

Discussion Paper 24

The Role of International Criminal Prosecutions in Reconstructing Divided Communities

**Public Lecture by Carla Del Ponte, Prosecutor, International Criminal Tribunal
for the Former Yugoslavia, given at the London School of Economics, on
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Carla Del Ponte, 'The Role of International Criminal Prosecutions in Reconstructing Divided Communities'

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Thank you very much for your kind introduction, Professor Kaldor, and also for the invitation to speak here, at the London School of Economics.

As the Prosecutor of the International Criminal Tribunal for the Former Yugoslavia, and as the former Prosecutor for the International Criminal Tribunal for Rwanda, it is a great pleasure for me to present my views on the role of international criminal prosecutions in reconstructing divided communities. Indeed, I consider this role fundamental, yet I know that it is extremely difficult to assess it.

At the outset, I would like to clarify the scope of my presentation. Speaking about international criminal prosecutions, I am limiting myself to the crimes which form the subject-matter jurisdiction of the UN ad hoc International Criminal Tribunals, and of the International Criminal Court, namely war crimes, crimes against Humanity and genocide. While the categories of war crimes are relatively well-known and defined, we may define for the purpose of clarity crimes against Humanity as a crime committed as part of an attack against a civilian population, and genocide as a crime committed with the intent to destroy, in whole or in part, a national, ethnic, racial or religious group.

By way of introduction, I would like to highlight the fact that, often, we face contradictory pressures between justice on the one hand and the need to restore peace and stability in conflict-shattered countries on the other. Some assert that, without Justice there is no peace or at least no lasting peace. But others claim that insisting on bringing the persons responsible for the crimes before justice may delay, or even block, the peace process and, thus, impose further suffering to the populations concerned.

Of course, the title of my presentation "The Role of International Criminal Prosecutions in Reconstructing Divided Communities" already assumes that the justice path is chosen.

This assumption brings to light yet other difficult choices: even though it is decided to make people accountable for their crimes, different solutions can be envisaged: truth and reconciliation commission - sometimes combined with a partial amnesty; fully-fledged prosecutions by national courts; or - of course - international prosecutions.

Hence a legitimate question: Should international prosecutions be favoured over national prosecutions? Isn't it important that the crimes be tried as closely as possible to the place where they were committed and where the victims live? Should the trials take place at the international level, to provide guarantees of independence and impartiality?

They are no easy answers to any of these questions, but I would like you to consider:

- First, often divided societies and countries lack the will or the power to prosecute and try those responsible for the worst crimes, in particular their leaders;
- Second, even when they establish prosecutions and trial, domestic courts in divided societies often do not provide the necessary guarantees for a due process of Justice. Indeed, to paraphrase a saying dear to lawyers: "Justice must not only be fair, but must also be seen to be fair".

On this basis, I strongly believe that widespread and systematic crimes, as they were for instance, committed in the Former Yugoslavia, in Rwanda, in Sierra Leone or in East Timor, to take but a few of the most recent examples, warrant an international intervention in the form of international prosecutions.

This said, the very concept of instituting international criminal prosecutions is rather recent. Mass killings took place throughout history, from the Roman destruction of Carthage to the most recent massacres in the Democratic Republic of Congo, through the crimes committed against the native Indian-American peoples, and the massacres in Cambodia under the Pol Pot regime. Scottish writer Gil Elliot remarked 30 years ago, when he published "The Twentieth Century Book of the Dead", that, in the 20th century, "the number of man-made deaths ... is about one hundred million." Still, it has often been noted that, until recently, one stood a much better chance of being tried for the murder of one person than for the massacre of thousands.

