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Judging War Crimes

Patricia M. Wald*

I. SOME BACKGROUND

In November 1999, after twenty years as a judge on the United States Court of Appeals for the District of Columbia Circuit, I began serving as a judge on the International Criminal Tribunal for the Former Yugoslavia ("ICTY"). The ICTY was established under a United Nations Security Council Resolution in 1993; its jurisdiction is limited to grave breaches of the Geneva Conventions of 1949, violations of the laws or customs of war, crimes against humanity, and genocide. It also has temporal and geographic limitations; these crimes must have been committed in the territory of the former Yugoslavia on or after January 1, 1991. Practically, that jurisdiction covers any of the four categories of international crimes committed between 1991-95 among the various Bosnian, Croatian, Serbian, or Yugoslav armies or paramilitary units, as well as the more recent violence in Kosovo. The ICTY has fourteen judges elected for four-year terms by a majority of the U.N. General Assembly from a list of candidates generated in the Security Council; no more than one judge can come from a single country. The current judges come from the United States, France, Italy, Great Britain, Australia, Jamaica, China, Morocco, Egypt, Guyana, Portugal, Zambia, Malaysia, and Colombia. The Statute of the ICTY provides for the imposition of prison sentences on convicted war criminals but no death penalty.

The formal working languages of the ICTY are French and English, although typically trials also involve a Serbo-Croat dialect since that is the native language of most witnesses and defendants and many defense lawyers. The three courtrooms are high-tech, allowing for simultaneous video and audio translation among the different languages. The court is organized into three Trial Chambers of three judges each and an Appellate Chamber of five judges. The Appellate Chamber also hears appeals from a separate similar Tribunal, the International Criminal Tribunal for Rwanda ("ICTR"), which tries crimes committed in Rwanda emanating from its genocidal episode in 1994. The same Prosecutor investigates and prosecutes crimes before both the Yugoslav and Rwandan tribunals.

The ICTY is housed in a grim, high security, converted insurance building in the commercial section of The Hague. The building has no adornments; judges have their own offices, sparsely furnished, a secretary down the hall and one legal assistant (federal judges enjoy, by contrast, considerably more spacious quarters including a

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bathroom, at least one secretary within calling distance and two to four law clerks). There is a senior legal assistant assigned to each of the four ICTY Chambers.

Since the ICTY has no police force of its own, it must depend on other countries or international peace-keeping forces to deliver the suspects it indicts. As a result, in the ICTY's first three years, 1993-96, no trials were held since it had no suspects in custody (the Tribunal does not conduct trials in absentia). It did, however, indict over ninety defendants for war crimes. Despite a disappointing lack of cooperation in apprehending indictees from the governments of Yugoslavia, Croatia, and the Republika Srpska, the number of suspects in physical detention at The Hague has escalated in the last several years. Some indicted persons have surrendered voluntarily; some have been captured and handed over by supporters of the ICTY such as Austria and Germany; and some have been apprehended by U.N. peacekeeping forces. A few have even been extradited from Croatia and Bosnia. As a result, as of February, 2000, thirty-four accused were in the ICTY's detention unit on the outskirts of The Hague, and thirty had been publicly indicted but were not yet in physical custody. Thirteen accused were at the appeal stage, one had finished trial and was awaiting judgment and sentencing. Two were on trial, while twenty were in pre-trial proceedings. The ICTY is now a very busy court; indeed, its chief operational problem is bringing detained defendants to trial within a reasonable time. The ICTY employs 832 persons from sixty-eight countries, the bulk in the Office of the Prosecutor and the Registry (which arranges for witnesses, defense counsel, and supervises detention); its annual budget has grown from \$276,000 in 1993 to \$94 million in 1999.¹

The ICTY is not uncontroversial. Some commentators contend that unless it is able to try the "big fish," political leaders like Slobodan Milosevic and Radovan Karadzic or military commanders like Ratko Mladic (all of whom have been indicted but not taken into custody) it cannot be judged a success.² Serb and Croat critics question its impartiality because its major support comes from NATO countries and most of the defendants are Serbs or Croats. Still others point to the small numbers of accused actually tried and to the long periods of pre-trial detention that are becoming increasingly frequent as more suspects come physically under ICTY control. Some commentators and policymakers believe that reconciliation, not vindication, is the preferable route to pursue in the aftermath of civil wars. It is safe to say that any final judgment on the ICTY's legacy is still on hold.

