

# **THE YUGOSLAV CRIMES TRIBUNAL: A PROSECUTOR'S VIEW**

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## **I. INTRODUCTION**

In the midst of these scholarly international law discussions, I bring you a prosecutor's perspective of the International Criminal Tribunal for the Former Yugoslavia (the Tribunal).

I am a former federal prosecutor from the Southern District of New York, now on leave from my position as partner in a New York law firm. Most of my colleagues in the Office of the Prosecutor are prosecutors and criminal investigators. Very few of us came to the Tribunal with any knowledge, let alone expertise, in matters of international humanitarian law. We have come to learn that for most of the legal issues we confront, there is scant authority and we must therefore rely on theoretical arguments. Until the Appeals Chamber of the Tribunal rules on the first few cases, the best we can do is to formulate reasonable approaches to virtually every legal issue we encounter, from fundamental challenges to our jurisdiction, to applications of the command responsibility doctrine, to definitions of the elements of the crimes within our jurisdiction and rules for admissibility of evidence.

At the same time that we are debating these legal issues, we are gathering evidence and deciding which cases to prosecute, and how. To give you some insight into how we have been operating, there are three points I think it is important to understand. The first point is what it means, as a practical matter, to say that we are building a truly international prosecutor's office; second, the criteria we have used to decide which cases we will investigate and prosecute; and third, our overarching concern for fairness and due process.

## **II. BACKGROUND OF THE TRIBUNAL**

Alarmed by news of human rights abuses in the former Yugoslavia, reported with increasing urgency by the world press and non-governmental organizations in the summer of 1992, the United Nations Security Council in October 1992 established a Commission

of Experts to report on those abuses.<sup>1</sup> The Commission amassed thousands of documents and interviewed many people, albeit not necessarily collecting the information in a way that would create admissible evidence in a court of law, and reported that indeed there had been apparent serious violations of human rights.<sup>2</sup>

In May 1993, following a report from the Secretary-General, the Security Council adopted a resolution establishing the Tribunal.<sup>3</sup> The resolution includes the Tribunal's statute (Tribunal Statute), which defines our office's jurisdiction to prosecute particular crimes and sets forth certain guiding principles.<sup>4</sup> Pursuant to the Tribunal Statute, there are four different crimes within our jurisdiction:

1. grave breaches of the 1949 Geneva Conventions;
2. violations of the laws and customs of war;
3. crimes against humanity; and
4. genocide.<sup>5</sup>

In September 1993, the General Assembly of the United Nations appointed a panel of eleven judges, each from a different country, to the Tribunal. The judges are more or less evenly balanced between civil law and common law backgrounds. Most judges have experience on the bench, while three are distinguished professors of international law. Over the first year or so, the judges met in plenary session and issued their Rules of Procedure and Evidence (Rules).<sup>6</sup> The Rules offer much, but by no means complete, guidance as to how the Tribunal will conduct trials and other proceedings. Coming from a common law background, I view the Tribunal Statute and Rules as essentially providing a common law approach. My colleagues from civil law countries agree, but point out that there are also civil law aspects. For example, pursuant to Article 19 of the Tribunal Statute

1. S.C. Res. 780, U.N. SCOR, 47th Sess., 3119th mtg., U.N. Doc. S/RES/780 (1992).

2. *Interim Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)*, Annex I, U.N. Doc. S/25274 (1993).

3. S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/RES/827 (1993).

4. Statute of the International Tribunal, *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808*, U.N. SCOR, 48th Sess., Annex, U.N. Doc. S/25704 (1993) [hereinafter Tribunal Statute].

5. *Id.* arts. 2-5.

6. International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, Rules of Procedure and Evidence, U.N. Doc. IT/32 (March 14, 1994), *adopted* Feb. 11, 1994, *entered into force* March 14, 1994, *reprinted in* 33 I.L.M. 484 (1994) [hereinafter Tribunal Rules].

and Rule 47, indictments must be presented to one of the judges for confirmation, together with some or all of the supporting evidence.<sup>7</sup> This is a procedure that is familiar to those from civil law jurisdictions.

