

**TESTIMONY OF PATRICIA MCGOWAN WALD
FORMER JUDGE
INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA**

**COMMITTEE ON INTERNATIONAL RELATIONS
U.S. HOUSE OF REPRESENTATIVES
HEARING ON
U.N. CRIMINAL TRIBUNALS FOR YUGOSLAVIA AND RAWANDA:
INTERNATIONAL JUSTICE OR SHOW OF JUSTICE**

February 28, 2002

Introduction

Chairman Hyde, Congressman Lantos, Committee Members, thank you for inviting me to testify at your hearing on the UN Tribunals for Yugoslavia and Rawanda. I returned a few months ago from two years service on the International Criminal Tribunal for the Former Yugoslavia (ICTY) after twenty years on the U.S. Court of Appeals for the District of Columbia. I am not personally familiar with the operations of the Rawandan Tribunal. The Yugoslav Tribunal has been in existence for almost nine years and I believe its history and accomplishments are a worthy subject for informational hearings. I am pleased to share my observations on the Tribunal's successes and problems, and to offer recommendations for improvement.

The Accomplishments of the ICTY

The ICTY was established by a United Nations Security Council Resolution in 1993, as a 14-member court on which no country could have more than one judge. The judges are nominated by their respective countries for four-year terms and elections made by the U.N. General Assembly. Subsequent amendments to the ICTY Statute have enlarged the court to 16 members and provided a corps of 27 ad litem judges who come to the Hague for one or two trials but do not enjoy all the privileges of full-time judges. The mandate of the Tribunal is to prosecute and try individuals for war crimes, crimes against humanity and genocides (as defined in the Statute) committed on the territory of the former Yugoslavia since 1991. Indictments are brought by the Prosecutor who is chosen by the Security Council. The Tribunal is authorized to impose prison sentences up to life but not the death penalty; those sentences are served within the prison systems of several nations with whom the Tribunal has formal arrangements. The Tribunal has no police force of its own and must depend on the cooperation of States (and SFOR) for arrests, access to documents, and compulsory production of witnesses. The Statute mandates such cooperation from all States but in practice cooperation is not always forthcoming. The Tribunal is organized into three trial Chambers and an Appeal Chamber which also hears appeals from the Rawandan Tribunal, (ICTR) located in Tanzania. Judges sit in trial panels of three on individual cases. The Statute provides for an independent Office of the Prosecutor (OTP) and a Registry to provide logistic support for the Tribunal, i.e. filing, translation, defense services, press and public relations, legal assistance and security. The ICTY currently has over 1,000 employees and a budget of over 100 million dollars annually.

What has the Tribunal accomplished in its nine years? It has indicted 91 defendants publicly (there are an unpublicized number of secret indictments), completed the trials of 31 of whom 29 have been convicted or plead guilty and 2 acquitted), completed the appeals of 14 of whom 11 are either serving or about to serve prison sentences (3 defendants' convictions were reversed on appeal). 11 defendants are currently in trial and 18 in pretrial proceedings. The

majority of these in trial or awaiting trial are in detention at the Hague and a few are on provisional release to their home States.

Of course the bare statistics do not tell the whole story. Apart from former Yugoslav President Slobodan Milosevic, now on trial, several other high-ranking military and civic leaders accused of war crimes or crimes against humanity committed during the 1991-95 conflicts involving Slovenia, Bosnia, Croatia, Serbia and later Kosovo have been apprehended or voluntarily surrendered to the Tribunal. These include General Radislav Krstic Commander of the Drina Corp. who has been found guilty of genocide in the Srebrenica massacres of up to 8,000 young Muslim men in one week in 1995, Croatian General Tihomir Blaskic found guilty of the dawn massacre of the village of Ahmici in which 100 Muslim inhabitants were slaughtered and their homes destroyed, General Galic who allegedly oversaw the shelling of civilians in Sarajevo, and numerous mayors and police chiefs of cities and villages in Bosnia who planned or implemented the expulsion of unwelcome ethnic groups from the territory and the imprisonment of thousands of civilians in inhumane conditions in the so-called "collection centers" that sprang up throughout Bosnia in 1992. It is unfortunately true that two of the most notorious indictees, President Radovan Karadzic of Republica Serbska, the Bosnia Serb Republic and Ratko Mladic former Commander of the Bosnia Serb army, remain at large, but it is nonetheless difficult to deny that a significant number of the civic and military leaders in the conflict - on all sides - who are accused of committing or permitting those under their supervision to commit crimes against the laws of war, humanity, and genocide have been brought to the Hague to stand trial. Even critics of the Tribunal would, I believe, admit that a strong signal has been sent that national leaders may not with impunity violate the laws of war and the rights of innocent civilians and not undergo the risk of substantial punishment. Except for the Nuremberg and Tokyo Tribunals in the brief period immediately following World War II and a few scattered national court prosecutions for war crimes in the interim 50 years, that risk was not present before.