II. SOME FIRST IMPRESSIONS ABOUT JUDGING AT THE ICTY

At this writing, I have been a member of the ICTY less than six months and, first impressions may be undependable. But there are several marked contrasts with my twenty years on the federal bench that merit comment.

1. ICTY website: <<http://www.un.org/icty/glance/fact.htm>> (visited Mar 4, 2000).

2. However, several of the military leaders allegedly in the next tier of command, such as Serb General Radislav Krste; General Stanislav Galic, and General Momir Talic, are in custody, and former Croatian General Timohir Blaskic was sentenced to forty-five years on March 3, 2000.

A. Different Missions

The missions of the two courts are different in important ways. In simplified terms, the job of a federal court of appeals is to assure that the district trial court or the federal agency has not made some egregious error in finding the relevant facts, and then to apply the proper legal standard to those facts to arrive at as close an approximation to individual justice as our system allows. Yes, we often have to interpret ambiguous statutes, precedents, and even the Constitution, and to fill in interstices that the law has purposely or inadvertently left open. In most cases, however, we have guidelines aplenty in statutory text and legislative history, prior cases in our own and other courts, and commentators galore to fill in important voids. Our main aim is to apply law to each new case that is consistent and coherent with a mature jurisprudence, but still allows for its continuing adaptation to novel situations. At least that is the way I tried to write my 830 opinions for the D.C. Circuit; on the few occasions where I went astray—by the sights of my colleagues or the Supreme Court—I was set straight.

At the ICTY, there are two major differences in that scenario. As the first court to systematically apply international criminal law to individual defendants since the Nuremberg and Tokyo tribunals after World War II, the Tribunal has three tasks: the first, not dissimilar to that of national courts, is to find what really happened (who did what, when, where, and why), and then to apply norms of international law in deciding the culpability of and punishment for the implicated individuals before the court (more on this subsequently).

Its second task is to flesh out and develop, and sometimes to weave from many disparate strands the international norms themselves. Except for Nuremberg, Tokyo, and isolated instances of war crimes prosecuted in national courts, there is a dearth of precedent actually applying the mandates and bans of the myriad of treaties, conventions, practices, treatises, and learned commentaries that make up what we call international law. The unexplored territory is vast. In this regard, it is interesting that the ICTY and ICTR have themselves spawned over 300 articles in the international journals, more than any other topic in international law in the last decade. This tedious, but essential task, of creating almost from scratch an entire body of relevant precedent about the way humanitarian norms in times of war—some centuries old—are to be applied when an individual defendant's freedom is at stake is something most domestic courts need not face. This body of law further must comply with the fundamental principle *nullum crimen sine lege* (that is, that no one can be convicted of a crime that was not defined as such at the time he or she acted).³ In other words, the Tribunal is charged with applying existing law, not making up new law. But the details of this "already existing" law are not laid out neatly in cases and legislative materials directly on point, but must be extracted from an amorphous body of legal

3. Report of Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), UN Doc § 25704 para 34 (May 3, 1993).

materials of varying relevance and specificity. Thus, the Tribunal has had to decide, often for the first time in any court, questions like: What proof suffices for the special intent that the crime of genocide, much deplored but so little prosecuted, requires? When, if ever, can the duress of an immediate threat of losing one's own life justify following an order to execute an innocent civilian? When does a practice or a goal of some but not all civilized nations become a norm of international law so that it can serve as the basis for a prosecution?

