The ICTY: a Conspectus

Burton Hall*

Observations shared with Foreign Service Officers
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Good morning to you all –

I thank the Permanent Secretary, Ms Sheila Carey, the Director General, Mrs Sharon Brennen Haylock, and the Director of the Ministry's Foreign Service Training Division, Ms Donna Lowe, for providing this opportunity to share these observations with some of my fellow Bahamians who have the opportunity to serve in the challenging and continually changing world of foreign relations – the reality of having to work with and relate to your counterparts who serve the particular interests of their governments from all around this planet which is our common home. I am also grateful to Mr Celsus Williams who had the responsibility for organising this morning's presentation.

I need not remind you of how small The Bahamas is – both in terms of geography and population – and, when you consider Bahamian history in the context of the post-Columbian history of the region and the wider context of British imperial ambitions, you recognise the comparative insignificance of these rocks and cays and I admit to a continued sense of awe that a boy who was born and grew up in Hercules Street in Mason's Addition in the shadow of Fort Fincastle here in New Providence has been afforded the opportunity to sit and deliberate with eminent jurists who would have been nurtured in the milieu of nations both more populous and more powerful and to contribute to the evolution of international criminal law and international human rights law which may be said to have been revivified, after a half century of dormancy, through the work of the ICTY, the accepted abbreviation for the body whose full name is "The International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991".

1. Historical Background

In order to understand the work of the ICTY, it is necessary to take a brief excursion into the history of that portion of Eastern Europe called “the Balkans”.

The roots of the Balkan crisis can be traced back to 1389 when the Serbs, who were Eastern Orthodox Christians were conquered by the expanding Ottoman Turkish empire. There is no shortage of material, much of it available online, for those of you who would wish to untangle the complex history of the region which has had, and which continues to have, implications far beyond its geographical boundaries

The former Yugoslavia was a Socialist state created after German occupation in World War II. A federation of six republics (Slovenia, Croatia, Bosnia and Herzegovina, Serbia, Montenegro, and Macedonia), it brought together Serbs, Croats, Bosnian Muslims, Albanians, Slovenes and others under the leadership of President Tito.

After Tito's death in 1980, tensions re-emerged. Calls for more autonomy within Yugoslavia by nationalist groups led in 1991 to declarations of independence in Croatia and Slovenia followed shortly thereafter by Macedonia and Bosnia and Herzegovina.

With few exceptions, the dissolution was violent. While Macedonia exited with little trouble and Slovenia escaped with just a short war, Croatia and Bosnia and Herzegovina endured major military campaigns.

Croatian Serbs rejected Croatian independence and, aided by the Yugoslav army and Serbia, seized control of large swaths of territory. The ensuing fighting caused major destruction, most notably at Vukovar and Dubrovnik. Bosnia and Herzegovina became the site of three-way fighting between Bosnian Serbs, Croats, and Muslims. The fighting claimed over 100 000 lives, displaced two million people, and featured genocide. From 1998-1999, ethnic Albanians in Kosovo fought for independence. The war displaced hundreds of thousands of people

2. Advancing from Nuremberg and Tokyo

The ICTY, the first international criminal tribunal since the Nuremberg and Tokyo Tribunals established at the end of World War II, was established by the Security Council on 25 May 1993 (SC Res 827).

The Preamble states that the establishment of an ad hoc tribunal to try those most responsible for atrocities committed in the former Yugoslavia since 1991 would:

- contribute to the restoration and maintenance of peace,
- ensure that serious violations of international humanitarian law are halted and effectively redressed, and
- bring to justice those responsible for crimes.

As the preamble suggests, there has been collective hope that the Tribunal's functioning would deter future crimes, render justice to victims and their families, and contribute to a lasting peace in the former Yugoslavia. However, these expectations might be too high and unreasonable for a judicial body.

The Tribunal had a discrete, temporary mandate. Its core function was judicial- to try those most responsible and this is a limited function that cannot be expected to achieve all the goals of transitional justice and rebuilding a society.

Even the truth-seeking mission that some commentators have ascribed to the Tribunal is an imperfect aim: judicial truth is not the whole truth because it depends, among other factors, on how a case is prosecuted and which witnesses have testified.

The Tribunal was always expected to one day close its doors, which will happen at the end of this year, leaving crimes perpetrated by lower level officials to be prosecuted on the state level in the countries of the former Yugoslavia.

