

The Meanders of the International Criminal Justice

The present article has no other ambition to draw some lessons learned from a judicial-operational experience in a multinational environment. It must be placed back in the cooperation context of that period between the International Criminal Tribunal for the former Yugoslavia (ICTY) and the Stabilization Force (SFOR). As it is known, this context has considerably evolved in the following years in order to enable the indictment and the conviction of a larger number of persons indicted for war crimes. Straight off, it is acceptable to say that the strict respect of the legal framework of the SFOR-ICTY cooperation is a guarantee of success.

To plead the case, following the description of the general framework of that mission, some lessons learned will be proposed regarding a six-month experience in the theater.

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THE GENERAL FRAMEWORK

UNDERSTANDING THE ICTY IN ORDER TO UNDERSTAND THE MISSION FRAMEWORK

The general framework was created by resolution 827 of the Security Council on May 25 1993 to judge the persons presumed to be responsible of

serious violations of the international humanitarian law committed on the territory of the former Yugoslavia between January 1 1991, and a date to be determined when peace is restored. It has not been fixed yet, which explains that the Tribunal is still

competent for crimes committed in Kosovo.

After a difficult or even chaotic start, due on one part to the procedural system it chose, and on another part, to the unwillingness to cooperate of the states,

the ICTY asserted itself as an essential element of the settlement of conflicts in the former Yugoslavia.

Another strong characteristic must be noted - its Anglo-Saxon procedure. At that time, the ICTY is suffering from the difficulty in adjusting its procedure strongly inspired by the Anglo-Saxon law (the common law). Indeed, the latter leads to endless questioning and cross-examination of the witnesses. Thus, the duration of some criminal trials can reach up to eighteen months such as in the Croatian General Tihomir Blaskic's case.

Generally speaking, the aim of the ICTY investigations in Bosnia-Herzegovina is to collect the maximum of informations and evidences on the sites likely to contain open graves ; to hold the inquiries and to perform the exhumations of these open graves to gather evidence



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about these war crimes ; to study and to copy any available document linked to these matters ; to hear witnesses and victims ; finally to audition the persons indicted for war crimes.

How is the NATO SFOR action in keeping with this framework ? Exclusively in a regular and legal framework derived from the resolutions of the Security Council and from the Dayton agreements² (General Framework Agreement for Peace - GFAP). The agreement signed by the ICTY and SHAPE - The Memorandum of Understanding - in March 96, constitutes the reference document for everything pertaining to the support that SFOR can provide to the Hague Tribunal. It is then translated in very detailed standing operation procedures (SOPs) for the Force (units deployed in the field; liaison officers...) : 3 407 for the investigations as a general rule and 3 409 for the persons indicted for war crimes.

Concretely, as early as January 1996, this is expressed by the provision of additional informations about the zone in question; liaison teams and a safe environment ensured by patrols around the enquiry location; accomodation and catering possibility with SFOR units and medical evacuation in case of emergency. From April 1996 on, SFOR ensures reconnaissance flights as well as a reinforced air and ground surveillance of the sites known to be the most sensitive ones.

THE LIAISON OFFICER'S MISSION

Inserted within the coordination cell of the SFOR operation office, the liaison officer to the ICTY (LO-ICTY) is also an integral part of the Joint Operation

Center (JOC) where he performs other functions. His mission can be resumed as follows :

- Relations with the ICTY office in Sarajevo and its chargé de mission.
- Relations within the SFOR staff : the LO-ICTY is also in touch with the legal advisor's office (LEGAD) for the legal control of the support provided by SFOR; with G2 for the assessment of the potential threat against the enquiry area...
- Relations with the subordinate units : in his domain, he is responsible for the drafting and updating of the SOPs and of the FRAGOs (fragmentary orders) to the divisions.

