

2004

Carla Del Ponte: Her Retrospective of Four Years in The Hague

Angela M. Banks

William & Mary Law School, ambank@wm.edu

Repository Citation

Banks, Angela M., "Carla Del Ponte: Her Retrospective of Four Years in The Hague" (2004). *Faculty Publications*. 130.
<https://scholarship.law.wm.edu/facpubs/130>

Copyright c 2004 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.
<https://scholarship.law.wm.edu/facpubs>

Conference Scene / Le tour des conférences

Carla Del Ponte: Her Retrospective of Four Years in The Hague

ANGELA M. BANKS*

Over the past ten years the work of the International Criminal Tribunal for the former Yugoslavia ("ICTY" or "International Tribunal") has significantly advanced the field of international humanitarian law. On 2 October 2003, the Prosecutor for the International Tribunal, Carla Del Ponte, provided a retrospective of her last four years at the Tribunal in which she addressed these legal achievements, ICTY procedural developments that have increased the institution's efficiency, and the legal contributions of the International Criminal Tribunal for Rwanda ("ICTR").¹ Del Ponte noted that the ICTR was the first international court to issue a judgment on genocide, which gave new life to the Genocide Convention. There have been several ICTR genocide judgments and together they leave little doubt that segments of the Hutu population were intent on destroying the Tutsi population in Rwanda. The ICTR was also the first international court to conclude that rape constituted a crime against humanity. In addition to providing an overview of ICTY and ICTR contributions to the development of international humanitarian law, Del Ponte discussed the ICTY's Completion Strategy. This comment will focus primarily on Del Ponte's comments regarding this Strategy.

The United Nations Security Council has recently endorsed the ICTY Completion Strategy, which requires the Tribunal to complete all investigations by the end of 2004, all trial activities at first instance by the end of 2008, and all work by 2010.² Del Ponte stated that two specific developments will be critical in enabling the International Tribunal to meet these deadlines – openness to accepting guilty pleas and plea agreements, and transferring cases to local courts. At the time of Del Ponte's speech, the ICTY had received fifteen guilty pleas, seven of which had been entered since May 2003. Del Ponte acknowledged that there have been numerous criticisms of the ICTY's use of guilty pleas and plea agreements, but she placed the trend in the broader context of criminal prosecution. Ninety percent of criminal

* Legal Adviser, Iran-United States Claims Tribunal.

¹ Del Ponte's speech entitled, "Four Years in The Hague: A Retrospective – and the Way Forward" was sponsored by The Netherlands Society for International Affairs.

defendants in the United States plead guilty in exchange for a lower sentence and fifty percent of individuals accused of serious crimes in England plead guilty. Del Ponte also responded to three main critiques of this practice: the nature of the crimes makes it unseemly to bargain for a lower sentence, the procedure runs counter to a transparent process, and victims are given insufficient opportunities to tell their stories. She acknowledged the importance of transparent proceedings and providing adequate opportunities for victims to participate, but maintained that the ICTY has arrived at an appropriate balance between these interests such that the institution remains a model for future prosecutions of war crimes. Del Ponte went even further to stress the value of guilty pleas to the work of the ICTY, stating that such pleas enable the Office of the Prosecutor to obtain valuable information and can help promote reconciliation in the former Yugoslavia.³ Accused who plead guilty generally provide detailed information about atrocities that could otherwise remain unknown. This information can prove helpful, if not necessary, in prosecuting individuals who had high levels of responsibility.

The other development Del Ponte identified as necessary to enable the International Tribunal to adhere to the Competition Strategy is the increased transfer of cases to local courts. The ICTY has concurrent jurisdiction with national courts “to prosecute persons for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991,” but the Tribunal has primacy over the national courts. In 2000, the UN Security Council recalled this fact and began to examine the “length of the mandate of the Tribunal.”⁴ Subsequently, the ICTY has been aware of the need to “accomplish its mission in an expeditious and exemplary fashion.”⁵ The recent push to transfer ICTY cases to local courts is motivated by this need, but also a desire to ensure that those responsible for violating international humanitarian law are held accountable. Former ICTY President Claude Jorda noted that this course of action,

² S.C. Res. 1503, UN SCOR, 58th Sess., UN Doc. S/RES/1503 (2003).

³ Del Ponte also quoted Emir Suljagic, a Srebrenica survivor, who has written that “the confessions have brought me a sense of relief I have not known since the fall of Srebrenica in 1995. They have given me the acknowledgment I have been looking for these past eight years. While far from an apology, these admissions are a start.” Emir Suljagic, “Truth at The Hague”, *New York Times* (1 June 2003) (op-ed).

