

# The International Criminal Tribunal for the Former Yugoslavia Comes of Age: Some Observations on Day-To-Day Dilemmas of an International Court

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## I. INTRODUCTION

In late 1999 I left the Court of Appeals for the District of Columbia Circuit to become the U.S. Judge on the International Criminal Tribunal for the Former Yugoslavia (ICTY or Tribunal).

For me, this year has been a fascinating, difficult, sometimes frustrating, and mostly rewarding experience. The ICTY was created by United Nations Security Council Resolution in 1993 to prosecute and adjudicate war crimes, crimes against humanity, and genocide committed in the territory of the former Yugoslavia on or after January, 1991. That includes all aspects of the Bosnian conflict as well as the more recent Kosovo war. The Tribunal exercises personal jurisdiction over persons indicted for the categories of war crimes set out in the ICTY Statute,<sup>1</sup> wherever apprehended; no extradition proceedings are necessary. It can impose sentences up to life imprisonment, but not death.<sup>2</sup> The Tribunal is a temporary court in the sense that its mission is geographically and temporally limited. It is not expected to finish its work for at least another decade.<sup>3</sup> In the

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1. U.N. SCOR 48th Sess., 3217th mtg, U.N. Doc. S/Res 827 (1993); ICTY STATUTE OF THE INTERNATIONAL TRIBUNAL art. 1, available at <http://www.un.org/icty/basic/statut/statute.html> (last visited Mar. 25, 2001) [hereinafter ICTY STAT.].

2. ICTY STAT., *supra* note 1, art. 23.

3. *Report of the Expert Group to Conduct a Review of the Effective Operation and Functioning of the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda*, U.N. Doc A/54/634, at 18-19 (1999) [hereinafter *Expert Group Report*].

first few years the Tribunal tried very few cases, defendants had been indicted but few apprehended. Now SFOR, the NATO Peacekeeping force, is arresting indictees at the rate of one a month and we are overwhelmed in our Trial Chambers. The UN has agreed to supply us with *ad litem* judges (designated for particular cases only) to cut down our backlog.<sup>4</sup> There are sixteen members of the court elected by the General Assembly with no more than one from a single country; nine assigned to three Chambers of three trial judges each and seven to an Appeals Chamber.<sup>5</sup> The Tribunal makes its own rules of procedure in plenary session and is governed by a president and vice-president elected by its members. The Tribunal has three organs: the Chambers, the Office of the Prosecutor (OTP), and the Registry which administers services to the court and provides for protection of witnesses and detention of the accused. We sit in the Hague in the Netherlands in austere quarters, no one would mistake our renovated insurance building for the “Peace Palace” of the International Court of Justice. The ICTY in seven years has grown from a dozen or so employees to over one thousand and has a budget of almost a \$100 million.<sup>6</sup> There is a companion court, the International Criminal Tribunal for Rwanda (ICTR), created to adjudicate criminal cases arising from the 1994 genocide in that country. Appeals from the ICTR are heard by the common Appeals Chamber of our Tribunal. Both courts are considered precursors for the forthcoming International Criminal Court (ICC), which will be treaty-based and permanent—and which the United States has not yet ratified.

Those are the bare-bone statistics. Inside our courtrooms the darkest and most brutal tales are told of man’s inhumanity to man and woman, including genocide and crimes against humanity involving thousands of victims, systematic rapes of women and girls, prolonged detention under the most barbaric of conditions, merciless beatings, and callous destruction of homes and villages. Only a small number of the perpetrators can be brought to trial. The rest remain at large,

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4. Judge Claude Jorda, ICTY, Speech to Security Council 6 (June 21, 2000) (on file with author).

5. ICTY STAT., *supra* note 1, arts. 12-13.

6. ICTY, *ICTY Key figures*, at <http://www.un.org/icty/glance/keyfig-e.htm> (last visited March, 2001).

intensifying the perception in some quarters that we are a political tool of the Western nations, and in others quarters that we are a marginal operation because we have been unable to get jurisdiction over the so-called “big fish”—Slobodan Milosevic, Radovan Karadzic, and Ratko Mladic—who are thought to have masterminded the worst crimes.

The ICTY is a bold experiment. It tracks to some degree the earlier Nuremberg and Tokyo World War II war crime trials but it goes far beyond those precedents in important ways. It is performing three functions: adjudicating international crimes, developing international humanitarian law, and memorializing important, albeit horrible, events of modern history. Except for Nuremberg and Tokyo and subsequent isolated war crimes prosecutions in national courts of figures such as Adolph Eichmann and Klaus Barbie, the Tribunal has very little caselaw to rely upon. Its procedures are a hybrid of common law and continental practice and its judges speak a dozen native languages more fluently than the official French and English of the Tribunal.

Among international scholars the Tribunal has attracted widespread attention. It is reportedly more written about in the international journals than any other topic. I will not trace the legal developments at the Tribunal, which are already widely covered by scholars and commentators, or recount the heartbreaking stories of the horrors inflicted on citizens of a fairly modern central European country—indeed, one that had hosted the 1984 Olympics—in the last years of the twentieth century. Rather because I believe we will see many more international courts—temporary or permanent—in the years to come, I want to share my impressions of the way these newbreed courts work, what problems beset our day-to-day functioning, and how we try to resolve those problems—all comprising the monumental task of making the Tribunal work in the way that will further justice and maybe even deter future reigns of terror both in war and in peace.

## II. THE JUDGES

Judges on international courts come from different legal systems. A roughcut can be made between the Anglo-American common law

system and the continental civil law system. As far as criminal law is concerned, the common law system relies on the parties to make their case with the judge or jury as umpire and is characterized by detailed rules governing the admissibility of evidence in court and what the parties can expect from one another before and during trial. On the other hand, the civil law system uses an investigating judge to supervise the compilation of a dossier, that can include more wide-ranging evidence than permitted at common law, to which the defendant responds at trial. The judge actively controls the direction of the trial and often directs the questioning.<sup>7</sup>

The ICTY employs a sometimes uneasy and frequently awkward blend of the two systems. Even though the ICTY has over 100 Rules<sup>8</sup> setting out the ingredients of a mix which initially tilted in favor of the common law adversarial trial, invariably interstitial questions arise in response to which judges from different systems will tend to apply “what comes naturally.” For instance, civil law judges may question witnesses much more freely than in our system. However, I have noticed that such questioning may throw off the rhythm of the prosecution’s or the defense’s case presented in an adversarial mode, casting the judge in the role of an uninvited guest at the party. The prosecution or the defense may have a carefully selected series of witnesses, called in sequence to build on each other’s testimony and with knowledge of just how far to take each witness in questioning. The other side, for its own strategic reasons, may have no desire to press that witness further, but then when the judge steps in and asks the ultimate blunt conclusionary questions the prosecution (or the defense) have been slowly and painstakingly working toward, the lawyer that presented the witness must scramble to get back control of the case. Additionally, judges don’t always repeat the witness’s testimony precisely when they ask a follow-up question (or, not infrequently, it may be garbled in translation), thereby risking an answer based on an erroneous premise. Counsel are understandably hesitant to correct the judge and, candidly, the judges do not always welcome such interruptions. When a civil law judge asks questions he has the benefit of an ongoing familiarity with the dossier compiled

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7. GLENDON ET AL., *COMPARATIVE LEGAL TRADITIONS* 179-83 (1994).

8. ICTY R.P. & EVID. (2000).

in the case.<sup>9</sup> It is my opinion that civil judges tend to feel more comfortable in letting evidence into the case that might be banned in a common law trial on the theory that the judge can sort out the reliable from the unreliable. Common law judges are used to operating under restraints imposed at the threshold as to what kind of evidence is admissible. Differences of opinions on admissibility arise often in ICTY trials among judges on the same panel and among different Chambers. There are numerous other areas where differing practices from the two systems clash: the legitimacy of leading questions; whether notes used by a witness must be divulged to the opposite party; and whether in-court identification of the accused should be allowed. The lack of a common legal culture tends to produce frequent, small irritations and tensions throughout the trials.

