

**TESTIMONY OF LARRY A. HAMMOND
BEFORE THE
HOUSE INTERNATIONAL RELATIONS COMMITTEE**

February 28, 2002

I am grateful to the Committee for affording me this opportunity to appear and to provide my observations about the operation of the International Tribunals for the Former Yugoslavia and Rwanda (ICTY and ICTR). I wish that I could open my remarks with a glowing endorsement of the workings of these Tribunals. Sadly, I cannot. Anyone who cares about assuring basic due process and fairness must be concerned about recent events involving the trial and appellate chambers of these Tribunals. For the reasons I will summarize briefly in this testimony, there is cause for concern that the rights of those charged with crimes have been subordinated to the larger political objective of gaining convictions and maintaining cooperative relations with Governments affected by the Tribunals. At a time when there is growing international concern about the establishment of criminal tribunals to address acts of terrorism and wrongdoing, there is heightened need to assure that these tribunals command respect of nations like the United States that are committed to fair trials and due process of law. There is reason for concern that to date these existing Tribunals have fallen short of fulfilling this goal.

Before summarizing these concerns, I will briefly provide to the Committee my background as it might be relevant to the issues discussed here. In 1993, I was invited to serve on an American Bar Association Task Force engaged in an effort to recommend rules to govern the prosecutions that might be brought at the Hague. Several members of the Task Force expressed concerns about basic due process issues arising from the anticipated structure and the proposed rules that would govern the ICTY. While some changes were embraced by the ABA and the State Department in commenting on the proposed rules, most of these concerns were not. I believe that I was asked to join the Task Force because of my experience during the Carter Administration at the Justice department. From 1977 to 1980, I served as Deputy Assistant Attorney General in the Office of Legal Counsel under Attorneys General Griffin Bell and Benjamin Civiletti. During the last year of the Carter Administration I worked on matters in connection with the Iranian Hostage Task Force. The absence of any international criminal tribunal to prosecute the hostage-takers in Tehran was an always-present reality in dealing with that crisis—a reality that caused me (and many others at that time) to hope for the creation of an international criminal court.

Since leaving Justice, I have remained a believer in the creation of an international criminal court. I am a criminal defense lawyer, but nothing in my professional experience has caused me to doubt the importance of such courts. It has always been evident to me, however, that central to any system of ordered criminal justice is the institution of aggressive, honorable and independent prosecutors and judges who truly regard themselves as independent and free to apply the law without political concern.. Much of what disturbs me about the operation of the ICTY and ICTR concerns the roles and responsibilities of judges and prosecutors. As a young lawyer I was honored to work for Archibald Cox and the Watergate Special Prosecution Force. That experience informs many of my opinions about the seminal importance of independent judges and prosecutors in assuring that doing justice is more important than gaining convictions.

It is also of overarching importance that prosecutors and judges retain an independence from each other. This structural separation inheres in our Constitutional system and is often taken for granted. The same is not the case in many countries that employ the Civil Law tradition. I have had occasion to work with the Lawyers Committee for Human Rights on a project that gave me exposure to the Turkish judicial system—a system very much within the Civil Law tradition. The close alliance of judge and prosecutor we observed in Turkey is reflective of the structures of both the ICTY and ICTR. That alliance accounts for much of what disturbs me about these Tribunals.

Let me begin with the role of the Tribunals themselves. While all of us like to think that courts are created to see that justice is done in specific cases, it was evident from the creation of the Hague Tribunal that it would be seen as having a different purpose. Recall that the ICTY was established under Chapter VII of the United Nations Charter as an "enforcement measure" to restore peace in the former Yugoslavia. The Security Council had made a specific finding that violations of international humanitarian law had constituted a "threat to peace" in the region. From the beginning, then, the ICTY was established to carry out a specific political purpose: to restore peace. This purpose is evident. Note the official name of the Tribunal: "The International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991." There may be nothing wrong with the purpose, but it is not one that should guide a court that exists to assure just trials. There is no hint of any presumption of innocence, or of the possibility that persons brought before the Tribunal might not be "responsible for serious violations" of law.

