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HAVE WE REALLY LEARNED THE LESSONS OF NUREMBERG?*

MICHAEL P. SCHARF**

I. Introduction

The Nuremberg Tribunal was the first international criminal tribunal in modern times. Its Charter and Judgment are among the most significant developments in international law in this century. But, like any novel endeavor, the Nuremberg Tribunal has engendered its share of criticism.¹

Yet, Nuremberg must be judged, not by contemporary standards, but through the prism of history. Viewed within the historic context, it was extraordinary that the major German war criminals were even given a trial, rather than summarily executed as had been proposed by Churchill and Stalin at the Yalta Conference in 1945.² With this in mind, Justice Robert Jackson, the Chief Prosecutor of Nuremberg, began his opening speech for the prosecution by stating: "That four great nations, flushed with victory and

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**A graduate of Duke University School of Law, Professor Scharf now teaches international law, human rights law, international criminal law, and criminal law at the New England School of Law in Boston. From 1989-93, Professor Scharf was an Attorney-Advisor in the Office of the Legal Adviser of the United States Department of State, where he served initially as Counsel to the Counter-Terrorism Bureau and later served as Attorney-Advisor for United Nations Affairs, United States Representative to the Sixth (Legal) Committee during the 1991 and 1992 sessions of the United Nations General Assembly, and as a member of the United States Delegation to the United Nations Human Rights Commission in 1993. Professor Scharf has written several articles on the establishment of an international criminal court and is the author of a recently published two-volume book entitled *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia*, which contains a chapter comparing and contrasting the Yugoslavia and Nuremberg Tribunals.

¹See generally A. BRACKMAN, *THE OTHER NUREMBERG* (1987); R. CONOT, *JUSTICE AT NUREMBERG* (1983); A. TUSA & J. TUSA, *THE NUREMBERG TRIAL* (1983).

²TELFORD TAYLOR, *THE ANATOMY OF THE NUREMBERG TRIALS* 29-32 (1992). Stalin had proposed that 50,000 German General Staff Officers should be executed, while Churchill had favored executions for a short list of only the most prominent German war criminals. Roosevelt was noncommittal. It was not until President Harry Truman took office two months later, that the United States made it clear that it opposed summary execution and supported instead the establishment of a tribunal to try the German leaders.

stung with injury, stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of the law is one of the most significant tributes that Power has ever paid to reason."³

This is not meant to exonerate Nuremberg or excuse its shortcomings. Even Robert Jackson acknowledged at the conclusion of the Nuremberg Trials that "many mistakes have been made and many inadequacies must be confessed."⁴ But he went on to say that he was "consoled by the fact that in proceedings of this novelty, errors and missteps may also be instructive to the future."⁵ The question, then, is have we learned from the mistakes of Nuremberg? As the first international tribunal since Nuremberg, we must examine the Yugoslavia Tribunal for the answer to this question.

II. Has the Yugoslavia Tribunal Avoided the Shortcomings of Nuremberg?

There were four main criticisms levied on Nuremberg. First, that it was a victor's tribunal before which only the vanquished were called to account for violations of international humanitarian law. Second, that the defendants were prosecuted and punished for crimes expressly defined for the first time in an instrument adopted by the victors at the conclusion of the war. Third, that the Nuremberg Tribunal functioned on the basis of limited procedural rules that inadequately protected the rights of the accused. And finally, that it was a tribunal of first and last resort, because it had no appellate chamber. On paper, the Yugoslavia Tribunal appears to have avoided a repeat of these inadequacies, but the practice of the Yugoslavia Tribunal to date may suggest a different story.

A. *Victor's Justice*

Elsewhere, I have written that 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.⁶ Yet, this is somewhat of an oversimplification. The decision to establish the Yugoslavia Tribunal was made by the United Nations Security Council, which has not remained merely a neutral third party; rather, it has become deeply involved in the conflict.

³Robert H. Jackson, Opening Speech for the Prosecution at Nuremberg (21 Nov. 1945) [hereinafter Opening Speech].

⁴Robert Jackson, Report to the President (Oct. 7, 1946).