There are nine ICTY trial judges who sit in panels of three, usually five days a week for four to seven hours a day. Trials have lasted between two weeks and two years,<sup>10</sup> with one of the judges, usually the senior judge on the panel, acting as presiding officer. This regime produces problems when one judge is absent for sickness or urgent personal matters. The Rules are quite rigid. A judge may not be absent from trial for more than three days in a row without defense counsel's consent once the trial has begun, no matter the reason.<sup>11</sup> Some chambers have obtained counsel's consent to treat a regular trial day as a deposition when one of those members of the panel is absent for reasons other than sickness or emergency. The "deposition" is then put in the trial record, but basically is viewed as a regular part of the trial transcript. But this is done rarely. The point is that it seems unrealistic to expect three judges—some of reasonably advanced age—to sit up to seven hours a day, five days a week for months or years on end or that they will never be ill or that their urgent personal matters will occur on the same days. Counsel bent on delay can object to continuing the trial in front of less than three judges. An entire trial may need to be cancelled if one judge has a

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9. GLENDON ET AL., *supra* note 7, at 179-83.

10. *See, e.g.*, Prosecutor v. Blaskic, Case No. IT-95-14-T (Mar. 3, 2000) (trial from June 24, 1997 until July 30, 1999, with judgment rendered on March 3, 2000); Prosecutor v. Kupreskic, Case No. IT-95-16-T (Jan. 14, 2000) (trial from August 17, 1998, to November 11, 1999, with judgment rendered on January 14, 2000).

11. ICTY R.P. & EVID. 15 *bis*.

lengthy illness. I must say that the practice of three judges sitting together in trial for months at a time seems to me a dubious use of scarce resources, although I appreciate that trial before a single judge from one country might provoke criticism that the court represents the “voice” of that one country. Still, either shorter trials or more flexible rules for occasional absences, such as no more than five days in any trial for any reason, seem sensible especially for the nonpresiding judges whose functions are often confined to listening, asking a few questions, and consulting on procedural rulings.

Lack of fluency in both English and French—the two working languages of the Tribunal—and to an extent in the native language of the defendants and witnesses has turned out to be a greater obstacle than I would have anticipated. In court, a bank of simulcast translators and simulcast video screens allow a trial to proceed relatively smoothly even though the defendants and their counsel speak Serbo-Croatian and the prosecutors and the judges speak French or English. I am assigned to a Chamber where the other judges are more at home in French as a second language than English (Portuguese and Arabic are their native languages). I am not fluent in French. There is no question that the lack of a common language makes out-of-court communication less spontaneous and memorializing the proceedings more difficult. All internal memoranda as well as external documents must be drafted in both English and French. The resources available for so much translation at the ICTY are not adequate. A document sent to the official translation unit in the Registry may take weeks to get back. Hence we try to utilize the talents of legal assistants to translate back and forth inside the Chambers. In my Chamber during the past year only my legal assistant and I wrote fluently in English. As a result, she and I bore a disproportionate burden in translating French documents into readable English. Chambers in which a majority of the judges have fluency in only one of the two working languages realistically need a full-time translator. More fundamentally, the notion of two working languages in any one court or Chamber may need to be rethought; it engenders immense delays. In some cases judgments have not been rendered in the second language for months after issuance in the first, thereby causing delays in the time for filing appeals because a lawyer who speaks English cannot be expected to appeal a judgement

available only in French. If for political reasons the two-language rule is adhered to, sufficient translators ought to be furnished to make the two-operating-languages rule a reality. If Chamber translators are not available, then judges and legal assistants might either be required themselves to be fluent in both languages, though that would significantly cut down the talent pool. Right now the language barrier causes substantial delays and requires enormous resources.

The UN is legendary for its frequently impenetrable bureaucracy. In the United States, courts have battled the specter of judicial bureaucracy in the form of masters, adjuncts, and magistrates and have stoutly defended themselves against charges that their law clerks carry too much responsibility for preparing opinions. Because ICTY trials are long and fact-specific and because legal assistants are often assigned to the Chambers as a whole, with only one junior legal assistant assigned to any individual judge, the task of initially drafting the Chambers' judgments, to a very considerable degree, is not infrequently delegated to the pool of legal assistants who commonly are selected by the Presiding Judge or the senior legal officers. Reading some of the several-hundred-pages-long, format-stylized judgments of the ICTY, one can guess that many of the judgments are the work of a committee rather than an individual judge or judges. Indeed sometimes judgments are parceled out to different judges, sometimes the staff assistants prepare first drafts with guidance from the judges who then review, revise, and approve the judgment. But my experience has been that ICTY judgments are not usually the individualized one-on-one opinions of a federal trial or appellate judge in the United States. I admit I much prefer the latter, though I recognize the imperative for division of responsibility in large-scale productions. I have never belonged to the "A judge must write every word herself" school, but I have recognized the risk of losing control of the process if the judge does not define the issues, work out the reasoning and responsibility in advance with law clerks, and meticulously analyze, revise and edit any draft presented to her. That close monitoring task becomes monumental, however, when parts of the judgment are produced in one language not spoken or understood by all three judges and by legal assistants who do not "belong" to individual judges but rather to the Chambers as a whole, reporting primarily to the President of the Chambers or to the senior

legal assistant whom he selects. I also have the impression that the purpose of a judgement may vary within legal cultures. In my U.S. experience the emphasis is on telling the parties and the public why the judges came to a particular result in light of relevant facts and law. In the culture of some of my new colleagues, the format appears to be more ritualistic, requiring a formal recitation of what the parties argued; what the abstract legal theory is; what the factual findings of the court are; and then, finally and not always predictably, the ultimate result. There seems to be less premium on making transparent the judges' reasoning as to how the law applies to the facts, except where dissenting or concurring judges file separate statements. In my opinion, there is less emphasis on style and readability. The author of the judgement itself is not identified (though I find the *cognoscenti* around the Tribunal make informed guesses); it is signed either by the presiding judge or all three judges. For these reasons ICTY judgments sometimes seem stilted, bureaucratic, and insufficiently reasoned, making them largely inaccessible to the reader and frustrating to the press and even legal scholars who try to analyze them. If I could, I would opt for legal assistants assigned to individual judges and for giving the judges specific responsibility for drafting the entire or at least significant parts of the judgement, which could be profitably much shorter than they are now.

These comments lead inexorably to thoughts about the selection of judges for an international court. At the ICTY the sixteen judges are elected for four-year terms by the General Assembly of the UN, based on the nomination of member countries.<sup>12</sup> The ICTY Statute says only that candidates must be qualified to serve on the highest judicial level in their own countries. The new ICC law is somewhat more specific, requiring a proportioned mix of judges expert in criminal procedure and international law.<sup>13</sup> Judges come to the Tribunal at all ages (a few in fragile health) and with widely different careers as politicians, scholars, diplomats, and practicing lawyers or

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12. ICTY STAT., *supra* note 1, arts. 12-13.

13. ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT art. 36, U.N. Doc. A/CONF. 183/9th, available at <http://www.un.org/law/icc/statute/rome.htm> (last visited Mar. 25, 2001).



judges. They are assigned to trial or appeals work by the President of the Tribunal, largely based on vacancies rather than fit. Thus we have judges with no criminal law background sitting on massive trials and judges with no appellate experience sitting in the Appeals Chamber, which in turn reviews the decisions of experienced trial judges. This happens to a degree in all court systems, including the United States, but in federal trial courts actual trial practice is generally a prerequisite to the job. On-the-job learning is fairly expensive in complex, prolonged trials in which the judge must make hundreds of procedural rulings. In the early years of the ICTY, political leaders may not have been sufficiently aware of the critical role that the Tribunal would play in the development of international humanitarian law or as a precursor to a permanent international criminal court. They may not have focused on the perception as well as the reality that a fair trial by capable judges is indispensable to the Tribunal's reputation as a legitimate vehicle of international accountability. It is to be hoped that country nominating authorities will become more sensitive to the necessary talents an ICTY judge needs. Admittedly, the Tribunal has had some stars and some quick learners, but a keener sense of the day-to-day functions of the judges and the mission of the Tribunal by national leaders is needed for more qualified appointments and more effective work of the Tribunal.

