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A Critique of the Yugoslavia War Crimes Tribunal

MICHAEL P. SCHARF*

In his historic opening statement, Robert Jackson, the U.S. Chief Prosecutor at Nuremberg said, "we must never forget that the record on which we judge these defendants today is the record on which history will judge us tomorrow. To pass these defendants a poisoned chalice is to put it to our lips as well."¹ It is ironic that history has not been altogether kind to the Nuremberg Tribunal, labeling it "victor's justice," denouncing its application of *ex post facto* law, and rebuking its procedural shortcomings. Fifty years later, the world community has created another war crimes tribunal — the International Criminal Tribunal for the Former Yugoslavia. In its first annual report, this new Tribunal stated that "one can discern in the statute and the rules a conscious effort to avoid some of the often-mentioned flaws of Nuremberg and Tokyo."² Because it will serve as the model for future *ad hoc* tribunals and a permanent international criminal court, the Yugoslav Tribunal has recognized that to achieve success it must not only be fair, but be seen as fair — a goal it has only partially achieved thus far.

In many respects, the Yugoslavia Tribunal is a vast improvement over its predecessor. Its detailed Rules of Procedure and Evidence, for example, represent a tremendous advancement over the scant set of rules that were fashioned for the Nuremberg Tribunal. Further, in contrast to the Nuremberg Tribunal, the Yugoslavia Tribunal prohibits trials *in absentia*, which are inherently unfair and are likely to be seen as an empty gesture. And where the defense attorneys at Nuremberg were prevented from full access to the Nuremberg Tribunal's eviden-

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1. Opening Speech of Robert H. Jackson, *THE TRIAL OF GERMAN MAJOR WAR CRIMINALS BY THE INTERNATIONAL MILITARY TRIBUNAL SITTING AT NUREMBERG* (1946).

2. *Annual Report of the International Tribunal*, at 24, U.N. Doc. S/1994/1007, A/49/342 (1994).

tiary archives,³ defendants before the Yugoslavia Tribunal are entitled to any exculpatory evidence in the possession of the Prosecutor, and both the prosecution and the defense are reciprocally bound to disclose all documents and witnesses prior to trial. Finally, where the Nuremberg Tribunal has been criticized for compelling defendants to make incriminating statements, the Statute of the Yugoslavia Tribunal guarantees every accused the right "not to be compelled to testify against himself or to confess guilt,"⁴ in addition to a panoply of other rights not recognized under the Nuremberg Charter.

The most often heard criticism of Nuremberg was its perceived application of *ex post facto* laws, by holding persons responsible for the first time in history for the "crime of aggression" and by applying the concept of conspiracy which had never been recognized in continental Europe. The creators of the Yugoslavia Tribunal went to great lengths to avoid a similar perception with regard to the International Tribunal. First, the Security Council adopted a series of resolutions that put the people of the former Yugoslavia on notice that they were bound by existing international humanitarian law, in particular the Geneva Conventions. The resolutions enumerated the various types of reported acts that would amount to breaches of this law, and warned that persons who commit or order the commission of such breaches would be held individually responsible. Second, the jurisdiction of the International Tribunal is defined on the basis of the highest standard of applicable law, namely rules of law which are beyond any doubt part of customary law to avoid any question of full respect for the principle *nullem crimen sine lege*. It is particularly noteworthy that the crime of waging a war of aggression, which engendered so much criticism after Nuremberg, is not within the Yugoslavia Tribunal's Jurisdiction.

To some extent, the Yugoslavia Tribunal undermined this accomplishment in one of its first pre-trial rulings interpreting its subject matter jurisdiction. In a pre-trial motion, 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. To support his argument, Tadic pointed out that 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 inter-

3. Kevin R. Chaney, *Pitfalls and Imperatives: Applying the Lessons of Nuremberg to the Yugoslav War Crimes Trials*, 14 DICK. J. INT'L L. 57, 89 (1995).