Simultaneous to the work of the judges, Theo Van Boven, a distinguished international law professor, was appointed as acting registrar to oversee the administrative functions of the Tribunal. A jail was prepared and staffed, ready and waiting for the day when prisoners would be brought to the Hague. However, it was not until the end of July 1994, more than a year after the Security Council resolution was adopted, that the Prosecutor, South Africa's Judge Richard Goldstone, was appointed. Several months earlier, the Secretary-General had appointed as Acting Deputy Prosecutor Graham Blewitt, who, at first almost single handedly, undertook to organize the Prosecutor's office, to recruit staff, and, on an interim and inadequate budget, to get the office up and running. When Judge Goldstone arrived at the end of August 1994, he found about forty staff members who had just begun to work. By October 1995, the Office of the Prosecutor had increased its size to about 130 people, including lawyers, investigators, analysts and secretaries. In addition, there are about fifteen interpreters. About thirty of our number have been lent by the United States, Holland, Sweden, Denmark, Norway and Great Britain.

In November 1994, the Security Council established a war crimes tribunal for Rwanda that is parallel, in many ways, to the Yugoslav Tribunal.<sup>8</sup> Judge Goldstone is also the Prosecutor for the Rwanda Tribunal, and the same judges who comprise the Appeals Chamber of the Yugoslav Tribunal serve as the Appeals Chamber for the Rwanda Tribunal. Although the circumstances in Rwanda and the former Yugoslavia are very different, the hope is to achieve a consistency in general approach.

### III. A TRULY INTERNATIONAL PROSECUTOR'S OFFICE

While we in the Office of the Prosecutor for the former Yugoslav Tribunal were still learning to work together, the public and the judges were understandably impatient for us to bring cases. One of my colleagues described the manner in which the Tribunal was organized, with the judges appointed more than a year before the Prosecutor, as like trying to build a house from the roof down. This criticism, I

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7. Tribunal Statute, *supra* note 4, art. 19; Tribunal Rules, *supra* note 6, rule 47.

8. S.C. Res. 955, U.N. SCOR, 49th Sess., 3453rd mtg., U.N. Doc. S/RES/955 (1994).

suppose, is understandable. However, one must keep in mind the numerous obstacles this office has faced. There was no precedent at the United Nations for establishing and running a prosecutor's office, and no understanding of the resources required or the time it takes to investigate criminal cases and prepare them for trial. The first interim budgets neglected to provide for interpreters and a host of other things most prosecutor's offices take for granted.<sup>9</sup>

We are trying not only to create an operating prosecutor's office where there was none before, but also to create a truly international office, with lawyers and investigators who come from many different countries and legal systems working together on the same projects. Every day we experience a practical application of comparative criminal procedure. We are not, as was the case at Nuremberg, separate national teams of well-organized military lawyers and investigators with shared assumptions about legal, evidentiary and procedural matters.

When we started, we had no operating procedures or conceptual framework in place. With one significant exception,<sup>10</sup> we have no shared assumptions about legal, evidentiary or procedural matters. For us, all the things prosecutors and investigators ordinarily do must be articulated, discussed and understood. For example, concrete operating questions like what a witness statement should look like, long, short, almost verbatim, question and answer format, taped, sworn; how many factual allegations should be contained in an indictment; whether an accused's "actual knowledge" should be determined according to an objective or subjective standard; whether signed witness statements should be treated as exhibits; what records and practices are necessary to prove chain of custody of exhibits; were all subjects of debate. The Rules of Procedure and Evidence do not provide enough detail to offer guidance in that level of detail. Most of us are happy to set aside hypertechnical requirements from our own jurisdictions and create something more sensible, but even so, there are always questions.

A conversation I had with two colleagues, both very experienced prosecutors and both from common law countries, when we were just beginning to work in July 1994, illustrates the dramatic differences in

9. Several countries and organizations have been generous in providing support to the Tribunal, but we still do not have an adequate number of interpreters, a library, or enough filing cabinets, chairs and file folders.