Indeed, after the First World War and the unsuccessful attempt to try German and Turkish war criminals (provided for in the Treaty of Versailles of 1919 and the Treaty of Sevres of 1920), it was only in 1945 that the very first international criminal jurisdiction was established in Nuremberg. On 8 August 1945, the Allies concluded in this city, London, an agreement establishing the International Military Tribunal, mandated to try the most notorious Germans responsible for crimes against peace, war crimes and crimes against Humanity. In the Nuremberg trials, twenty-two accused were tried and convicted in ten months, largely because of the documentary evidence that was available to the prosecutors and judges. The creation of the Nuremberg Tribunal, and the judgement it rendered, provided the foundation for all subsequent international criminal proceedings. In its judgement, the Nuremberg Tribunal recognised that: "... crimes against international law are committed by men not by abstract entities and only by punishing individuals who commit such crimes can the provisions of international law be enforced."

The following year, on 19 January 1946, the Tokyo Charter established the International Military Tribunal for the Far East.

Despite the criticisms levied to the Nuremberg and Tokyo Tribunals, notably for being "victor-justice", they were an essential step in the evolution of the principle of international criminal prosecutions.

Once the work of these two jurisdictions was over, little progress was subsequently made at the international level to punish any crimes against Humanity, war crimes and other mass atrocities. Some had hoped that the International Military Tribunals would lead to the establishment of a permanent international criminal court, operating on the basis of an international criminal code, but the reality of the international relations during the Cold War period manifested itself in blocking any such effort.

It was only after the shocking crimes committed during the disintegration of the former Yugoslavia, that the international community established another international criminal tribunal, in 1993. The International Criminal Tribunal for the Former Yugoslavia or ICTY was established by the UN Security Council, acting on the basis of its power under Chapter VII of the UN Charter. The Security Council found that serious violations of international humanitarian law constituted a threat to

international peace and security, and it considered that the prosecution of persons responsible for these violations would contribute to the process of national reconciliation and to the restoration and maintenance of peace.

When, in 1994, at the very least half a million persons were killed in Rwanda, the Security Council was pushed to act again as it had done for the Former Yugoslavia. Rwanda officially requested the creation of an international jurisdiction, as its domestic judicial system had been destroyed. The killing of lawyers, prosecutors and judges, and the fleeing from Rwanda of many others, had left the country's legal system unable to cope with the tens of thousand of cases generated by the genocide. Additionally, several UN reports exposed the scale of the massacres committed and called for those responsible to be brought to Justice. The UN Security Council decided to establish the ad hoc International Criminal Tribunal for Rwanda or ICTR, to promote justice and reconciliation in this country. Almost two years after the establishment of the ICTY, the Security Council reiterated its position that serious violations of international humanitarian law constitute a threat to international peace and security.

Creating these jurisdictions was obviously a giant step, but everything remained to be done: for these Tribunals to be credible, they needed, first and foremost, to actually try cases, and second, to operate fairly and provide due process of Justice. As was expressed by Justice Robert Jackson, the U.S. Chief Prosecutor at Nuremberg, the task ahead was to "patiently and temperately disclose" the record of terrible crimes. My predecessors, as myself, have tried and continue to try to do just that. Justice must be done.

However, an international tribunal cannot investigate every violation that has occurred in the course of several years. We are simply unable to investigate each and every case of torture, rape, or even murder. There are too many victims and too many criminals. Moreover, our mandate is limited to war crimes, crimes against Humanity or genocide. In this context, we have focused our efforts on the most atrocious and heinous crimes, and we also concentrate our prosecutions on the main perpetrators or the architects of these crimes.

I arrived at The Hague as chief prosecutor of the ICTY and the ICTR in September of 1999. At this time, the war in Kosovo was coming to an end. Although the ICTY had existed for some five years, it was still in many ways just beginning. At that point, the bulk of our work had involved investigations. Only 13 trials had begun and only the Tadic case had made it all the way through the trial and appeal process. It has been a busy four years: we have indicted 34 individuals, plus another 60 indictments in an amended version. We have completed 16 first instance trials and the Appeals Chamber has rendered 8 judgements. Moreover 51 accused have been arrested or surrendered voluntarily and have been transferred to our detention centre in The Hague.

