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UN-BASED INTERNATIONAL CRIMINAL TRIBUNALS: HOW THEY MIX AND MATCH

MYRES S. MCDUGAL LECTURE
University of Denver Sturm College of Law
March 10, 2007

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I. INTRODUCTION

Myres McDougal was a great American lawyer, professor and conceptual engineer, building a bridge between private and public law and constructing the great New Haven school of legal theory based on “public order and values.” He was distinctive, even among sociologically oriented colleagues in jurisprudence, in insisting on detailed attention to social and power processes. Although I never had the pleasure of studying under Professor McDougal (or “Mac” as he was known) I was among his many admirers. I am deeply honoured to have been asked by the University of Denver Sturm College of Law and my very good friend, Professor Ved Nanda to deliver this lecture in honour of Mac.

This lecture is not intended to be on Mac’s theories and jurisprudence, a task clearly beyond the time allowed and more to the point, beyond my own capabilities. Rather, I intend to discuss one aspect of international criminal law—the development of United Nations-based international criminal tribunals, to be exact. But before embarking on that, let me mention just a few phrases or concepts which I believe are found in Mac’s approach.**

For Mac, law was not a body of rules but was a process of making decisions about how values—power, wealth, enlightenment, skill, well-being, affection, respect and rectitude—are to be produced and distributed in a given community. The role of the lawyer, as advocate or decision-maker, was to influence the process in order to achieve the desired results. The goals of this process are those of a public order of human dignity. The concept of community needs to be viewed in a

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** For an authoritative exposition of Mac’s jurisprudence and theories, see W. Michael Reisman, “McDougal, Myres S.” in *International Encyclopedia of the Social Sciences, Biographical Supplement*, vol. 18, p. 479 (1979).

globally comprehensive and interdependent manner, with effective power processes incorporated. Law is conceived as processes of authoritative decision by which people clarify and implement their common interests, incorporating both authority and control. In the field of international law, goals should be postulated to guide decision-makers if community responses are to contribute to a public order of human dignity. Perhaps some of these phrases or elements may be instructive as we now proceed to the subject at hand.

When examining United Nations (UN)-based international criminal tribunals, it is most important from the outset to note how recent this remarkable development has been. Fifteen years ago, no such tribunals existed. The establishment of such institutions has occurred rapidly and is one of the most exciting and hopeful reaffirmations that the progressive development of international law is very much alive and that the search for human dignity has been advanced. It would have been inconceivable just a few years ago that a tribunal of international judges—or mixed international/domestic judges—could by some action under international law (UN resolution or treaty) have the authority to prosecute individuals for crimes and sentence the guilty to imprisonment.

I will not discuss the International Criminal Court (ICC), the tribunal established by universal multilateral treaty, nor the “Sarajevo War Crimes Chamber,” a non-UN domestic court but with international judges. I will also not discuss war crimes prosecutions or courts established as part of a UN temporary administration of territory such as in East Timor and Kosovo. Rather, I will examine the international criminal tribunals established under UN auspices for the former Yugoslavia (1993), Rwanda (1994), Sierra Leone (2002), Cambodia (2003) and Lebanon (2007). Rather than taking them one by one, let us re-group under headings to highlight their similarities and differences: a) broad goals; b) legal basis; c) applicable law/jurisdiction; d) composition and location; e) financing; and f) effectiveness. This presentation, given time and length constraints, can only be somewhat superficial and deal with matters in a “broad stroke” manner.

II. BROAD GOALS

In terms of broad goals, here all the tribunals share the same community values and goals: accountability for heinous crimes, no impunity for those who commit them and, hopefully, through that process contribute to peace and reconciliation in the community concerned.

