GAVIN RUXTON*

1. The ad hoc Tribunals are important stepping stones

My purpose today, as a representative of their Prosecutor, is to set the work of the two ad hoc Tribunals, the ICTY and the ICTR, in the context of the progress being made towards the creation of a permanent international criminal court. I have chosen the image of these Tribunals as stepping stones because I think it is an appropriate one, given the torrent of violence that has poured across the planet twice this century in world wars, and more recently has engulfed particular areas in the form of savage and bitter regional conflicts. The Tribunals are indeed important stepping stones. As we balance on them, somewhat precariously, we can still see, on the bank behind us, the outlines of the Nuremberg and Tokyo structures, and we can still hear the echoes of the founders of the United Nations pledging to prevent future wars. Perhaps we can also see around us a number of shining post-war conventions developing the laws of war and human rights. But when we look forward the view is less clear: we may be starting to see the outline of the other bank, but the picture is still rather hazy, and we cannot be sure, if we jump from our stepping stones, whether we will make it safely to the other side, or whether the torrent will suck us down or sweep us backwards.

The Tribunals are important for two reasons: they reassert the principle that justice is an essential part of the peace process; and they make their contribution in the most direct way - by sending the guilty to prison after a full and public examination of their guilt. The Tribunals embody the expressed will of the international community that atrocities on the scale and of the calculated cruelty shown in the former Yugoslavia and Rwanda will not be tolerated by civilised nations, in the name of politics or religion or military expansion, or whatever other motive may have led to their commission. The very creation of the ICTY and the ICTR is therefore a step of enormous significance for the development of international humanitarian law.

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*Senior Legal Adviser, International Criminal Tribunal for the Former Yugoslavia.

2. The ad hoc Tribunals have made significant progress

The Tribunals are very practical bodies. They are not perfect creations, and they have each had their difficulties, but they are now fully-functioning criminal justice systems, and have demonstrated to a very considerable extent that they are capable of conducting their own investigations, securing arrests, holding fair trials, and dispensing a satisfactory standard of justice. These are no mean achievements for any new legal system.

Already, important judicial decisions are emerging, which will serve to develop international criminal law. The judges have ruled on a range of important issues including: jurisdiction; the meaning of international and internal armed conflict; the scope of Grave Breaches of the Geneva Conventions and the broad application of common article 3; the powers of the Tribunal to compel evidence, the treatment of sexual offences; the protection of sensitive information and the treatment of vulnerable witnesses. The Trial Chambers have dealt with a host of motions on various courtroom issues, and the Judges have revised and refined the rules of procedure and evidence.

All this means that the two ad hoc Tribunals have developed a considerable amount of practical experience and operational expertise in both the investigation and prosecution of serious violations of international humanitarian law. Those of us involved in the daily work of the Tribunals believe that we have a collective insight into the problems which arise in practice, many of which are unforeseen and cannot readily be anticipated in the preparatory committees. We therefore hope to be able to pass on some of our experiences in a constructive way.

We certainly do not pretend to have answers to all of the questions raised by the enormously complex task of fashioning a full-functioning international criminal court. Nor do the staff of the Tribunals express any single or official view on these issues. Nevertheless, there are perhaps a number of broad points on which we would all generally agree, and although the Tribunals have appeared relatively late in the ICC process, these points bear stressing even now.

3. The ad hoc Tribunals are practical enforcement mechanisms

The Tribunals apply a body of law which has been much developed

since the Second World War, but which has mostly lain dormant on the bookshelves. The Tribunals take this set of rules and principles, add to them a framework of procedure and evidence, and set about the business of gathering the proof and enforcing the law. If the Tribunals are not effective enforcement mechanisms, they are empty shells: without the ability to collect evidence they cannot produce indictments; unless they have prisoners to try, they can bring no-one to justice; and without cases in their courtrooms they cannot contribute to the development of jurisprudence. So it is essential that the ICC be an effective institution.