⁴ S.C. Res. 1329, UN SCOR, 55th Sess., UN Doc. S/RES/1329 (2000).

⁵ Press Release, ICTY, Address by His Excellency, Judge Claude Jorda, President of the International Criminal Tribunal for the former Yugoslavia, to the UN Security Council (27 Nov. 2001), available at <http://www.un.org/icty/pressreal/p641-e.htm>.

would have the merit of considerably lightening the International Tribunal's workload, thereby allowing it to complete its mission at an even earlier juncture. Moreover, it would make the trial of the cases referred before the national courts more transparent to the local populations and so make a more effective contribution to reconciling the peoples of the Balkans.⁶

If the Tribunal is to complete all investigations and trials in the first instance by 2008, it has to be selective in its prosecutions and Del Ponte has stated that the ICTY will focus on high-level individuals. She also recognizes, however, the importance of prosecuting the lower- to mid-level perpetrators, stating that these are the individuals who brought devastation to the local people's lives. Local courts thus provide a venue in which "the international community's historic effort to bring accountability to those who commit terrible atrocities" can be realized.⁷ The ICTY has been working with the Office of the High Representative ("OHR") for Bosnia and Herzegovina ("BiH") to establish the War Crimes Chamber within the Court of Bosnia and Herzegovina. This chamber will be responsible for prosecuting individuals accused of committing war crimes in BiH during the war. It is anticipated that the War Crimes Chamber ("WCC" or "Chamber") will initially take over fifteen lower-level ICTY cases.⁸

The option to transfer cases to local courts in BiH has not been utilized in the past because, as current ICTY President Theodore Meron has noted, the local courts currently face problems related to structural difficulties, the lack of cooperation between Republika Srpska and the Federation of Bosnia and Herzegovina, political pressure on judges and prosecutors, the mono-ethnic composition of local courts, ethnic bias, difficulties protecting witnesses and victims, and inadequate

⁶ *Id.*

⁷ Press Release, ICTY, Statement of Judge Theodor Meron, President of the International Criminal Tribunal for the former Yugoslavia, to the United Nations Security Council (9 Oct. 2003) (speech given 8 November 2003), available at <http://www.un.org/icty/pressreal/2003/p788-e.htm> [hereinafter Meron 2003 Security Council Statement]; see also Press Release, ICTY, Address by Ms. Carla Del Ponte, Chief Prosecutor of the International Criminal Tribunal for the former Yugoslavia, to the United Nations Security Council (10 Oct. 2003) (address given 9 October 2003), available at <http://www.un.org/icty/pressreal/2003/p791-e.htm>.

⁸ "Bosnia gets war crimes court", *BBC News* (31 Oct. 2003), available at <http://news.bbc.co.uk/1/hi/world/europe/3229263.stm>.

training for court personnel.⁹ The creation of the Chamber in BiH will avoid these problems because it will begin its work with an international staff of judges and prosecutors. The WCC, which is scheduled to open in 2004 at the latest, will have a staff of approximately 100, with seven prosecutors and eleven judges. Over time, power will “gradually be handed over to Bosnian officials and the court will become fully national after five years.”¹⁰ In the early planning stages of this Chamber, former President Jorda hastened to emphasize that the new court would not be “a mini-international tribunal’ in Sarajevo.”¹¹ Instead the War Crimes Chamber was envisioned as a “national court already in place” that would provisionally be accorded “a *minimal* international character in order to guarantee its impartiality and independence.”¹²

Unfortunately this strategy risks exacerbating a problem that has contributed to the ICTY’s inability to transfer cases to local BiH courts – the failure to build the institutional capacity of these courts.¹³ Noting this problem, one commentator has stated that “[i]nstead of serving as an important tool of legal development and as a catalyst for local war crime prosecutions, the tribunal will apparently fold its operations without contributing much to either the justice systems in the region or the prosecution of war crimes.”¹⁴ Aware of the increased importance of building the capacity of local courts, Del Ponte shared several types of assistance that the

⁹ Meron 2003 Security Council Statement, *supra* note 7. Former President Jorda noted these obstacles in 2002 when he explained why a new war crimes chamber was necessary. Press Release, ICTY, Address by His Excellency, Judge Claude Jorda, President of the International Criminal Tribunal for the former Yugoslavia, to the UN Security Council (26 July 2002) (address took place 23 July 2002), available at <http://www.un.org/icty/pressreal/p690-e.htm> [hereinafter Jorda 2002 Security Council Address].

¹⁰ Anthony Deutsch, “Bosnia Gets \$18.4M for War Crimes Court”, *Newsday* (30 Oct. 2003), available at <http://www.newsday.com> (last visited 17 Nov. 2003).

