



The spotlight was placed on the intricacies and machinations of the International Criminal Tribunal in The Hague when the Hon. Kevin Parker AC RFD QC, a PMS alumnus and former president of the ICT, spoke to senior students at the school.

Three Australians have served as UN judges in The Hague on the International Criminal Tribunal into the former Yugoslavia. Mr Parker was the third. His predecessors were Sir Ninian Stephen, a former Governor-General and former judge of the High Court, and the Hon. David Hunt, a former judge of the Supreme Court of NSW. This is an edited version of Mr Parker's address to students:

“Just how I got into the act is one of those mysteries. I don't know and I don't propose to find out - it's better not to know some things in life.

The appointment came out of the blue. I was about to go into the Supreme Court one day and my secretary said 'the Attorney-General is on the phone'. He said he and the Prime Minister and the Minister for Foreign Affairs would like to know if I wanted to be the permanent Australian judge in The Hague.

I hadn't sought the job – hadn't expected it – and there were more than 160 federal and supreme court judges in Australia and somehow they got me. I had 24 hours to decide. I was just then turning 67 years of age. I was about to retire from the Supreme Court.

I'm now 75 and I've been rejuvenated by the

experience of having been in The Hague. It was a rush to get there. We had six weeks. I had to complete work with a number of other judges on cases that were in progress. It meant a lot of hard work for everybody.

I was farewelled on a Monday, got on a plane on Tuesday, arrived in Holland on Wednesday and was sworn in on Thursday morning and started sitting immediately as the presiding judge in a new trial, with two other brand new judges.

It was for me an amazing new experience to sit with judges, only two of whom had English as a first language.

“I never stopped learning . . .”

In seven and a half years in The Hague, I never stopped learning.

There is no age limit. But we imposed our own and retired at 75.

The Hague. It's known in the legal world and UN as the Legal Capital, because in 1907, there was a conference there on world peace and law and order. That led to the World Court and there were treaties dealing with the law of war, signed in The Hague. There are two international UN courts in The Hague – the International Court of Justice and the International Criminal Tribunal for the Former Yugoslavia.

The ICJ deals with disputes between nations. It deals with a great range of matters – most frequently with disputes over boundaries, disputes over fishing rights and mineral rights in the ocean. Australia has undertaken one case in the ICJ against Japan over international whaling. Disputes between nations are dealt with here.

That's the sort of dispute I tried in the ICJ.

Fifteen judges - and they all sit in one long row, like 15 black hawks - and the person addressing them has to try to keep the whole 15 in sight. Our High court is nearly as bad with 7 judges in a row.

The other court, the International Criminal Tribunal for the Former Yugoslavia, was formed in very special circumstances.

It was originally proposed when the UN was formed in 1945 that there'd be the ICJ to deal with disputes between nations and there'd be a criminal court to deal with breaches of international criminal law. But that second court was vetoed.

Five countries, the United States, United Kingdom, France, Russia and China, the victor nations of World War 2, have the power of veto in the UN.

If one says “no”, then that is the position of all. Two of them vetoed the proposed criminal court – Russia and China.

Over the years since 1945, there have been a number of efforts to revive this court, but they were always vetoed, sometimes the US joined China and Russia in the veto.

Enter the BBC World and CNN international television networks.

They were vividly portraying on the world's TV screens the enormous horrors that occurred in the former Yugoslavia as it was disintegrating. Yugoslavia consisted of six provinces in a federation and it was breaking up – Serbia, Croatia, Montenegro, Bosnia Herzegovina, Macedonia and Slovenia.

It was proposed that a solution to this terrible thing was to have a world criminal court.

The UN debated that idea again. To appease

Russia, China and the United States, it was agreed that instead of the World Criminal Court, it would become just the former Yugoslavia and that it would deal only with conduct from the start of the disintegration of Yugoslavia in 1991.

There were no vetoes and the International Criminal Tribunal for the former Yugoslavia was born.

It came into existence in 1993.

Only ten months later, when it was already showing signs of working, the UN did it once more, for Rwanda. Two tribes in Rwanda were killing themselves - the two disputing who should be the governing power of Rwanda - and so there were two international criminal tribunals.

The Rwandan tribunal has 11 judges and two of its judges sit up in The Hague with the criminal tribunal for the former Yugoslavia.

The ITFY has complete jurisdiction over war crimes and humanitarian law. Most people are tried for breaches of those two categories.

