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THE UN INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA AND INTERNATIONAL JUSTICE: THE JUDGES AND THEIR ROLE

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The Yugoslav Tribunal came into existence when the UN Security Council adopted the Tribunal's Statute on 25 May 1993. The election of the first judges took place in September of the same year, and the first judges were sworn in on 16 November for a term of four years. They elected a President and a Vice-President, the President then assigned the judges to the different Chambers, and they started work.

This was an entirely new entity. Although the Nuremberg and Far East Tribunals after the Second World War were international criminal tribunals, they had been set-up by the victors in the war and their structure and procedures were imposed upon the accused. They did not provide an ideal model for this new international criminal tribunal which, for the first time, was truly international in nature. The Tribunal was also different from its predecessors in that, for the first time, it included an appellate structure whereby appeals may be taken from any decisions given before and during the trial and from the judgment delivered at its conclusion.

Because there was at that time no Prosecutor, and therefore no accused to try, the first judges spent a considerable amount of time and effort to draft the Rules of Procedure and Evidence within the framework of the Tribunal's Statute. To a large extent, by making the Prosecutor responsible for the investigation and prosecution of the accused, the Statute had adopted the common law adversarial system in preference to the civil law inquisitorial system, and this fact is reflected in the Rules which were adopted. A lot has been written about the fundamental differences between the two systems – generally, I should add, by lawyers whose training has been in only one those systems without very much practical experience in the other system. As a common lawyer, I accept that what I am about to say may be criticised upon the same basis, but I intend only to refute some of the more common criticisms made of the adversarial system which is basic to the common law, and I hope to avoid criticism of the civil law system (at least directly).

The fundamental attributes of the adversarial system are these. The accused has the right to remain silent and to require the prosecution to prove its case against him. The prosecution is required to produce all of its evidence to the Trial Chamber before the accused may be asked whether he wishes to produce any material in his defence. Even then, he is entitled to remain silent. Unless it is agreed otherwise, the witnesses for the prosecution must give their evidence orally. The accused is entitled, through his counsel, to cross-examine those witnesses. The prosecutor is entirely independent of the judges, and is solely responsible for the proper investigation of the alleged offence and the charging of the accused. A judge of the Tribunal must confirm that a *prima facie* case exists to support the allegations in the indictment, but that is only in order to justify the issue of an arrest warrant[1]. The judges

[1] A *prima facie* case exists where there is evidence (if accepted) upon which a reasonable tribunal of fact *could*

have no say in what the charges should be.

In my view, the non-participation of any judge in the charging process should not be seen as a weakness. The accused person is not left unprotected. The guarantees of fairness which the Statute provides by Article 21 are substantial – the rights of the accused to silence, to a fair and public hearing, to the presumption of innocence, to be tried without undue delay and only after adequate time to prepare for trial with counsel of his choosing (with legal aid if required), to confront his accusers and to challenge their evidence given in his presence. Those rights are fundamental to the justice system, whatever the mode of trial – adversarial or inquisitorial – although the accused's right to remain silent appears to be of less importance in the actual operation of the inquisitorial system. The source of these rights given by Article 21 of the Tribunal's Statute is Article 14 of the International Covenant on Civil and Political Rights, which seems to me to be a reasonably reputable source.

The adversarial procedure adopted by the Tribunal has been criticised as ignoring the benefits of the dossier compiled by the investigating judge in the inquisitorial system, and as inefficiently relying solely upon the oral recollection of witnesses given long after the event. I suggest that these are not fair criticisms. Statements are taken from prospective witnesses by the investigators from the Office of the Prosecutor as soon as the investigation commences. The witnesses are permitted to refresh their recollection from such statements before giving their evidence to the Trial Chamber. In most cases before the Tribunal, these statements find their way into evidence in any event. But the value of the requirement that witnesses give oral evidence before the Trial Chamber lies in the fact that the version which they give is theirs, and not that of any person who takes the statement. With all the best will in the world, the person taking a statement from a witness rarely reflects accurately what the witness is able to say for himself or herself.

Cross-examination, when skillfully conducted, is one of the most efficient procedures designed for testing the truth about the evidence given by a witness. However, cross-examination can properly be undertaken only by counsel who is in full possession of the case which the accused proposes to make in his defence – its strengths as well as its weaknesses. With all due respect to those who assert otherwise, cross-examination of witnesses cannot be conducted effectively by judges who, unlike counsel, necessarily cannot have any real knowledge of the case which the accused proposes to make.

