

Clerking at the ICTY

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Exaggerations come easy in the war-crimes business, as highlighted by common public rhetoric. For example, who among us has not heard Slobodan Milosevic or Ariel Sharon or an average American soldier in Iraq described as a Nazi or the worst thug since Genghis Khan? Although I'm not prone to superlatives—nor are the attorneys and investigators I met working in The Hague—I can profess that my experience at the United Nations International Criminal Tribunal for the former Yugoslavia (ICTY) could not have been a more profound experience.

After graduating from Cardozo, I spent six months working as a clerk to the ICTY's Office of Prosecution. I was drawn to an ICTY clerkship to express my sympathy, care, and attention for the victims, and I believed it was the most significant contribution I could make to prevent future war crimes. As a descendant of Holocaust survivors and victims, I am especially aware of the awful consequences when the international community sits back as war crimes happen, as in Darfur and the Congo. I was also prompted after reading that during the Yugoslavian war and Rwandan genocide, there were American Jews who had argued against pleas for intervention, suggesting that the atrocities in Yugoslavia and

Rwanda were not a Holocaust. I could not accept that irrelevant argument from a part of the Jewish community.

I also believe that only a firm rule of law can prevent future criminal action, and the ICTY is the primary mechanism for establishing that rule of law. I hope that by assisting in the development of international criminal law and the prosecutions of deserving offenders, I have contributed something meaningful at the ICTY. I am very appreciative of the support I received from The Floersheimer Center for Constitutional Democracy, which made me feel that I was also representing Cardozo and its values.

At the ICTY I was assigned to a series of cases against



Croatian defendants for war crimes perpetrated in Croatia against Serbs—all on the eve of Croatia’s attempt to enter the European Union. Two of the cases are pending referral to domestic courts in Croatia, and I assisted on the prosecution’s motions and responses in one of the matters. My work concentrated on a controversial third case against three Croatian defendants for their actions towards Serbian ethnic cleansing in the 1995 “Operation Storm.” The arch-criminal of the enterprise, a former general named Ante Gotovina, continues to be on the run from the law.

Many of the ICTY’s prosecutions are against Serbian defendants, so my Croatian-focused cases were exceptional. Indeed, according to a persistent rumor in The Hague, the case against Operation Storm will survive attempts to dismiss it out of institutional fear that without a prominent Croatian case, the ICTY will earn itself and the United Nations a distasteful anti-Serbian legacy.

Most people remain understandably confused about the work of the ICTY since the media has distorted perceptions of the Serbian-Croatian conflict. Although the ICTY deals with many cases against a variety of ethnicities and perpetrators, it is Milosevic’s stalling tactics and antagonism that catch the media’s attention, and therefore he is best known to the American public.

This was particularly evident to me upon my return to New York. When my building’s elevator man remarked upon my six-month absence, I answered that my family and I had been living in The Hague while I worked for the Yugoslavia tribunal. Predictably, he requested stories about Milosevic. When I said I had concentrated on something else, he reminded me that Milosevic is among the worst humans of today and followed up with a lecture on the biases of the ICTY for allowing Milosevic to grandstand while innocents—and he emphasized Kosovo Albanians—are indicted and sentenced for petty crimes. Although himself an Albanian, his attitude is illustrative of many. Most people in discussing the former Yugoslavia can’t see beyond Milosevic to realize that guilt is shared across ethnic borders.

The case against Operation Storm, which is still in its pre-trial stage, names three Croats in its indictment. Each is charged with engineering and managing a part of the ethnic cleansing that occurred in and as a result of the operation. In the six months I spent in the ICTY’s Office of Prosecution, I became well acquainted with each of them—not

personally, however, since one of them hasn’t bothered to show up at The Hague, and the other two have been provisionally released to Croatia’s recognizance until the commencement of their trial. The defendants, Ivan Cermak, Mladen Markac, and Ante Gotovina, had been military commanders during the operation, and Cermak had also acted as a civilian authority. In the war years, all three had been tightly connected to the elite of the Croatian government. Cermak, who remains one of Croatia’s wealthiest men, was a friend of Croatia’s former president, the late Franjo Tudjman, who, if he were alive, would be a codefendant. The indictment refers to Tudjman as a coparticipant in the ethnic cleansing because he orchestrated the operation.

This case, like most ICTY cases, is prosecuting the highest level of perpetrators. To argue that a military figure

like each of the defendants was responsible, whether individually or as a commanding officer with effective control of subordinates, entails a comprehensive understanding of details. I had to learn the hierarchy of the Croatian military, and study the differences between military police and civilian police, and other arcane facts. Sometimes the scrutiny of troop locations and chains-of-command was boring; at other times it was fast-paced and exciting, such as when I ran an analysis of road blockades—

and the orders issued to the soldiers and police at those blockades—to show how Cermak had restricted the movements of international organization workers to prevent them from aiding Serbian victims.