### III. THE ACCUSED

Ninety-nine persons, including one woman, have been indicted publicly for war crimes, crimes against humanity, or genocide. Sixty-six people have been publicly indicted and are currently facing charges (in some cases, charges were dropped or the accused died), six have been completed, twelve are on appeals, ten are currently in trial, and fourteen are awaiting trial.<sup>14</sup> The accused vary greatly in their alleged culpability; big fish and small fish swim side-by-side. Although two of the three whales—Milosevic, Karadzic, and Mladic—remain at large and the third is on trial for domestic crimes, several of their key military and civilian deputies as well as one-time members

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14. See ICTY, *ICTY Key Figures*, at <http://www.un.org/icty/glance.keyfig-e.htm> (last visited March 29, 2001).

of the Bosnian-Serb Presidency are in detention at the Hague. They are accused of conducting years-long shelling and sniper attacks in Sarajevo and of planning and executing the massacre at Srebrenica of 5,000 young Bosnian men, just months before the Dayton Accord was signed. They are charged with commanding prison camps through which thousands of civilians were herded and brutally abused.<sup>15</sup> But it must be recognized that there are also less consequential legacies from the early years of the Tribunal: prison guards and opportunistic bullies accused of committing atrocities who would probably not be considered priority defendants today. This must contrasted with Nuremberg and Tokyo where the war was over and the vast majority of the defendants were already in allied hands before trials began.

The ICTY accused include some petty criminal types with records of delinquency and local crimes to whom war provided a sensational outlet for sociopathic tendencies. But ironically most of the accused do not fall into that category—they had no prior criminal record, many were policemen, politicians, or professional soldiers who still view themselves as patriots, and family men with citations for past services to their communities. One defendant is himself the son of an Auschwitz survivor. Many have served abroad in Western capitals, and some have even negotiated with Western diplomats. While some are accused of hands-on atrocities, brutal beatings, murders, and rapes, the most serious offenders are more akin to the Nuremberg High Command defendants. They are the senior officials who allegedly drew up the plans, strategies, and campaigns to achieve the vicious ends they had come to believe were legitimate state activities. Some appear depressed in the courtroom as they listen to the horrors attributed to them. Others appear arrogant, staring down witnesses on the stand, grimacing, and passing streams of notes to their counsel during trial. Others giggle during testimony on rape and sexual slavery. Some have surrendered voluntarily, proclaiming their innocence and their confidence that the Tribunal will exonerate them. Several were acquitted of all or some of the charges.<sup>16</sup> Some

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15. Prosecutor v. Galic, Case No. IT-98-29-I (Indictment, Mar. 26, 1999); Prosecutor v. Krajisnik, Case No. IT-00-39-I (Indictment, Mar. 21, 2000).

16. See, e.g., Prosecutor v. Kupreskic, Case No. IT-85-16-T (Jan. 14, 2000); Prosecutor

complain of physical after-effects from the violent apprehensions they underwent, including broken arms or ribs, at the hands of SFOR peacekeepers or foreign police. Others have fought extradition for months or years from their countries of residence.

The Detention Unit in Scheveningen, the North Sea Port on the outskirts of The Hague where they are held, is quite upscale, certainly in comparison to some American prisons I have viewed. Each accused has his own cell with toilet and shower and an outlet for a computer. The day rooms are clean and equipped with television and games. There is an exercise room, a medical facility with a full-time nurse and visiting doctors, outdoor recreation, and several training and craft classes—even provision for conjugal visits. Under Tribunal rules the accused is asked regularly in open court if he has any complaints about detention. Few register any of consequence; the inability to get Serbian channels on television is the most common. A press comment attributed to Mrs. Milosevic that the Detention Unit is a death camp is ludicrous. There have, however, been two deaths in detention. One died from a heart attack. The other committed suicide. The facility does conduct suicide watches and prevents some defendants from having contact with certain others where there may be danger of physical harm or undue influence, and it also monitors phone calls.

The pretrial detention periods are long—an average of over two years now that apprehensions have so dramatically increased.<sup>17</sup> If the Tribunal had not received an infusion of *ad litem* judges (judges designated for a particular trial) from the UN, a defendant arrested today would not have been tried before 2002.<sup>18</sup> Most of the defendants have families about whom they obviously care. The restrained and dignified appearance of some in court day after day,

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v. Delalic, Case No. IT-96-21-T (Nov. 16, 1998).

17. See ICTY, *Detainees and Former Detainees*, at <http://www.un.org/icty/glance.htm> (last visited Oct. 2000) (examples include Tadic (arrested February 12, 1994, trial commenced May 7, 1996); Cerkez (arrested October 6, 1996, trial commenced April 12, 1999); Krnojelac (arrested June 15, 1998, still in pre-trial); and Kunarac (arrested March 4, 1998 trial commenced March 20, 2000)).

18. Status of Ongoing Cases in the ICTY Trial Chamber, April, 2000 (on file with author) (without additional resources, none of the three Trial Chambers would be available before 2002).

month after month cannot but raise anew unanswerable questions about the metamorphosis of the human personality in time of war from caring family and community member to vicious abuser or executioner. In ICTY prosecutions, this is especially perplexing. The war crimes were often committed against neighbors, most frequently Muslims, but Croates and Serbs as well, or people with whom the accused had worked, recreated, lived, and even inter-married. A vital component of almost every Bosnian-Serb defense is that the accused lived for most of his life amiably with his Muslim neighbors and coworkers and that he helped Muslim friends during the war at the same time he is accused of killing or beating other Muslims. The most common defense, harking back to Nuremberg, is not that the awful things that the victim-witnesses testify to did not happen or that they were not terrible and wicked deeds, but that the accused was not responsible because either he was not there at all or he did not know about the atrocities committed by subordinates or superiors. He was, it is contended, merely the wrong man at the wrong place at the wrong time. Because the paper trail in many of these cases is sparse and episodic as contrasted to the meticulously maintained archives the Allies had at their disposal in Nuremberg, the defense sometimes works.

Under the ICTY Statute the accused may, but is not compelled to, take the stand.<sup>19</sup> Indeed, even if he chooses not to testify, he can make an unsworn statement not subject to cross-examination at the beginning of the trial.<sup>20</sup> He also can testify formally under oath at the beginning of the trial before the prosecution puts on its case. Surprisingly, two defendants in the Omarska prison camp trial did so, presumably to acquaint the court from the start with their own version of what their involvement was. This is apparently common practice in the courts of the Former Yugoslavia. An accused in a different case gave a videotaped pretrial interview to the prosecution with full knowledge that the prosecution could make it part of its case-in-chief. There are no trials in absentia, so the accused faces his accusers day after day for months at a time. In the courtroom he has his own television monitor and simulcast translation in his native

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19. ICTY STAT., *supra* note 1, art. 21(g).

20. ICTY R.P. & EVID. 84 *bis*.

language of all testimony. Should he become unruly he can be removed, but to my knowledge this has never happened.<sup>21</sup> Witnesses typically are called up to identify him in court, though in some cases this seemingly surefire technique has misfired on the prosecution. Some of these witnesses have not seen the defendants for nearly a decade, and then under the traumatic circumstances of a prison camp or on the execution field and they do not recognize them in court.