This is not to say that the judges and prosecutors serving these Tribunals are indifferent to questions of due process, but in reality there exists an always present pressure to gain convictions. To a great extent these Tribunals are subjected to pressure to convict—a pressure that is fueled by the presumption evident in virtually every pronouncement of the present Chief Prosecutor. This prosecutorial and judicial attitude is predictable given the history and funding for these Tribunals.. Both the ICTY and the ICTR must annually seek funding from the United Nations General Assembly. As anyone familiar with the process of fundraising will know, increased funding is very much related to whether the project for which funding is sought will be successful. Again, it is difficult to imagine that the ICTY could successfully obtain a budget increase by convincing the General Assembly that it was successfully acquitting people brought before the Tribunal. Indeed, the opposite is true: the arguments made in recent years to the General Assembly often focus on the "success" of the Tribunal in apprehending and convicting those accused by the Prosecutor of war crimes. In addition, the two ad hoc tribunals bear the burden of being the precursors to the ICC. The success or failure of the ICTY and ICTR could have a great impact on the establishment of the ICC. Acquittals would not have the effect of creating momentum for the establishment of a permanent court.

Apart from questions of funding, these Tribunals are subject to pressures from the countries and political factions they must count on for the development of evidence. Because the tribunals do not have a police force, an intelligence service, or an ability to gain immediate and unfettered access to the territory they are investigating, the ICTY and ICTR are very much dependent upon the cooperation of governments and international institutions. For example, the tribunals have no ability to make arrests, gather intelligence data, or secure a crime site for investigation. Without the

cooperation of NATO and countries from the region, the ICTY and ICTR would be unable to fulfill their mandates.

These pressures understandably cause the Tribunals to want to protect witnesses secured through the cooperation of affected governments—often at the expense of the right of the accused to confront his accuser. This was a problem foreseen by members of the ABA Task Force. Rules that allow witnesses to testify anonymously, and procedures that permit the prosecution to withhold information that might allow the accused's attorneys to investigate the credibility of key witnesses, were implanted in the structure of the courts from the outset, and the results have been as one might expect—disturbing. For example, in the Tadic case, the first case before either tribunal, the ICTY Trial Chamber allowed the prosecution to call witnesses whose true identities were withheld not only from the public, but from the defendant and his attorneys. Only later was it discovered that two anonymous witnesses against Mr. Tadic had lied about their identities to the Trial Chamber and in fact had been coached by the secret services of the Bosnian government.

In the Kordic trial, public criticism of the slow pace of most trials at the ICTY led the Trial Chamber to allow the prosecution to script its questions with its witnesses on direct examination. Furthermore, the prosecution was allowed to lead its witnesses by asking a series of "yes or no" questions. In the case of Prosecutor v. Furundzija, most of the testimony in the case (including that of accusing witness) was held in closed session and outside of public scrutiny. To this day, none of the testimony that is relevant to Mr. Furundzija's guilt or innocence is available to the public.

Perhaps the clearest example of political pressure influencing the ad hoc tribunals is the Barayagwiza case before the ICTR. In that case, the defendant had been held for three years without charge. Finally, defense counsel filed a motion seeking the release of the accused on the basis that his right to a speedy trial without delay had been violated. The Appeals Chamber of the ICTR (which is the same Appeals Chamber for both ad hoc tribunals), after hearing the arguments, granted the defense motion and ordered that the accused be released. In so doing, the Appeals Chamber held that "nothing short of the credibility of the tribunal is at stake, and to allow these proceedings to continue would amount to a travesty of justice." Because the Appeals Chamber is the highest authority at either Tribunal, this decision was final and no further appeal could be taken.

Immediately, however, politics intruded into the work of the Appeals Chamber. The government of Rwanda, which sought Barayagwiza's conviction, immediately protested and declared that it would no longer cooperate with the ICTR. Indeed, Rwanda denied visas to all members of the Office of the Prosecutor, which made it impossible for the Prosecutor to conduct investigations in Rwanda or to prepare for trial. In short, without Rwanda's cooperation, the work of the ICTR would come to a halt.