Operation Storm, lasting just a few days, was a carefully planned military operation to retake an area of Croatia called the Krajina that had been conquered by Serbs. Within a week, the Krajina was effectively cleansed of Serbs, who fled or were forced out of their homes, often into Bosnia. The Serbian population was, according to the indictment, deported or internally displaced, both of which are crimes under the ICTY statute. By most estimates, a quarter of a million Serbs abandoned the Krajina as a result of Operation Storm, but there were no cattle cars trucking the undesired persons to a relocation center. So how and why the Serbs left the Krajina is not entirely clear. In one memorandum, I attempted to anticipate the defense arguments pointing out where the existing law supports the prosecution and where there are holes that need plugging. Indeed, the prosecution is aware that a narrow construal of the statutory crime of



Coat of Arms of The Hague

deportation could find that the initial events of Operation Storm—the exodus of Serbs from the Krajina—were voluntary because they were anticipatory and preemptive.

The prosecution's case against Operation Storm rests on the allegation of a "joint criminal enterprise," which is international legalese for conspiracy. Much of my work focused on this allegation, both on the facts and the law. With my team's investigators and attorneys, I studied and filtered the evidence and record of the events under indictment to structure a coherent and credible narrative of the Croatian plan to ethnically cleanse the Krajina of its Serbian population. The Prosecutor's Office is in possession of the late president's personal transcripts, and Tudjman had fastidiously recorded his office conversations. The transcripts are revealing, but Tudjman carefully avoided saying anything incriminating. The case therefore needs to be built from witness statements, forensic evidence, and other investigative tools.

As I grew familiar with the facts of the case, I also researched the legal elements of its joint criminal enterprise and began to see problems in the indictment. Joint criminal enterprise (JCE) is the fastest-changing legal concept in the ICTY's jurisprudence. JCE has been inconsistently treated in the ICTY's case law and the many kinks in the concept have yet to be sorted out. While I was at the ICTY, both the judges and the Prosecutor's Office contradicted their respective pronouncements, making the JCE concept a hot and fertile subject for an enterprising attorney, and I was fortunate to engage it when I could make an impact.

I began analyzing each allegation and slowly started reformulating the indictment. This critical process resulted in a cleaner and more precise narrative of the events under indictment, and because my direct bosses—the team's supervising attorneys—agreed with my conclusions, they tasked me with drafting a new version of the indictment. This was a preemptive response to the pending defense motions on defects in the indictment.

So, fortunately for me, I had the opportunity and the privilege to draft an amended indictment for a case pending at the ICTY. In March the Trial Chamber found for the defendants on several claims in their motions against the indictment, requiring its emendation. Because my draft anticipated such a ruling, the prosecution needs only to tweak it and submit it as conforming to the chamber's orders.

Within a short time, I realized that the Croatian government is a key player in these proceedings. I also learned that the perpetrators and their allies did not disappear from the corridors of power when Croatia formally announced its intent to cooperate with the ICTY. These savvy politicians merely shifted their guises and vocabulary, greatly complicating the prosecution's efforts. Through a mix of political acumen, outright lies, and simple perseverance, the Croatian government has advanced toward European Union ascension while evading responsibility for crimes of ethnic cleansing. The illusory war-crimes trials that Croatia claims to have conducted in the postwar years are part of the same story. According to a recent Amnesty International finding, Croatia's trials have mostly convicted Serbs for war crimes against Croats but rarely a Croat for war crimes against Serbs.

The ICTY's success hinges largely on diplomatic ties, cooperation of the nation states formerly of Yugoslavia, and international pressure brought on the uncooperative. Croatia never fully settled whether it is cooperating, and is amenable to cooperating, with the tribunal, which, as I experienced firsthand, upsets the practicalities of case management and investigation.

The case against Operation Storm, as in other ICTY prosecutions, entails the in-depth in-

vestigation of state-held materials and interviews with state-employed persons. Essentially, because state-sponsored war crimes, like those allegedly having transpired during Operation Storm, originated in plans at the highest levels of government and were perpetrated or covered up by senior political or military officials, the host state's cooperation is absolutely necessary. Absent such cooperation, no effective investigation can proceed.

To date, Croatian authorities have refused to present witnesses for interviews, and the Croatian government is accused of harboring Gotovina, who has become the benchmark of Croatia's cooperation. EU officials have repeatedly said that Gotovina is the key to Croatia's ascension into the EU, although that government insists it has fully cooperated. Meanwhile, the ICTY's chief prosecutor claims to know that Gotovina is in Croatia, and others place him in Israel under the Russian mafia's protection, or in Ireland sequestered with acquaintances from the IRA. If Gotovina finally appears in The Hague, it would be very tempting to return to assist my team with his prosecution. ■



ICTY building in the Hague