The points I wish to select today for emphasis all relate to the concept of the ICC as an authoritative and effective enforcement mechanism, and I hope that any caveats I express will help decision-makers avoid what seem to me to be a number of dangers. Designing the ICC on paper is essentially creating a model, an abstract representation of the real world. As economists know, at one extreme models can be gross oversimplifications of reality, while at the other end of the spectrum models can be extremely elaborate constructions of complex systems. For legislators in criminal law there is a constant tension between, on the one hand, the need for clarity and simplicity, and, on the other the need for completeness and the avoidance of ambiguity. This dilemma is particularly acute if the rules cannot be easily amended or developed by the court. In her address to the ICC prepcom last month, Judge McDonald of the ICTY argued for a statute of principle rather than detail. But whatever degree of codification is adopted, it is important to get the basic framework of the model right, and to make choices when compromise would lead to confusion.

4. Investigations and prosecutions are in reality complex matters

In the draft statute there seem to me to be several oversimplifications. First, there is an assumption that a case proceeds in a predictable fashion from beginning to end, and that the accused (a single suspect) is known from the outset. In fact, investigations often begin when there are many potential suspects, or where the identity of the suspects are not known, or where their involvement is not clearly understood. When dealing with the kind of crimes within the jurisdiction of the Tribunals, a case involving a single suspect or accused is rare. Even if investigations begin by targeting particular individuals, the decision as to who will be indicted is

usually taken towards the end of the process. As the investigation proceeds, its focus may change, and the availability of witnesses can alter dramatically. Witnesses move around and are to be found all over the world, so that investigators may have to go to many different countries to gather evidence. Any working model of the Prosecutor's work, therefore, should assume uncertainty at the outset, poorly defined and understood crimes, and no clear idea about who is responsible. A good Prosecutor, setting about an investigation, will start from the position that he or she knows nothing about the facts, and can take nothing for granted.

So the Prosecutor of the ICC will most likely be faced with cases involving many potential or actual accused. Cases involving multiple accused have their own special problems, particularly in the international forum. It is likely the accused will not all be arrested together. That means that they may not be tried together, or depending on the trigger mechanisms, even that investigations against all of them may not be possible simultaneously despite an obvious overlap in the subject matter of the inquiry. Or again the identity of the accused may be known but they may be at liberty, either with their whereabouts known or unknown. There may be no "custodial state" or there may be several "custodial states". The proposed trigger mechanisms are already complicated, and may involve the consent of several states. Whatever formula is finally agreed upon, it should be workable where there are multiple accused.

Real cases can be complex in other respects. Criminal conduct can be categorised in different ways. Often prosecutors cannot be sure of a conviction of one crime rather than another. Different crimes comprise different elements requiring separate proof. Because of the uncertainty of proving all the elements of a given crime, cautious Tribunal prosecutors will produce indictments containing alternative, or sometimes cumulative, charges. For example, failure to prove the requisite intent in a genocide charge may nonetheless leave open the possibility of a conviction for crimes against humanity. To deal effectively with situations referred to the Tribunal, the Prosecutor needs to have a package of crimes available in all cases. It would be an affront to justice in the example just given for an accused acquitted of genocide to walk free from the court despite having been proved to have committed crimes against humanity. Yet, in the draft statute, Article 21 apparently rests jurisdiction on the acceptance by states of particular crimes. It may be that states bringing complaints will make sensible choices in this respect, but

again an overly simple assumption seems to underly the statute - that cases conveniently will involve single crimes.

All of this goes to jurisdiction. And jurisdiction governs investigation as it does prosecution. If the court has no jurisdiction to try the crime, the Prosecutor has no justification for investigating it. But many matters arise in the course of investigations pointing to the commission of crimes which are not the subject of the initial inquiry, but are often closely related to it. Are investigators to ignore those matters? It seems to me that those problems could be avoided by requiring states which accept the court's jurisdiction at least to accept groupings of related crimes.