I am however, aware of the position of some critics of the international tribunals that the task of bringing war criminals to justice is better left to the individual states from which the perpetrators come or where they may be apprehended under ordinary laws of international jurisdiction.

Actually there is widespread agreement among international commentators and criminal practitioners that whenever local courts can and will conscientiously undertake the task, war crime perpetrators should ordinarily be tried in national court. Indeed the ICTY itself contemplates such a scenario as it winds down and is currently investigating when and under what conditions some of its current caseload might be devolved onto State courts. And the Rome Statute creating the permanent International Criminal Court (ICC) is built around a principle that its jurisdiction is secondary in most instances, triggered only if the relevant State courts cannot or will not assume responsibility for the prosecutions. As you undoubtedly know, the OTP at the ICTY already operates under the so-called Rules of the Road whereby the prosecutor may send potential ICTY cases to the States rather than pursue them in the Tribunal itself. It is true that as originally established the ICTY could take a case which fell in its jurisdiction away from a national court and it did so once. But to my knowledge that has not again happened.

The crux of the matter however is that often the relevant States are not capable of pursuing their war criminals during or immediately after wars or internal conflicts. Their own judicial infrastructure has frequently been so damaged in terms of resources, personnel and facilities that there is no possibility they

can prosecute major war crimes in the immediate future. This was certainly true of Bosnia at the time the ICTY was established and to a degree it is still true. War crime prosecutions, especially against top leaders who have planned or executed countrywide strategies of abuse, are enormously complex, expensive and time consuming. Many of the ICTY prosecutions, such as the Srebrenica genocide, followed five year field investigations in which hundreds of witnesses had to be interviewed, thousands of documents seized or accessed, and exhumations of mass burial sites conducted and the scattered body parts of thousands of victims collected, analyzed, and identifications attempted. There was no way Bosnian authorities in the mid-nineties - or even now - could conduct major endeavors on this scale. And yet if these investigations had to wait until the recuperating war torn countries had the facilities to undertake them, potential witnesses and documents would likely be lost and graves vandalized or robbed.

In the cases of other Balkan countries, most exhibited no desire to pursue war crimes until their internal politics changed, several years after the ICTY began operations. In many of those countries, war criminals indicted at the Hague were still "homeland heroes". I was in Sarajevo two weeks ago at a conference dealing with the training of counsel who practice before both the ICTY and domestic courts in war crime trials. There the Ombudsman for the Federation of Bosnia/Herzegovina, appointed pursuant to the Dayton Accords, said publicly that the Federation simply did not yet have the resources or the substantive law in place, nor even the fundamentals of legal education to take over the job of prosecuting the bulk of war crimes. Bosnia as well as other countries in the region have to pass new laws to define war crimes in their national codes and to provide for the protection of victim-witnesses; they have to train prosecutors and defense counsel to perform new functions in investigating and prosecuting novel theories of criminal responsibility. Some war crimes are in fact being prosecuted already in a few courts in the Federation but the national system cannot take over the bulk of the Hague-type prosecutions for at least several more years - and then it will need an infusion of resources to do an adequate job. A report on the situation in Republica Serbska (the Bosnian Serb region) similarly predicts a 2-year minimum before prosecutors and courts can take over any sizeable number of prosecutions and adds that political ambivalence toward such prosecutions is still a fact of life in that region. Croatia under its new government has begun some important war crime prosecutions, but this has been a development only of the past year or so. There are numerous estimates of how many potential war crime prosecutions are involved in the Bosnian and Kosovo conflicts; they range from 20,000 to 50,000. Assuredly neither the international courts nor the domestic ones can handle all or even most of them in the near future, if ever. And that may be one of the sad legacies of any war. But the Bosnian situation indicates that a realistic look must be taken at the particular situation in each country that has been involved in an international or internal conflict to assess its capability to pursue justice for victims of war crimes before relegating all war crime prosecutions to its national courts. In some cases that would be the equivalent of denying accountability altogether to the gravest violations of international humanitarian law. I recognize that war crime tribunals are not the only answer or necessarily the best one in every situation - truth and reconciliation commissions have played a valuable role in countries in the transition from war and tyranny to peace and democracy; and hybrid international/national tribunals have proved useful in others. My point is that there are many situations where a war torn country cannot pursue accountability for war criminals through its own system in the aftermath of war and some form of international war crimes tribunal may be the only realistic alternative. I am satisfied that this was the case when the ICTY was set up. After listening to hundreds of witnesses who suffered hideous assaults on their bodies, minds and souls yet found the courage to come to the Hague to testify