4. *Statute for the International Tribunal for the Former Yugoslavia*, S.C. Res. 827, U.N. SCOR., 47th Sess., 3217th mtg., art. 21(4)(g), U.N. Doc. S/RES/827 (1993) [hereinafter *Statute for the Yugoslav Tribunal*].

national armed conflict.⁷⁵ In what can only be described as a novel interpretation, the Yugoslavia Tribunal's Appeals Chamber decided on a four to one vote 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."⁷⁶ 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."⁷⁷

While distinguished commentators such as Professors Meron and Paust have 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,⁸ 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.

Another criticism of Nuremberg was that those acquitted by the Tribunal were retried and convicted in subsequent proceedings before national courts. The Statute of the Yugoslavia Tribunal, in contrast, expressly protects defendants against double jeopardy by prohibiting national courts from retrying persons who have been tried by the International Tribunal.⁹ However, by permitting the Tribunal's Prosecutor to appeal an acquittal,¹⁰ the Tribunal itself may infringe the accused's interest in finality which underlies the double jeopardy principle. The U.S. Constitutional prohibition of double jeopardy prohibits prosecution appeals of acquittals. The prohibition is not against being twice punished, but against being twice forced to stand trial for the same offense. There are two important rationales for the rule. One rationale is that the trial itself is a great ordeal, and once the defendant is acquitted, the ordeal must end.¹¹ The other is based on the in-

5. *Preliminary Remarks of the International Committee of the Red Cross*, 22 Feb. 1993, reprinted in VIRGINIA MORRIS & MICHAEL SCHARF, AN INSIDER'S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 391 (1995).

6. Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 Oct. 1995, IT Doc. IT-94-1-AR72, at 68. Judge Li dissented from this conclusion.

7. *Id.* at 54.

8. See Theodor Meron, *International Criminalization of Internal Atrocities*, 89 AM. J. INT'L L. 554 (1995); Jordan Paust, *Applicability of International Criminal Laws to Events in the Former Yugoslavia*, 9 AM. U. J. INT'L L. & POLY. 499, 521-22 (1994).

9. *Statute for the Yugoslav Tribunal*, *supra* note 4, art. 10(1).

10. *Id.* art 25.

11. See *Ball v. United States*, 163 U.S. 662, 669 (1896).

creased risk of an erroneous conviction that may occur if the state, with its superior resources, were allowed to retry an individual until it finally obtained a conviction.¹² These rationales are just as applicable to prosecution before an international criminal court as to domestic prosecutions. The International Tribunal's Prosecutor, together with State authorities assisting the Prosecutor, will have the full resources of the court and several interested States behind it, while defendants and their counsel will be acting alone to refute guilt.

Nuremberg has also been criticized for its failure to 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 right of appeal and providing for a separate court of appeal. However, the procedure for the selection of judges by the General Assembly did not differentiate between trial and appellate judges, leaving the decision to be worked out by the judges themselves. 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.¹³ 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 and avoid the future reversal of their own decisions.¹⁴ The rotation principle, therefore, undermines the Yugoslavia Tribunal's appellate process.

Critics of Nuremberg have pointed out that the Nuremberg Tribunal failed to provide sufficient due process guarantees to the defend-

12. See *Green v. United States*, 355 U.S. 184, 187-88 (1957); *United States v. DiFrancesco*, 449 U.S. 117, 130 (1980).

13. Rule 27 of the Rules of Procedure and Evidence (Adopted on 11 Feb. 1994, amended on 5 May 1994 and 4 Oct. 1993, and further revised on 30 Jan. 1995), U.N. Doc. IT/32/Rev.3, 30 Jan. 1995, reprinted in MORRIS & SCHARF, *supra* note 5, at 41.