Over its life, the ICTY has indicted 161 individuals: 83 have been sentenced, 19 were acquitted, 13 were transferred to national jurisdictions,

37 proceedings were terminated or indictments were withdrawn, seven remain in ongoing proceedings.

In accordance with its Statute, the ICTY had jurisdiction over the territory of the former Yugoslavia from 1991 onwards. Pursuant to Article 1, it had jurisdiction over individual persons and not organisations, political parties, army units, administrative entities or other legal subjects. The Statute also states that the official position of an accused, whether as Head of State or Government or as a responsible Government official, does not relieve him of criminal responsibility nor mitigate punishment.

Although the ICTY and national courts had concurrent jurisdiction over serious violations of international humanitarian law committed in the former Yugoslavia, the ICTY could claim primacy and take over national investigations and proceedings at any stage if this proved to be in the interest of international justice. It could also refer its cases to competent national authorities in the former Yugoslavia.

The Tribunal had authority to prosecute and try individuals on four categories of offences: grave breaches of the 1949 Geneva conventions, violations of the laws or customs of war, genocide and crimes against humanity. The ICTY had no authority to prosecute states for aggression or crimes against peace; these crimes are within the jurisdiction of The International Court of Justice.

Articles 2 to 5 of the Statute identified four different categories of crimes, as described below, for which the Tribunal had jurisdiction. Importantly, Article 7 provided that a person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in Articles 2 to 5 shall be individually responsible for the crime.

(1) Grave breaches of the Geneva Conventions of 1949

The four Geneva Conventions set forth rules for the wartime protection of civilians, who do not take part in the fighting, and sick, wounded or shipwrecked members of armed forces and prisoners of war, who can no longer fight.

Currently there are 194 States which are parties to the Geneva Conventions. These States Parties are required to enact any legislation necessary to provide effective penal sanctions for persons committing or ordering to be committed "grave breaches", of the Geneva Conventions. They are also obliged to search for persons alleged to have committed, or to have ordered to be committed, such breaches and bring them before their courts or hand them over to another state for trial. Pursuant to Article 2 of its Statute, the Tribunal had jurisdiction over these grave breaches:

> The International Tribunal shall have the power to prosecute persons committing or ordering to be committed grave breaches of the Geneva Conventions of 12 August 1949, namely the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

(a) wilful killing;

(b) torture or inhuman treatment, including biological experiments;
(c) wilfully causing great suffering or serious injury to body or health;
(d) extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
(e) compelling a prisoner of war or a civilian to serve in the forces of a hostile power;
(f) wilfully depriving a prisoner of war or a civilian of the rights of fair and regular trial;
(g) unlawful deportation or transfer or unlawful confinement of a civilian;
(h) taking civilians as hostages.

(2) Violations of the laws or customs of war

The laws or customs of war regulate the conduct of armed conflict, including towards civilians. Article 3 of the ICTY Statute sets out a non-exhaustive list of violations punishable under its jurisdiction. The list includes, for example, the employment of poisonous weapons, wanton destruction of cities not justified by military necessity, destruction of institutions dedicated to religion and plunder of public or private property.

The laws or customs of war are a body of international law introduced through various international treaties, conventions and agreements, most

notably The Hague Conventions of 1899 and 1907 and the Geneva Conventions of 1949 and Additional Protocols of 1977, as well as through the development of customary international law.

(3) Crimes against humanity

The notion of crimes against humanity has evolved over many decades and they were included in the Charters of the Nuremberg and Tokyo Tribunals which conducted trials in the aftermath of World War II. Article 5 of the Statute defines them as:

> the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population*:*
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> (a) murder;
> (b) extermination;
> (c) enslavement;
> (d) deportation;
> (e) imprisonment;
> (f) torture;
> (g) rape;
> (h) persecutions on political, racial and religious grounds;
> (i) other inhumane acts.

(4) **Genocide**

Article 4 of the Statute incorporates Articles 2 and 3 of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. Article 4 lists acts which constitute genocide, if committed “with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such". These acts include killing members of the group and causing serious bodily or mental harm to members of the group.

In addition to genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide and complicity in genocide are also punishable under Article 4.

3. The ICTY's Legacy

One can say that the ICTY's principal legacy is the fight against impunity: to hold perpetrators of the most heinous crimes accountable. When the Tribunal began its work, no one could have foreseen all the developments that would result from the Tribunal carrying out its mandate, particularly it trying the number of individuals it did.