The only real area of international criminal law it doesn't deal with is piracy.

The offences include all those you can think of and a lot more - murders, genocide, rape, wanton destruction of civilian property, forced relocation of people from their homes, usually across national borders as refugees, that sort of thing. The International Court of Criminal Justice in The Hague, formed in 1945, took a long time to become accepted.

People were very nervous about it. And there is a basic principle of international law that each nation is sovereign. It is its own boss.

And most people saw a court being able to solve disputes between nations as taking away the sovereignty of each nation.

Therefore people were very suspicious of this new creature called the international court of justice. It took until the mid-1980s for the ICJ to gain enough credibility for most nations of the world to be confident in it.

Today it has peopled queued up with cases. It's extremely popular. Because of this principle of sovereignty, which is still the case today, before the court can deal with a case and make the result binding on a nation, that nation has to agree to be subject to the court's jurisdiction.

There can be standing agreements or agreements case-by-case.

But unless a nation agrees, the International Court of Justice can't deal with disputes concerning that nation.

Australia and Japan both have standing agreements, so Australia can take Japan to the International Court of Justice over whaling.

But when Australia, Indonesia and Portugal, believe it or not, were in dispute over Timor, because Timor used to be a Portuguese possession a long time ago.

That could not be resolved by the ICJ because Indonesia - a central party - is not a nation that accepts the ICJ, so nothing could be done by the ICJ.

Lots of countries don't agree with the ICJ dealing with their affairs today.

Our old friends Russia, China, the USA, India, Pakistan, Indonesia and Israel, just to name a few. The USA used to agree, but it lost the case concerning American forces dealing with drugs in Latin America, so America took its football and went home.

It now doesn't agree with the ICJ dealing with affairs concerning the United States.

In Australia, we're used to the idea that if there's a dispute, we go to a court. The court will deal with you and settle your dispute - rightly or wrongly, you're bound by that decision.

That's the law in Australia.

That's the law in all other countries. But it's not the international law. In international law a nation must consent to be bound by it.

International criminal disputations are extremely different from anything we find here in Australia or in any other national court.

In my last trial in The Hague, there were nearly 900 separate murders alleged in the one indictment against one person.

It was also alleged in the same indictment that the destruction of 37 towns and villages. The wiping-out of complete towns and villages.

There is also alleged to have been the forced transfer, mostly out of the country, of more than 800-thousand people. That was all in one indictment, in one case against one person. Enormous scale.

The accused was the chief of police of one of the countries. It was not alleged that he'd gone around shooting nearly 900 people, but that policemen, following his orders and directions, had done so. And had destroyed these villages and had forced more than 800-thousand people out of the country.

He stood trial, and his minister above him was also due to stand trial, but he committed suicide first.

The horror of the evidence we heard was the sort of thing that shook you inside.

I don't want to go over a lot of it, but to give you a bit of an idea, I've taken two examples



concerning people who were of school age. The first is an 11-year-old girl, living in a regional town with her parents and brothers and sisters.

Police and soldiers established a regional headquarters in that town and the men of the town fled because they knew what would happen.

She, with 19 other women, girls and children of her family, were lined up against a wall and shot.

She woke from unconsciousness to find her young brother, a little fellow, underneath her, but she was too weak to be able to get off him and he died as she lay there.

She remembered drifting in and out of consciousness, other soldiers running into the courtyard, some in white clothes. They were a

medical unit of the permanent army. It was the **police** unit that had done the shooting. She was put in an ambulance and taken to a

hospital.

Two or three months later, NATO entered Yugoslavia and she was flown immediately to the United Kingdom. She had suffered 13 AK47 rifle bullet wounds to her 11-year-old body.

One of her arms was completely smashed. Alone, in England, she had no English; she had to undergo multiple operations, to deal with her condition.

Three months later, one of her brothers was identified. A young fellow two years younger. And he was flown to England to join her.

And then an uncle, the only surviving adult male member of the family was found and flown to England, so a new little family unit was established.

When I saw her as a witness, it was 10 years later - she was 21.

She was an elegant, alive, charming young woman who had just completed a three-year university degree in England and she was about to do post-graduate study. She had a full, wonderful future bubbling out.

Put yourself in the position of that 11-year-old girl and think what she went through.

The other example concerns the people of one village. There were about 300 of them.

One morning, before daylight, tanks rumbled in. The village was bombed.