10. See *infra* part V.

legal viewpoints that we continuously confront. A conversation about taking witness statements turned to preparing witnesses for cross examination. I described the procedure I used in New York, which was to ask the witness the difficult questions expected from the adversary. One of my colleagues, who comes from a jurisdiction where the witnesses are considered to be neutral and to "belong" to the state, said that if he followed such a procedure, he would be subject to criminal prosecution. Another colleague, from another jurisdiction, said that where he comes from, it would not be criminal, but it would be unethical. I said that for me to fail to prepare the witness in this way would be malpractice.

Then how do we decide what to do? In a context where there is no particular authority and where no jurisdiction necessarily carries more weight than any other, we have found no better way than to consider each issue as it comes up, debate it, and try to find a sensible consensus. We are aware that the decisions we make will become a type of precedent for the future of this, and perhaps other, international criminal tribunals. Although that thought may inspire still more awe than we already have for our responsibility, the decisions we reach are most often driven by what I hope is practical common sense and an attempt to define and adhere to common core principles for the administration of justice.

#### IV. CRITERIA FOR INVESTIGATING AND PROSECUTING

Our decisions as to what cases to pursue have been guided primarily by the same kind of practical considerations. The war in the former Yugoslavia is still going on. We do not have captured documents or imprisoned senior officials as sources of evidence. We do not yet have intelligence reports from United Nations Member States. We are just starting to receive actual witness statements and other evidence collected by some non-governmental organizations. We do have journalists' published articles and summary reports from non-governmental organizations and materials collected by the Commission of Experts. These are very useful as leads but, because they are not necessarily based on first hand observation and are often impossible to corroborate, they are not themselves evidence upon which we can build a criminal case.

As we began to work, it was apparent that we could not start, as they did at Nuremberg and Tokyo, with cases against the military and political leaders. We had to have a way to find out, as precisely as possible, what had actually happened. The obvious first step was to

begin talking with witnesses.

We began by following up on one of the case studies undertaken by the Commission of Experts. It was an examination of events in the area of Prijedor in northwestern Bosnia during the Serbian offensive in the spring of 1992. At the same time, we started investigating what appeared to be a systematic campaign of terror conducted by Serbian authorities throughout Bosnia, a campaign apparently designed to persuade non-Serb residents to leave their homes and never return. We also probed reports of atrocities committed by Croats and Muslims.

Long before the Office of the Prosecutor had any staff, German authorities in Munich arrested a man named Dusko Tadic, who was accused by Bosnian refugees there, and reported by a German journalist, as being responsible for war crimes in the Prijedor area. In the fall of 1994, mindful of the importance of our being able to present evidence as soon as possible in a public trial (the Tribunal Statute and Rules do not permit trials *in absentia*),<sup>11</sup> we asked the Tribunal judges to request that the German prosecution defer to our investigation. A provision in our Rules, based on the principle set forth in Article 9 of the Tribunal Statute regarding the Tribunal's primacy over national courts, permits us to seek such deferral.<sup>12</sup> The Tribunal judges granted our application, the deferral request was made, and we filed an indictment against Mr. Tadic in February 1995. After German enabling legislation was passed permitting deferral to the Tribunal, Mr. Tadic arrived in The Hague in April 1995.

Mr. Tadic is not a senior official comparable to the members of the German High Command who were the first persons tried at Nuremberg. But to the victims of Mr. Tadic and his colleagues, to those who suffered as a result of the actions of ordinary prison guards and police officials, it is very important that some of their torturers be brought to justice. Only by prosecuting particular individuals, at all levels of responsibility, can we hope to persuade the victims that justice has been done. We must persuade the victims that criminal responsibility is personal to the particular person accused and should not be attributed to entire communities. Only in this way, we believe,

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11. Recently, the judges of the Tribunal revised Rule 61, permitting us to call witnesses to testify publicly in the context of a proceeding to reconfirm an indictment and issue an international arrest warrant in the event the arrest warrant issued by the Tribunal when the indictment was first confirmed has not been honored. In that context, publicly but without an adjudication of guilt or innocence, we will be able to demonstrate some of our findings.

12. Tribunal Rules, *supra* note 6, rule 10; Tribunal Statute, *supra* note 4, art. 9(2).

can the Tribunal be useful in helping to break the endless cycle of violence and retribution. We can not possibly prosecute every prison guard who caused great suffering in Yugoslavia, and our primary focus is on the leaders who were responsible for instigating and directing the crimes. At the same time, we think prosecutions of prison guards and others like them have significant symbolic value and that it is our obligation to pursue some of them.