against their accused violators, I cannot imagine that the bulk of them would have testified willingly in their local courts which in many cases were located in villages and towns still populated and in some areas dominated by forces sympathetic to the alleged wrongdoers rather than to their victims. I am convinced the ICTY filled a critical void in that respect, that no national courts were prepared or able to fill.

Having said this, I must agree however with those commentators who say that international criminal tribunals should concentrate on the so-called "big fish", the military and civic leaders who planned, initiated and were in charge of executing the major campaigns and strategies that violated laws of war and humanity - the generals who approved shellings of civilians, who oversaw executions of civilians and prisoners of war, who set up the terrible detention camps, who expelled ethnic groups from territories or towns they captured. The mid-level and lower level individuals who participated in war crimes - soldiers, guards, aides - should be for the most part handled in national courts, even if that involves unfortunate delay. In that sense, I agree that too many of these mid-level violators may have been indicted by the ICTY. Historically this is understandable because in the early years of the Tribunal, the major war criminals in the Balkan conflict had not been apprehended or surrendered. When they finally did begin to come under ICTY custody, the pipeline was to a degree already filled with the earlier indictments of less prominent war criminals. Conditions were quite different at Nuremberg a half century ago - captured Nazi leaders were already in custody - the main trials were over in about a year and up to a thousand lesser violators were tried subsequently and separately in single judge trials by the four Allied Command members in their own tribunals. I think so far as future ad hoc international criminal tribunals are concerned, more thought should be given at the inception to achieving a goal of trying a realistic number of the most serious offenders within a finite number of years, after which the national courts (or a permanent ICC) would take over. Perhaps, as suggested by Ambassador Prosper in an earlier speech, guidelines as to which types of indictees should be included in the category of serious offenders designed for the international tribunal could be agreed upon between the drafters of Tribunal statutes and the prosecutors from the start.

I will allude only briefly to some other accomplishments of the Tribunal. Foremost is the development of vital concepts of international law such as whether an international conflict is necessary to the invocation of certain provisions of the Hague and Geneva Conventions, what are included in war crimes, what can be identified as the "customary" law of war, what constitutes genocide and many more issues which had heretofore been discussed only in treatises and among diplomats. We all know from our domestic experience how often it is essential that a statute be interpreted by courts in order to apply its provisions legitimately to a variety of different factual situations. The same is true for international law: for example until the Tribunals appeared in the scene, the Genocide Convention drafted in 1948 (ratified by the United States in the mid-eighties) had been interpreted only by a few national courts, not always consistently. It required interpretation to apply its provisions to situations like the ethnic cleansing campaigns in the Balkan wars. The ICTY (along with the ICTR) has produced a substantial corpus of coherent international law on war crimes and crimes against humanity as well as genocide - something that a few random decisions in national courts could not. It is only by accretion of case law interpreting ambiguous parts of treaties or "customary law" that coherent, consistent and predictable norms of law are established that can govern the future behavior of leaders in war time. A second example of its contribution in this regard is the Tribunals' pathbreaking decisions as to the status of rapes, sexual violence, and sexual enslavement as crimes of war and crimes against

humanity when committed in the context of a widespread campaign against civilians. An estimated 50,000 rapes were committed in wartime Bosnia, as part of a campaign of terrorism against civilians or inside the prison camps. For the first time in history an entire war crimes prosecution at the ICTY was devoted to crimes against women. From my reading of the international journals, the commentators generally agree that the advent of the Tribunal has ushered in a giant step forward in the elucidation and clarification of what international law means and requires in time of war.