Soldiers came into the village, they were actually police who had entered the village. The soldiers were in tanks that surrounded it.

Everybody was forced out on to the street.

Those who wouldn't leave their homes were simply burnt alive as the homes were set alight.

The women and young children were then forced to march away from the village.

Three days later they were forced to cross the border and into a neighbouring village - those who survived the journey.

And as refugees in a very poor country, they were exploited.

They didn't know what had happened to the men and any boy of the age of 15 or more had been gathered together and marched to a timber barn.

They were forced into the barn and then machine-gunned.

Two or three wounded managed to escape into forest that surrounded the barn.

The rest, though, died there.

The barn was set on fire and more than 110 people, including 12 or thirteen teenage boys, were burnt.

That was end of the whole of the young manhood of that village and that happened in lots of other villages

and lots of other towns.

Those two examples just touch on the horror. Bits of evidence from one case were similar in dozens of cases.

You can imagine how much the country was devastated by this sort of conduct.

This was the sort of injustice the international judges were asked to deal with.

The legal system of that country had completely broken down during this operation and there was no national legal system to deal with this sort of atrocity.

At its busiest there were 28 judges at the international criminal tribunal.

16 permanent judges - one of whom was me - and 12 temporary judges.

They had come from 28 different countries of the world, 28 different legal systems.

The court had two official languages - English and French. But my last trial, five languages most of the time, but six on occasions - all

simultaneously.

There were simultaneous translations. The judges simply dialed up the one they wanted transmitted to their headphones.

Every piece of paper had to be translated into those languages.

Counsel were speaking different languages from other counsel and the judges. Witnesses spoke their own languages.

So a great deal of technical effort and cost and time went into the business of enabling everybody to understand what was going on. All instantaneously – as I was speaking, my



words were translated and appeared, one or two words behind, on a screen.

The results:

Some 161 military police or political leaders from the former Yugoslavia were charged. This was regarded as an absolutely amazing achievement, not expected by the UN, who thought perhaps 10 or 12 people would be found and evidence would be located that would support charges and they would be tried.

Nearly all of them were generals of police or military or premiers or prime ministers or ministers of governments – deliberately, the concentration was on those rather than on the ordinary soldier or police officer.

It was not the people who pulled the trigger, but the people who formed the policies and gave the orders, so as to make an example.

Somewhat uniquely – nobody had immunity. In some parts of Europe and some parts of the world, people in government are immune from legal action.

This legal system prevails in a lot of the world. There was no immunity at all here, so presidents of three of the countries were charged.

Ministers, generals in the police and military commanders were charged.

That sent an enormous message back to the people in those countries, that people in government were suddenly subjected to the law. The very last trials are now under way, so 161 cases have been completed.

Many of the accused were found in all parts of the world and brought back for trial.

The offences all carry a sentence of life imprisonment as the maximum.

Some sentences of life imprisonment have been imposed – others of lesser terms – 20, 30, 40 years. Two have been sentenced to five years or less when what was proved against them in the end proved to be relatively minor. But some very big people in their respective

countries have been tried, convicted and sentenced to significant terms of imprisonment. This has had a big effect within those countries. The ICTY has also been instrumental in restoring the legal systems in what are now the six separate nations that formerly comprised Yugoslavia. The nations, having separated, wanted to join the European Union. The European Union said: “All right, this is fine, but we are going to look at your human rights records before we decide whether you should be part of the EU.”

That happened in 1999 and 2000.

Until then, it was very difficult to get any accused names or any witnesses or any documents. Once the EU said “we’re going to look at your human rights records”, suddenly those nations started to find accused they hadn’t been able to find before, started to find documents. They were even finding witnesses that had been lost and they were sent to The Hague. It was because of the political

ambition of a country to belong to the EU, that they were forced to do something to assist. They had a legal obligation to assist in every way the work that the International Court at The Hague, but they hadn’t been doing it. The political imperative of wanting to join the EU gave them a whole new set of obligations. They became utterly willing to assist. Governments even found it was very helpful to have had the last prime minister under arrest in The Hague, being tried, rather than back in the home country. So people like President Milosevich of Serbia found their way to The Hague.

This was a great embarrassment for the ICT because suddenly, instead of having too little work, they had too much work.

When I reached The Hague, there were 47 in custody, waiting to be tried.

Trials in the international criminal tribunal or for any form of war crimes take a great deal longer than a trial here in Australia.

If you tried 900 separate murders here in Perth, it would take you many years.