As of July 1995, we had filed seven other indictments, including one that charged Radovan Karadzic and General Ratko Mladic with genocide and crimes against humanity. As a result of an investigation involving serious human rights abuses at a detention camp in the Vlasenica area, abuses that appear to be similar to those we are finding in other places in Bosnia, in our first indictment issued in November 1994, we charged a camp official, Dragan Nikolic, with several violations of the Tribunal Statute. In February 1995, we filed an indictment arising from the Prijedor investigation against the camp commander and several others responsible for crimes at the Omarska detention camp, where countless civilians from Prijedor were killed, raped, tortured, beaten, and otherwise abused. We charged the camp commander with genocide and he and the others were also accused of other violations of the Tribunal Statute. That indictment is particularly significant, we think, because Omarska is the first camp in Bosnia that international journalists were permitted to see and film, in August 1992. It is largely as a result of their work that the international community began to address the apparent human rights abuses occurring in the former Yugoslavia.

Since April 1992, hundreds of thousands of non-Serbs have left their homes in Serb-controlled areas of Bosnia. Our investigation so far indicates that most of these people left, or were killed, as a result of a deliberate campaign of terror, a phenomenon that has come to be known as ethnic cleansing. Based on the pattern of abuses that we have found at Omarska, Vlasenica, and several other places like them in other parts of Bosnia, we are building cases against those Serbs in positions of authority who organized, ordered, or were otherwise responsible for the abuses. At the same time, our investigations of abuses by various Croats and Muslims are continuing.

There are those who say that the atrocities committed during the course of this war are simply the consequences of deep-seated hatreds and demands for vengeance, whether decades or centuries old. One danger in this viewpoint is that it suggests that the atrocities and human rights abuses are something peculiar to the Balkans, so that the

abuses need not be taken quite so seriously. In our view, that approach is also factually incorrect. However deep-seated and ancient the group tensions may be, it is apparent to us that they were deliberately inflamed. We intend to prosecute the persons responsible for deliberately inciting others to commit war crimes.

## V. FAIRNESS AND DUE PROCESS

There is one central point on which all of us at the Office of the Prosecutor, no matter what country or legal system we come from, agree, and for which we needed no debate: our determination that the prosecutions be, and be perceived to be, fair. As professionals, that is an article of faith for us.

There are those, not in the Office of the Prosecutor, who suggest that we simply rely on hearsay, journalists' reports, or file charges and investigate later, or that because a particular person was in a position of authority, we should simply assume that he must have been responsible for the atrocities. Our view is that as prosecutors of human rights violations, we must be exemplary in our respect for the rights of the accused. If the Tribunal is necessary, as we think it is, to bring a sense of justice to the victims, and thereby undercut a hopeless cycle of revenge, than it is imperative that everything the Tribunal does be fair to the accused and conducted according to the highest standards of due process. We must also strive to ensure that our proceedings are perceived as fair, especially in the former Yugoslavia. We must be an example to the states that we expect in time will prosecute the cases we can not possibly handle.

When I was first trained as a prosecutor in the Southern District of New York, in the office of Robert Fiske, I became aware of the enormous power prosecutors have to affect people's lives, victims as well as those accused, simply through the power to indict. Prosecutors must have broad discretion and independence from political demands to exercise that discretion wisely and fairly. My colleagues share a common appreciation of the power to prosecute and the responsibility that accompanies that power.

## VI. CONCLUSION

In law school, I was fortunate to have taken two constitutional law courses taught by Telford Taylor. He was inspiring, although he never said a word about Nuremberg. What he taught me, by the example of his analysis, is a cornerstone of how I approach our work as prosecutors: the need for care and accuracy and thorough

understanding. I, and my colleagues, no matter where they come from, are trying to achieve the standard he set.

We hope that by convicting those most responsible for the atrocities in the former Yugoslavia we will help to demonstrate that justice is possible. We hope our work will help to restore the rule of law in that part of the world, and at the same time confirm the fundamental underpinnings for international humanitarian law that will serve us all well into the next century.