III. LEGAL BASIS

It is on the legal basis of the tribunals that the differences begin. The first two for the former Yugoslavia and Rwanda are subsidiary organs of the Security Council, established by the Council under its Chapter VII enforcement powers. They are thus “imposed” as it were—obligations were created by the Council which bind all States, including that of complying with orders of the Tribunals. The first tribunal, for the former Yugoslavia, was set up during the conflict in 1993, when the thrust was providing a deterrent to further violations of international humanitarian law and providing a mechanism to bring to justice those who allegedly committed such crimes; there was little talk of reconciliation as the war was still raging in the Balkans. These two tribunals have “power” bases which

the other tribunals lack: the Council could, in the appropriate circumstances, adopt enforcement measures (such as imposing sanctions) against States which do not comply with tribunal orders or judgments. Although the Yugoslav tribunal has reported non-compliance to the Council on a number of occasions, no sanctions have ever been imposed by the Council on States based on those reports. From Mac's point of view, what would be interesting is to examine the effective use of power (or political pressure) to achieve the desired community result in another way: so-called "conditionality" of membership of Balkan States in NATO and the EU. Those two organizations made the commencement of steps towards membership of former Yugoslav countries conditional on full cooperation on the part of the country concerned with the tribunal, including good faith efforts to arrest fugitives and turn them over to the tribunal. Quite a number of fugitives were turned over or "voluntarily surrendered" to the tribunal, so that very few fugitives are left, although the two notorious ones—Mladic and Karadzic—are still at large.

For the Sierra Leone and Cambodia tribunals, while the genesis for their creation emanated from the Security Council for the former and the General Assembly for the latter, their legal basis is not a decision of a UN body, but rather a bilateral treaty between the UN and the country concerned. Thus these tribunals were not "imposed" but rather exist at the request and with the consent of the States concerned. There are no enforcement powers for these tribunals outside the States concerned. While the Lebanon tribunal was modeled on the Sierra Leone example, because of internal political difficulties the bilateral agreement between the UN and the Government was not put before Lebanon's Parliament for ratification. Acting on the request of the Government of Lebanon, the Security Council under Chapter VII decided that the agreement would enter into force on a certain date if the Parliament had not acted by that date. Thus, while clearly a tribunal created at the request and with the consent of the Government of Lebanon, the actual agreement establishing the tribunal was put into effect by virtue of a binding decision of the Council.

Please note that the legal basis or method of establishment is directly related to the accountability of the tribunals for their work. For the two Council tribunals for the former Yugoslavia and Rwanda, they must report periodically to the Security Council and the General Assembly on their work, the former as the parent organ often giving policy and management direction to the two tribunals. For the Sierra Leone and Lebanon tribunals, however, there is no reporting to any organ of the United Nations. For the Cambodia tribunal, the Secretary-General reports to the General Assembly on its progress of work.

IV. APPLICABLE LAW/ JURISDICTION

The former Yugoslav tribunal is a direct descendant of the Nuremburg tribunals, covering war crimes, the crime of genocide and crimes against humanity. These crimes are often referred to as the "core crimes." The Rwanda tribunal statute focused on crimes committed in internal armed conflict. In the case of the Sierra Leone and Cambodia tribunals, they both included in the applicable law the core crimes (except for the Sierra Leone tribunal which did not cover genocide) but added other crimes more domestic in nature to take into account the particular

situation of the country concerned. For example, the Sierra Leone tribunal had in its subject matter jurisdiction recruitment of child soldiers and cruelty to children; the Cambodia tribunal included torture and religious prosecution. A further difference may be noted here: while the Sierra Leone tribunal is independent and not linked to the domestic judicial system, the Cambodia tribunal is part of the Cambodian domestic judicial system. Nonetheless, in both cases the tribunal is to exercise jurisdiction in accordance with international standards of justice, fairness and due process of law.

The Lebanon tribunal is radically different from the others: there are no international crimes involved, at least on its face. While it is a tribunal of an international character (see below), the crimes in its jurisdiction all flow from the Lebanese Penal Code and relate to terrorist attacks and assassinations. Whether the jurisprudence of this future tribunal will advance the argument that international terrorism is an international crime outside a given treaty context remains to be seen.

The applicable procedural law of the four "war crimes" tribunals is fairly similar and is based on the international standards of justice and due process inspired by the International Covenant on Civil and Political Rights. The Lebanese tribunal, being a tribunal applying the domestic law of Lebanon, will have to adopt its rules of procedure and evidence in the light of the Lebanese Code of Criminal Procedure. Such rules will also have to reflect international standards of justice and due process.