ALL THE WORK ACTIONS ARE IMPREGNATED WITH THE NATO CULTURE

Like all the officers inserted in NATO staffs, his working framework is characterized by :

- **Numerous Computers Working in Nets.** The secured electronic communication system (CRONOS) is omnipresent and permits to rapidly send to SHAPE, to a division, to a staff officer in the next office prepared document or message forms. So, every Monday, the LO-ICTY sends directly to the SHAPE JOC the weekly report about the support provided to the ICTY (Weekly report of SFOR support to the ICTY). Besides, this net enables him to send FRAGOs - in real time- to different subordinate units sometimes penalized by the lack of anticipation of the ICTY.

THE SCUFFLE FOR DELAYS OR THE IMPORTANCE OF FILTERS

- Any document with an external value or considered as an order passes through numerous filters :

the coordination cell commander, the ops center commander, the legal or even the political advisor, the PR officer... the DCOSOPS. By the way, let us note the key place held by the LEGAD. In the Anglo-Saxon sense, he is in charge of ensuring a strong judicial basis to the operational decisions taken upstream. In other words, he will search the specific rules of the operation (rules of engagement and rules of behavior which are in the OPLAN and SUPLAN) for the justification of the action of the force. Given the political-media sensitivity of the matters this control, *a priori*, may go as far as sending the document to the SACEUR legal advisor's office to be approved.

WHAT CAN WE DEDUCE FOR THE ICTY ?

- As the privileged interlocutor of the ICTY, he must be able to speak in lieu of the DCOSOPS, and answer, while respecting the letter and the spirit of the legal regulations, to the numerous requests from his correspondants in the ICTY Sarajevo. He is therefore requested to mix two qualities : firmness and judgement.
- As the first drafter of the letters sent to the Tribunal in The Hague he must know how to master the language and shades of meaning indispensable to the writing of a diplomatic letter.
- Finally, he must be able to present a synthesis situation report to the SFOR G3 (COS Operations) in order to facilitate rapid decision-making on subjects that are sensitive from a political-military point of view. As a comparison, the best example that can be quoted

is the presentation of synthesis slides by CPCO staff officers.

LESSONS LEARNED

As the general framework has been described, which major lessons can we learn ? Three major groups are evident : the influence of foreign policy on this sensitive subject, the media pressure, and the strict respect of the legal framework.

• Foreign Policy Influence :

So, as early as the beginning of 1997, the tribunal is exerting a strong pressure to bring the peace maintaining forces to track the war criminals. The prosecutor of that time, Mme Louise Harbour, makes a statement in that direction in order to be able to convict 74 persons indicted for war crimes. It is when the case of the Croatian general Tihomir Blaskic is debated, and for whom the Croatian authorities initially refuse to provide the smallest evidence to the ICTY. Concretely, that political-legal pressure demands that the actors in the field - LO-ICTY, LEGAD...- show perseverance and, let us say it, firmness not to give into the sound box effect.

• **Media pressure.** Concerning the pertinence of the informations released by the AFP (Agence France Presse). What is really this all about ? On December 26th 1996, the liaison officer receives an information from a French PR officer. Reported by the AFP, it says that soldiers would have denied to a Bosnian exhumation committee team the possibility to keep working on the Kladanj area (North-East of Bosnia-Herzegovina and sector of responsibility of



the Multinational Division North MND-N) in which 120 persons killed in July 1995 might have been buried. In the same report it is said that the president of that same committee requests the SFOR Commander in chief to withdraw his soldiers so that the committee be able to keep working. The LO-ICTY immediately reports to the G3 coordination cell commander after checking the information with the MND-N as well as with the theater intelligence sources or the national ones (the famous National Intelligence Cells). Nobody seems to be aware and no report has been forwarded up to the Division commander. Despite the reservations of the LO-ICTY and of the French PR officer it is decided to release an official denial. The next day the DMN-N duty officer reports via CRONOS that something effectively

took place : an American military police team had not found necessary to report. The consequence of this mistake : the SFOR PR officer must make amends during the usual evening Press point. What lesson can we learn ? That the Anglo-Saxon reporting procedures are so strict that if nothing shows in due time it is considered that nothing happened. One must be convinced that, in this domain, there is only little room for French good sense.

