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Abstract

Speech given at Session 4: The Legal Profession and Human Rights. Louise Arbour discusses the differences between the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda, the marriage between international law which principally governs state relationships and criminal law which governs personal conduct, and how this contributes to the development of international humanitarian law.

PROGRESS AND CHALLENGES IN INTERNATIONAL CRIMINAL JUSTICE

*Louise Arbour**

In the spring of 1993, in the context of the former Yugoslavia, and then, sadly, once again in the fall of 1994, in the context of Rwanda, violations of human rights were recognized as constituting a threat to international peace, and the conduct was defined as criminal. This was enough of an achievement, I suppose, for those involved in human rights issues to think that the work of a lifetime had been accomplished. I intend to call upon you not to rest on that accomplishment, and instead invite you to join me in making sure that this extremely bold experiment, with its most noble recourse to the rule of law, reaches its full potential.

Ever since I have been involved in the work of the Tribunals — that is, since October 1, 1996 — I have been confronted on a daily basis with the extraordinary difficulty of trying to marry together principles of international law (a profoundly consensual body of law that is essentially concerned with regulating conduct between *States*) with the criminal law, which is primarily concerned with *personal* liability. Viewed another way, the criminal law governs the authoritative actions of States against individuals, and it is therefore a body of law that is profoundly coercive. As I hope to be able to illustrate, this marriage is not always a happy one, and legal practitioners, I think, can therefore make a very important contribution to the development of international humanitarian law.

I. *THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA*

I wish to present a brief overview of the current state of affairs in the two Tribunals. You will recall that the Security Council created the International Criminal Tribunal for the former Yugoslavia ("ICTY") by a Security Council Resolution in the spring of 1993.[1] The ICTY is based in The Hague. It has ap-

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1. *See* United Nations Security Council Resolution on Establishing an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of Interna-

proximately 350 employees coming from, I believe, about fifty-seven different countries.

The Office of the Prosecutor has a total staff of approximately 115, comprised of investigators, lawyers, data processors, and other support staff. The Office of the Prosecutor is based in The Hague, but we have small field offices, mostly for logistical and liaison purposes, in Sarajevo, in Zagreb, and in Belgrade.

In all, seventy-four people have been indicted in the ICTY. Eight are in custody. Two have been convicted, one pursuant to a guilty plea, which is now the subject of an appeal, and the other after a fully contested trial which lasted six months. That trial resulted in the conviction of the accused on not all but, in my view, the most important counts that were being prosecuted. That conviction is also under appeal.

Another substantial trial is currently in progress, a joint trial involving the prosecution of four accused. This will be followed by two more trials, at which point the current list of detainees will have been exhausted. Therefore, I look forward to all initiatives that will be taken between now and then to ensure the continuity of the work of the ICTY.

The judges of the Tribunal are elected by the General Assembly, and they have a four-year term of office. There has recently been a new election for the judges of the Tribunal for the former Yugoslavia, whose term of office expires in November of this year. Eleven judges, including some of the present judges, have been chosen by the General Assembly for the next four years.

II. *THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA*

In November 1994, after a genocide that saw (certainly by conservative estimates it would seem) some half a million people killed in approximately one hundred days, the International Criminal Tribunal for Rwanda[2] ("ICTR") was created under a

tional Law Committed in the Territory of the former Yugoslavia, S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg. at 1, U.N. Doc. S/RES/827 (1993) (establishing international Tribunal to prosecute persons responsible for serious violations of international humanitarian law).

2. Establishment of an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandese Citizens Responsible for such Violations Committed

statute virtually identical to that of the ICTY. The seat of the ICTR is in Arusha, Tanzania. It is, therefore, a completely distinct institution. It has its own statute, its own body of rules, and its independent seat.

However, the two Tribunals share two institutions. They have a common Prosecutor and a common Appeal Chamber. I serve as Prosecutor in both Tribunals, and my Rwanda staff members are primarily based in my office in Kigali, Rwanda. The Appeal Chamber is comprised of the five judges of the ICTY and is based in The Hague.