The verdict of the court is announced simultaneously with the sentence, which ranges up to life imprisonment.<sup>22</sup> The longest sentence imposed so far is forty-five years.<sup>23</sup> Sentences are served in the prison systems of neutral countries with whom the Tribunal has negotiated agreements. Pardons or commutations can be implemented only by the Tribunal. Appeals can be taken from the sentence as well as the verdict, and the prosecution can appeal an acquittal or the length of a sentence.<sup>24</sup> New evidence may be admitted on appeal if it is "in the interests of justice."<sup>25</sup> The whole process from apprehension or surrender to judgement on appeal (assuming no remand) takes on average three to four years. People debate the deterrent effect of the Tribunal on future war crimes when pitted against the terrible and immediate pressures of rampant nationalism and war. However, I think that anyone exposed to a year or longer trial in the Hague, televised throughout the Balkans and Europe, must come to believe it will have some effect, at least on intelligent, professional military or civilian leaders even if not on monomaniacal tyrants, and perhaps on those who might otherwise be the opportunistic rogue players. No defendant I have seen in the dock looks like he ever remotely expected to be there, and had there been a stronger prior precedent of war crimes Tribunals, some might have been deterred.

#### IV. THE PROSECUTOR

The Prosecutor is the chief policy maker and political lightning rod of the Tribunal. She determines which indictments to bring and

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21. ICTY R.P. & EVID. 80(B).

22. ICTY R.P. & EVID. 98 *ter*.

23. Prosecutor v. Blaskic, Case No. IT-95-14-T (Mar. 3, 2000).

24. ICTY R.P. & EVID. 108.

25. ICTY R.P. & EVID. 115.

how vigorously to pursue them by exerting pressure on SFOR or foreign governments to make arrests. She exercises her power completely independently—an issue of some controversy to the United States insofar as the new International Criminal Court is concerned. Thus she could—and indeed was asked to and did—determine whether to open an investigation which could lead to bringing an indictment against NATO decisionmakers in the bombing of Belgrade—she found no cause to do so.<sup>26</sup> She has also been urged, but declined, to investigate UN and Dutch officials for allegedly contributing to the Srebrenica massacres by their inaction. She has the greatest resources of any branch of the Tribunal with 182 budgeted posts in the investigators division<sup>27</sup> alone. Although her indictments must be confirmed by a judge of the Tribunal who decides if the supporting material she provides makes out “reasonable grounds for believing that a subject has committed a crime,”<sup>28</sup> there is no other check on her choice of whom to indict, whether to do it publicly or secretly, which ones or how many charges to bring, what evidence to offer, and whether to seek protective measures for witnesses. She even can appeal an acquittal or a sentence she considers too lenient. She is the Prosecutor of the Rwanda Tribunal as well as the ICTY.

The multinational ICTY prosecution staff, in my limited experience, is able, dedicated, and professional. If I were to question anything, it would be the apparent view of each prosecution task force that it should have the full resources of the Tribunal available for its case, with proliferating witnesses lists of 100 or more, despite lengthening backlogs of other cases and the Prosecutor’s own oft-repeated admonitions that the court act more speedily. Based on U.S. experience, I think the prosecution could make many of its cases with far fewer witnesses and fewer counts in their indictments. For a time the Tribunal and the Prosecutor engaged in a debate over what, if any, limits on cumulative charging there should be. Some judges felt

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26. Press Release, Office of the Prosecutor (June 13, 2000) (on file with author) (stating that there is no basis for opening an investigation into incidents related to the NATO air campaign).

27. *Expert Group Report*, *supra* note 3, at 48.

28. ICTY R.P. & EVID. 47.

a plethora of charges prolongs trials unnecessarily, while the Prosecution said it poses no problems of multiplication of proof and the fact that a number of charges are based on the same incidents can be considered at sentencing. The debate was settled by an Appeals Chamber decision allowing simulated charging and setting out a liberal criteria for cumulative convictions as well.<sup>29</sup> Since many indictments are the result of years of difficult field investigations—at least 5 years in the case of the Srebrenica trial—it is understandable that the Prosecutors want their fullest case spread on the record. However, consistent with the doctrine of speedy trial I do not think the Tribunal can accommodate the rising backlog of cases unless the current length of trials is curtailed somehow. Some judges at the ICTY, perhaps reflecting more their civil law indoctrination, seem reluctant to direct counsel to drop charges or limit duplicative witnesses. The Prosecutor also argues consistently for the broadest leeway in introducing evidence, including in some cases prior witness statements that its investigators have taken in the field, even where cross-examination is not possible. I hasten to say, however, that the prosecution presentations are sophisticated. Expert witnesses are used widely with enormously detailed backup reports on mass grave exhumations, military command structure in the Bosnian-Serb army, and communications intercepts. I found most astounding in the Srebrenica case the satellite aerial image photography furnished by the U.S. military intelligence which pinpointed to the minute movements on the ground of men and transports in remote Eastern Bosnian locations. These photographs not only assisted the prosecution in locating the mass grave sites over hundreds of miles of terrain, they were also introduced to validate its witnesses' accounts of where thousands of civilians were detained and eventually killed.

Withal, it is the Prosecutor who decides how to use her vast resources, whether to go after low-level perpetrators as well as the “big fish.” In the beginning, as I noted earlier, when all major figures were beyond reach, it was understandable that charges would be brought against lesser miscreants. Unfortunately the trial of those cases, unless materially disciplined, makes the likelihood of bringing

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29. Prosecutor v. Delalić, Case No. IT-96-21-A (Feb. 20, 2001), ¶¶ 389-425.

the leaders reasonably promptly to trial—if they are caught—more difficult. Marginal indictments and heavy use of cumulative charging can clog the pipeline. A recent arrest was made of a single camp commander charged with eighty counts; some might think it a case of overkill.<sup>30</sup> More efforts might be made to send some of the smaller cases to be tried in national courts, where that is a realistic possibility. Right now the Prosecutor does not engage openly in plea bargaining—a concept unique but indispensable to the American criminal law system. Nor does she, as a general rule, grant immunity in exchange for testimony, although a few exceptions can be spotted in the records. While it is asserted that these techniques have been employed too liberally in the U.S. system, there is a compelling need for some careful, constructive use of them to cut down the burgeoning ICTY backlog. As of March, 2001 thirty-seven of sixty-six public indictees were in detention; three were on provisional release; twenty-four were in trial or pre-trial in twelve cases (four trials, eight pre-trials); four were awaiting sentences; eighteen had been tried, and twelve were on appeal.<sup>31</sup> There are also thirty-six ongoing investigations in Kosovo with a potential for up to 150 new defendants.<sup>32</sup> The Prosecutor predicted that the Tribunal would need ten years or more to do its work, not counting appeal times. With new outbreaks of civil and international disorder occurring all over the globe and new demands for war crimes tribunals in Sierra Leone, Cambodia, and East Timor, it just may not be realistic to expect the UN to concentrate its efforts so heavily in a Tribunal that, along with the Rwandan Tribunal, will account for 10% of the UN's annual budget for another decade.<sup>33</sup>

## V. THE DEFENSE COUNSEL

A vigorous, unintimidated, knowledgeable defense is the *sine qua non* of a fair trial. In ICTY trials, the obstacles, including lack of access to witnesses and evidence, logistical difficulties in meeting

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30. Prosecutor v. Nikolic, Case No. IT-95-2-I (Indictment, Feb. 12, 1999).

31. ICTY, *Fact Sheet on ICTY Proceedings*, at <http://www.un.org/icty/glance/procfact-e.htm> (last visited March, 2000).

32. ICTY Weekly Press Briefing (Feb. 9, 2000) (on file with author).

33. *Id.*



with clients, risks of homegrown intimidation, and strange new hybrid procedures make the defense counsel's job especially fraught with problems.