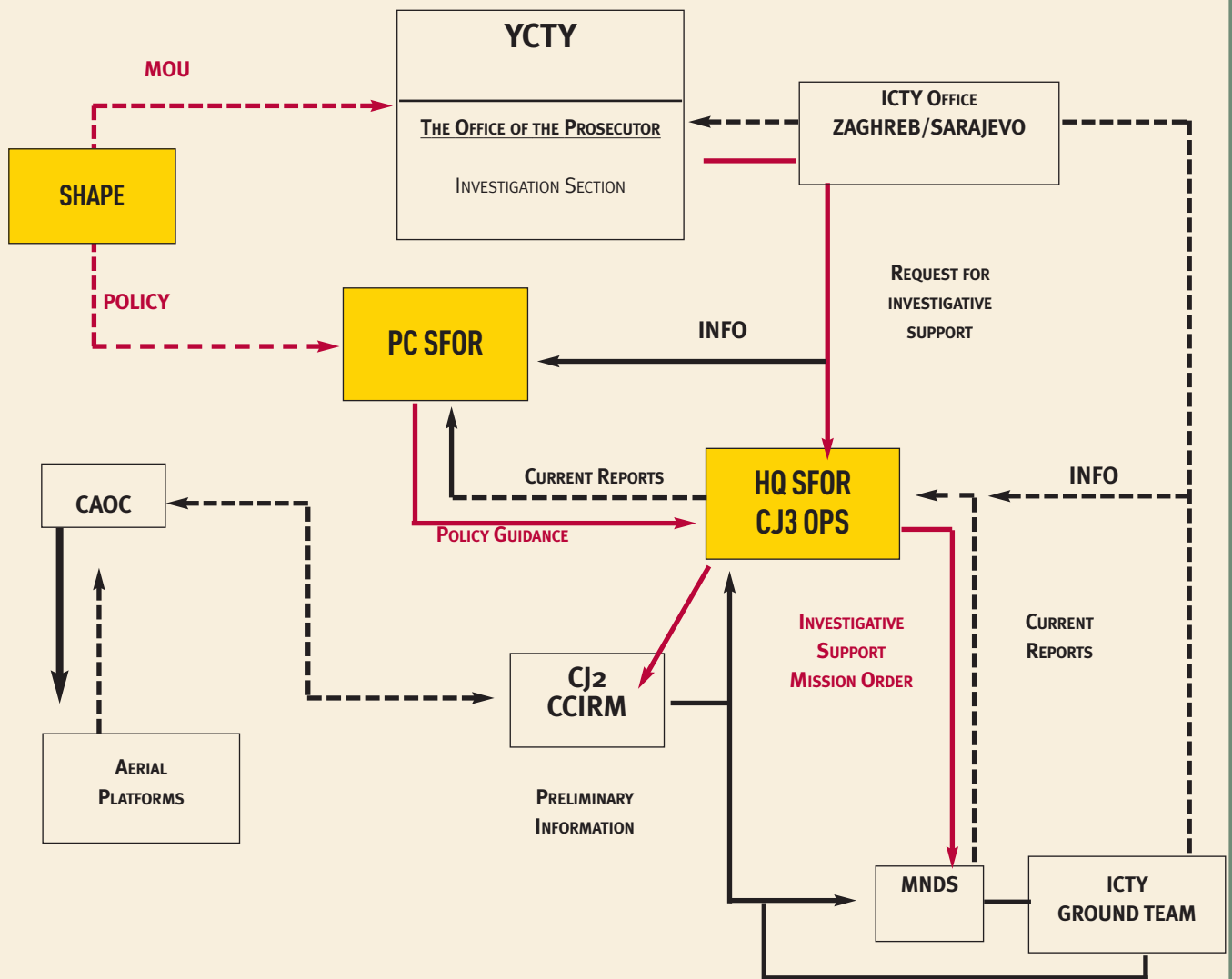
Strict Respect of the Legal Framework : the mandate, the whole mandate, only but the mandate. Here lies the importance of the accuracy and of the exhaustiveness of the paragraphs - coordinating measures and legal aspects - in the Fragos given to the subordinates units. Each sentence has its importance :