The third function of the ICTY is a unique one, also not duplicated in ordinary criminal courts. That is to memorialize for history the factual story of what happened. The Tribunals' prosecutions are typically not of the "what did person X do to person Y" variety. Usually, they involve major events in the Bosnia (or Kosovo) conflicts—the running of the detention camps where atrocities against women and civilians took place over months, even years; the forcible removal of thousands of residents from one location to another; the use of non-combatants as human shields in battle; mass executions; and, the plundering of whole villages. Often many defendants involved in the same sequence of events are tried jointly, and hundreds of witnesses may have to be called to establish that these horrors actually occurred. Already articles have begun appearing in the international media challenging the numbers and even the fact of mass graves in Bosnia and Kosovo. The results of widespread scientific explorations and the inferences to be drawn from intensely detailed findings about bone fragments, primary and secondary grave sites and soil differences, the significance of the frozen time on watches worn by the corpses and other issues are disputed in many trials. Many historians as well as the relatives of victims maintain that only the adjudicated findings of an impartial international body of jurists following accepted rules of legal procedure will quell the doubts of future generations that the terrible things did in fact happen. To chronicle accurately for history some of the world's darkest deeds is the special responsibility of the Tribunal. Many would say it explains and even justifies the extraordinary length of the Tribunal's judgments and what sometimes appears to be the Tribunal's near-obsession with minute factual detail.

B. Different Rules

A federal judge's awesome powers are usually defended on the ground that she must abide by the rules laid down by the Constitution, statutes, and her own court. Thus the judge conducts a trial according to the Federal Rules of Criminal Procedure, adopted by the Supreme Court with the tacit approval of Congress, as well as interstitial local rules of her own circuit. Though labeled procedure, every knowledgeable judge and lawyer knows the Rules are often outcome determinative and control what happens in the courtroom just as much as does the substantive criminal law. But there is no one tidy set of volumes containing clear text and explanation of what international law considers a criminal offense and how it must be judged or defended. That must be discerned from treaties and conventions, cases decided in different countries under different judicial systems, learned treatises and a potpourri of other sources.

The ICTY has had to establish its own Rules of Procedure; its judges have done so in plenary session over the past nine years. There are now over 100 such Rules—many amended several times as a result of experience—covering relationships with national courts and states having custody over suspects, the investigation and detention of suspects, the arraignment of indictees, assignment of counsel and other rights of defendants, pre-trial discovery, provisional release pending trial, execution of arrest warrants, protection of victims and witnesses, depositions, preliminary motions, rules of evidence, and appellate proceedings.

The judges of the Tribunal have the final word on its Rules, and because of the different cultures from which the fourteen judges come, the Rules reflect a combination of common law and civil law procedure. For example, trial is before a bench of three judges who may find by a majority that the defendant is guilty beyond a reasonable doubt.⁴ An acquittal can be appealed by the prosecution.⁵ Pre-trial discovery of the prosecution's evidence by the defendant is far more liberal than our American rules permit.⁶ The presumption is in favor of detention not pre-trial release.⁷ The Tribunal has a requirement that evidence be "relevant" and "probative" but nothing like our complex hearsay rules.⁸ Trials are conducted basically in an adversary mode with cross-examination of witness by counsel but judges may not only question witnesses on their own but call for additional witnesses or evidence *sua sponte*.⁹ There is no jury or grand jury but an indictment must be confirmed by a judge to whom supporting material must be shown, and that material must soon thereafter be turned over to the defendant.¹⁰ The accused may, but need not, take the stand, and, even if he chooses not to testify, he is allowed to make an unsworn statement at the start of the proceedings.¹¹ The Tribunal, as yet, recognizes no binding precedent in its own or other courts' decisions.