5. The Prosecutor must exercise wide discretion

The complexity of investigations and prosecution at the international level means that, however an investigation has been set in motion, very quickly the Prosecutor will be called upon to exercise discretion. It therefore seems to me that the extent of the Prosecutor's discretion should be clearly articulated at the outset. It appears to be widely accepted that the Prosecutor must be independent. However, discussions of the Prosecutor's independence tend to be limited to the question of the right to initiate investigations, and the right to take operational decisions without taking instructions. But in practice the Prosecutor acting on a complaint from a state cannot be expected to refer back to the state every time the investigation takes a new turn raising jurisdiction questions. That kind of state involvement does begin to threaten the independence of the Prosecutor.

By contrast, the jurisdiction of the ad hoc tribunals is relatively simple and comprehensive. The Prosecutor has almost complete freedom to act within the limits of each Tribunal's jurisdiction, and is free to exercise a great deal of discretion in relation to the acts and persons investigated, and the crimes charged. Political influence is thus eliminated, and the independence of the Prosecutor guaranteed. There is no suggestion of the Prosecutor acting as the agent of any state.

6. The Co-operation of states cannot be assumed

Another simple, and perhaps more dangerous assumption is that states, particularly states where the crimes were committed, will accept the court's jurisdiction, allow complaints to be made, and

permit investigations to be carried out on their territory. The experience of the ad hoc Tribunals is often quite the opposite. Even under intense international pressure, states have not always been willing to recognise the legitimacy of the Tribunal or to co-operate with its Prosecutor. Even so, it may be possible to prove the commission of crimes within those states by relying on witnesses who have fled abroad and relying for evidence on the presence of the international community on the ground in the territory in question. If crimes of the gravity of crimes against humanity have been perpetrated by the organs of a state, and if high officials of that state are the subject of a complaint to the international court, it looks distinctly odd to a prosecutor's eye to have the very jurisdiction of the court predicated effectively on its acceptance by the accused. The ICC model should be carefully examined to ensure that the court cannot be thwarted by the non co-operation of states sympathetic to the accused.

It is easy to lose sight of the investigative role of the Prosecutor, and to overlook the stark fact that, in order to do justice in a criminal case, a court must have full access to the facts in issue. When those possessing evidence do not co-operate, and where in consequence proof is not forthcoming but is withheld, any court commanding authority must have the ability to compel the production of evidence and the attendance of witnesses. In the ad hoc Tribunals our experience in this regard has been salutary, with the greatest reluctance being demonstrated by some states to accept any power on the part of an International Tribunal to employ compulsory measures. Even if states accept the binding nature of requests under Chapter VII of the United Nations Charter, some will fight long and hard to control the method of compliance and to protect what they perceive to be their national interest and their sovereignty. In my view the freedom to investigate crime is so central to the functioning of the Prosecutor (and ultimately the court) that it should be addressed at some length in the statute itself. It is unrealistic within the timescale of prosecutions already underway to expect the court itself to build up the necessary jurisprudence. We know that in achieving co-operation of states, so much depends upon establishing trust and working relations with their authorities that a heavy-handed approach by the Prosecutor at the outset would be counter-productive. For me, this is a core issue that should be tackled head-on in the ICC statute. And if it is a sensitive issue on which agreement may be fragile, states should be reminded that if they do not clarify the relationship between the powers of the court

and the powers of states, they will inevitably find the court doing so later.

7. A permanent court must have authority

An international criminal Tribunal must have standing and authority. The status accorded to the ad hoc tribunals rests firstly on their being subsidiary organs of the Security Council. Their orders and requests are thus binding upon member states. States also recognise that the ICTY and ICTR deal with the most serious crimes known to humankind, which national systems are ill-equipped to tackle. States therefore accept that the tribunals have concurrent jurisdiction with their national courts, but have primacy over them. We have exercised that primacy on a number of occasions, and in each tribunal. Interestingly, we have not experienced any resistance from the states concerned, as might perhaps have been expected. We have also decided to exercise our primacy with restraint, and only in cases where we ourselves intend to prosecute. We will therefore resist any attempt to turn the ad hoc tribunals into criminal appeal courts for the former Yugoslavia or Rwanda. The tribunals were not intended to play that role.