3.1 rules of procedure and evidence

The Tribunal has contributed to International Criminal Law by developing a robust body of jurisprudence and procedural rules, which include the creation of an innovative system of procedural law which mixes elements from common and civil law systems, admittedly with uneven and imperfect results.

Security Council Resolution 827, paragraph 3, provided that the Secretary-General would provide the Tribunal with suggested rules of procedure. To assist the Secretary-General, the United States provided a lengthy and influential submission which became the basis of the ICTY's Rules of Procedure and Evidence.

As the Tribunal developed, as an obvious result of the several judges from different legal systems bringing their training and prior experience to bear on the cases in which they sat, there evolved a melding of the continental and adversarial systems.
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For example, in the approach to evidence, common law has very detailed rules regarding the admissibility of evidence. A common law trial is concerned with two things: has the crime alleged in the indictment been committed and, if so, has the prosecution proved that the person charged committed it. However, in the continental system, which sees a criminal trial as an exercise is finding out the truth of what happened, evidence is liberally admitted.

The ICTY, despite the common law foundations of its Rules of Procedure and Evidence, has not taken on detailed rules of evidence exclusion. Adopting the continental style, evidence at the ICTY is more liberally admitted.

3.2 witness protection

Another achievement of which the ICTY boasts is the development of an effective victims and witnesses program.

The Tribunal has recognized that testifying about war related events can be difficult for witnesses, so trained staff have been made available to help witnesses with their psycho-social and practical needs before, during, and after their testimony in The Hague. There is also a witness relocation programme in the instances where testifying may endanger the witness's safety back home.

While many witnesses testify in open court, parties can ask the court to apply protective measures in the form of pseudonyms, face distortion, voice distortion, or allowing testimony to be given in closed session.

What are the practical consequences of witness protection on the trial itself? Are witness protection measures too liberally applied?

Visitors sitting in the galleries to watch the trials are often surprised by how much of the trial is not public. The conflicting concerns between the right of an accused to a public trial and the protection concerns of victim-witnesses has always been a fact of life in proceedings at the ICTY. Does the story told during a trial and in a judgement, lose something when witness identities remain hidden?

All in all, however, witness protection concerns and efforts to speed up trials have shifted the nature of ICTY trials from ones centred predominately on live testimony to trials admitting a greater variety of evidence such as witness statements and other documentary evidence. This shift is also a consequence of the mixture of civil and common law traditions in the Tribunal.

The ICTY has transferred knowledge to other tribunals in victim and witness support. It has developed and pioneered a witness centred approach, in which logistics, support and protection services are all integrated in its Victims and Witnesses Section (VWS). This approach has been taken as a model by the Witness Services offices in the countries which comprise the former Yugoslavia, extending beyond war crimes trials. The head of the Witness Support Office of the Court of Bosnia Herzegovina has stated that

one of the most important legacies of the ICTY is the existence of such an office there.

3.3 legal aid

The ICTY has established a legal aid system and a list of defence attorneys qualified to practice on the international level. The ICTY has always understood that there is no justice without qualified defence counsel. The Tribunal has therefore aimed at strengthening the capacity of defence counsel by offering training and legal aid. Proceedings against the accused are serious and complex and require the appropriate means of mounting a defence. Thus, if an accused demonstrates an inability to remunerate counsel in whole or in part, he or she will be entitled to legal aid. Self-represented accused may also be entitled to funding from the Tribunal to remunerate members of their defence teams.

The Registrar issues a decision determining the extent to which the accused may pay for his defence and administers the payments accordingly. The rate at which the defence is remunerated depends on the stage of the case and its complexity. The Registrar seeks the Trial Chamber's advice when determining the level of complexity, the case stands.

3.4 prohibition of torture

The work of the ICTY has resulted in the Identification of a general prohibition of torture in international law which cannot be derogated from by a treaty, internal law, or otherwise.

In two cases, it held the definition of torture in Article 1 of the Convention Against Torture to be part of customary international law applicable in armed conflict. In another case, it further noted that definition of torture under international humanitarian law (IHL) does not comprise the same elements as the definition of torture under international human rights law. For an offence to be regarded as torture under IHL, there is no need for there to be the presence of a state official or any other authority-wielding person in the torture process. The ICTY has defined torture as the intentional infliction, by act or omission, of severe pain or suffering, whether physical or mental, in order to obtain information or a confession, or to

punish, intimidate or coerce the victim or a third person, or to discriminate on any ground, against the victim or a third person.