14. *Report of the International Law Commission on the Work of Its Forty-Fifth Session*, 3 May - 23 July 1993, U.N. GAOR, 48th Sess., Supp. No. 10, at 323, U.N. Doc. A/48/10 (1993).

ants, and those it did provide were circumscribed by several prosecution judicial rulings. The most notable of such rulings was the Nuremberg Tribunal's decision to allow the prosecutors to introduce *ex parte* affidavits (depositions taken out of the presence of the accused or his lawyer) of persons who were, in fact, available to testify at trial. During the proceedings, the Nuremberg Tribunal took statements from 240 witnesses, and received 300,000 *ex parte* affidavits into evidence.¹⁵ As Telford Taylor, one of the Prosecutors at Nuremberg, wrote: "Total 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."¹⁶ Such *ex parte* affidavits seriously undermined the right of the defendants to confront the witnesses against them. The U.S. Supreme Court has 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."¹⁷

The jurisprudence of the Yugoslavia Tribunal has been stained by this same criticism that tarnished the legacy of Nuremberg. At the Prosecutor's request, the Yugoslavia Trial Chamber recently ruled 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.¹⁸ There are two problems with this decision. First, the Tribunal decided to elevate the protection of victims above the accused's right of confrontation, notwithstanding the fact that 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.*" Simply put, the right to examine or cross-examine witnesses cannot be effective without the right to know the identity of adverse witnesses. As one noted commentator has stated, "[I]t is an almost impossible task to effectively cross-examine an adverse witness without knowing that witness' name, background, habitual residence, or whereabouts at the time of the events to which he or she testifies."¹⁹ Second, 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 leni-

15. JOE J. HEYDECKER & JOHANNES LEEB, *THE NUREMBERG TRIAL* 94 (R.A. Downie trans., 1962).

16. TELFORD TAYLOR, *ANATOMY OF THE NUREMBERG TRIALS* 174 (1992).

17. *Maryland v. Craig*, 497 U.S. 836, 846 (1990).

18. *Decision on the Prosecutor's Motion for Protective Measures for Victims and Witnesses*, 10 Aug. 1995, IT. Doc. IT-94-I-T.

19. Monroe Leigh, *The Yugoslav Tribunal: The Use of Unnamed Witnesses Against Accused*, 90 AM. J. INT'L L. 235 (1996).

ent rules of evidence."²⁰ 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.²¹ What the Tribunal (apparently) failed to realize is that this practice has in fact been a lightening rod for criticism of the Nuremberg Tribunal.²²

Perhaps the most often-heard criticism of Nuremberg was that it constituted "victor's justice." 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.²³ The judges of the Yugoslavia Tribunal come from all parts of the world, and are elected by the General Assembly.²⁴

On the other hand, 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 most responsible for the conflict, the Serbs,²⁵ and authorized the use of force and air strikes,²⁶ and sent in tens of thousands of peacekeeping personnel.²⁷ Its numerous resolutions have been ignored and many of its peacekeeping troops have been injured or killed; some have even been held hostage. Moreover, throughout the conflict, the Security Council has (justifiably) favored the Bosnian

20. *Decision on the Prosecutor's Motion for Protective Measures for Victims and Witnesses*, Doc. IT-94-I-IT, at 15.

21. *Id.*

22. The Nuremberg Tribunal had also been severely criticized for allowing the prosecutors to introduce *ex parte* affidavits against the accused over the objections of their attorneys. See TAYLOR, *supra* note 16, at 241; AMERICAN BAR ASSOCIATION SECTION OF INTERNATIONAL LAW AND PRACTICE, REPORT ON THE INTERNATIONAL TRIBUNAL TO ADJUDICATE WAR CRIMES COMMITTED IN THE FORMER YUGOSLAVIA 27 (1993).

23. MORRIS & SCHARF, *supra* note 5, at 332.

24. *Statute for the International Criminal Tribunal for the Former Yugoslavia*, S.C. Res. 827, U.N. SCOR, 47th Sess., 3217th mtg., art. 12 and 13, U.N. Doc. S/RES/827 (1993).

25. S.C. Res. 757, U.N. SCOR, 46th Sess., 3082d mtg., U.N. Doc. S/RES/757 (1992).

26. S.C. Res. 770, U.N. SCOR, 46th Sess., 3106th mtg., U.N. Doc. S/RES/770 (1992) (authorizing force to facilitate the delivery of humanitarian assistance in Bosnia); S.C. Res. 816, U.N. SCOR, 47th Sess., 3191st mtg., U.N. Doc. S/RES/816 (1993) (authorizing force to enforce the no fly zone over Bosnia); S.C. Res. 820, U.N. SCOR, 47th Sess., 3200th mtg., U.N. Doc. S/RES/820 (1993) (authorizing measures to prevent violations of economic sanctions imposed on Serbia).

