Tudjman and Milosevic were still in power. Indeed, I do not believe that truth commissions or tribunals can function in a country where crimes were committed unless there has been a radical change of regime(s) and until the new government(s) makes a concerted effort to address its country's recent history.

However, if the political climate is not overtly hostile to an international war crimes tribunal and if victim and witness protection and general security can be facilitated, such tribunals should consider basing a significant portion of their investigative operations and holding trials in the country where the crimes were perpetrated. These trials could be adjudicated solely by "international" judges or by "mixed" tribunals that include both international and "local" judges.

The point of such an effort would be to ensure that the tribunals provide justice to the victims, the families of victims, and civil society of the respective country(ies) in which heinous crimes were committed. However, such trials are not feasible in all places. Despite my call for increased outreach by the ICTY, I do not believe that war crimes trials can yet be held in the former Yugoslavia. Because the Balkan wars were fought between ethnic groups who had and now do live in separate countries/entities, because the war therein involved eight separate entities and states, and because at least in present-day Yugoslavia those who are the architects of the war remain in a position to harm witnesses and informants, such trials cannot yet be held in that region.

Nevertheless, burgeoning attempts at "mixed" tribunals (*e.g.* in Sierra Leone, Cambodia, and East Timor) have commenced in other parts of the world. This hybrid attempt to fuse both international and national participation in adjudicating war crimes cases may, in some cases, be preferable than the existing "elitist" models (*i.e.*, ICTY and ICTR). A hybrid tribunal should use both international and national law (*i.e.*, aspects of a country's legal code that incorporate relevant and complementary elements of international treaty and customary law, civil and human rights, etc.). Such an approach would add legitimacy to the international tribunals in the eyes of the local people and would breathe "life" into the laws that exist in countries that have either been ignored or usurped by abusive regimes in the past. It would also serve to facilitate respect for the rule of law from within the country, rather than imposing it from afar.

The "hybrid" aspect of these tribunals should also be reflected in the staffing of these tribunals in the office of the Prosecutor, Chambers, and Registrar. Often and understandably, "local" populations are not objective, but there are some portions of the population that have stood up in the face of tyranny and their opinions and expertise should be used and listened to by the

tribunals. For example, while a prosecutor could be an international, two deputy prosecutors—one from the respective region and the other an international—could operate immediately below him or her. A variation of this is being considered for the Sierra Leone tribunal and may prove successful.

However, one must concede that the nature of certain trials will require that they be held in the Hague or in some other removed setting. When heads of state, armies and powerful paramilitary or police forces are indicted, and when their supporters retain some level of power or influence within a country or region, it will be difficult if not impossible to try such persons in the area where their crimes were committed. Because such investigations and trials include testimony of sensitive witnesses, including informants close to the accused, the security of such witnesses could probably not be guaranteed in the respective country. Moreover, incarceration of such persons may also not be feasible if their supporters retain significant military or paramilitary power to force their release. In such circumstances, it would be irresponsible and naive to suggest that such trials be held in-country.

The difficulties and obstacles posed by holding “local” trials and of incorporating “local” participation into an international court are admittedly significant, *e.g.*, protection of both local and international staff; ethnic/tribal/political divisions among the local population(s) and the risk of appearing biased if one is favored/appointed over another; lack of or damaged local infrastructure; and lack of experienced local lawyers, judges, investigators, analysts, etc. But this should not preclude exploration of the possibility.

For example, despite Hun Sen’s obstruction and criticisms of the Cambodian tribunal, one should not negate the importance of Cambodian participation in trials in that country. The crimes being adjudicated were perpetrated in their country, and the international community did nothing to prevent the slaughter at the time of its commission. The same can be said for the victims of the Rwandan genocide. The international community cannot have an elitist, paternalistic attitude toward these crimes and toward the victims of these crimes, *i.e.*, viewing local participation as inherently biased, tribal, inexperienced, and inept. Recent efforts to involve local populations in East Timor, and possibly in Sierra Leone, are steps in the right direction. The ICC should continue to support local participation when it begins functioning. Preferably, the ICC should largely exist in the Hague as an administrative headquarters of sorts, but the bulk of its investigative and trial efforts should take place either within the country where the atrocities were committed or, if that is not possible, as close to that country as possible.

