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AN ASSESSMENT OF THE YUGOSLAVIA WAR CRIMES TRIBUNAL

*Michael P. Scharf**

I. INTRODUCTION

In May 1993, in response to the “ethnic cleansing” of some 250,000 Muslims in the former Yugoslavia, the Security Council adopted a resolution establishing the Yugoslavia Tribunal; in September 1993, the General Assembly elected the Tribunal’s judges; and in July 1994, the Security Council appointed its Prosecutor. As of the time of this writing, the Yugoslavia Tribunal has indicted over fifty suspects, including Bosnian Serb leader Radovan Karadzic and his military chief, General Ratko Mladic, yet only a few trials have commenced.

The establishment of the Yugoslavia Tribunal marked the first time since the Allies created the Nuremberg and Tokyo Military tribunals following World War II that an international court was set up to prosecute persons responsible for such international crimes. Justice Robert Jackson, the Chief Prosecutor at Nuremberg, concluded his report to the President on the Nuremberg Trials by acknowledging that “many mistakes have been made and many inadequacies must be confessed.” But he went on to say that he was “consoled by the fact that in proceedings of this novelty, errors and missteps may also be instructive to the future.” As the first international criminal court, the Nuremberg Tribunal provides a benchmark for assessing the Yugoslavia Tribunal. The question, then, is have we learned from the mistakes of Nuremberg?

II. A COMPARISON WITH NUREMBERG

There were four main criticisms levied on Nuremberg. First, that it was a victor’s tribunal before which only the vanquished were called to account for violations of international humanitarian law. Second, that the defendants were prosecuted and punished for crimes expressly defined for the first time in an instrument adopted by the victors at the conclusion of the war. Third, that the Nuremberg Tribunal functioned on the basis of limited

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procedural rules that inadequately protected the rights of the accused. And finally, that it was a tribunal of first and last resort, since it had no appellate chamber.

A. *Victor's Justice*

Elsewhere, I have written that in contrast to Nuremberg, the Yugoslavia Tribunal was created neither by the victors nor by the parties involved in the conflict, but rather by the United Nations, representing the international community of States. Yet, this is perhaps somewhat of an oversimplification. The decision to establish the Yugoslavia Tribunal was made by the U.N. Security Council, which has not remained merely a neutral third party; rather, it has itself become deeply involved in the conflict.

The Security Council has imposed sanctions on the side perceived to be responsible for the conflict, authorized the use of force, and sent in tens of thousands of peacekeeping personnel. Its numerous resolutions have been ignored and many of its peacekeeping troops have been injured or killed; some have even been held hostage. Moreover, a compelling argument can be made that the Security Council has (justifiably) favored the Bosnian-Muslims over the Serbs throughout the conflict. Although it imposed sweeping economic sanctions on the Serbs; such action was never even considered when Croatian forces committed similar acts of ethnic cleansing. During the conflict, the Council has been quite vocal in its condemnation of Serb atrocities, but its criticisms of those committed by Muslims and Croats has been muted.

Although the Yugoslavia Tribunal is supposed to be independent from the Security Council, one cannot ignore that the Tribunal's Prosecutor was selected by the Security Council and its Judges were selected by the General Assembly from a short list proposed by the Security Council. While the Tribunal has jurisdiction to prosecute any one responsible for violations of international humanitarian law in the Former Yugoslavia, it is perhaps no surprise that the indictments so far have been overwhelmingly against Serbs. As long as the jurisdiction of ad hoc tribunals is triggered by a decision of the Security Council, and the prosecutors and judges are selected by the Council, such tribunals will be susceptible to the criticism that they are not completely neutral. This is one of the reasons the international community is so interested in establishing a permanent international criminal court.

B. *Application of Ex Post Facto Laws*

Perhaps the greatest criticism of Nuremberg was its perceived application of *ex post facto* laws, by holding individuals responsible for

waging a war of aggression. The first to voice this criticism was Senator Robert Taft of Ohio in 1946, but it wasn't until John F. Kennedy reproduced Taft's speech in his Pulitzer Prize winning 1956 book, *Profiles of Courage*, that this criticism became part of the public legacy of Nuremberg.

The creators of the Yugoslavia Tribunal went to great lengths to ensure that the Tribunal would not be subject to a similar criticism. Thus, in drafting the Tribunal's Statute, the Secretary-General required that the Tribunal's jurisdiction be defined on the basis of "rules of law which are beyond any doubt part of customary international law." In its proposal for the Tribunal's Statute, the International Committee of the Red Cross, the world's leading authority on international humanitarian law, "underlined the fact that according to International Humanitarian Law as it stands today, the notion of war crimes is limited to situations of international armed conflict."

In the first case to be heard before the Yugoslavia Tribunal, the defendant, Dusko Tadic, challenged the lawfulness of his indictment under Article 2 (grave breaches of the Geneva Conventions) and Article 3 (violations of the customs of war) of the Tribunal's Statute on the ground that there was no international armed conflict in the region of Prijedor, where the crimes he was charged with are said to have been committed. In a novel interpretation, the Yugoslavia Tribunal's Appeals Chamber decided by a vote of four to five that, although Article 2 of the Tribunal's Statute applied only in international armed conflicts, Article 3 applied to war crimes "regardless of whether they are committed in internal or international armed conflicts."