The consequence is that trials take a long time in The Hague.

Milosevich died of a heart attack just near the end of his trial. It was actually the start of his fourth year of trial. My last trial involved 47 people. You can imagine the time that would take.

I was president at the time and I introduced a couple of novel ideas from the Australian system,

like trying people together, which had never been done before.

In the European system, people were always tried separately.

So people involved in the same conduct were tried together - we actually had seven tried in one case.

It took a Scottish judge and two others 33 months to do the trial.

But if those seven had been tried separately, it would have taken a great deal more time.

So it is that now, we have reached the point that the very last accused are being tried, of all those originally charged.

There is another creature – the International Criminal Court.

The veto power of the UN was always a problem for a court with jurisdiction to deal with anybody for offences anywhere in the world.

To work around this obstacle in the mid-1990s, a separate treaty called the Treaty of Rome was entered into. Australia was one of the first countries to enter into that treaty and the whole purpose of that treaty is to establish an international criminal court.

There are 193 nations in the world.

Sixty joined together in the treaty of Rome.

Gradually more are joining and there are now nearly 120 are parties to the Treaty of Rome. Still a lot to go.

The old favorites are still missing: the United States, Russia and China. There are still problems with states such as Chechnya for Russia and Tibet for China, so they’re still standing off.

The International Criminal Court is not a UN court. Its first judges were elected in 2002 and it is sitting in The Hague.



It has the job of trying to gather enough international support to be able to take over from where the ICTFY has left off. It is finishing off now in the hope that the International Criminal Court can take over. It has the same jurisdiction as the Yugoslavian tribunal - war crimes, humanitarian law, In theory it can deal with any of those anywhere in the world.

Unfortunately, sovereignty of nations means the theory has not yet been achieved.

All a nation has to do, if one of its citizens is to appear before the court, is to say: “We’re going to deal with that” and the International Criminal Court can’t.

Australia has always been a strong supporter of the international court.

All our troops in Afghanistan are theoretically subject to the jurisdiction of the International Criminal Court.



But under the terms of the treaty, Australia can tell the ICC it will deal with any case involving Australian citizens and the ICC can't. Australia has to then genuinely pursue the case. So any of our troops who are alleged to have breached international military law, will be dealt with by a military court in Australia, not by the ICC.

In Libya a nephew of Colonel Ghaddafi survived and is in custody in Libya awaiting trial. The ICC has said it will deal with him, but Libya has said "no", Libya will do it. It's complicated, because nobody can be sure which is the real government of Libya at the moment, so they're not sure whose hand has to go up and whether they have an established legal system. Another instance is in the Sudan. The Sudan is not a party to the ICC and the UN can't go in. These are two examples why the ICC is struggling to gain credibility. We hope it will, because it is the body that must take over where the Yugoslav Tribunal leaves off."

Edited by Graeme Hunt

Curriculum Vitae Hon. Kevin Horace Parker AO RFD

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CAREER HIGHLIGHTS:

Admitted as Legal Practitioner 1960
Chief Crown Prosecutor for WA 1972 - 1974
Appointed Queen's Counsel 1977
Solicitor General of WA 1979 - 1994
Judge, Supreme Court of WA 1994 - 2003
Judge, UN International Criminal Tribunal for the Former Yugoslavia 2003
Council Member, Law Society of WA 1972 - 1979
Member, Barristers' Board /later Legal Practice Board 1977 - 1994 (Chairman 1979 - 1994)
Member, Australian Law Admissions Consultative Committee 1983 - 2003
Reserve Legal Officer, RAAF, reaching Rank of Air Commodore 1958 - 1997
Reviewing Judge Advocate, Australian Defence Force 1985 - 1997
Hon ADC (AIR) to HM the Queen 1979 - 1981
Member Canon Law Commission, Anglican Church of Australia 1981 - 2003
Chancellor, Anglican Diocese of Perth 1994 - 2003

Created an Officer in the Order of Australia (AO) in 1989 particular for my role in achieving the enactment of the Australia Acts 1986 of Australia and the UK, and the Jurisdiction of Courts (Cross-Vesting) Acts of every State, Territory and the Commonwealth in 1987. The Australia Acts secured the complete independence of Australia and its States from the UK. The Cross-Vesting Acts enabled every Supreme Court in Australia to exercise the jurisdiction of all other Supreme Courts and of the Federal Court and the Family Court of Australia.