It is often said that, in the adversarial system, the judges are mere referees, who have no control over the trial and who are at the mercy of the parties as to how the trials are conducted. This criticism is inevitably made in the absence of any practical experience in the adversarial system. Experienced common law judges are able to exert, and do exert, a considerable degree of control over the conduct of the trial. Such judges may and do insist upon full disclosure by the prosecution prior to the commencement of the trial. They are able to question the prosecution as to the need to call certain evidence, and to prevent unnecessary and time-wasting evidence being given. Such judges may and do insist upon at least a partial disclosure by the accused at the commencement of the trial as to the general nature of the case he is to present, so as to identify the *real* issues to be tried.

There was a great deal of criticism of the performance of the Yugoslav Tribunal when it finally got under way with trials. I readily concede that some of that criticism was justified, to an extent because many of the judges elected by the UN General Assembly, although highly qualified in their own fields, possessed little practical experience in criminal trials of any kind, and therefore did not have the necessary confidence initially to insist upon a more efficient manner of conducting those early trials. This is not intended as a criticism of the judges themselves. The system of electing judges adopted by the UN is intended to ensure that the

convict – that is to say, evidence (if accepted) upon which a reasonable tribunal of fact *could* be satisfied beyond reasonable doubt of the guilt of the accused on the particular charge in question.

Tribunal is composed of judges with a variety of qualifications and backgrounds. It was also the only one which is politically possible, and it was obviously better to have a politically acceptable tribunal than one which was more efficient but not politically acceptable. With the accumulation of experience by judges since, those initial problems in the conduct of trials should now have been substantially resolved.

The Rules of Procedure and Evidence have now been refined to state expressly the powers which the judges in an adversarial system have always been able to exercise, but which do not appear to have been considered when the Tribunal first started its work. There is now a pre-trial judge in every case whose task is to ensure that the real issues in that case are identified at an early stage (Rule 65*ter*). There are Pre-Trial and Pre-Defence Conferences held which enable the judges to refine further the real issues in the trial (Rules 73*bis* and 73*ter*). The Rules give power to the judges to issue search warrants and to order States to co-operate by the production of evidence (Rules 54 and 54*bis*). The judges may order appropriate measures to protect the victims and witnesses, subject to the rights of the accused (Rule 75). The judges control whether the proceedings are held in public or private, subject to the interests of justice (Rules 78 to 80). They must apply the rules of evidence which best favour a fair determination of the case and which are consistent with the general principles of law, and they may exclude any evidence if its probative value is substantially outweighed by the need to ensure a fair trial (Rule 89). The judges must exercise control over the examination of witnesses so as to ensure that the truth is discovered and to avoid the needless consumption of time (Rule 90(G)). The judges may exclude evidence if it was obtained by methods which cast substantial doubt on its reliability or if its admission would seriously damage the integrity of the proceedings (Rule 95). They may dispense with proof of facts which are matters of common knowledge (Rule 94).

All of these features are commonly utilised in adversarial proceedings in order to manage the trials efficiently. I suggest to you, therefore, that the common criticisms of the adversarial system largely adopted by the Tribunal as inefficient are misplaced.

And, because the Tribunal is – subject to the terms of the Statute – free to pick and choose from each of the two systems of procedure, a number of features from the inquisitorial system have also been adopted. An accused person may, if he wishes and if the Trial Chamber permits it, make an unsworn and untested statement at the commencement of proceedings, as is commonly done in the inquisitorial system (Rule 84*bis*). The Trial Chambers may order either party to produce additional evidence, and of their own motion they may summon witnesses and order their attendance (Rule 98). Evidence relating to sentence must be given and submissions on sentence made during the trial and before judgment (Rules 85 and 86). My own personal view of this third feature from the inquisitorial system is that it is unfair to the accused, but there you are – a majority of judges voted to adopt that procedural rule from the civil law system.

So much for the role of judges before and during the trial. But what I regard as the most important part of their task is yet to come, and that is in writing the judgment in the case.

It is perhaps unnecessary to remind you that the Tribunal is concerned only with offences amounting to *serious* violations of international humanitarian law. In those circumstances, a person who is convicted by the Tribunal will generally be liable to receive a very substantial sentence. Understandably, he is likely to be considerably distressed both by his conviction and by his sentence. It is therefore necessary that the judges explain with great care in their judgment precisely why he has been convicted. The writing of judgments in order to perform this function is an extremely important task, and sometimes a difficult one.

Another function of judgment writing is to ensure that the victims of those crimes believe that they, too, have received justice. This second task, though very important, must necessarily be subservient to the first, the conviction of those whose guilt has been established. Although the victims understandably seek justice by having the perpetrators convicted, a

conviction can be entered against the persons who have been charged with these crimes only when their guilt has been established by the Prosecutor beyond reasonable doubt. Victims generally have no trouble in establishing that a crime was committed against them, but (especially in the circumstances with which our Tribunal has had to deal) they may be unable to establish by their *own* evidence that the crime was committed by the particular person standing trial. That is because the person charged is often not alleged to be the person who actually did the particular act to the victim which constitutes the crime charged, but who is alleged nevertheless to have been criminally responsible for that act – either as a superior or as an accessory. The prosecution has adopted the realistic policy that an international tribunal such as our Tribunal should be concerned more with those higher up in the chain of command who give the orders than with what may be called the foot soldiers who were merely carrying out those orders[2]. Proof that those higher up in the chain of command were responsible is not always easy, and the prosecution does not always succeed.