So far, 92 accused have already appeared in proceedings before the ICTY. As for the future, realising that the States would only continue to support our efforts if we could show that we are maximising our activities, we have embarked into a so-called "completion strategy". It foresees that we will terminate all investigations by the end of 2004. As a consequence, we now concentrate on a small number of very high-level

persons suspected of being responsible for the most serious crimes. The Security Council recently endorsed this strategy, in its Resolution 1503. I expect approximately 30 additional suspects to be indicted before the end of my investigations. This could result up to 13 new indictments and 9 trials, concerning all the main communities in the region.

To date, 21 indictees remain at large, including General Ratko Mladic, believed to be in Serbia, Radovan Karadžic, believed to be in the Republika Srpska in Bosnia, and General Ante Gotovina, believed to be in Croatia. Nonetheless, we have been successful in apprehending some of the highest-level leaders responsible for the terrible events that took place in the former Yugoslavia. The most famous example of our success is obviously the arrest and trial of Slobodan Milosevic. As you know, his trial is still under way, slowed down due to his ill health.

The ICTY has completed a number of significant cases against key persons responsible for atrocities. To take a recent example, on 31 July, one of the Trial Chambers in the Hague passed the first life-long imprisonment in the Tribunal's history. Dr. Milomir Stakic, the leading politician in the northeastern Bosnian town of Prijedor, was held responsible for a brutal campaign of ethnic cleansing that led to death, detention and deportation of thousands of Bosnian Muslims. In particular, Stakic was found responsible for the establishment of the Omarska, Keraterm and Trnopolje camps. You may recall having seen in 1992 the images of emaciated men looking through barbed wires into the cameras of international media. Ethnic cleansing, or persecution as we call it, is a crime against Humanity and constitutes one of the most extreme forms of human rights violations. It forms the core of what happened in the nineties in the former Yugoslavia. In the name of extreme national, racial, ethnical or religious policies, people were expelled from their jobs, raped, tortured, deported, detained and killed, and that just because they did not belong to the right group, as defined by the perpetrators.

Furthermore, the ICTY has developed its jurisprudence on crimes specifically targeting women. In the Celebici case, rape was recognised as constituting a form of torture under international law. In the Kunarac case, the ICTY found two of the accused guilty inter alia of rape as a crime against Humanity and a violation of the laws or customs of war. This case concerned the rape and enslavement of women and girls, and instances where women were loaned among the men, traded and even sold. Many victims, some of them 12 year-old girls, were detained in homes, schools and gyms, and gang-raped publicly. The enslavement of the women lasted for days, sometimes for months.

Recent decisions have also shed light on an important area for international prosecutions: the issue of command responsibility. Several judgements have confirmed that, regardless of the functions of a "superior", be it not only a military, but also a politician, a teacher, or a philosopher, if he or she did have subordinates and command authority over them, he or she is criminally responsible for their crimes, if he or she failed to stop them or to punish them. A superior can not turn a blind eye towards what is happening in his or her area of responsibility, but has to take action if information in his or her possession looks suspicious, if not alarming, as determined in the recent Appeals decision in the Krnojelac case. It held that the accused, a warden in a Foca camp, had a concrete duty to investigate the acts of his subordinates, even if

he did not have a direct knowledge of the crimes they were committing, when he saw blood and bullet holes on the walls of the camp.

Now, of course, our work becomes particularly relevant as it exposes to the world in general, and in particular to the people directly concerned in the Former Yugoslavia, the crimes committed. Therefore, it is crucial that we ensure that our judgements reach the communities involved, and in particular the victims. In this regard, my office works closely with the ICTY Registrar to ensure that a full public explanation is provided and available in the Former Yugoslavia, to all interested parties, and in particular to the victims of the crimes.

I believe that the needs and longing that victims have for Justice was magnificently expressed by a witness who appeared before the ICTY. This witness, Teufika Ibrahimfendic, a psychologist from Bosnia, testified in the trial of General Radislav Krstic, who was charged with the massacres committed in Srebrenica in July 1995. In her testimony, Ms. Ibrahimfendic talked about the trauma of the surviving women and children of Srebrenica.