⁵*Id.*

⁶1 VIRGINIA MORRIS & MICHAEL P. SCHARF, AN INSIDER'S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 332 (1995).

The Security Council has imposed sanctions on the side perceived to be responsible for the conflict,⁷ authorized the use of force,⁸ and sent in tens of thousands of peacekeeping personnel.⁹ Its numerous resolutions have been ignored and many of its peacekeeping troops have been injured or killed; some have even been held hostage. Moreover, a compelling argument can be made that the Security Council has (justifiably) favored the Bosnian-Muslims over the Serbs throughout the conflict. Although it imposed sweeping economic sanctions on Serbia; such action was never even considered when Croatian forces committed similar acts of ethnic cleansing. During the conflict, the Council has been quite vocal in its condemnation of Serb atrocities, but its criticisms of those committed by Muslims and Croats has been muted.

Although the Yugoslavia Tribunal is supposed 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. While the Tribunal has jurisdiction to prosecute any one responsible for violations of international humanitarian law in the former Yugoslavia, it is perhaps no surprise that the indictments so far have been overwhelmingly against Serbs. As long as the jurisdiction of ad hoc 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.

B. Application of Ex Post Facto Laws

Perhaps the greatest criticism of Nuremberg was its perceived application of ex post facto laws, by holding individuals responsible for the first time in history for waging a war of aggression. The first to voice this criticism was Senator Robert Taft of Ohio in 1946, but it was not until John F. Kennedy reproduced Taft's speech in his Pulitzer Prize winning 1956 book, *Profiles of Courage*, that this criticism became part of the public legacy of Nuremberg.¹⁰

⁷S.C. Res. 757 (30 May 1992).

⁸S.C. Res. 770 (13 Aug. 1992) (authorizing force to facilitate the delivery of humanitarian assistance in Bosnia); S.C. Res. 816 (31 Mar. 1993) (authorizing force to enforce the "no fly zone" over Bosnia); S.C. Res. 820 (17 Apr. 1993) (authorizing forceful measures to prevent violations of economic sanctions imposed on Serbia).

⁹See e.g., S.C. Res. 761 (29 June 1992) (dispatching peacekeepers to ensure the security of Sarajevo airport); S.C. Res. 762 (30 June 1992) (dispatching peacekeepers to "pink zones" in Croatia); S.C. Res. 776 (14 Sept. 1992) (dispatching peacekeepers to other parts of Bosnia to facilitate delivery of aid); S.C. Res. 819 (16 Apr. 1993) (dispatching peacekeepers to "safe areas" in Bosnia).

¹⁰JOHN F. KENNEDY, *PROFILES IN COURAGE* 228-30 (commemorative ed. 1964).

The creators of the Yugoslavia Tribunal went to great lengths to ensure that the Tribunal would not be subject to a similar criticism. Thus, in drafting the Tribunal's Statute, the Secretary-General required that the Tribunal's jurisdiction be defined on the basis of "rules of law which are beyond any doubt part of customary international law."¹¹ 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 international armed conflict."¹²

In the first case to be heard before the Yugoslavia Tribunal, 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. In a novel interpretation, the Yugoslavia Tribunal's Appeals Chamber decided by a four-to-one vote that, although Article 2 of the Tribunal's Statute applied only to acts occurring in international armed conflicts, Article 3 applied to war crimes "regardless of whether they are committed in internal or international armed conflicts."¹³

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."¹⁴ While Professor Meron has 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,¹⁵ such recognition would constitute progressive development of international law, rather than acknowledgment of a rule that is beyond doubt entrenched in existing law. In addition to avoiding the *ex post facto* criticism, there is a second important reason why the Tribunal should have exercised 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

¹¹*Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808* (1993), U.N. Doc. S/25704 (3 May 1993), reproduced in 2 MORRIS & SCHARF, *supra* note 6, at 3.

¹²Preliminary Remarks of the International Committee of the Red Cross (22 Feb. 1993) reproduced in 2 MORRIS & SCHARF, *supra* note 6, at 391.