The Office of the Prosecutor for the ICTR in Kigali has a staff of about one hundred. It has indicted twenty-one persons so far, thirteen of whom are in custody in Arusha, and several trials are presently in progress.

Each Tribunal is principally funded through the General Assembly of the United Nations. The budget for each Tribunal is currently a little under US$50 million. The budgets are supplemented by voluntary contributions that States make to a trust fund.

The legal framework governing Tribunals is, by any measure, somewhat skeletal. Each statute, created by the Security Council Resolution, contains thirty-four Articles, most of which concern themselves with the constitutional framework of the Tribunal, and many tie terms and conditions of those serving in it, particularly the judges.

Apart from these thirty-four Articles, the Tribunals have a set of Rules of Procedure and Evidence enacted by the judges sitting in plenary session. All in all, this entire body of provisions contain some 125 Rules. The Tribunals, obviously being new legal institutions, have virtually no jurisprudence to work from and a very small body of doctrine, essentially the legal writings that were generated following the Nuremberg and Tokyo trials.

The judges are elected by the General Assembly. There are six trial judges for each Tribunal. The judges do not sit with juries. A Trial Chambers comprises three judges sitting together. The maximum capacity of the Tribunal is to hold two trials (one before each Chamber) at any one time. At this point in their development, each Tribunal only has one courtroom.

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in the Territory of Neighboring States, S.C. Res. 955, U.N. SCOR, 49th Sess., 3453rd mtg. at 1, U.N. Doc. S/RES/955 (1994).

An immediate distinction can be seen between the work of these Tribunals and a domestic criminal justice system because a domestic prosecutor is never really seriously called upon to be selective in the prosecution of serious crimes. Crimes are committed, they are reported, investigated, charges are brought, and the prosecutors prosecute all major crimes where the evidence permits.

By contrast, in the work of the international Tribunals, the Prosecutor has to be highly selective before committing resources to investigate or prosecute, and must work in a manner that can complement domestic legal systems. That is what we have had to do.

The Tribunals are extraordinary institutions in many ways. I will highlight some of the fundamental issues that illustrate what future there is for the enforcement of human rights as criminal conduct. Criminal conduct becomes a threat to international peace when domestic institutions are either unwilling or unable to deliver justice in adequate response to the harm inflicted. Both of these *ad hoc* Tribunals are premised on the principle of complementarity (although with primacy) over domestic jurisdictions.

In both the former Yugoslavia and in Rwanda, for very different reasons, the national criminal justice system was too incapacitated to satisfy the forms of justice in the context of the enormity of the injury inflicted on the social fabric of these countries by the crimes committed. In Rwanda, the genocide left the country with virtually no functioning justice system. Even as the system is now recuperating and is beginning to function, that system is unlikely to satisfy all extradition norms that would allow it to seize suspects of important cases on its own where the suspects are outside the country. The Rwandese Government itself took the initiative in proposing the establishment of an international Tribunal as early as September 1994, before any serious consideration was given to the matter by other States.

During the Security Council deliberations, the Rwandese representative invoked four basic arguments in support of establishing an *ad hoc* international criminal jurisdiction, and all these basic arguments illustrate the suitability of using Chapter VII of

the United Nations Charter,[3] that is, a fundamentally coercive measure to bring criminal law into play in the field of international affairs.

First, the Rwandese Government favored an international Tribunal based on the view that the genocide committed in Rwanda is a crime against humankind and should be suppressed by the international community as a whole.

The second argument given by the Rwandese Government for supporting an international Tribunal was its desire to avoid any suspicion of its wanting to organize speedy, vengeful justice. This was very much in line with criticisms historically mounted to what could be perceived as repressive measures taken in a post-conflict situation by whoever could emerge with the capacity to use justice for political ends.

Third, the Rwandese Government believed that it is impossible to build a state of law and arrive at true national reconciliation without eradicating the culture of impunity which has characterized Rwandese society. I think it is fair to say that the culture of impunity referred to in that argument is not unique to Rwandese society. There had been a widespread assumption that national sovereignty would always trump international efforts to intervene, even in the face of the most horrendous violation of human rights.