The Prosecutor, despite the fact that the decisions of the Appeals Chamber are final, brought a motion on the basis that she had "new evidence" which would cause the Appeals Chamber to reconsider. In reality, this was nothing more than

an excuse so that the Appeals Chamber, in light of the political firestorm that had resulted, could reverse itself. Ms. Del Ponte made no secret that this was her real motive, and she made this clear in her argument to the Appeals Chamber. The Washington Post reported her comments as follows:

"Whether we like it or not, we must come to terms with the reality that our ability to continue our investigations depends on Rwanda," she told the five-judge panel. Without the help of the country where the genocide occurred and so many witnesses reside, "we might as well open the doors to the prison."

"It is my hope," she said in closing, "that Barayagwiza will not be the one to decide the fate of this tribunal"

No secret was made of the fact that political considerations, and not necessarily the law and due process, required that the Appeals Chamber reverse itself.

Surprisingly, this view was not only espoused by the Prosecutor, but by the Chief Judge of the ICTR herself. In an article that appeared in The Washington Post on March 10, 2000, Judge Navanathem Pillay made perfectly clear the point that I too wish to make: due process rights of the accused are often viewed as secondary to the political considerations surrounding the Tribunals. Judge Pillay admits that "public opinion" influences the work of the ICTR, and that due process rights do not necessarily fit into the political purpose of the ICTR (and presumably the ICTY). After hearing the arguments, the Appeals Chamber reversed itself and ordered that Mr. Barayagwiza continue to be held in custody for trial before the ICTR. It seems that the political considerations discussed by Carla Del Ponte and Judge Pillay did take priority over the due process rights of the accused.

Let me pause here to make clear the essence of my concern. I would not advocate that persons accused of serious crimes be released on what the world community might see as technicalities. My concern goes to the fundamental roles and responsibilities of judges and prosecutors. Unless principles of evenhanded justice are seen to animate the decisions of these Tribunals, they will be stripped of the moral authority necessary to successfully prosecute and convict the guilty.

Some might wish to claim that the Barayagwiza case is not reflective of the true nature of these Tribunals. A signal test of whether these international Tribunals will place due process above the goal of getting and upholding convictions is unfolding this year before the ICTY in the appeal of a Bosnian Croat General named Tihomir Blaskic. This appeal deserves close attention. General Blaskic was tried in an extraordinarily lengthy trial of a series of war crimes. The case against him rested on the belief that he enjoyed command

responsibility over forces in the field that committed atrocities against civilians and non-combatants. The most celebrated of the charges involved the deaths of approximately 100 Bosnian Muslim civilians in the village of Ahmici during a raid in April, 1993. He was convicted based on assertions that he controlled these events. He received a 45-year sentence. The defense sought to prove that in fact the military General had no command authority over those who committed these unlawful acts. At trial he was unsuccessful. His case is now on appeal.

Stunningly, however, the Prosecutor withheld exculpatory evidence in the Blaskic case and is using the same evidence to proceed with the prosecution of another man named Dario Kordic. Mr. Kordic was prosecuted for his role in the same massacre under a theory that Bosnian operatives under his control—and reporting directly to the highest levels of the Government of then President Franjo Tudjman—carried out the crimes. Evidence developed by the prosecution in the Kordic case was not provided to the defense in the Blaskic case. That evidence revealed decisionmaking chains of command that bypassed Blaskic and may well have been unknown to him. It is difficult not to conclude that Prosecutors deliberately concealed evidence in order to win a conviction over Mr. Blaskic.

Whatever mystery may have surrounded this seemingly inconsistent set of prosecutions was exposed to public scrutiny in the Spring of 2000 when Franjo Tudjman died and previously secret and now famous archives were found in the basement of the Croatian intelligence services. This is not the time to go into the emerging details of these files, except to say that they cast serious doubt on the theory of the ICTY's prosecution of General Blaskic. What is most disturbing from a due process standpoint is the question why every shred of information and evidence in the hands of the prosecutors that might relate to this issue was not freely disclosed before, during or after the trial of General Blaskic. While the archives may have been unknown before early 2000, it now appears that much was known by the prosecutors and was regarded as reliable—indeed, reliable enough to be used as evidence in the Kordic case. The Blaskic appeal deserves close attention by those who wish to assess whether our international Tribunals are capable of dispensing justice.