Both the ICTY Statute and the European Convention on Human Rights give an accused the right to counsel of his own choosing, or alternatively the right to defend himself. If he is without means, he is given counsel free of charge.<sup>34</sup> Counsel is qualified under ICTY Tribunal Rules if fluent in one of the Tribunal's languages and an established member of the bar of his home country or a law professor.<sup>35</sup> In Rwanda, defense counsel must have ten years of "relevant experience." Most accused get a defense team which includes two or more lawyers and an investigator. They come and go—expenses paid by the Tribunal—to the Hague from their home bases. The accused also has the right to an interpreter if he doesn't speak either of the two working languages of the court, French and English.

In all but four cases, the indictees have pled indigence and the Tribunal pays for their counsel at rates reputed to be often much more generous than those prevailing in their home countries. This creates, according to some, strong incentive for counsel to prolong the proceedings. The investigation into whether an accused in fact is indigent is difficult. The Registry of the Tribunal to whom this task is committed must inquire into the assets and income of the defendant in countries like Croatia and Republika Srpska whose authorities, whether from hostility or ennui—no one is quite sure, do not always reply to inquiries. The Tribunal places a high priority on moving ahead expeditiously to trial, so if a defendant and his counsel are persistent enough the Tribunal will pay.

Logistics cause continuing problems for the defense. Counsel often complain they do not get the myriad of pretrial disclosures and motions served upon them in reasonable time to prepare for hearings. In some cases, due to translation overload, the clients' rights under the Rules to translations of critical documents in their native Serbo-Croatian language are not honored promptly. Moreover, there are obvious obstacles to regular communication between client and

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34. ICTY Stat., *supra* note 1, art. 21.

35. ICTY R.P. & EVID. 44, 45.

counsel. Clients in detention in the War Crimes Detention Unit in Scheveningen are inaccessible to out-of-country counsel much of the time.

But some commentators say there are even more profound problems with defense counsel, involving issues of competence, integrity, and accessibility to the evidence and witnesses they need in order to play on a level field with the prosecution.

The Tribunal often operates under different rules from those of the national court system. The Rules originally tilted toward our Anglo-American adversarial trial system, though that is changing, perceptibly. The burden of proof is on the prosecution to show guilt beyond a reasonable doubt, and there used to be, but no longer is, a stated preference for live witnesses rather than paper dossiers, and the accused has a right to cross-examine witnesses against him, to have adequate time and facilities to prepare his defense, and to obtain the attendance of witnesses on his own behalf. There are, however, distinct elements of the continental system woven throughout: indictments are confirmed by a judge and not a grand jury; the accused may make an unsworn statement not subject to cross-examination; hearsay bars do not generally apply; there is no jury and two out of three judges can decide whether the reasonable doubt standard has been met; the prosecution may appeal from an acquittal; and the judges may not only ask questions at trial but can call for additional evidence or witnesses of their own.

Understandably, the bulk of defense counsel are Balkan-trained lawyers and are typically not experienced at cross-examination. Some are quick learners, but others are painfully awkward and unfocused on just what they are trying to accomplish. They sometimes argue with or even criticize the witnesses. They also go off on tangents that are not always relevant to their case. The Tribunal is now operating training courses for appointed lawyers, but, candidly, it is not easy to acculturate lawyers in a wholly new legal system in a few days of lectures or even simulated exercises. As an American judge, I frankly find many ICTY defense cross-examinations painfully unhelpful to my own judgement. I have noticed how often the witnesses seem to resent the cross-examinations and pull back into a litany of “don’t remembers.” They see the defense counsel allied with their nemeses in the docks. Several witnesses have at the end of their testimony

addressed concluding remarks to the defense counsel rather than the accused: “How can you stand there and defend these men who have taken everything away from us, our families, our health, our homeland?” In sum, I came away from the two lengthy trials in which I have participated thinking that the potential of cross-examination by defense counsel in the search for truth has not been realized.

Defense counsel complain bitterly—not without basis—that they do not have the “equality of arms” supposedly guaranteed by the ICTY Statute and the European Convention on Human Rights.<sup>36</sup> For reasons not difficult to discern, prospective defense witnesses often refuse to come to the Hague from Bosnia or Republika Srpska, and in most cases cannot realistically be subpoenaed or forced to do so. Governments of former belligerents may refuse to give up evidence to defense counsel which could help the particular defendants, but perhaps embarrass or implicate persons of power or influence in those countries. Defense counsel may ask the Tribunal to assist them in making formal requests to recalcitrant countries and witnesses, but there is no real enforceability of such requests except to report the malfeasors to the UN Security Council. Recent changes of government in Balkan countries such as Croatia and Serbia have increased cooperation with the Tribunal,<sup>37</sup> but in the end defense counsel are left to scramble on their own in the quest for witnesses and evidence.

Finally, the role of defense counsel as the bridge between his client and the outside world is often a treacherous one in the politically volatile climate of the Balkans. Just as in other professions, there are bad apples among the good,<sup>38</sup> but in a national

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36. Defense counsel argued unsuccessfully in the Tadic case that this inequality in access to information—the Prosecution has hundreds of investigators, more clout with hostile governments, and several years lead time in which to prepare its case—violates a defendant’s right to adequate defense. The Appeals Chamber, however, dismissed the argument. Prosecutor v. Tadic, Case No. IT-94-I-A (July 15, 1999).

37. See, e.g., *Interview of President Mesic*, CROATIAN MEDIA SUMMARY (Sept. 25, 2000) (on file with author) (“[T]he names are known, the perpetrators and commanders are known and they must end up in court. There is no statute of limitations on war crimes.”); see also ICTY, SEVENTH ANNUAL REPORT OF THE ICTY 3, 32 (2000) (noting “significant upturn in [cooperation] in the Republic of Croatia”) (on file with author).

38. The UN is currently investigating newspaper reports that in some cases defense

court system there is usually an agreed upon norm for lawyers' behavior, undergirded by law school training and bar codes of conduct and disciplinary proceedings. In an international court, lawyers come from different legal cultures. As occasional players, their loyalties to the ICTY may be less strong than to their local court systems or to their clients. Pressures to improvise evidence or even on some occasions to intimidate witnesses may be intense. As a result, there have been instances of defense counsel implication in witness obstruction. The Tribunal has a Code of Conduct for attorneys appearing before it and the Registry has powers to censure or disqualify incompetent or corrupt counsel.<sup>39</sup> Trial Chambers also have held contempt hearings based on the behavior of some counsel.<sup>40</sup> Still, the endemic problems defense counsel face defending hometown heroes, whose hometowns reject the legitimacy of the Tribunal, are formidable. Sometimes the accused themselves thwart the process. Frustrated day after day with watching legal arguments that they do not really understand and anxious to assert themselves in the face of piteous tales of victim-witnesses, they resort to "firing" their counsel in open court, giving the counsel counterproductive instructions, or insisting on telling their stories at strategically inopportune times.

Occasionally the defense counsel or their families may even find themselves at physical risk if they are perceived by hostile political forces at home to be mounting a defense that may implicate powerful personages. Though the so-called Nuremberg defense of "following orders" is inapplicable as a defense to ICTY war crimes prosecutions,<sup>41</sup> it may still be relevant to mitigation of punishment,<sup>42</sup> and, in certain cases, location of the responsibility for initiating certain actions elsewhere may exonerate a defendant altogether. But

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counsel are inveighed by their clients to pay back a percentage of their fees as a condition of their selection or to make substantial gifts to them. See *The Tribunal's Money leaks out to the Accused*, NRC HANDELSBLAD, July 1, 2000, at 1.

39. ICTY R.P. & EVID. 46.

40. Prosecutor v. Tadic, Case No. IT-94-1-A-R77 (Judgment on Allegations of Contempt Against Prior Counsel, Jan. 31, 2000); Prosecutor v. Aleksovski, Case No. IT-95-14/1 (Decision on Contempt of Tribunal, Dec. 11, 1998).

41. ICTY STAT., *supra* note 1, art. 7.

42. Prosecutor v. Erdemovic, Case No. IT-96-22-A (Oct. 7, 1997).

it may also increase the personal risks that counsel run.