The fourth argument made by the Rwandese Government was that it wanted an international Tribunal in order to make it easier to get at those criminals who have found refuge in foreign countries. This was a highly important pragmatic consideration because, as is often the case, in that particular instance, many of the perpetrators, especially those in a position of leadership, had fled Rwanda. Hence, the appropriateness of coercive international action.

Now, for the first time since Nuremberg and Tokyo, a serious attempt is being made at punishing, and therefore possibly preventing, the perpetration of the most horrendously violent, large scale criminal attacks on human life: genocide; widespread or systematic persecutions on a racial, religious, or political ground; murder; rape; torture; deportation; or enslavement of civilian populations.

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3. *See* U.N. CHARTER art. 39, ¶1 (outlining power of Security Council to maintain international peace).

How will this be done? I return to what I described as an unhappy marriage between international law and criminal law. The union will be achieved, I believe, to some extent by consensus, but unavoidably, in my opinion, it will have to be done in large part by force. The Security Council made a decision that there could be no lasting peace in the former Yugoslavia or in Rwanda without national reconciliation, and further, that there could be no such reconciliation without justice.

Personal criminal responsibility for war crimes and for genocide was thus used for the first time since Nuremberg and Tokyo. But there should be no misapprehension that this unfolding of a criminal process can be done on a consensual, voluntary basis. The Security Council passed a resolution binding on all Member States which provides that the Prosecutor shall act independently as a separate organ of the Tribunal.[4] The Prosecutor is given the dual responsibility for investigation and prosecution. The Prosecutor may initiate investigations *ex officio* or from information received, but the statute makes it absolutely clear that the Prosecutor shall neither seek nor receive instructions from any government, nor from any other source. Under the statute, the Prosecutor has the power to question suspects, collect evidence, and conduct on-site investigations. In doing so, she may, where appropriate, seek the assistance of the State authorities concerned. The statute provides that cooperation with the Tribunal is compulsory. It specifically says, "States shall cooperate with the International Tribunal . . . States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber . . . ."[5] These include orders for the arrest, detention, surrender, and transfer of persons to the seat of the Tribunal. It is, therefore, clearly compulsory for all States to comply with these obligations. Failure to do so is a violation of international law and may be reported as such to the Security Council, which may decide to take appropriate action.

Many countries have enacted specific legislation permitting them to discharge these obligations, including the obligation to supply evidence to the Tribunal and to arrest persons indicted

4. United Nations Secretary General's Report on Aspects of Establishing an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia, U.N. Doc. S/25704 (1993).

5. *Id.*

should any be found on their territory. Other countries have formally notified the Tribunal of their ability to comply under their existing national law without the need to enact further legislation.

Many countries have not taken those steps. They have neither enacted legislation permitting them to comply, nor have they notified the Tribunal that they can do so without legislative intervention. My own country, Canada, is one of those yet to notify the Tribunal of its capacity to comply or to enact legislation. I would certainly urge all lawyers to scrutinize the activities of their own government to ensure that the widespread support that was given to the creation of these institutions actually translates into the kind of action that is necessary to make these two Tribunals functional.

Accused have been arrested all over the world in relation to both Tribunals. There have been arrests in Germany, Switzerland, Cameroon, Kenya, Zambia, Belgium, and the United States. If an accused was located in any country, I would make a formal demand for his or her arrest and transfer to The Hague, and I believe that law-abiding people everywhere would expect compliance.

Some States, particularly the Republics of Croatia and Serbia and the Serb Republic of Bosnia and Herzegovina, are not complying or are not fully complying with their international obligation to cooperate with the Tribunal — specifically, their obligation to arrest and surrender indicted persons to The Hague.

On that issue, I have been fully engaged in discussions with many foreign ministries, ministers of justice, representatives of the European Union, and NGOs (non-governmental organizations), urging bilateral and multilateral diplomatic intervention, and exploring all other options to remedy the situation. I am confident that I can also call upon the support of all lawyers interested in, and committed to, the advancement of human rights issues. Such legal support and intervention is most important if the Tribunals are to fulfill their mandates. I particularly would like to call on lawyers to use their skills to assist in developing the means to guarantee the lasting success of the Tribunals.