Another case recently indicted by the ICTY—this one involving alleged war crimes said to have occurred at the end of the war in Croatia—also deserves close attention. The ICTY Prosecutor has indicted General Ante Gotovina in connection with crimes alleged to have been committed by Croatian military forces against Serbian civilian populations in the Krajina region. In the last days before the ceasefire that led to the Dayton Conference, the Croatian Military engaged in an offensive known as Operation Storm. As with the case of General Blaskic, serious questions remain with respect to whether the acts alleged were in fact undertaken with General Gotovina's knowledge and authorization, but of even greater interest are questions with respect to whether the events in question were part of a military operation undertaken with the cooperation and knowledge

of the United States.

One need only read two documents to see the uncomfortable questions: (1) the indictment of General Gotovina, and (2) the memoir of Richard Holbrooke, entitled *To End A War*. If it is true that the General is a war criminal, it may well also be true that our Government is complicitous. Even if not complicitous, it is absolutely clear that our Government and our military and intelligence personnel in the Krajina region in August of 1995 have information relevant to the case—and possibly critically important to the General's defense. Journalist Roy Gutman's Newsweek article from August 27 of last year lays bare much of this apparently delicate problem. The disturbing article, entitled *What Did the CIA Know*, catalogues the close engagement of U.S. military and political resources in the Croatian offensive (copy attached.) The question this information raises is much like the question that should have surfaced in the Blaskic trial. How far is the prosecution and the ICTY willing to go to see to it that the accused has access to information so that he may defend himself? I cannot begin to predict whether the United States Government would turn over intelligence information if it were demanded—as it should be—but if information and witnesses from the United States military and diplomatic establishment are not made available there should be no prosecution. The pressures discussed above make one wonder whether the ICTY will have the courage to say that the rights of the accused should dominate over the political goal of obtaining convictions.

The name of the Chairman of this International Relations Committee is associated with one of the most important recent enactments designed to govern the conduct of prosecutors in the American federal prosecutorial system. The Hyde Amendment, enacted in 1997, is designed to assure that federal prosecutions are "substantially justified"—that is, that individuals are not indicted and pushed through our judicial system unless a careful evaluation has first been undertaken by an independent prosecutor. This Amendment, which authorizes an award of attorneys fees to the accused in cases of meritless prosecution, is supported by strongly worded remarks from Congressman Hyde. He asked questions that might with equal justification be asked of those who would prosecute war crimes before the ICTY and the ICTR. Is there a potential that prosecutors will "keep information from you that the law says you must disclose?" Will prosecutors be tempted to "hide . . . exculpatory information to which you are entitled?" Is it possible that a prosecutor may "wrench somebody out of their job and their home and put them on trial as a criminal" in a case that lacks substantial justification?

Again, the Gotovina indictment affords what may be suitable and distressing examples of the need to ask similar questions about ICTY prosecutorial decisions. Paragraph 20 of the Gotovina indictment charges that the General is responsible for a "large-scale deportation" – a "forced displacement" – of an "estimated 150,000-200,000 Krajina Serbs." Amazingly, that very charge is contradicted by the Prosecutors' own spokeswoman, Florence Hartman. Ms. Hartman

published a book in 1999 in which she wrote that Milosevic, not Croatia, ethnically cleansed the area in question: "It was Belgrade that evacuated the Serbs from Krajina and led them to Banja Luka and northern Bosnia. This was done so that Belgrade could later justify holding on to these Bosnian territories during future peace negotiations over Bosnia and Herzegovina. "