“ The Stabilization force will provide a safe environment as well as the freedom of movement to the ICTY inquiries ”. On the other hand it is emphasized that “ the SFOR units are not obliged to provide direct escorts or to guard sites which are under investigation ”. A precise example will illustrate the validity of these rules. During an investigation performed in the Bosanski Samak area (North-East sector and responsibility area of the DMN-N under American command) in mid-December 1996, one of the employees of the ICTY Sarajevo calls me to indicate that the American officer in charge of accompanying the ICTY team does not provide the same level of security. After checking in the field, it actually appears that one of the female inspectors took the initiative to request to

be escorted inside premises. This is beyond the legal framework of the mandate. In Sarajevo, after a thorough control of the exact wording of the Frago and SOPs by the LEGAD, it is demonstrated that the force is strictly in its rights. In parallel, a Press point is prepared, and a letter is sent that same day to M Hendrick, the chief of the investigators in The Hague, with a copy to the SHAPE LEGAD's office in order to definitely defuse the rumor. What lessons can we learn *a posteriori* ?

The importance to establish relations based on confidence with those who hold the Law, among whom the LEGAD. Directly integrated in the operational loop, his legal control a priori is a necessary and sufficient life insurance for the units which are executing these same orders and *a fortiori* for the LO-ICTY.

ICTY TASKING PROCEDURES (INVESTIGATIVE SUPPORT)



Another special case can be quoted when in March 1997, an ICTY team investigating in the Prijedor and Banja Luka area (sector West and responsibility area of the DMN-SO - under British command) wants to question persons not appearing on the poster showing the persons indicted for war crimes. A new reiteration by the LO-ICTY and the LEGAD restores things in conformity with the reality. So, it confirms the Force in its right as regards legality. How is that ? According to the agreement (Memorandum of Understanding) signed by the ICTY and SHAPE on May 9th 1996 “ it is agreed that the SFOR personnel could detain persons indicted for war crimes by relying on the warrants of arrest accompanied with the corresponding bills of indictment and all additional information provided

by the tribunal. These same documents must be forwarded to the SACEUR LEGAD’s office by the prosecutor’s office in The Hague which itself forwards them to the Force LEGAD’s office. Finally, the latter is in charge of dispatching these same informations to the subordinate units through the poster of the indicted persons or any other means he judges ad hoc”. It is even emphasized further “ that there is no precise clause permitting the ICTY teams to indict persons directly in the field. SFOR units must clearly specify that they do not accept orders but from military leaders and not from the tribunal”. To make it short, once again, the strict application of the legal rules accepted by the two parties allowed the force to remain *stricto sensu* in the framework of its mandate.

- 1 NATO SFOR Liaison Officer to the International Criminal Tribunal for the former Yugoslavia (ICTY), lieutenant-colonel PETREL carried out a LANDCENT reinforcement mission in Bosnia Herzegovina from November 1st 96 to March 27 97.
- 2 Signed on December 14th 1995, the Dayton agreements put an end to the war in Bosnia-Herzegovina by establishing the division of the country in two entities while planning the implementation of common institutions.

Finally, it is truly the rigorous application of the legal framework which enables a newcomer in matters of international criminal justice to fulfill his mission in the letter and spirit. It remains that the most concrete goal of this article is to learn some lessons from an assignment in an international environment in order for those who want to individually prepare themselves for similar responsibilities to have concrete examples at their disposal. Inserted in the RETEX (US equivalent is CALL) data base, they might then facilitate the understanding of seemingly complicated missions in the long-term.