Apart from the formal rules, there are other *sui generis* aspects of an ICTY trial, compared to the American model. The witnesses in war crime trials generally come from one of the formerly warring countries or regions, and their susceptibility to intimidation and threats in their home territory is far more common than in domestic trials. Often they must be provided safe passage through hostile countries to get to The Hague in order to testify; they frequently request and often must be given elaborate guarantees of protection from public disclosure of their identities. Their travel and stay in The Hague must be arranged and paid for by the U.N. Defendants, defense counsel, witnesses and even the judges may speak different languages, yet under the Rules the defendant must be apprised of charges and the evidence against

4. ICTY Rule 98ter(c).

5. See, for example, *Prosecutor v Tadic*, Case No IT-94-I-A (July 15, 1999).

6. Compare ICTY Rule 66 with FRCP 16.

7. ICTY Rule 65.

8. ICTY Rule 89.

9. ICTY Rule 98.

10. ICTY Rule 47; Rule 66(A)(i).

11. UN Doc § RES/827 (1993) (the ICTY Statute), Art 21.

him in his own language.¹² The defendant may retain his own counsel, but in most cases counsel is assigned and paid for by the Registrar of the Tribunal. Even the inquiry into whether the defendant has insufficient assets of his own so as to qualify for assigned counsel is complicated by distance, language differences, and often the refusal of the local authorities to cooperate in such an inquiry. Some of these defense counsel are not accustomed to cross-examination and must be specially trained. When defense counsel also come from a hostile country, there are special dangers of witness intimidation. Joint trials of defendants involved in the same episode—though procedurally desirable—must sometimes be foregone because only one defendant is in custody and a non-cooperative country will not apprehend or transfer the other to the Tribunal. Most of the trials conducted so far have taken a year or more. While clearly that record must be substantially improved upon in order for the Tribunal to do its job of trying war crime suspects without infringing their rights to fair trials within a reasonable time, the obstacles recounted make that undertaking a formidable one. Of late, the ICTY is trying to pursue more effective pre-trial conferencing and is looking into ad hoc judges, more liberal provisional release, and more flexible use of its trial judges.

C. *Different Dynamics*

Any judge serving on a multi-judge court soon learns what a major role the unwritten dynamics of the court play in its daily operations and overall efficiency. The way in which cases are assigned, the relationship among the judges, their commonality or diversity of background and outlook, the privileges of seniority, the protocol for drafting and reviewing opinions, even the personal agendas and ambitions of the judges can affect a court's workings. I perceive strong differences in court dynamics between my old court and my new court. I will discuss a few.

1. All fourteen ICTY judges come from different judicial systems; although English and French are the working languages of the Tribunal, many judges speak only one of those languages easily. In the courtrooms, translations are instantaneous and pose no problem to a minority-language judge, but in more informal settings, where the majority language usually prevails, the minority-language judge tends to be at somewhat of a disadvantage in engaging in give and take among the panel judges. Each judge may draft her judgments, orders, and memos in the language of choice, but translations into the other language may not be forthcoming for several days, inflicting an inevitable delay in response time. And there are frequent instances in which differences arise as to whether the essence of the original version has been preserved in the translation. Plainly, fluency in both working languages would make for a more efficient operation all around.

2. The Tribunal is organized into three Trial Chambers of three judges each, with one judge elected as presiding head by chamber-mates. An appellate Chamber of

¹². ICTY Stat Art 21.

five judges is headed by the President of the Tribunal, elected by the entire body. The three judges in each Chamber must sit on every trial together (no changing of panel mates monthly as in the D.C. Circuit), so that in the past, each chamber conducted only one trial at a time (some Chambers are now conducting two trials simultaneously). At present, judges are not freely transferred from one chamber to another. Because the ICTY trials are typically so long, however, the three judges are tied up for months before they can begin another trial; and of course opinions (known in the ICTY as judgments) cannot be written until the trial is over. Thus I found as a new judge, my time was initially somewhat underutilized while chamber colleagues finished up ongoing trials and wrote lengthy judgments. This kind of hiatus rarely happens in the federal courts; trial judges run their own individual calendars and can adjust their schedules to stay busy at all times; at the appeals level, a new judge can usually be slotted into another panel or new panels can be created at will to hear pending cases. On my appeals court, we heard up to four appeals a day, so there were always opinions waiting to be written, and motions panel judgments to fill in any spare time. It may be that rigid adherence to the Chambers structure will have to be revisited as the number of defendants awaiting trial escalates.