I quote: "At that time the greatest and most stressful traumatic event for them was the disappearance of a large number of men; heads of families, fathers, brothers, uncles, and so on. So that every woman had losses. All the women I worked with had lost two, three, four, five, six persons. A woman I worked with, 56 male members of her immediate and broader family went missing in a single day. So the search for the missing, what happened to them? Were they killed? If they were killed, were they tortured? How were they killed? Were they wounded? Were they hungry, thirsty? Where their bones are, the digging up of graves, identification of victims. All these are additionally stressful events, additional traumas that traumatise them on a daily basis.- The fact that they do not know the truth -- even the worst truth, would be better for them than this uncertainty, this constant, perpetual uncertainty as to what happened to their loved ones, because they keep waiting, they're waiting for something. They cannot begin life, they cannot face up with the reality of the death of a missing person. They only remember the moment they bade farewell, the moment when they had agreed to meet in a spot that would be safe. And this is still something that still guides them in their thoughts." (end of quote)

At the end of her testimony, the Presiding Judge asked the witness what she saw as the role of the International Tribunal in The Hague. She answered (I quote): "The Hague Tribunal, all the victims, all the women with whom I have had a chance to work, has a very great significance for them. They expect that justice will be done. We believed we were members of a civilised society, of a society where good will be compensated for and evil punished. They do trust that the real causes of what happened will be identified and that the people will muster enough courage, including victims, to tell the story of what happened. Those who did it, that they too will be able to speak out so that we all can have a future, so that we all can have a basis for a common life together one day. Great expectations are being placed upon the Tribunal. People expect that justice will be done and that the right decisions will be reached." (end of quote)

This witness expressed in her own words, I believe, some of the important roles that international prosecutions must play: record what really happen and make the persons responsible accountable.

The truth-telling component of international prosecutions is extremely important. To some extent, a historical record emerges, and people are forced to face up to the crimes committed or ordered by their own leaders. But of course, this role is somehow restricted by the very limits that we face in our international prosecutions and that I was exposing to you earlier. We can only prosecute so many crimes and must concentrate our efforts on the leaders, whenever we can bring them to trial. Therefore, I wonder whether truth and reconciliation commissions do not sometimes provide a better historical record of the crimes committed. But, at the same time, as a Prosecutor for more than 20 years, I am deeply convinced that holding people accountable for their crimes is of paramount importance, especially for the categories of crimes we are referring to now. In any case, truth commissions also have many potential pitfalls, notably the risk of politicisation of the process, questions of confidentiality of the results, and, of course, issues of amnesty. Truth Commissions can nonetheless play their part. A specific model must be designed on a case-by-case approach, specifically for the country concerned, and, if possible, in complement to a prosecution process.

The other important function of prosecution is to emphasise individual criminal responsibility, and to break down the idea of collective guilt and demonisation of whole groups.

I would like to take the example of the ICTR to illustrate this idea. After the crimes committed in Rwanda in 1994, it was clear that a transformation of values among the Rwandan people was need. Most have been subjected to decades of incitement of ethnic hatred and violence, whether as victim or as obedient perpetrators. The Tutsi have to absolve the Hutu of indefinite collective responsibility for the genocide while also having a legitimate means of vindicating their suffering. Generally, the ICTR, as well as national tribunals, have a decisive role to play in that respect. Justice has to be done so that the vicious cycle of impunity is broken, and that collective vengeance against Hutu, as well as against Tutsi, is definitely discouraged. The prosecution of all those suspected of having organised massacres, irrespective of their ethnic identity, is a crucial confidence building measure that would greatly contribute to the peace in Rwanda, and, consequently, to the long-term stability of the entire Great Lakes region.

At this juncture, it is important to underline that international criminal jurisdictions can and should whenever possible interact with national judicial systems in various ways. Although we have primacy, and although we may have doubts about the quality of justice provided by the domestic courts, we have to work in partnership with the national jurisdictions. We cannot prosecute all cases, and therefore we must, I believe, set an example to damaged legal systems and help them, within our limits and as long as they want our help. We tried to do just that with Rwanda when I held the mandate of ICTR Prosecutor. Let me also take the example of the ICTY, and of the Rules of the Road project that we developed to assist the Bosnian prosecutors. They submit to us their files when they wish to bring war crimes charges. This is a good example of our activities slightly outside our core-mandate, but very much consistent with it.