¹³Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, at 68, IT Doc. IT-94-1-AR72 (2 Oct. 1995). Judge Li dissented from this conclusion.

¹⁴*Id.* at 54.

¹⁵See Theodor Meron, *International Criminalization of Internal Atrocities*, 89 AM. J. INT'L L. 554 (1995).

permanent international criminal court if the Tribunal is perceived as prone to expansive interpretations of international law.

C. Violations of Defendant's Due Process

The Nuremberg Tribunal has been severely criticized for allowing the prosecutors to introduce *ex parte* affidavits against the accused over the objections of their attorneys.¹⁶ Such affidavits, it has been argued, seriously undermined the defendant's right to confront witnesses against him. The United States 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

On August 10, 1995, the Trial Chamber of the Yugoslavia Tribunal issued a two-to-one decision, holding that the identity of several witnesses could be withheld indefinitely from the defendant, Dusko Tadic, and his counsel, even throughout the trial, to protect the witnesses and their families from retribution.¹⁸ This decision is troubling in two respects. First, like Nuremberg, the Yugoslavia Tribunal decided to elevate the protection of victims above the accused's right of confrontation, notwithstanding 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.*" Second, and most worrisome of all, 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 lenient rules of evidence."¹⁹ It then cited favorably the (the oft-criticized) practice of the Nuremberg Tribunal of admitting hearsay evidence and *ex parte* affidavits with greater frequency than would be appropriate in domestic trials.²⁰ Unfortunately, the Tribunal's rules do not permit an interlocutory appeal from this decision of the Trial Chamber, which will thus not be reviewed until after the completion of the trial.

¹⁶See TELFORD TAYLOR, *supra* note 2, at 174, 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).

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

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

¹⁹Protective Measures for Victims and Witnesses, *supra* note 18, at 15.

²⁰*Id.*

D. Right of Appeal

A final criticism of Nuremberg was that it did not 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 did not differentiate between trial and appellate judges, leaving the decision to be worked out by the judges themselves. When they arrived at The Hague, this became the subject of an acrimonious debate, because 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.²¹

The rotation principle adopted by the judges is at odds with the provisions of the Tribunal's Statute that were 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 meant 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. As recognized by the International Law Commission, 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 to avoid the future reversal of their own decisions.²² The rotation principle, therefore, undermines the integrity of Yugoslavia Tribunal's appellate process.

III. Conclusion

I have previously written that "[t]he Statute represents a marked improvement over the scant set of rules that were fashioned for the Nuremberg Tribunal. The Statute and the Rules provide the necessary framework for ensuring that the [Yugoslavia] Tribunal will comply with international standards of fair trial and due

²¹Rule 27 of the Rules of Procedure and Evidence (adopted on 11 Feb. 1994, amended on 5 May 1994, 4 Oct. 1993, further revised on 30 Jan. 1995), U.N. Doc. IT/32/Rev.3 (30 Jan. 1995), reprinted in MORRIS & SCHARF, *supra* note 6, at 41.

²²Report of the International Law Commission on the Work of Its Forty-Fifth Session, at 323, U.N. Doc. A/48/10 (1993).

process and avoid the criticisms of its predecessor."²³ In light of the subsequent developments described above, I may have been too optimistic in my assessment. The Yugoslavia Tribunal's record so far can only be described as a mixed one. It can, and must, do better. With a half century of development of standards of international due process since Nuremberg to draw from, the Yugoslavia Tribunal's shortcomings cannot be excused as a product of the times.

To paraphrase Robert Jackson again, if we pass the defendants in an international trial a poisoned chalice, it is we, the international community, who ultimately are injured. The record on which we judge Mr. Tadic today, will be the record on which history judges the entire effort to prosecute crimes before an international tribunal.²⁴ If the Yugoslavia Tribunal can demonstrate that such an institution can function effectively *and fairly*, then the case for establishing future ad hoc tribunals or a permanent international criminal court will be strengthened beyond measure.

²³MORRIS & SCHARF, *supra* note 6, at 333-34.

²⁴Opening Speech, *supra* note 3.