The ICC should not aspire to the “disconnectedness” of the ICTR, which is at least partly based in Kigali, and the ICTY, which has virtually no connection whatsoever with the peoples of the former Yugoslavia. Even if a country truly cannot try its own or participate in that process, the people of that

country should at the very least be consulted and kept informed of what the international *ad hoc* or permanent tribunals are doing, ostensibly on their behalf.

IV. TO WHAT EXTENT CAN ANALYTICAL AND OPERATIONAL ISSUES BE BETTER ADDRESSED BY FUTURE AD HOC TRIBUNALS AND THE ICC?

The attention to Statutes and Rules of Evidence and Procedure of *ad hoc* tribunals and the ICC are obviously necessary and integral to their workings. However, appreciation for country and fact-based expertise, operational aspects, and organizational structures of these tribunals are not properly if at all addressed when these tribunals are formed, despite the fact that they have enormous effect on the extent to which the Tribunals can function and achieve what they were meant to do.

The following general suggestions are posited in the hope that future tribunals will provide the attention and resources necessary to properly support these factual, operational and organizational necessities.

A. Develop and Maintain Country-Specific and Regional Expertise within a Respective Ad Hoc Tribunal and within the ICC

Any *ad hoc* tribunal and the ICC should maintain a staff that serve the need for in-house expertise relating to the background and facts relating to a war, armed conflict, genocide, or other event that the tribunal is mandated to investigate, indict and prosecute.

This proposed staff should play a minimal role in developing the facts of a specific crime scene under investigation. Rather, it should focus on providing tribunal and ICC staff with the following:

- 1) The “big picture” of what transpired during a respective war, genocide or conflict, and how events in one area relate to those in another;
- 2) The relevant positions and ideologies of the various parties to the conflict, political factions, ethnic groups, religious groups, etc.;
- 3) Who’s who in the country/countries and their relationship to one another; and
- 4) The structure and hierarchy of a relevant government, interior ministry, military, and paramilitary or guerrilla group(s).

This staff need not be large in number, and it should not resemble an academic think-tank. Rather, it should focus its efforts on providing information necessary to making informed decisions as to what crimes and which individuals are to be investigated. As noted above, an effective investigative strategy cannot be formulated if staff remains ignorant of overall facts relevant to the area under investigation. Moreover, this staff should craft its analysis in a fashion consistent with the requirements for trial preparedness of trial

attorneys and, to a lesser extent, judges. While factual background knowledge is of imperative importance during the early stages of a tribunal's existence, the subsequent development of factual information must be tailored to meet the requirements of a trial.

B. Specialize and Improve Victim, Witness, and Informant Protection

Significant discussion has been devoted to victim and witness protection *vis-à-vis* the existing *ad hoc* and future tribunals. However, this effort has focused on direct victims of, and witnesses to, violence criminal activity. Although there is significant room for improvement in this regard, consideration must also be given to the arguably more difficult protection of potential informants and other high- and mid-ranking officials who can implicate, and are willing to testify or provide evidence against, heads of state, intelligence officials, high-ranking military personnel, and other related leadership figures.

The "handling" of such persons necessarily requires staff experienced in dealing with such sensitive situations. However, certain general issues present themselves *vis-à-vis* such situations that future tribunals should consider:

- 1) Third countries generally are not willing to grant refuge to war crimes tribunal informants if such persons do not fit the profile of a "refugee" or "asylum seeker." If the individual is a perpetrator of crimes who is willing to inform on his co-perpetrators, countries are even more reluctant to provide refuge to such persons. The laws of individual countries do not allow entrance and re-settlement of persons into their countries unless they meet the criteria of the country's laws. To date, most countries do not have legislation that would permit for relocation, resettlement and protection of the very specialized but potentially very important informant witnesses for international war crimes persecutions.
- 2) The establishment of new identities for such "witnesses" must be addressed. High-ranking officials who inform for a tribunal are not likely to assimilate in countries where they are complete strangers who must conceal their past, and lack the necessary language proficiency, relevant job skills, housing, and means through which to make a living.
- 3) The agreement of third countries to assist with such witness relocation must be negotiated with various states *before* a tribunal commences operating. One cannot spend months negotiating on such matters when an individual has a justifiable and credible fear of discovery and subsequent harm.