One might argue that a prosecutor is not bound by the public statements of her official spokesperson, but my concern is that such blatant inconsistencies evidence a lack of prosecutorial care and attention to accuracy. The Gotovina indictment affords a second example. The last paragraph of the indictment (Paragraph 44) alleges that "Croatian forces [said to be under the command of General Gotovina] directed a massive artillery assault on Knin" (the city described by the Serbs as their "capital "). Where did this accusation come from? At least three American journalists who were in the region on the day of the supposed "massive artillery assault" saw no evidence of one. It is a reasonably safe assumption that had there been such an assault the destructive effects would have been evident. It may be even safer to conclude that no investigator or prosecutor from the Hague visited Knin to assess artillery damage. A federal prosecutor in the United States, mindful of the Hyde Amendment, would surely not bring charges of this portent without careful evaluation. A prosecutor acting on behalf of an international tribunal can operate on no lower standard of justification.

The recent history of the cases like the Gotovina, Blaskic and Barayagwiza cases suggests that, indeed, proceedings that disserve due process can happen at the Hague and in Rwanda. Unless a fair trial—one in which the accused is given full access to all information in the hands of the prosecution or within his grasp—is assured, there will be little cause to support this Tribunal and even less cause to place confidence in the International Criminal Court yet to come into existence. The world and the United States need these courts. They perform critical roles, but they cannot be embraced and respected unless they exist as a first priority to secure justice, rather than to secure convictions.

I have read and considered the recent appellate decisions authored by former Court of Appeals for the D.C. Circuit Judge Pat Wald in her capacity as a member of the ICTY. These opinions, especially the case handed down in October of 2001 known as Prosecutor v. Kupreskic, et al, deserve careful attention. Judge Wald is plainly a judge who appreciates the seminal importance of due process and full disclosure. Readers of her opinions will be struck by her respect for fairness when, for example, her opinion urges "extreme caution when assessing witness' identification of the accused made under difficult circumstances." At a time in the United States when the cause of wrongful conviction seems often to surround faulty eye-witness identification, it is comforting to see that at least one appellate Tribunal at the Hague appreciates the dangers of witness testimony that has not been subjected to full examination. These rulings are cause both for optimism and concern. Optimism, because they reflect a maturing

Court coming to recognize that there may be something more important than convictions. Concern, because Judge Wald has concluded her two-year term and will no longer be there to check the prosecutors and the judges less inclined to withstand public criticism. Judge Wald's remarkable appellate handiwork also calls to mind one of the fundamental deficiencies in the structure of these Tribunals. The absence of a separate and independent appellate court remains a serious shortcoming. It is unrealistic to believe that many judges who must interact and cooperate with their trial and appellate judicial colleagues on a daily basis would have the courage displayed by Judge Wald to reject and reverse their colleagues in the Trial Chamber. Several members of the ABA Task Force urged that this obvious flaw be remedied. I am sorry that the argument did not prevail. We would have had a better court, one in which the accused could have greater confidence that errors at trial would genuinely receive evenhanded appellate review.

Plainly, the two Tribunals now in existence are at a crossroads. Their performances to date can be most fairly characterized as mixed. How they perform in the near term will inform our judgments about whether the International Criminal Court concept is one achievable in conformance with American principles of fairness. A first step would be the establishment of a principle of full disclosure and full cooperation in gathering relevant evidence. Whether that evidence is already in the hands of the Tribunal—as some of it apparently was in the Blastic case—or in the hands of cooperating Governments—as it apparently is in the Gotovina case—the watchword of these Tribunals should be that every effort will be expended to make sure that all facts are known to the accused. Due process and a fair trial requires nothing less.

Concluding Observation

Much of what the world hears about these tribunals is wrapped up in the highly visible, and sure to be long-running, trial of Slobodan Milosevic. The daily reports of the savagely disrespectful and inappropriate behavior of Mr. Milosevic deserve sharp rebuke from the world community. But if the ICTY is to merit the respect denied it by this defendant, it must establish by example that it is above politics and exists truly to see only that justice is done. Experience over the early years of these Tribunals, in my judgment, leaves open the question whether international courts, and those who serve them as judges and prosecutors, have the will to take the steps and make the sometimes unpopular choices required when justice and due process, rather than convictions, are the overarching goals.