V. COMPOSITION AND LOCATION

For the two Security Council ("ad hoc") tribunals—for the former Yugoslavia and Rwanda—all the judges are international and no national judges serve. Those two tribunals, it may be recalled, were Council enforcement measures. For the Sierra Leone and Lebanese tribunals, the majority of judges are international with a minority of judges being national judges. In the case of Cambodia, the situation changes. The majority of judges are national with the international judges being in the minority. But to guard against a purely "national" decision, no decision can be taken by a chamber unless at least one international judge joins the majority of national judges. The "dual" nature of this tribunal is further seen in the fact that there are both UN and national "co-prosecutors" and "investigative judges" and two sides to the staff—a Cambodian side where staff are hired by the Government and the "UN" side hired as UN staff. This has created a complicated and challenging structure.

On location, for the Yugoslav tribunal there was no question that it would obviously have to be located outside the region as it was in flames at the time of the tribunal's establishment. Thus The Hague was selected as it was already the site of the principal judicial organ of the UN, the International Court of Justice. For Rwanda the tribunal was established shortly after the end of internal conflict. It was thought best for a variety of reasons to locate the tribunal outside the country, in this case in Arusha, Tanzania, but with an office in Kigali. In both cases, commentators have noted that placing the tribunals some distance outside the country where the crimes occurred goes against the usual criminal law tenet

that trials should normally be held where the crime occurred, where the evidence can be found and where the witnesses can be located. The local population can attend the trials and see that justice is indeed being done; they feel they are participating in the process. Certainly in the former Yugoslavia, there is a feeling of resentment by various segments of the population that the tribunal's work has not been impartial, targeting some ethnic groups while leaving others untouched.

Partly as a reaction to this, in both the cases of Sierra Leone and Cambodia the tribunals were located in the affected countries themselves, to engage the population and local authorities in the international justice system and to facilitate national peace and reconciliation. The results for the Sierra Leone tribunal have been very positive, with highly successful and popular "outreach" programmes reaching remote towns and villages. But even in Sierra Leone, the sensitive nature of a defendant can affect the location of the trial. At the request of the leaders of countries in West Africa, the trial of Charles Taylor in the Sierra Leone tribunal is being held in The Hague, not in Freetown, the site of the tribunal. The trial of the ex-President of Liberia in near-by Sierra Leone with Taylor supporters still active in both countries would have risked instability in the region. In Cambodia, the trials have yet to begin but the fact of "embedding" the tribunal in the Cambodian judicial system and providing for a split national/international structure has allegedly undermined international justice. The Open Society Initiative has alleged that corruption, kickbacks and improper hiring procedures occurred on the Cambodian side of the tribunal. Obviously if such practices are condoned, international standards of justice and due process would be undermined and its proceedings could be fatally contaminated. Audits have been conducted and measures put in place to prevent such practices. Whether investigations of past allegations of corruption need to be conducted is a matter for consideration.

For the Lebanon tribunal, the divisions and tensions among the various groups in Lebanon—sometimes leading to violence and assassinations—made it implausible to consider establishing the tribunal in Beirut. It will be located in The Hague with an office in Beirut.

VI. FINANCING

For the two Security Council tribunals for the former Yugoslav and Rwanda, as they are subsidiary bodies of the Council reporting to it, they are part of the established programme of activities of the United Nations. Their expenses are assessed and allocated among all the Member States of the Organization as decided by the relevant budgetary bodies of the General Assembly.

For the other three tribunals, they are financed from voluntary contributions of Member States and not from the budget of the United Nations. At the time of establishing the Sierra Leone tribunal, major contributors to the budget of the UN felt that the two Council criminal tribunals had grown too large and too expensive; the new one should be funded from voluntary contributions from States and closely monitored by the donors. The then Secretary-General and Legal Counsel resisted that approach, noting that justice cannot be subject to the availability of funds which could "dry up" at any time in the middle of a trial or when an accused is

awaiting trial. Power and allocation of resources won the day: that tribunal as well as the subsequent UN-based tribunals are funded by voluntary contributions.

For the Sierra Leone tribunal, the money did in fact run out at one point, and the General Assembly, as an exception and for one time only, gave a "subvention" or loan to the tribunal so that it could continue functioning. The Cambodian tribunal has difficulty in raising funds. The Lebanon tribunal is just in the course of being established and is still collecting the required funds and pledges in order to begin functioning. It is interesting to note that for that tribunal a special contribution formula was chosen: the Lebanese Government contributes 49% of the expenses and other States contribute 51% of the expenses.