## VI. THE WITNESSES

Victim-witnesses are the soul of war crimes trials at the ICTY. This was not true of earlier war crimes trials. In the Nuremberg prosecutions, the Nazi High Command and bureaucracy left behind a vast paper trail that made witness testimony less important. Moreover, as unconditional victor, the Allies had ready access to those troves of documentation. The architects of “ethnic cleansing” in the Balkans were not so systematic or paper-bound. Many of their most notorious actions were decided on the spot or were transmitted orally or telephonically, usually encrypted on a closed circuit. As critically, because the conflicts that split the former Yugoslavia were settled by diplomatic accords that brokered the territorial boundaries of the combatants, tribunal prosecutors do not have guaranteed access to those relevant documents that do exist but are still in the hands of former belligerents. They must often negotiate to obtain them—frequently unsuccessfully—with not-so-friendly governments.

The hundreds of witnesses come not only from the Balkans, but from Western Europe, Australia, and other distant places where they have emigrated or resettled as refugees. It is, in critical part, on their testimony that the ICTY judges must make their judgments as to the responsibility of the accused for grave breaches of the Geneva Conventions, violations of the laws or customs of war, crimes against humanity, and genocide. For example, in the prison camps (euphemistically labeled “collection centers” by their creators) established all across Bosnia in 1992 to hold Muslims or Croats expelled from their villages in Serb takeovers (or, indeed, camps sometimes set up by the Muslims to hold captured Serbs), lists of the thousands of detainees usually do not exist. There are often not even records of the chain of command in these centers. As a result, in trials of guards and lower level officers, such as the Omarska and Keraterm camps cases on which I am sitting now, the principal issue is identifying who made the decisions. The accuseds’ assertions are invariably that they were only foot soldiers or sometimes that they were not even in the camps. A parade of victim-witnesses must be mobilized by the Prosecution to refute these defenses. Even in the

most monstrous war crimes involving executions and massacres of thousands there may be no evidence of written orders to execute, bury, or rebury the victims, nor sure identification of the senior commanders who actively planned, approved, or ordered the slaughter.<sup>43</sup> The only documents in these trials may consist of coded excerpts from Bosnian-Serbian intercepted phone calls, often subject to varying interpretations. The prosecution must rely on a combination of the personal testimony of victim-witnesses who survived the killing fields and expert testimony that pieces victim-witness testimony together into a coherent story.

Since 1996 nearly 1000 victim-witnesses have been brought to the Hague to give testimony.<sup>44</sup> It is not possible to recount in any shorthand way their stories: the physical or emotional horrors they lived through; the ruination of their lives, families, and communities; and the residues of hate, hopelessness and despair. Most of the witnesses were severely traumatized. Some avoided execution by playing dead for hours under piles of corpses. Some saw three generations of men in their families killed within a week's time. Many were tortured or themselves forced to abuse or to beat fellow prisoners. Women including twelve and thirteen year-old girls, underwent torture in the form of indiscriminate gang rapes and prolonged sexual enslavement.

My focus here is on the difficulties encountered—primarily by the prosecution—in transforming these terrible experiences into admissible evidence against war crimes defendants. The obstacles are formidable. First there is the problem of getting victim witnesses to testify at all. The Tribunal has no enforceable subpoena power over residents of independent states. If the witness does not want to come and the state where she lives will not compel her to, the Tribunal can do nothing.<sup>45</sup>

Many witnesses still reside in the areas where the war crimes took place and their fear of intimidation and retaliation by friends, family,

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43. Prosecutor v. Krstic, Case No. IT-98-33-T (Indictment, Nov. 2, 1998).

44. Remarks of Judge Richard May, ICTY, to Preparatory Commission for the International Criminal Court (Mar. 20, 2000) (on file with author).

45. Some friendly countries have adopted domestic legislation requiring citizens who receive a Tribunal summons to honor it in the same manner as if it came from a national court but less friendly countries where the bulk of the witnesses live often do not have such laws.

or allies of the defendants is often real. Threats to their safety are not infrequent, some are blatantly public, and some are anonymous. Even families of accused persons in detention may be threatened if higher-ups still at large fear that the accused's testimony will implicate them before the Tribunal. As a result, a large percentage of witnesses in ICTY trials ask for and get some type of protection ranging from: (1) non-disclosure of their identity to the media or in the public record; (2) court orders to defense counsel to keep a log and notify the prosecutor of all contacts with witnesses; (3) facial and voice distortion of the witness on camera since the proceedings are televised to the Balkans; and (4) in extreme cases taking testimony in closed session which will not appear in the public transcripts.

Even with these protective measures, the tension in the courtroom is palpable. Many of the witnesses are physically and emotionally fragile—in the aftermath of their fractured lives. They frequently break down on the stand. The accused are there in the courtroom only a few feet away. One witness openly pled with the court to stop the accused from threatening her with his eyes. At other times, watching and listening, it seems to me that the witness grows impatient with the trial process. He has recounted his story of beatings, torture, and killings and then he must submit to being cross-examined on minute details like what kind of uniform the accused was wearing at the time or where he stood or what his facial expression was. Some of the witnesses say they are relieved to testify before us. Some express a humbling confidence that we will bring justice to their suffering. Others seem to find their courtroom experience with its stress on legal subtleties anti-climatic and frustrating. Prosecutors say that as the years go by (it is almost a decade now since the first Bosnian conflict began) it is harder and harder to convince witnesses to testify. Many are bent on rebuilding their lives, some even in their old home communities. The most vulnerable have tried to put the horrors behind them. Memories fade; some are downright cynical, watching their real oppressors still at large and thriving.

Yet traditional rights of the accused, such as pretrial release, are also implicated. In the early years of the Tribunal, detention presented no real problems since there were so few defendants and they could be tried promptly. Now the situation is very different. We have thirty-five defendants in detention in a Dutch prison on the

outskirts of the Hague. Some have languished there for over two years.<sup>46</sup> The European Convention on Human Rights accords a right to trial in a reasonable time or release pending trial, yet the Tribunal's own Rules initially had an express presumption against release except in "exceptional conditions," interpreted by the judges to mean terminal illness.<sup>47</sup> This limitation was rationalized on the basis of the extreme gravity of all war crime charges, on the fact that many accused had been captured under conditions that put UN peacekeepers' lives at risk, and the reality that local authorities in the accused's home communities could not be expected to supervise the accused properly. In the last year, however, under pressure from the growing number of detainees and pursuant to the recommendation of a UN Expert Group<sup>48</sup> evaluating the Tribunal's practices, the ICTY changed course. It deleted the "exceptional conditions" requirement and released several defendants back to the Republika Srpska on the country's guarantees that its police would monitor the accused and return them for trial.<sup>49</sup> The Chamber that granted the release was influenced also by the fact that these particular accused had voluntarily surrendered, could not yet be brought to trial for more than a year, and had already been in detention for two years. The Prosecutor strenuously resisted the releases, arguing, not implausibly, that the spectacle of indicted war criminals walking freely among their alleged victims would chill future witnesses from coming forth and intimidate those that had already agreed to do so. Some Tribunal pretrial discovery rules are more liberal than U.S. Federal Rules of Criminal Procedure, entitling the defendant to all prior statements of witnesses the prosecution intends to call. The accused, at the time of release, would know not only who the witnesses against him were but what they were likely to say, a factor which increases the witness's

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46. ICTY, *Fact Sheet on ICTY Proceedings*, at <http://www.un.org/icty/glance/glance/profact-e.htm> (last visited Dec. 2000).