ICTY thus provides an important safeguard against arbitrary arrest and directly helps to build confidence among people and to reconstruct a multi-ethnic society.

International prosecutions, by recording the crimes which took place, setting what really happen, and making the persons responsible accountable for these crimes, also deter the commission of similar crimes. I believe that this is yet another role for international prosecutions. Of course, the deterrence of crimes is difficult to assess, and it is never complete. The prosecutions of murder for centuries by our respective domestic judicial systems have never put an end to their commission. But still, deterrence, especially at the international level, should not be overlooked. It is reported that Adolph Hitler remarked in the late 1930s: "Who remembers the Armenians?" If this is correct, it illustrates the deterrent role that international prosecutions could play, if only they could one day be universal and would suffer no exception.

To conclude, the basic point to be made is that an essential pre-condition for reconciliation is the removal from the scene of high-level war criminals, so that their influence cannot continue in the post-conflict arrangements. Justice makes this unique contribution to the reconstruction of divided societies.

Of course, there are no easy answers to the contradictory pressures of justice and pacification in restoring stability to divided communities. Last month, the United Nations Secretary-General Kofi Annan called for more resources and greater effort to enhance the rule of law in the course of UN peace-keeping operations. He stressed that people lose faith in the peace process in the face of impunity for past grievous crimes and without a restoration of justice in rebuilding shattered societies. He said: "Ending the climate of impunity is vital to restoring public confidence and building international support to implement peace agreements." "There should be no amnesties for war crimes, genocide, crimes against humanity or other serious violations of international human rights," he added.

"Yet the relentless pursuit of justice may sometimes be an obstacle to peace. If we insist at all times and in all places on punishing those who are guilty of extreme violations of human rights, it may be difficult or even impossible to stop the bloodshed and save innocent civilians. If we always and everywhere insist on uncompromising standards of justice, a delicate peace may not survive."

The Secretary-General concluded: "We have learned that the rule of law delayed is lasting peace denied, and that justice is the handmaiden of true peace. Implementing these lessons is a tremendous challenge."

" Removing the bad apples from the barrel " may in the short-term complicate efforts to hold a fragile peace together, but in the long run, the alternative is to store up trouble for the future, and to sow the seeds for future conflict. There is no lasting or sustainable peace without facing up to massive crimes when they have been committed. This seems to be now generally accepted by policy-makers: peace and justice are complementary.

Dreadful events of history repeat themselves and the ever-present threats to civilisation seem to take on new and frightening forms. We must therefore do

everything we can to redress the balance and to promote the values upon which society itself rests. The future will not build itself if we sit by passively and watch. If the peoples of the world are to secure the continuity of their diverse cultural, linguistic, national and ethnic groups, we must invest in the future and we must strive to instil the necessary values in succeeding generations. Failure to comply with the norms of international law, in my experience, always leads to the radicalisation of confrontations. Thus, impunity is an aggravating factor in a conflict.

I would like to finish by citing my friend Benjamin B. Ferencz, who was one of the young American prosecutors involved in the work of the Nuremberg Tribunal and remains today a strong and vocal supporter of international criminal justice. He recently said : "Nations should recognise that a more peaceful and humane world can only come about by replacing the force of war by the force of law. Small and poor nations have much more at stake than the rich and powerful. In our interdependent planet, the peace and well-being of each is inextricably linked to the peace and well-being of all. Outdated notions of sovereignty must not block acceptance of rules of the road needed to enhance the security of people everywhere by deterring wars of aggression, genocide and the horrible crimes against humanity that continue to deface the human landscape. The world is filled with human suffering but it is also blessed by very many people who are determined to make it a better place for all and whose individual efforts made a difference."

I thank you