VII. EFFECTIVENESS

Effectiveness involves matters of power, achieving goals and advancing shared community values. If you ask the detainees waiting trial or those serving time in prison as a result of tribunal convictions, chances are they would consider the tribunals highly effective—they have lost their liberty. In the Yugoslav tribunal alone, over 100 persons have been tried and almost 50 are or have been sentenced to serve time in prison.

Some commentators claim that the tribunals have not been effective since they have not achieved the goal of peace and reconciliation. But was that the goal of the tribunals? Or was it to prosecute, as in any other criminal court, those accused of heinous crimes in accordance with the law and standards of due process? The influence of human rights and the rights of victims has entered the policy goals of these tribunals which are different or absent from trials on the domestic level. Here, the prosecutor represents the victims and international community and wants to prove as much as can possibly be proven, to show the monstrosity and enormity of the crimes the individual is charged with having committed—not just what is needed for a successful conviction (more or less the usual domestic goal). Rather, the prosecutorial policy includes showing and proving to the world, to the victims and to the affected population, all the international crimes the person allegedly committed. This means complicated and thus lengthy trials with many witnesses and pieces of evidence. The tensions between the goal of representing the interests of the victims and the goal of financial restraint and speedy trials are evident. Some say the tribunals also have an important role to play in getting the historical record straight to avoid future denials and facilitating reconciliation, while others would say that is not the function of a court of law. Finally, it must be pointed out that proving the elements of core crimes (such as a "widespread or systematic attack against a civilian population") may require more evidence and testimony than that of a domestic murder prosecution.

Each tribunal faces its own challenges of effectiveness depending on its own circumstances and political/social context: the Yugoslav and Rwanda tribunals have to begin winding down as they are searching for the final fugitives and grappling with populations and Governments in their affected regions not necessarily supportive; for the Sierra Leone tribunal, judgments will soon begin to be announced, some of which might not prove popular; for the Cambodia tribunal,

the first trials will be a test of the application of international standards by a tribunal “embedded” in a country’s national system; and for the Lebanon tribunal the challenge is to be established and function in a volatile environment, where violence and assassination, including against tribunal judges and officials, will be a constant risk.

On the core value or purposes, however, there can be little doubt: the tribunals and their jurisprudence have advanced the cause of promoting and protecting the human dignity of the individual against crimes of the worst order on the international level. Accountability and no impunity have been the driving forces behind all these tribunals, with peace and reconciliation part of the process. The tribunals will leave behind a powerful and effective legacy for the ICC.

As to power to enforce and achieving truth and reconciliation, the report card is mixed depending on the tribunal concerned and its particular mandate and ability to bring about goals sought. How much consensus is needed in the relevant community in order to succeed is, again, a matter for each individual tribunal. Each one was established and operates in its own social/political/legal context; each must be judged within its own context. Under this umbrella one can find various intersecting interests and policies: differences between civil and common law approaches; truth and reconciliation processes compared to judicial mechanisms; peace negotiations alongside no impunity for committing core crimes; and local community values compared with universal community values.

VIII. CONCLUSION

Summing up, no single “legal” mold fits all. The success and study of each tribunal will have to be judged on its own in its own context. But I think there is no doubt that the experiment begun 15 years ago was overall a success and more than worth it. The establishment of these UN-based tribunals, while some would criticize as being examples of “selective justice,” nonetheless proved to the world that at least in some cases, heinous acts by individuals would not go unnoticed by the larger community and that legal mechanisms would be established to try the accused and deliver justice. There would be accountability and no impunity for those found guilty of committing the worst of crimes. Even though Milosevic died before his trial was over and thus was never technically found “guilty” by the tribunal, I do not view that a failure. The fact remains he was in detention when he died, on trial by an international mechanism for crimes he allegedly committed against thousands of people. He did not die in a palace in Belgrade; he did not die while at the Casino on the Riviera. An international criminal justice system was operating against a former Head of State. Frankly, 15 years ago that would have been beyond almost anyone’s imagination.

I believe that the story of the UN-based criminal tribunals show that when the constellation of the various factors and elements are right, a “public order of human dignity” can be achieved.