47. ICTY R.P. & EVID. 65 (as adopted, February 11, 1994); *see, e.g.*, Prosecutor v. Simic, et al., Case No. IT-95-9-PT (Decision on Provisional Release of the Accused, Mar. 26, 1998); Prosecutor v. Djukic, Case No. IT-96-20-T (Decision Rejecting the Application to Withdraw Indictment and Order for Provisional Release, Apr. 24, 1996); *see also* European Convention For the Protection of Human Rights and Fundamental Freedoms art. 5 (3), available at <http://www.worldpolicy.org/americas/treaties/echr.html> (last visited March 29, 2001).

48. *Expert Group Report*, *supra* note 3, at 96.

49. Prosecutor v. Simic, Case No. IT-95-9-PT (Apr. 4, 2000) (release of Tadic and Zoric).



unease. It is too soon to see if the dire prophecy of the Prosecutor will eventuate, but the dilemma does raise legitimate questions about the nexus between defendants' rights, witness protection, and Tribunal resources. If we had the means to try defendants quickly, we should, rather than send them back to still-conflict-ridden areas. Unfortunately, we do not.

A further troubling aspect of ICTY trials concerns the use at trial of witness statements given years earlier to investigators in the field. The ICTY's own Rules conflict as to the admissibility of these statements. Until recently when it was amended, one Rule proclaimed "witnesses shall, in principle, be heard directly by the Chambers,"<sup>50</sup> but there have always been numerous exceptions. One exception is for depositions taken by a Tribunal hearing officer.<sup>51</sup> However, the Rules do not, as U.S. Federal rules do, specify the circumstances under which such deposition evidence may be offered at trial. The practice in some Chambers is to let it in freely, other Chambers are restrictive. There is also a highly ambiguous Rule on Judicial Notice which applies not just to facts of common knowledge but to "adjudicated facts or documentary evidence from other proceedings at the Tribunal relating to matters at issue in the current proceedings."<sup>52</sup> The scope of this rule has been the subject of much controversy among the judges. The Prosecution urges a very broad reading that would admit relevant facts found in one case, into a different case, even though the defendants are not the same. Plainly, to accept as fact any matter already adjudicated would shorten trials—a desirable goal—but it also raises serious questions about fairness to the second set of defendants who were not before the Court in the first trial.

Another Rule permits a party to submit affidavits or formal statements of corroborating witnesses to a specific fact testified to by a live witness if it is in accord with the procedures of the state in which they are signed and submitted in advance of the live witness' testimony. Here, again, some Chambers have read the Rule narrowly,

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50. ICTY R.P. & EVID. 90.

51. ICTY R.P. & EVID. 71.

52. ICTY R.P. & EVID. 94.

and some more broadly.<sup>53</sup>

In one trial, the Tribunal admitted the prior unsworn statement of a dead person under a broad general rule of the Tribunal allowing a Chamber “to admit any relevant evidence which it deems to have probative value”—a truly vast power which could conflict with the other more specific rules.<sup>54</sup> The Tribunal Appeals Chamber, however, reversed the ruling as providing no guarantee of reliability, even under that broad residual clause.<sup>55</sup> Chambers are fond of pointing out that there are no prohibitions in Tribunal jurisprudence against hearsay per se, and judges can decide in continental style what weight to give it. Though widely criticized, there is abundant precedent in the Nuremberg and Tokyo war crimes trials for use of affidavits in lieu of live testimony.<sup>56</sup>

I must admit that I find the use of prior witness statements as a substitute for live testimony troublesome. In my short time at the Tribunal I have seen too many instances in which witnesses on the stand have changed, reneged, or even repudiated earlier statements which though closer in time to the events, had not been tested in any way and were unsworn. Often the statement the witness signs for a Prosecution investigator in the field is not even in his native language. It has been orally translated from English and read to him in Serbo-Bosnian-Croat. There is little doubt that it would be infinitely more efficient for witnesses merely to affirm prior statements than to give their testimony live and be cross-examined on it. But the excruciating process of facing one’s torturer, reliving awful times, and defending one’s account on cross-examination may sometimes be indispensable to the integrity of the Tribunal’s final product. Certainly, I believe where the testimony is important to a critical issue it should be live.

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53. ICTY R.P. & EVID. 94 *ter*. There are two other rules of almost equal generality: a Chamber may reject evidence if its probative value is outweighed by its effect on the fairness of the trial, ICTY R.P. & EVID. 89(D), and it may not consider evidence obtained by methods which cast doubt on its reliability or would damage the integrity of the proceeding. ICTY R.P. & EVID. 95.

54. ICTY R.P. & EVID. 89(C).

55. Prosecutor v. Kordic, Case No. IT-95-14/2-AR73.6 (Decision on Appeal Regarding the Admission into Evidence of Seven Affidavits and One Formal Statement, Sept. 18, 2000).

56. Richard May & Marieke Wierda, *Trends in International Criminal Evidence: Nuremberg, Tokyo, The Hague and Arusha*, 37 COLUM. J. TRANSNAT’L L. 725, 751-52 (1999).

A final area of concern to witnesses, particularly in cases of rape, is the Tribunal's rejection so far of any privilege for records of medical or psychological counseling or treatment received by witnesses in the wake of their wartime experience. In one Trial Chamber all such records are automatically disclosed to the defense before trial. This seems paradoxical in view of the special protections afforded rape and sexual abuse victims in the Tribunal rule which excludes evidence of past sexual conduct rules out the need for corroboration of the victim's testimony and severely circumscribes the occasions on which the defense of consent can be used.<sup>57</sup> The Tribunal in *Furundžija* not only compelled the prosecutor to disclose the counselling and treatment records of a rape victim witness it possessed, but approved a subpoena for other victims' records to a nongovernmental organization offering such counseling.<sup>58</sup> The Prosecutor currently is seeking to revisit the question in other cases so that becoming a witness does not automatically open for pretrial disclosure all prior medical and psychological records. It may require amendment to the Rules. Human Rights organizations currently are warning Kosovo rape victims of this risk.<sup>59</sup>

Because witnesses are so vital to the success of any international criminal tribunal, we must be scrupulously protective of their rights, as well as the rights of the accused. I hope that the draft rules for the forthcoming International Criminal Court will take careful note of our experience.

## VII. LESSONS

### *A. The Risk of Isolation*

Though I have served only a short time on the Tribunal, there are lessons I think that can be fairly drawn from that experience. The record of the ICTY importantly contributes to the development of humanitarian law and hopefully to the deterrence of future wartime

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57. ICTY R.P. & EVID. 96.

58. Prosecutor v. Furundžija, Case No. IT-95-17/1-T (July 16, 1998) (finding the prosecution had breached obligation of disclosure under Rule 68 and reopening trial).

59. See HUMAN RIGHTS WATCH, KOSOVO: RAPE AS A WEAPON OF "ETHNIC CLEANSING" 24 (2000), available at <http://www.hrw.org/hrw/reports/2000/fry> (last visited Mar. 25, 2000).

atrocities. But the Tribunal, in many ways, is still in its adolescence. As it seeks to fulfil its laudable and ambitious goals, we must recognize and correct its flaws and defects. It needs supportive and continual surveillance. Moreover, since some of our *modus operandi* are being adopted or adapted—for better or worse—in the procedures of the permanent ICC, the Tribunal's due diligence is required to evaluate how our practices work in practice.

The importance of scrutiny is increased by the Tribunal's institutional isolation as an international court. Unlike the U.S. federal and state courts and those of most other national systems, the ICTY is not a part of any integrated judicial system. There are no lower courts to feed it and screen its cases. There are no sister courts, except the ICTR, to provide a point of reference or comparison and no higher courts to curb its errors. Although other international courts, like the International Court of Justice, are similarly isolated they do not exercise criminal jurisdiction or forcibly apprehend persons and sentence them to prison. There is a sense of humility that reversals by a higher court brings to our U.S. judges, which is not always appreciated in the rarefied atmosphere of international jurisprudence. A court whose awesome mission is to promote international justice and which must apply international humanitarian law for the first time in a criminal trial setting needs constructive oversight by the outside world of its unique powers and varied procedures to assure that mission is achieved.