C. Improve Due Process Guarantees for the Defense

Defendants are not always afforded a right to a speedy trial by the present Tribunals. This is due in large part to the fact that the defendants usually have not retained lawyers and developed defenses prior to arriving at the tribunals. The development of a defense necessarily takes weeks and often months of preparation. While this delay is understandable on the part of the defense, all indictments that are issued by the prosecutor's office must be "trial ready" when they are approved and signed by the prosecutor. Although the defense must be given time and resources to develop its case, there is little excuse for prosecutorial ill-preparedness to commence trial once a suspect is in custody.

Another issue that has caused delay, at least at the ICTY, concerns the lack of courtroom space. As more persons are apprehended, there are not enough facilities available to allow for concurrent trials of various defendants to take place. As a result, trials are held on a rotating basis: defendant X in case A is on trial during the first two weeks of the month, and then defendant Y in case B is on trial for the next two weeks. This rotating schedule aims to address the lack of courtroom facilities, but future tribunals must ensure that it has appropriate courtroom, judicial, interpretation, and other resources available to ensure that a trial commences and concludes with brevity.

Moreover, the quality or motives of some defense counsel does not, at times, serve the best interests of their client. Although defendants must obviously have the right to choose their own counsel, tribunals should be careful to ensure that such lawyers are representing the interests of their clients rather than the governments by whom they were employed or to whom they are otherwise beholden. A defendant may be used as a scapegoat by an abusive government, and that defendant's lawyer may be under instructions to deflect culpability from others onto the defendant. International tribunals must explore avenues to prevent such situations, and judges should also consider grounds that would justify their intervention during trial in such cases.

D. Equity of Punishment

When the ICTR was created, the Rwandan government voiced its disapproval that high-level officials who might be convicted for their role in the country's genocide would serve their sentences outside Rwanda, probably in a comfortable jail in a third country that opposes the death penalty but which Rwanda retains. Others pointed out that while the architects of the genocide would be in relative "comfort" in Western prisons. Low-level perpetrators and possibly some wrongly accused of such crimes would be tried by the Rwandan government, incarcerated in over-crowded prisons under inhumane conditions, or put to death. Moreover, those persons convicted by the ICTY are placed in prisons in Western Europe and are subject to the respective European countries

parole and criminal justice laws that are infinitely more lenient than those in other parts of the world where persons convicted of less serious offenses are forced to serve longer and more difficult sentences.

I am opposed to use of the death penalty under any conditions, even for genocide, and I am not by any means implying that those convicted of such crimes should be incarcerated inhumanely. However, the inequity of punishment for those who are convicted by international tribunals and those convicted by domestic courts where the crimes took place can often be inordinately disparate. Thus, international tribunals should consider efforts to address this inequity.

E. Protection of Sensitive Information and Confidentiality

Various countries cooperate with international tribunals by sharing sensitive information, re-locating witnesses and other such matters. These countries have a legitimate right to insist that information they provide to the tribunals be handled appropriately and that confidentiality be strictly respected. The international tribunals cannot dismiss the concerns of cooperative governments in this respect as “interference in the court’s independence.” This is a legitimate and valid concern that must be addressed by tribunals by ensuring that security and confidentiality of such information are competently and strictly enforced and protected.

V. CONCLUSION

The aforementioned observations and recommendations were meant to provide an admittedly cursory, but hopefully constructively critical, observation of an *ad hoc* tribunal’s workings to date. It is hoped that future tribunals and especially the ICC will look to their predecessors and improve on their workings and accomplishments in their future endeavors.