3.5 advancement of IHL pertaining to the legal treatment and punishment of sexual violence in wartime

The case of *Duško Tadić* (1997), the first international war crimes trial since Nuremberg and Tokyo, was the first war crimes trial involving charges of sexual violence. In the Omarska Camp male detainees were sexually assaulted and the Tribunal held that, through his presence, Tadić aided and encouraged a group of men to actively take part in the assault. The Tribunal noted that of particular concern was the cruelty and humiliation inflicted on the victim and the other detainees.

The case of *Furundžija* in 1998 was the first ICTY case to concentrate exclusively on charges of sexual violence. Anto Furundžija was commander of the Jokers, a special unit of the Croatian Defence Council in Bosnia Herzegovina and his subordinates were found to have raped women during interrogations. While the Tribunal's Statute only made reference to rapes in the context of crimes against humanity, the Tribunal established that rape may also be prosecuted as a grave breach of the Geneva Conventions and as a violation of the laws and customs of war. Judges established that rape may also amount to an act of genocide.

In *Mucić et al.* (1998), where two women were raped during interrogation, Judges ruled that the purpose of the rape was to obtain information, punish the women for their inability to provide the information, and to intimidate them and that rape may constitute torture under international law.

In *Kunarac et al.* (2001), the second ICTY Trial to deal largely with charges of sexual violence, the facts were as follows: the three accused Bosnian Serb army officers were found to have played a prominent role in organising and maintaining the system of infamous rape camps in eastern Bosnian town of Foča.

- women were taken to apartments and hotels run as brothels for Serb soldiers;
- the women were obliged to perform household chores, were forced to comply with all the demands

of their captors, were unable to move freely, and were bought and sold like commodities.
- the judges determined that this enslavement was sexual in nature, thus the definition of enslavement was expanded to include sexual servitude where, before, the notion of enslavement was thought of primarily as forced labour and servitude.

The accused were also found guilty of rape as a crime against humanity. This was the first such conviction at the ICTY mirroring the historical precedent set by its sister tribunal. The International Criminal Tribunal for Rwanda (ICTR) in the *Akayesu* case in 1998.

3.6 Specification of crucial elements of the crime of genocide

The *Krstić* case was the first accused to be convicted for genocide at the ICTY (Note: Only one other case has resulted in a genocide conviction- *Blagojević and Jokić*)

The Genocide Convention lists four groups as beneficiaries of its protections: national, ethnical, racial, and religious groups. The *Krstić* case held that the four groups constitute an exhaustive list, but the four groups do not have distinct and different meanings in the Convention. Instead, the list was designed to describe a single phenomenon of national minorities. Each of the four listed groups helps define the other, operating as four corner posts that delineate an area within which a myriad of groups covered by the Convention find protection. This approach avoided the problems encountered by the ICTR when it provided a definition of each of the four groups and then found it difficult to fit the Tutsi into one of its four definitions. The ICTR's solution in *Akayesu* was to determine that any "stable and permanent" group was covered by the Genocide Convention and the ICTR Statute. Thus, the Tutsi were found to be a protected group.

ICTY case law also established that a protected group cannot be defined "negatively", i.e. by identifying persons that do not share the group characteristics of the perpetrators (*e.g.* non-Serb).

3.7 attacks against cultural property

The ICTY was the first tribunal to prosecute crimes of attacks against cultural property. The Nuremberg and Tokyo Tribunals brought accountability for many atrocities, but attacks against cultural property were only dealt with indirectly. Article 6 of the Charter of the Nuremberg Tribunal criminalised plunder of property and wanton destruction of towns or villages as war crimes, but did not include specific provisions regarding attacks on cultural property.

In the former Yugoslavia, the most widespread crime of cultural destruction was the obliteration of houses of worship. At the ICTY attacks against cultural property have been prosecuted as war crimes as well as crimes against humanity. The ICTY jurisprudence has determined that, with respect to cultural property, attacks against such property under the rubric of war crimes must be serious in order to be criminal, which generally means that there must be actual damage or destruction. However, with respect to religious institutions, ICTY jurisprudence has determined that assessment of the severity of damage must take into account the spiritual value of the damaged or destroyed property not just the extent of the destruction. Thus, vandalizing religious frescos was found to constitute sufficient damage under the ICTY Statute.