### *B. Political Nature of the Court*

While the ICTY is truly revolutionary in its authority to transcend national boundaries and try war criminals wherever found, it is in fact highly dependent on other institutions' cooperation. It needs state cooperation or the UN peacekeeping force to physically arrest indicted individuals. Cooperation is required to implement any provisional release of defendants awaiting trial or to take depositions or obtain formal statements from witnesses who cannot come to The Hague. States can hinder the work of the Tribunal by discouraging witnesses from coming forward or passively failing to enforce ICTY summonses, subpoenas, or requests for information.

The realpolitik, of course, is that in the Balkans the Tribunal is

viewed as a very political animal. After the conviction of the Croatian General Tihomir Blaskić last year, several thousand citizens demonstrated in front of the U.S. embassy in Zagreb.<sup>60</sup> Until the recent Yugoslav elections, no day passed without diatribes, threats, and condemnations against the Tribunal emanating from Belgrade. The Prosecutor has been denied entry into some states. Cooperation with the Tribunal has been a prime issue in national electoral campaigns in Serbia, Croatia and Montenegro.<sup>61</sup> It is informative to look at the results of a recent survey of the attitudes of thirty-two Bosnian judges and prosecutors toward the ICTY and their own domestic war crimes trials. The study found that support of the concept of accountability for war crimes varied widely among Bosnian-Serbs, Muslims, and Croats. But they all lacked a clear understanding of the procedures of the Tribunal or the results of its work, and complained they had little access to information from or about the Tribunal. Many expressed concern about the Tribunal's lack of contact with in-country professionals, its blend of civil and common law procedures, the selectivity of its targets, the length of detention and trials, the practice of sealed indictments, and its evidentiary rules. Bosnian-Serb and Croat participants particularly thought it "political".

Bosnian Muslims considered the Tribunal on the whole fair, but Bosnian-Serbs called it "a political body that was an instrument of Western influence rather than an independent judicial institution," and Bosnian-Croats thought it focused unfairly on Croatian suspects. Having recently returned from a week's outreach visit to Croatia, I can attest to the reality of this Croatian perception. All groups stressed the Tribunal's failure to involve any Bosnians in its workings or to establish communications with Bosnia through publications or visiting speakers. The Tribunal has since begun an Outreach program to rectify those problems.<sup>62</sup>

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60. Press Release, ICTY (Mar. 7, 2000) (several thousand Croatian citizens protest in front of the U.S. Embassy against ICTY sentencing of a Croatian general to 45 years in prison) (on file with author).

61. Press Release, ICTY (June 21, 2000) (opposition Socialist Party in Montenegro announces protest rallies to block a visit of the Chief Prosecutor of Hague Tribunal) (on file with author).

62. HUMAN RIGHTS CTR., UNIV. OF CAL., BERKLEY, & UNIV. OF SARAJEVO, JUSTICE,

Sharply contrasting with Nuremberg and Tokyo, which followed unconditional surrender of Germany and Japan, is the context in which the Tribunal was created and still operates. The Dayton Accords that ended the Bosnia war were a political compromise that left many of the perpetrators of war crimes still in power and many of the victims homeless and without a country. Srebrenica, the site of one of the worst massacres since World War II, is now overwhelmingly a Serbian occupied village, and only slowly and fearfully are a very few Muslims returning to what was then, before 1995, a predominantly Muslim town.<sup>63</sup> That pattern is repeated all over Bosnia. I have been moved by the number of victim-witnesses who conclude their testimony about the atrocities they suffered by focusing on the injustice of deportation or expulsion from their communities, of being made refugees with no way to return to their ancestral homes and villages. "By what right did those men make me a person without a home, without a community, without a country," one asked. In that sense, many of the perpetrators of the worst war crimes won their war, regardless of the verdicts of the ICTY.

### *C. The ICTY as Historian*

While the international law community regards the ICTY benignly, the regional Balkan reaction is decidedly mixed. Initially the Tribunal was urged to make detailed findings about the social and political etiology of events leading up to the atrocities on trial. This, it was suggested, would provide an antidote to revisionist history by preserving adjudicated accounts of what actually happened in the foreplay to the Bosnian conflict. As a result, dozens of pages in ICTY judgments focus on the causes and precursors of the 1991 outbreak of hostilities.<sup>64</sup> However, commentators, citizens, and officers of the implicated countries increasingly suggest that the adversarial trial process and the findings of judges may not produce the best

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ACCOUNTABILITY, AND SOCIAL RECONSTRUCTION (2000).

63. Raymond Whitaker, *Srebrenica, Cleansed of Muslims, but not of Serb Hatred*, THE INDEPENDENT, July 12, 2000, at 16.

64. See, e.g., Tom J. Farer, *Restraining the Barbarians: Can International Criminal Law Help?* 22 HUM. RTS. Q. 90 (Feb. 2000); Paul W. Khan, *Speaking Law to Power: Popular Sovereignty, Human Rights and the New International Order*, 1 CHI. J. INT'L LAW 1 (2000).

approximations of history. Moreover, the “adjudication” by ICTY of who started, prolonged, or ended the war and why in the context of criminal proceedings without the states themselves having input is basically unfair, or at least does not contribute to future reconciliation.

#### *D. The Specter of State Sovereignty*

Finally, a brief comment on the controversial issue of state sovereignty is warranted. The evolution of international human rights law in the past century has achieved the gradual triumph of individual rights over state sovereignty. Courts like the ICTY are a prime example. The source of its authority is a UN resolution, not a compact among states. It need not depend on extradition to obtain its suspects so long as a UN force can physically capture them. It tries suspects in a country to which they have no ties and sentences them to prison in other foreign countries. To many internationalists this may reflect a triumph, but there are also voices urging caution. Certainly none of us would want international courts to adjudicate the majority of local crimes committed in our own countries. Our judicial systems, with their peculiar rights and remedies, are products and reflections of our unique political and cultural notions.<sup>65</sup> Jury trials, no double jeopardy, and no appeal of an acquittal are just a few of the ingredients Americans consider *sine qua non* in their system. Until recently, everyone assumed that supranational justice could apply only to crimes or transactions that occurred across national borders or that happened in the course of international conflicts. But these boundaries already have moved and may change even more in the future. Violations of international conventions, treaties, or even customary international law that take place in internal or civil wars can and are being prosecuted and tried in international tribunals, and a rapid growth category called crimes against humanity has pushed away from even those fragile bonds. My experience with the inner workings of an international court suggests care. With careful self and public scrutiny, such courts can responsibly perform important adjudication and accountability functions that national courts in the

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65. U.N. SCOR, 55th Sess., 4186th mtg. at 1-2, U.N. Doc. S/Res. 1315 (2000).

thrall of leaders who are themselves alleged war criminals cannot. However, they should be reserved for just such extreme situations. In that sense I am happy to see the newer proposed UN tribunals relying more on tribunals located closer to the countries involved and composed in part, at least, of jurists from these countries.<sup>66</sup>

In conclusion, permit me just one orational flight in what I know has been a prosaic nuts and bolts account of my time at the Hague. In his *Ethics for the New Millenium*, the Dalai Lama wrote

The unfortunate truth is that we are conditioned to regard war as something exciting and even glamorous . . . . [W]e see murder as dreadful, but there is no association of war with criminality. What is even worse is the fact that in modern warfare the role of those who instigate it is often far removed from the conflict on the ground. At the same time its impact on non-combatants grows even greater. Those who suffer most in today's armed conflicts are the innocent—not only the families of those fighting, but in far greater numbers, civilians who often do not play a direct role . . . . [M]ore and more, women, children, and the elderly are among its prime victims . . . .”

I like to think that the ICTY will be viewed by history as making some small contribution to the resolution of that awful enigma.

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66. DALAI LAMA, *ANCIENT WISDOM MODERN WORLD: ETHICS FOR THE NEW MILLENIUM* (1999).