Let me briefly address some of those legal issues. There is a great gulf between the establishment of these two new criminal jurisdictions on paper and the capacity of the international com-

munity to render these Tribunals operational and effective. The practical problems involved in setting up these kinds of institutions should not be overlooked, nor should the difficulties be underestimated: the conclusion of host country agreements; the location or construction of suitable physical premises such as courtrooms and detention facilities; the formulation of rules of procedure and evidence which reflect the diverse legal systems; and particularly the two competing leading legal systems of the world, the civil law system (or continental law system, as it is sometimes referred to) and the common law-based legal tradition. These two systems are often clashing for supremacy over the development of this body of international criminal law. The list continues: the recruitment of qualified investigators and prosecutors who will be required to work, often for the first time in their lives, through the assistance of interpreters; working in a cultural environment that is unfamiliar to them; gathering witness testimony and evidence in several States where refugee populations are located; functioning in a country that still suffers from the aftermath of war, or where the basic infrastructure, such as roads and telephones, has been impaired or destroyed; not having access to documents which are vital to the preparation of their cases against suspects; having, on the other hand, to translate mountains of information which may prove useless; and having to rely entirely on State cooperation and on international political pressure to secure the apprehension of suspects.

These are all by-products of operating without any preexisting law enforcement infrastructure, and on this point it is instructive to recall some of the important differences between the International Military Tribunal of Nuremberg and these two *ad hoc* Tribunals. As the name indicates, the Nuremberg Tribunal was a military tribunal. It was multinational rather than truly international. It was composed essentially of the four victorious Allies as part of a political settlement. The war was over when the International Military Tribunal was created. War was still raging in the former Yugoslavia when the International Criminal Tribunal was set up to examine and to start investigating violations of international humanitarian law. In Nuremberg, most of the defendants were in custody when the work of the Tribunal was launched. The International Military Tribunal had a staff of two thousand, including one hundred prosecutors. It had four chief prosecutors and four judges with four alternates.

The International Military Tribunal had only some very basic rules of procedure and evidence. In fact, it only had eleven written rules.[6] It was entitled to hold trials *in absentia*, and in fact it did; Martin Borman was tried in his absence. The Nuremberg Tribunal could and did impose the death penalty, and there was no right of appeal.

In contrast, the two *ad hoc* Tribunals reflect a huge evolution in criminal justice standards, including the heavy obligations of prosecutorial disclosure, obligations relating to exculpatory evidence (which are particularly onerous because of the difficulties of translation, computerization, and the sheer volume of material in possession of the Office of the Prosecutor).

Over time, the International Military Tribunals of Nuremberg and Tokyo have gained a broad measure of acceptance. That is a crucial factor, perhaps the most precious feature of domestic criminal justice we must generate and cultivate in an international context. The Tribunals must gain the trust and respect of the international community and of the legal community. We must never forget that coercive powers can only safely be based on, and exercised by, judicial organs which enjoy widespread acceptability and credibility.

In functioning democracies, courts generally enjoy a large measure of acceptability. Prosecutors and judges are generally perceived as unbiased and fair, working with knowledge and integrity. They are generally perceived as such not only by the general population but also by the immediate victims of crimes and offenders alike. Acceptance is not universal, but it is sufficiently widely shared to permit the easy functioning of the courts without recourse to massive physical coercion.

It is the general consensus underlying criminal justice that permits it to be coercive against a relatively few recalcitrants. In the international context, there is no preexisting solid basis of credibility upon which the Tribunals can draw in order to develop appropriate coercive powers.

I believe that we must guard against becoming a generation of armchair Schindlers. We must not allow ourselves to fall into the trap of reassuring ourselves with some kind of romantic notion that, of course, we would always rise to the big challenges,

6. Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279.

while in reality remaining conveniently blind to the constant but unglamourous day-to-day effort and commitment that it takes to put ourselves on the right side of history. I have no doubt that the proliferation of armed conflicts, mostly bitter internal ones emerging from ethnic and regional intolerance and from competition for scarce and unevenly located resources, will tax the world's capacity for conflict resolution in the years to come. I believe that the International Tribunals illustrate that never before have lawyers had so much to contribute with so much at stake.