The trend at the ICTY has been to progressively develop legal protections for cultural property. For example, when determining whether cultural property, like civilian objects, can be considered a lawful military objective in some situations, ICTY jurisprudence has determined that attacks against cultural property are only lawful when the object is being used for military purposes. ICTY case law has rejected the notion that cultural property may be attacked if it is in the vicinity of legitimate military objectives. This is more protection than is afforded civilian objects, which when “by their nature, location, purpose, or use … offers a definite military advantage” may be regarded as lawful military targets.

Under ICTY jurisprudence attacks against cultural property have qualified as persecution as a crime against humanity. While not explicitly enumerated under Article 5 of the Statute, the Tribunal has held that an attack against cultural property when perpetrated with the requisite discriminatory intent, amounts to an attack on the very identity of a people

and “manifests a nearly pure expression of the notion of crimes against humanity”.

4.The Future of International Courts and Tribunals

The ICTY, ICTR, and MICT have created and maintained best practices in international law since the early 1990s. The success of these tribunals has encouraged growth in the membership of the International Criminal Court (ICC) which, despite a history of high profile opposition, is largely seen as the way forward for international justice.

As you in this Ministry would know better than I do, although The Bahamas is among the 139 countries which have signed the Rome Statute, the foundation document of the International Criminal Court (having done so on 29 December 2000), it is among 31 of those countries which has not ratified it. You would not be surprised that I am not infrequently asked why The Bahamas has not become a State Party to the Rome Statute. The “why” is, of course, a political question which I am not competent to answer.

There has been an exponential increase in international and domestic human rights trials over the past two decades. This trend will likely continue, but the world will see a myriad of courts and tribunals dealing with these cases – from the ICC to other ad hoc or hybrid tribunals to domestic courts.

Notwithstanding the lofty ideals which led to the creation of the ICC, a convincing argument could be made that the way forward for international criminal justice might be more diverse and nuanced.

The ICC is designed to operate only where national courts fail to act, thus encouraging States to litigate issues themselves. Hence, one possible way forward is domestic litigation.

After the ICC Prosecutor’s 2003 announcement of an investigation in Congo, the Congolese government sought to reform the Congolese judiciary so it could undertake national proceedings. Similarly, after the ICC opened investigations in Darfur, local courts were established to initiate domestic proceedings.

By way of comparison, the ICTY has referred cases to national jurisdictions, but Rules allowed for the Tribunal to revoke a referral at any time before an accused was found guilty. ICTY maintained a monitoring role with national proceedings to which it refers cases and could possibly revoke a case where fair trial standards were not being met. The Rome Statute does not provide for the same relationship.

Accountability for crimes in Syria is a concern for the international community. A referral to the ICC or the creation of an ad hoc tribunal would require a UN Security Council Resolution. Russia and China blocked a proposed referral of the Syrian situation to the ICC in 2014.

Domestic proceedings under the doctrine of “universal jurisdiction” are underway in Sweden, Finland, Germany, and Switzerland. This might be a way forward in the absence of a Security Council Resolution. In Sweden, a former Syrian rebel fighter has been given five years in prison in Sweden for attacking an enemy who is defenceless, a war-crime in Sweden, after video surfaced of the accused abusing a prisoner who was bound.

The development of international law is an incremental process. The ICTY has filled gaps in definitions of international crimes and has influenced the drafting of the Rome Statute of the ICC. It has also contributed to the development of international humanitarian law, especially in the field of non-international armed conflict. ICTY jurisprudence plays a role across jurisdictions, and the ICTY has contributed to the establishment of regional war crimes chambers.

International law is so far removed from the sovereign state it generally takes decades for developments to be reflected in national laws. However, the increased willingness of states to take up international criminal law cases might speed this process up.

One of the stated aims of international criminal law is its ability to deter future crimes, but if international criminal law is not ingrained in the national fabric, how will a potential perpetrator be able to identify what is potentially wrong and be aware of a possible sanction? Increased interaction between international Courts and Tribunals and national jurisdictions will assist in this process.

The creation of the ICTY itself did not end atrocities in the Balkans. The 1995 Genocide in Srebrenica occurred two years after the ICTY was created. Are perpetrators of war crimes immune to deterrence efforts because they act in tribute to their cause no matter what the price? Maybe the contribution of international criminal justice is more pragmatic. Maybe it simply makes it less possible for political leaders to credibly deny atrocities?

***Sir Burton, a former Chief Justice of The Bahamas, served as a permanent judge of the ICTY from 2009 to 2016 and is a judge of the MICT, the successor tribunal to the ICTY**