27. See, e.g., S.C. Res. 761, U.N. SCOR, 46th Sess., 3087th mtg., U.N. Doc. S/RES/761 (1992) (dispatching peacekeepers to ensure the security of Sarajevo airport); S.C. Res. 762, U.N. SCOR, 46th Sess., 3088th mtg., U.N. Doc. S/RES/762 (1992) (dispatching peacekeepers to "pink zones" in Croatia); S.C. Res. 776, U.N. SCOR, 46th Sess., 3114th mtg., U.N. Doc. S/RES/776 (1992) (dispatching peacekeepers to other parts of Bosnia to facilitate delivery of aid); S.C. Res. 819, U.N. SCOR, 47th Sess., 3199th mtg., U.N. Doc. S/RES/819 (1993) (dispatching peacekeepers to "safe areas" in Bosnia).

Muslims and Croats over the Serbs. Although it imposed sweeping economic sanctions on Serbia and the Bosnian Serbs; such action was never even proposed when Croatian forces committed similar acts of ethnic cleansing in central Bosnia in October 1993. Throughout the conflict, the Council had been quite vocal in its condemnation of Serb atrocities, but its criticisms of those committed by Muslims and Croats were muted.

Although the Yugoslavia Tribunal is designed 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. Indeed, given that the battle for control of Bosnia was in large measure a religious war between Bosnian Muslims and Bosnian Serbs, it is astonishing that four of the eleven judges elected by the General Assembly upon the nomination of the Council come from States with predominantly Muslim populations.²⁸ In contrast, the nominee for the Tribunal's bench from Russia (the one state with the closest historic ties to Serbia) was defeated ostensibly to avoid a pro-Serb bias.²⁹ While the Tribunal has jurisdiction to prosecute anyone responsible for violations of international humanitarian law in the Former Yugoslavia, the indictments so far have been overwhelmingly against Serbs: as of the date of this writing, 46 Serbs have been indicted, 9 Croats, and 3 Muslims.

Finally, noting China's dismal human rights record, one commentator has likened China's participation as a Permanent Member of the Security Council in the establishment of the Tribunal, the selection of its Prosecutor, and the nomination of its judges, as equivalent to Russia's presence on the Nuremberg Tribunal.³⁰ As long as the jurisdiction of international criminal 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 eventual establishment of a permanent international criminal court independent from the Security Council is so important.

In his report to the President on the Nuremberg trials, Robert Jackson said, "Many mistakes have been made and many inadequacies

28. Georges Michel Abi-Saab (Egypt), Adolphus Godwin Karibi-Whyte (Nigeria), Rustam S. Sidhwa (Pakistan), and Lal Chand Bohrah (Malaysia). None of the Judges, however, are, themselves, Muslim.

29. See Boris Krivoshei & Serbei Staroselsky, *Russia Will Obey Tribunal on War Crimes in Yugoslavia*, TASS, Sept. 24, 1993, available on LEXIS, News Library, CURNWS File.

30. Chaney *supra* note 3, at 82. Nuremberg has been criticized on the basis of "unclean hands" since Soviet judges convicted defendants for waging aggressive war and mistreatment of prisoners despite the forcible Soviet annexation of the Baltic States and appalling record of the Soviets regarding the treatment of their POWs.

must be confessed. But I am consoled by the fact that in proceedings of this novelty, errors and missteps may also be instructive to the future."³¹ Just as the Yugoslavia Tribunal reflects a general improvement over Nuremberg, the Statute and Rules of a Permanent International Criminal Court must be crafted in a way that avoids the errors and missteps of the Yugoslavia Tribunal which have been identified in this Report.

31. Robert H. Jackson, *Report to the President*, Oct. 7, 1946.