I hope that the precedents set by the relationships established by the ad hoc Tribunals will make it easier for states to "bite the bullet" on the question of powers. If the international community can make this decision, and if states can bring themselves to respect the authority of an international court, all other issues will pale into insignificance. From our daily experiences, in which we are continuously testing the limits of state co-operation, it seems to me that we still have some considerable way to go to overcome the nervousness of states about the idea of a powerful international body which might one day examine their own actions.

This question of powers extends beyond a Tribunal's ability to gather evidence, and into the area of crimes against the administration of justice, none of which feature among the list of principal crimes over which the Tribunals have jurisdiction. The Prosecutor and the Chambers must be able to protect witnesses and victims, many of whom testify at considerable personal risk. Those who interfere with witnesses must be dealt with, as must those who obstruct the course of investigations. Accused who have access to information about the witnesses against them must now be allowed to silence those witnesses. Similarly the court must know the extent of its powers to deal with contempt and offences against the course

of justice, and must be able to take effective action. The existence and limits of those powers are being explored now by the ad hoc Tribunals. Some may be inherent in any court, but others are properly for legislation. If the court itself cannot exercise these powers, it must at the very least have guaranteed access to other institutions which can.

8. A strong institution must be designed

In creating the ICC, partial solutions, however attractive as drafting compromises, will only store up practical problems later. In the statute, the relationship between the Court and the United Nations is left somewhat hanging. But if the court is to attract staff, it will have to be able to offer them careers. Our experience in the ad hoc Tribunals demonstrates that experienced professionals may be attracted for only relatively short periods before they are asked to take the very brave step of severing connections permanently with their previous jobs. The nature of the new organisation therefore has to be very clear to professional staff thinking of making a medium or long term commitment. (People like to know where their pensions will come from). Our experience has also shown that it cannot be assumed, at least in a UN context, that the secondment of gratis personnel will provide an easy way of augmenting staffing complements. Whatever solution is adopted, the financing of the permanent Tribunal must be solid and settled in advance. Our experience of delayed and short-term budgets has resulted in uncertainty, and a constantly distracting burden of fund-raising being placed on the Prosecutor.

The proposed model for the permanent court also seems to make the worrying assumption that the institution might have a part-time character: that it might have a core staff, but would in a sense be created and put on the shelf for states to reach down when required. In my view this notion is very suspect. It takes some 18 months to create a functioning Tribunal capable of effective investigations. So many time-lags are inherent in the start-up process, particularly in recruiting staff, such as suitable interpreters and translators, that it is simply not realistic to expect a "shelf company" to swing into action at a moment's notice. Creating a permanent court must mean more than having a skeleton crew engaged in building up and knocking down a succession of ad hoc tribunals in the same premises. Experience in the ICTY and ICTR shows beyond any doubt that establishing and maintaining a working

tribunal is a full-time job for the whole institution. A core staff might be a solution if no complaints or references were made to the court at the outset, but I would imagine that once seized of its first matter, a large staff would be needed from then onwards on a permanent basis.

Ladies and Gentlemen, those of us working in the ICTY and the ICTR understand the magnitude of the task involved in creating a permanent International Criminal Tribunal. Although they have a lot left to do, the ad hoc Tribunals have shown that international criminal justice can be made to work, and they are gathering momentum. I hope that we will see the establishment of a strong ICC in the coming years, and I hope also that the ad hoc tribunals will be regarded as instrumental in achieving that goal. To return to my original image, the more our stepping stones are allowed to grow into little islands, the easier becomes our leap ahead to the mainland, to reach the permanent court whose creation we support as a substantial contribution to the lasting peace and security of the world.