The Tribunal based its decision on its perception of the trend in international law in which "the distinction between interstate wars and civil wars is losing its value as far as human beings are concerned." While Professor Meron has argued convincingly for acceptance of individual responsibility for violations of the Geneva Conventions and the Protocols additional thereto in the context of internal armed conflict, such recognition would constitute progressive development of international law, rather than acknowledgment of a rule that is beyond doubt found in existing law. In addition to raising the *ex post facto* criticism, there is a second important reason for the Tribunal to exercise greater caution in construing its jurisdiction: States will not have faith in the integrity of the Tribunal as a precedent for other ad hoc tribunals and for a permanent international criminal court if the Tribunal is perceived as prone to expansive interpretations of its jurisdiction.

C. Violations of Defendant's Due Process

The Nuremberg Tribunal has been severely criticized for allowing the prosecutors to introduce *ex parte* affidavits against the accused over the objections of their attorneys. As Telford Taylor, one of the Prosecutors at Nuremberg, wrote in his book *Anatomy of the Nuremberg Tribunal*, “[t]otal reliance on ... untested depositions by unseen witnesses is certainly not the most reliable road to factual accuracy. ... Considering the number of deponents and the play of emotional factors, not only faulty observation but deliberate exaggeration must have warped many of the reports.”¹ Such affidavits seriously undermined the defendant's right to confront witnesses against him. In the case of *Maryland v. Craig*, the U.S. Supreme Court expressed the importance of this right as follows: “Face-to-face confrontation generally serves to enhance the accuracy of fact finding by reducing the risk that a witness will wrongfully implicate an innocent person.”

On August 10, 1995, the Trial Chamber of the Yugoslavia Tribunal issued a two to one decision, holding that the identity of several witnesses could be withheld indefinitely from the defendant, Dusko Tadic, and his counsel, even throughout the trial, in order to protect the witnesses and their families from retribution. This decision is troubling in that it elevates the protection of victims above the accused's right of confrontation, notwithstanding the fact that the Article 20 of the Tribunal's Statute requires that proceedings be conducted “*with full* respect for the rights of the accused,” and with merely “*due regard* for the protection of victims and witnesses.” In addition, the Yugoslavia Tribunal rationalized its decision on the ground that the Tribunal is “comparable to a military Tribunal” which has more “limited rights of due process and more lenient rules of evidence.” It then cited favorably the practice of the Nuremberg Tribunal to admit *hearsay evidence and ex parte* affidavits with greater frequency than would be appropriate in domestic trials. Although the rationale for this decision was that the United Nations had not established or funded a sufficient witness protection program, it would have been better for the Tribunal to refuse to proceed with the trial until such a program was set up than to go forward on the basis of unidentified and anonymous witnesses.

D. Right of Appeal

A final criticism of Nuremberg was that it did not provide for the right of appeal. The Statute of the Yugoslavia Tribunal has been recognized as constituting a major advancement over Nuremberg by guaranteeing the

1. TELFORD TAYLOR, *ANATOMY OF THE NUREMBERG TRIALS*, at 174, 241, and 315

right of appeal and providing for a separate court of appeal. However, the procedure for the selection of judges did not differentiate between trial and appellate judges, leaving the decision to be worked out by the judges themselves. When they arrived at the Hague, this became the subject of an acrimonious debate, since nearly all the judges wished to be appointed to the appeals chamber, which was viewed to be the more prestigious assignment. As a compromise, the judges agreed that assignments would be for an initial period of one year and subject to "rotat[ion] on a regular basis" thereafter.

The rotation principle adopted by the judges is at odds with the provisions of the Tribunal's Statute intended to maintain a clear distinction between the two levels of jurisdiction. Article 12 provides that there shall be three judges in each Trial Chamber and five judges in the Appeals Chamber, and Article 14(3) expressly states that a judge shall serve only in the chamber to which he or she is assigned. These provisions were intended to ensure the right of an accused to have an adverse judgment and sentence in a criminal case reviewed by "a higher tribunal according to law," as required by Article 14 of the International Covenant on Civil and Political Rights. The purpose of the principle of the double degree of jurisdiction under which judges of the same rank do not review each other's decision is to avoid undermining the integrity of the appeals process as a result of the judges' hesitancy to reverse decisions to avoid the future reversal of their own decisions. The rotation principle, therefore, undermines the Yugoslavia Tribunal's appellate process.

III. CONCLUSION

In the conclusion of Virginia Morris and my recent book on the Yugoslavia Tribunal, we stated:

The Statute of the [Yugoslavia] Tribunal clearly meets the international standards of due process established at Nuremberg and reflects the significant developments in international human rights standards in the last half century. The detailed Rules of Procedure and Evidence adopted by the judges pursuant to the Statute represents a marked improvement over the scant set of rules that were fashioned for the Nuremberg Tribunal. The Statute and the Rules provide the necessary framework for ensuring that the [Yugoslavia] Tribunal will comply with

international standards of fair trial and due process and avoid the criticisms of its predecessor.²

In light of the subsequent developments described above, we may have been too optimistic in our initial assessment. The Yugoslavia Tribunal's record so far can only be described as a mixed one. It can, and must, do better. To paraphrase Robert Jackson again, if we pass the defendants in an international trial a poisoned chalice, it is we, the international community, who is ultimately injured. For, the record upon which we judge Mr. Tadic today, will be the record upon which history judges the effort to prosecute crimes before an international Tribunal.

2. VIRGINIA MORRIS AND MICHAEL P. SCHARF, AN INSIDER'S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 333-334 (1995).