¹¹ Jorda 2002 Security Council Address, *supra* note 9.

¹² *Id.* (emphasis in original).

¹³ Given the uncertainty of the International Tribunal’s future when the institution began it is understandable that considerable focus was not placed on local courts. It made sense for the ICTY to concentrate on creating and developing its own capacity to conduct war crimes trials. See Gabrielle Kirk McDonald, “Reflections on the Contributions of the International Criminal Tribunal for the former Yugoslavia”, *Hastings Int’l & Comp. L. Rev.* 155, 158-59 (2001) (discussing meager beginnings of the International Tribunal).

¹⁴ David Tolbert, “The International Criminal Tribunal for the former Yugoslavia: Unforeseen Success and Foreseeable Shortcomings”, 26 *Fall Fletcher F. World Aff.* 7, 15 (2002).

ICTY can and will provide to local courts in an effort to prepare them to prosecute war crimes in the near future. The ICTY plans to provide documents, evidence, knowledge, expertise, and advice.

One aspect of capacity building was noticeably missing from Del Ponte's comments: how the new Chamber will address issues related to cooperation between the relevant political entities, the ethnic composition of the courts, and ethnic bias. Del Ponte appears to envision technical legal assistance; however it has been noted that the overriding problem when trying war crimes "is one of ethnicity."¹⁵ This may overstate the issue; however the international community is not confident that the local courts of BiH can, currently, fairly and freely prosecute war crimes. This opinion is partially based on the nearly mono-ethnic judiciary in which judges are believed to be appointed based on ethnic and political grounds.¹⁶ Factors such as these can produce legitimacy problems. When a judicial body with jurisdiction over war crimes was created in Kosovo, there were few ethnic Serb judges who were willing to serve and the few who agreed resigned soon thereafter.¹⁷ The lack of Serb representation caused the independence of the institution, which was important for local legitimacy, to be severely questioned. Consequently, "there was little ability for the local justice system to deliver verdicts perceived to be legitimate in trials of those suspected of committing mass atrocities."¹⁸ Even the ICTY, despite its international staff and location outside of the former Yugoslavia, has faced allegations that it is biased "to the benefit or detriment of one or [an]other ethnic group, and [mistreats] persons detained under its authority."¹⁹ Not only did these views negatively affect the ICTY's credibility in the region, they impeded the

¹⁵ "Hague Tribunal to Hand Over Cases to Local Courts", *Radio Netherlands Wereldomroep* (18 June 2002), available at <http://www.rnw.nl/hotspots/html/icty020618.html>.

¹⁶ *International Crisis Group, Rule Over Law: Obstacles to the Development of an Independent Judiciary in BiH*, ICG Report No. 72, at i, 15-17 (5 July 1999); see also The Human Rights Center & the International Human Rights Law Clinic, University of California, Berkeley, & the Centre for Human Rights, University of Sarajevo, "Justice, Accountability and Social Reconstruction: An Interview Study of Bosnian Judges and Prosecutors", 18 *Berkeley J. Int'l L.* 102, 107 (2000); Meron 2003 Security Council Statement, *supra* note 7.

¹⁷ Laura A. Dickinson, "The Relationship Between Hybrid Courts and International Courts: The Case of Kosovo", 37 *New Eng. L. Rev.* 1059, 1066 (2003).

¹⁸ *Id.*

¹⁹ Lal C. Vohrah & Jon Cina, "Outreach Programme", in *Essays on ICTY Procedure and Evidence: In Honour of Gabrielle Kirk McDonald* 551 (Richard May *et al.* eds., 2001).

work of the Prosecutor. In 1999, Judge Gabrielle Kirk McDonald, then President of the ICTY, created the Outreach Programme, which designed and implemented an information campaign that highlighted the ICTY's impartiality and independence. Through this program, the ICTY has been able to counter and overcome many of the perceptions of bias.

These examples, from Kosovo and the ICTY, demonstrate that it is important for the War Crimes Chamber to begin working on issues related to perceived bias early. Relying on an international staff for the early functioning of the Chamber without addressing these issues will only recreate the current problem – lack of confidence in the local courts of BiH. Building and maintaining a legitimate and effective judicial institution within a multiethnic society depends as much on the structural characteristics of the institution as on societal, political, and economic factors. Equal access and representation can address the ethnic composition of the institution, but those factors alone will not combat ethnic bias. Therefore it is critical that the ICTY, the OHR, and the WCC confront these issues early, in concert with other governmental and civil society entities, to ensure that the Chamber will be in a position to be completely national by the target deadline.