The Tribunal has also pioneered in the creation of procedural rules for an international court composed of judges who speak different languages and come from different legal cultures. This is a difficult task and I do not suggest the ICTY has achieved final success in this area. The Rules of Procedure and Evidence reflect a mix between the common law adversarial mode of trial with which we are familiar in this country and the civil law inquisitorial mode practiced on the European continent. The mix of those two modes at trial is a hard task to pull off and entails trial and error - the ICTY's Rules have been amended many times since 1994. Nonetheless, they represent a substantial starting point for future courts, ad hoc or permanent. I suggest some form of international criminal court will be around for some time to come, and it is unlikely that any one country's system will be adopted exclusively, but rather that parts of one system will have to be melded with parts of another. Although those of us from a particular country are most comfortable with our own procedures, as judges on an international court, we must always ask the basic question: are the courts' procedures basically fair and conducive to a legitimate trial even if they do not represent my own preference. Although I have many problems with the ICTY Rules, I can still answer the basic question in the affirmative. Defendants are guaranteed under Article 20 of the ICTY Statute virtually the full panoply of rights included in the International Covenant of Political and Civil Rights: the trials are public (though they may be closed for testimony implicating a State's security or for extreme cases of danger to a witness); the defendant receives notice of charges in his own language and the right to counsel, a right not to incriminate himself, and advance receipt of more of the prosecution's evidence than is provided in our own Federal Rules of Criminal Procedure, also a right to present his own witnesses and evidence and a right to appeal. In my experience, the judges with whom I have sat have been impartial and thoroughly independent. As a side comment, I would venture to say that the internal criminal rules of some national courts in the region I have visited are far less in accord with our notions of due process, and, were I or someone close to me to be brought before a court outside the United States, I would prefer the ICTY to some of those I have seen in the region. The proceedings of the ICTY are televised for public consumption in the Balkans so that its transparency throughout the region is assured.

The Tribunal has also produced a protocol for witnesses who are in danger of retaliation in their home territories that allows them to testify with some comfort; it includes a special Victim Witnesses Unit that arranges their travel and lodging in the Hague, sometimes escorts them there personally, provides in appropriate cases for pseudonyms, voice and face distortion onto and in extreme cases for closing the proceedings. Over 1,000 witnesses have come to the Hague, almost half of whom would not do so without some protection or assistance, and could not have been forced to because of the absence of binding subpoena power on the part of the Tribunal. This witness protocol is being adopted in several national systems for the first time to implement their own war crime prosecutions.

Problem Areas at the Tribunal

While I have few doubts about the fairness of the trials at the ICTY, there are significant problem areas. Trials have taken too long, averaging over a year and some taking two years or more. The Tribunal's President and judges are acutely aware of the problem and have taken steps to shorten trial time; these include a pretrial phase in which the pretrial judge attempts to streamline the issues that must be tried, sees if concessions or admissions can be made or types of proof agreed upon that do not require live witness testimony. New powers have been given to the judges in the Rules to insist on a limit to the number of witnesses and the length of their testimony. The addition of the ad litem judges means that 6 trials can be held simultaneously, two each day in the three courtrooms available. All this should help cut down trial time.

Some of the length of trials is due to special problems inherent in an international court. The translation into 3 languages of all proceedings, especially witness direct and cross-examination, probably lengthens normal trial time up to 50%. Thus, a prosecutor will ask a witness a question in English (or maybe French). That question must be translated into Serbo-Croat for the witness to answer. The answer in turn must be translated back into English and French for the judges to hear, for the prosecutor to continue his line of questioning or for the defense attorney to engage in cross-examination. There are sometimes disputes over the translations and in trials with hundreds of witnesses the process inevitably takes time that cannot be reduced. Witnesses often come from far away and since they cannot be forced to appear schedules must be adjusted to some degree to their convenience. The sheer volume of evidence necessary to document movements of hundreds of people over many months and the paucity in some cases of written documentation means a large number of fact and expert witnesses must be heard.