Where a victim has established that a crime has been committed against him or her, but where the prosecution has failed to establish that the person standing trial was responsible for that crime, there is likely to be intense distress on the part of the victim. It is therefore necessary that the judges again explain in their judgment with great care why the person charged was not convicted. For example, it must be made clear, if it be the fact, that the Trial Chamber has accepted the evidence of the victim that a crime was committed against him or her, but why it has not been satisfied that the particular person standing trial was responsible for that crime.

Another important task for the judges in writing their judgment is to provide a detailed record of the events with which the trial was concerned which will assist the historians who eventually – and, hopefully, with the benefit of calm reflection – will write an accurate account of the horrifying events which have taken place in the former Yugoslavia since 1991.

It is sometimes said that one purpose of the proceedings before the Yugoslav Tribunal is to effect reconciliation between the opposing parties in those horrifying events. I join wholeheartedly in the hope that such judgments *will* assist the parties to become reconciled, but – with all due respect to those who have suggested otherwise – I do not see how reconciliation can be a legitimate *purpose* in writing those judgments. That is a legitimate goal of a truth and reconciliation commission, but I question how that is a purpose which can legitimately be taken into account by the judges when writing their judgments. It would, for example, be quite wrong to allow the hopes of reconciliation to affect the findings of fact made and upon which a conviction is based. But I reiterate that I join wholeheartedly in the hope that, whatever the purpose with which the Tribunal judgments are written, they *will* have the effect of assisting in the reconciliation of the parties.

Another purpose of a judgment of the Tribunal is to demonstrate to other persons who may be minded at some time in the future to commit war crimes that they will be punished, and punished severely. This is known in some systems of law as the principle of public deterrence. In the context of the Yugoslav Tribunal, this principle was extended for the first time in history by showing that it was not only the war crimes committed by the *losing* side which are prosecuted. It was shown for the first time that it was not *victor's* justice which was being administered. Rather, where the crimes amount to serious violations of humanitarian law, it is justice administered by a wholly independent and international tribunal.

The Tribunal's judgments therefore operate as a deterrent in two different ways – to demonstrate that war crimes cannot be committed with impunity simply because the perpetrators are on the winning side, and to demonstrate that war crimes are serious crimes, and

[2] That is not to suggest that the foot soldiers who merely carried out orders are not also guilty. Obedience to a superior's orders is not a defence, although it is relevant to the sentence to be imposed.

that they will be punished severely.

Finally, another purpose of a judgment of the Yugoslav Tribunal is to contribute to the development of international humanitarian and criminal law. Except for the Nuremberg Tribunal and its associated tribunals and the similar Far East Tribunal at the end of the Second World War, there had been no international criminal courts prior to the Yugoslav Tribunal. That is not to belittle the contributions to international humanitarian and criminal law made by the various domestic courts which have tried war crime cases based upon that law since the last world war, but never before has there been a court dealing continuously and only with international humanitarian and criminal law.

The Yugoslav Tribunal has, of course, added considerably to the international law relating to the elements of the offences which it has to try. But that is not all. Whereas domestic courts have in general been able to conduct such cases in accordance with their own procedures, the Yugoslav Tribunal has also had to deal with important issues of criminal procedure and evidence which have arisen for the first time in any international court trying war crimes. Procedural and evidentiary issues continue to arise for decision by the Tribunal in relation to international law, and this particular jurisprudence of the Tribunal has also contributed considerably to that law.

It has often been said that the overall performance of the Yugoslav Tribunal will be judged not upon the number of convictions entered, but rather upon the fairness of the trials which it has conducted. I strongly support that statement, and I believe that my judicial colleagues support it also. This places considerable – and justified – pressure upon the judges to ensure that the proceedings before them are both conducted and concluded fairly. That is not an easy role for the judges to play. I hope that this paper will have given you some idea of what is involved in the judges' role in bringing about such a fair trial[3].

[3] I am grateful to Jérôme de Hemptinne, an Associate Legal Officer with the Tribunal, for drawing my attention to an earlier paper written by Judge Claude Jorda (then Presiding Judge of Trial Chamber I) and himself, *Le Rôle du Juge Dans la Procédure Face aux Enjeux de la Répression Internationale* [The Role of the Judge in Proceedings Faced with the Implications of International Bodies Punishing International Crimes, an unofficial translation]. The extent of my gratitude is not diminished by the fact that my approach has been substantially different to that taken by the authors of that paper.