3. Although I have only had the experience of these six months, my impression is that the presiding judge retains more control over the proceedings than in my former court where his main function was to call time and occasionally decide the order in which competing colleagues questioned counsel. The presiding judge in ICTY trials makes rulings from the bench—usually in consultation with co-judges; all the judges may ask questions during trial but usually according to a protocol set by the presiding judge. It is not quite the spontaneous free-for-all arguments that characterize the D.C. Circuit bench. Originally, the ICTY Rules provided that judges would be rotated on a regular basis between Trial and Appellate Chambers, but in practice this produced too many disqualifications on the appellate level of judges who had participated in the trial of the same case. Now the regular rotation has been dropped, but disqualifications still require substitution of judges on particular appeals; I am involved in one such appeal now. In either case, there is the slightly awkward situation of a relatively small number of judges sitting both as trial and appellate jurists and ruling on each other's cases. It should also be noted that experience in running a criminal trial is not an explicit requirement for the job; I concededly had none. Still it bears thinking whether the running of vastly complex trials of multiple defendants lasting a year or more with hundreds of witnesses should not be reserved for jurists with trial experience. Conceptualizing and analyzing intricate points of international law is a vital part of the job, but as the dockets grow full, the ability to move the trial along to judgment becomes just as important a qualification, and that, I submit, does benefit from experience.

4. In federal appellate courts, the drafting of opinions is usually assigned by the presiding judge to a single judge; that judge's draft is then reviewed by panel members and later circulated to the court as a whole. In the D.C. Circuit, we did, however, have one class of cases—very complex regulatory cases or criminal conspiracies—where the

panel would divide up the writing chore. In the ICTY cases, the judgments are typically long, some run over 300 pages. They are written either by several judges in charge of different parts or (shades of the law clerk debate in the United States) by a team of the Chamber's junior and senior legal assistants and then amended, edited, and revised by the judges themselves. Judgment writing at the ICTY may take months. When the judgment is issued, it is signed by all three judges with no identification of the authors of the particular sections, though the cognescenti in the courthouse generally can identify who wrote what. There may, of course, be concurring and dissenting opinions which are directly attributable to their authors. This process does, I believe, make for a less personalized form of adjudication, and some might argue that the lack of personal credit (or blame) makes the author less motivated to produce her personal best. Add the fact that the original judgment will be in one language, with the translation handled by Tribunal staff. It is not surprising then that most judgments appear to place a premium on fact-finding, long justifications of the choices in law to be applied and meticulous citation of the varied sources where the "law" may be found. There is little rhetorical phrase-making, and most opinions follow a stylized format that defies individual differences. It would be relatively difficult for any judge to build his reputation as a brilliant writer or even analyst on the basis of the opinions in which he participates at the ICTY, I have a feeling that a single identified author of ICTY opinions might make for more conciseness, even in some cases more coherence, but in the longest cases it would take its toll in terms of an impossible workload on the judges and even possibly detract from the commendable lack of egocentricity I find in the judges.

5. This leads me to my last—elusive but I think genuine—difference in the dynamics of the two courts on which I have sat. Judges on the ICTY—disparate as their backgrounds and cultures may be—are non-ideological about their commitment to the goals of the court, fair treatment of defendants, truth in fact finding for history's sake, and development of international criminal law as a practical and feasible tool for deterrence of wartime atrocities in the future. They may differ on the significance of a particular rule implementing those goals, but they are united on fundamental notions of what the role of the court is, and on whether the acts alleged deserve punishment. Because the judges will within relatively short periods return to their native countries, they do not appear to invest primary career ambitions in their Tribunal tenure; many like myself have already completed their main judicial careers; others are performing a public service but do not see their current stint as the launching pad for the next judicial promotion. As a result, there is a stronger sense of common cause than on some American courts, less jousting for the next judicial rung on the ladder, less emphasis on establishing ones self as *primus among peers*; in short, there is more opportunity for genuine collegiality. Whether in the long run that produces a more effective and productive court, I do not know but expect to find out in the next several years. For my part, I find it both exciting and humbling, at this stage in my career, to experience this new and important, even exotic, opportunity to serve. ♣