Nonetheless, I believe that certain structural changes could increase the speed of trials:

1. Assignments of judges are now made to chambers rather than to cases from a central calendar. That means in some cases, as happened to me in my first few months at the Tribunal, a newly arrived judge has nothing to do until the other two judges in her chamber finish prior judgments. More fundamentally in future Tribunals, thought might be given as to whether three trial judges must sit on all cases; there is of course no jury and the continental practice is to have one professional judge and two lay judges. But candidly having three professional judges sitting every day for a year on a trial struck me as a questionable use of judicial resources. I recognize that for perception reasons it may be unwise to have a single judge from one country decide alone the fate of a high profile leader of another country, but there may be intermediary ways in which one judge can take testimony upon which all three will decide the case, as magistrates often do in our federal courts, or some defendants might agree to a single judge trial for quicker scheduling. The Control Council No. 10 order that authorized the hundreds of trials of mid-level Nazis after the main Nuremberg trial used single judges.

2. I also think that assigning legal assistants directly to the judges rather than to the Chambers as they now are, would facilitate decision-making. Legal assistants are organized in a somewhat bureaucratic fashion under a chief legal officer, answerable ultimately only to the presiding judge of the chambers, who parcels out research and drafting assignments. I believe decisions could be accelerated if one or more of the judges were given the responsibility of producing draft decisions and the legal assistants were assigned directly to individual judges. In general, I thought there were too many interns and legal

assistants coming and going, the direct usefulness of whose work in the final judgment sometimes eluded me. I am comparing the experience to my D.C. Circuit experience where law clerks work directly for the judges and are selected and evaluated by them with no bureaucratic intermediary.

3. The Tribunals have three separate organs - the Office of the Prosecutor (OTP), the Court, and the Registry which basically services the court and the prosecutor. In our federal system, of course, the Administrative Office of the U.S. Courts works directly for and under the federal judiciary. The independence of the Registry at the ICTY to which the court must make all requests for support makes it more difficult for the court to get what it needs when it needs it, be it translators, supplies, priority services; they must be negotiated for. There is a coordinating committee on which all three branches sit, but I still find it anomalous that the court and the administrative arm serving the court are on a par with one another. In general, it seemed to me that while some parts of the Registry were understaffed, i.e., the Victim Witnesses Unit, others such as the security service which basically guards only the courthouse building were overstaffed. Were the judges to have a stronger say in the allocation of personnel and resources I suspect the Registry could be slimmed down considerably and the overall costs of the Tribunal which represent a major component of all non-peacekeeping costs of the UN could be reduced. The unhappiness of the UN with the expenses of the Tribunal is well known; it has reportedly refused to consider any more ad hoc tribunals that replicate the ICTY model. Therefore, revised and more economical structures are important factors to consider if more ad hoc Tribunals are created.

4. In contrast, defense counsel are in need of more attention. Many are not trained in the techniques of cross-examination used in ICTY proceedings or even in the Rules used in the courtroom. This engenders delay. The facilities for their work at the Tribunal are minimal - most are away from their offices and need access to computers, copiers, faxes, libraries. The norms of ethical behavior and the disciplinary mechanisms for ethical violations have been sketchy until recently; since defense counsel come from many different legal systems they do not bring a common set of ethics or legal practices to their work. Rigorous and independent counsel are essential to a fair trial, and the morale, integrity and efficiency of the defense counsel at the ICTY need to be given more attention.

5. I have said publicly in the past, and repeat, that in assigning presiding judges in complex trials, attention should be paid to the judges familiarity with and experience in the courtroom. I do not undervalue the contribution of international law scholars to the Tribunal's work, but a complex trial is primarily given over to the day-to-day decisions on the admissibility of evidence, the legitimacy of witness questions, the objections of opposing counsel etc. A judge with trial management skills and experiences can move a trial faster and more efficiently than one without that training and, frankly, with a prospect of fewer errors that could cause reversal on appeal. I am pleased to note the new ICC requires a majority of judges to have criminal procedure experience of some kind.

Conclusion

You will note that these observations pertain mainly to the efficiency not to the fairness of the ICTY proceedings. In the main, I was impressed during my two years with the integrity of the judges and their devotion to a fair result and with the idealism and dedication of many staff members. I have little doubt that the Tribunal will find its rightful place in history for its pioneering steps in

translating international norms of war and humanity into enforceable tenets of accountability, in developing and clarifying amorphous doctrines of international law, and in conducting fair trials for those responsible for some of the worst abuses of human rights since World War II.
Thank you for this opportunity to present my views.