

# TRIAL OF THE CENTURY? ASSESSING THE CASE OF DUSKO TADIC BEFORE THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA

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It is more than bitter irony that nearly fifty years to the day after the International Military Tribunal in Nuremberg rendered its judgment, we are here today analyzing the first international war crimes trial held since the end of World War II. The trial of Dusko Tadic, an alleged war criminal from the former Yugoslavia, concludes within the month. After seventy-four trial days and eighty-one witnesses, the International Criminal Tribunal for the Former Yugoslavia (ICTY) is preparing to hear closing arguments now scheduled to begin on November 25, 1996. A decision is expected by early February 1997.

The ultimate fate of Tadic may be as yet unknown, but the events that have transpired over the last six months enable us to offer preliminary analysis. The legacy of the ICTY is finally beginning to form. Unfortunately, the legacy developed thus far offers a very mixed picture; indeed, some might say a bleak one. But before I examine the particular details of the Tadic trial, I believe we first need to understand the backdrop in which this Tribunal was created and why, for to understand the significance of the Tadic case requires a lesson in history.

What was it that awakened the outrage in people after fifty years that the name of Nuremberg once again pursed our lips? After millions of people had died in countless civil wars, insurrections and revolutions, why suddenly did a cry for justice arise? The concept of an international criminal court had been a matter of discussion for decades. One might

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assert that the movement to create an international criminal court gained tremendous strength following Saddam Hussein's 1990 invasion of neighboring Kuwait and the senseless slaughter of Shiite and Kurd minorities. But it was the color pictures — both on television and in magazines — of Serbian *concentration* camps, grotesquely reminiscent of places like Auschwitz and Dachau, that was just too much for the world to bear. Word of mass deportations, exterminations, and systematic rapes spread throughout the international community. And then the magic words were spoken—*ethnic cleansing*.

The world was compelled — if not forced — to act. On February 22, 1993, the United Nations Security Council voted to create an international tribunal to prosecute crimes committed in the Former Yugoslavia.<sup>1</sup> Three months later the Court was established, at least on paper.<sup>2</sup> And with the blessing of the Security Council people across the globe spoke of another Nuremberg. But the ICTY is not another Nuremberg, and much of the frustration expressed throughout the world following the near completion of the Tadic trial is likely traced to this inappropriate comparison.<sup>3</sup>

Several immediate differences are readily and significantly apparent. First, the Germans on trial at Nuremberg did not deny the accusations, but argued essentially that their individual actions “[w]ere justified or outside of their individual responsibility.”<sup>4</sup> Tadic's sole defense has been one of alibi — he did not commit the charged offenses.<sup>5</sup> This fact alone sets the stage for a very different trial. Second, the Nuremberg defendants were leaders, high-level officials of the Third Reich. For example, one of the *smaller* figures on trial was Hans Frank who was the Governor-General of Poland. Ninety percent of all Jews were exterminated under his watch. While Tadic is accused of several

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1. S.C. Res. 808, U.N. SCOR, 48th Year, 3175th mtg. at 1, U.N. Doc. S/RES/808 (1993).

2. S.C. Res. 827, U.N. SCOR, 48th Year, 3217th mtg. at 1-2, U.N. Doc. S/RES/827 (1993).

3. Public perception, probably more than anything else, has cast the ICTY in the shadow of Nuremberg. Within the prosecution's office there was little doubt. Minna Schrag, then a senior trial attorney for the Tribunal stated, “[t]here's no question that this is no Nuremberg.” William W. Horne, *The Real Trial of the Century*, THE AM. LAW., Sept. 1995, at 5, 58.

4. “For example, when pleas were required from defendants, Goering had planned—but was not permitted—to read a speech declaring, in part, that ‘I accept the political responsibility for all my own acts or for acts carried out on my orders . . . I must . . . reject acceptance by me of responsibility for acts of other persons which were not known to me; of which, had I known them, I would have disapproved and which could not have been prevented by me anyway.’” ANN TUSA AND JOHN TUSA, THE NUREMBERG TRIAL 150 (1986).

5. Horne, *supra* note 3, at 8, 65.

counts of murder, persecution, and war crimes, he had no involvement with development of policy or control over those who were to carry out any such policies.<sup>6</sup>

In many ways Nuremberg can perhaps be considered or characterized as the parent of the ICTY, keeping in mind that while there is a relationship between parents and children, they can have very different traits and personalities. Justice Robert H. Jackson, the Chief Prosecutor for the International Military Tribunal (IMT), invoked Justice Cardozo's statement "[t]he power of the precedent is the power of the beaten path" in referring to the chief obstacle facing the Nuremberg Court.<sup>7</sup> In creating the ICTY, a beaten path, of course, existed that could be traced directly back to the IMT. From there, however, the ICTY must create a path of its own, one very distinct from Nuremberg.

Many of the problems and criticisms faced by the ICTY start with Nuremberg and the unfair expectations that arose from its ashes. Twenty-two major Nazi defendants were tried by the four victorious Allied Powers, including Hermann Goering, Julius Striecher, Hans Frank and Wilhelm Frick. Nearly all of the high-level German officials who survived the war were present at Nuremberg and on trial. But it was not only those who survived that were on trial. Nuremberg placed on trial the ghosts of Adolf Hitler, Heinrich Himmler, and other leading architects of Nazi Germany. Those that were responsible for the deaths of millions were judged at Nuremberg whether they were physically present or not.

Goering stated before the trial began that it was a political court.<sup>8</sup> By that he meant the trial was merely one for show; each of the defendants' fate had already been sealed before the first piece of evidence was even introduced. Goering was right, but wrong in his application. The IMT was political, just as is the ICTY and the forthcoming permanent International Criminal Court (ICC), but they are or were political necessities, not political trials.<sup>9</sup> These courts were, and will be in the case

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6. Another significant difference is that the Serbs, unlike the meticulous Germans of World War II, kept no written records of their deeds. Therefore, the evidence against Tadic is almost entirely based on eyewitness testimony.

7. Prosecution of Major Nazi War Criminals: Final Report to the President From Supreme Court Justice Robert H. Jackson, 15 DEP'T ST. BULL. 946, at 771,774.

8. Goering stated that "[a]s far as the trial is concerned, it's just a cut-and-dried political affair and I'm prepared for the consequences. The victors are the judges . . . I know what's in store for me." TUSA & TUSA, *supra* note 4, at 13.

9. Of course, at first, the simple *political* solution expressed by the British and Russians in the waning days of World War II was to simply execute the German leaders. ROBERT E. CONOT, JUSTICE AT NUREMBERG 14 (1983). Fortunately, the position of the United States to convene an international court prevailed.

of the ICC, created to judge those who can not or should not be judged in national courts for political reasons.

Why was Tadic then, as the first alleged war criminal, brought to trial before an international criminal court? What is the legacy of Tadic's trial? On a macro level, the ICTY presents a significant achievement in the development of the law of nations and individual and state criminal responsibility. On the micro level, so long as Tadic remains the Tribunal's sole voice, it borders on failure.<sup>10</sup>

This takes me back to my initial observation. From the beginning we expected the ICTY to be another Nuremberg. Before a panel of three judges from three different countries would occur the prosecutions of Nuremberg-like defendants. Mass murderers, killers of defenseless women, helpless children, infirm elderly, and members of minorities — those types of people were Nazis. We expected swastikas and tales of concentration camps.<sup>11</sup> We saw the decimation of Yugoslavia and the horrors of Serb concentration camps on television. Someone must be held accountable. Instead, we got Tadic.<sup>12</sup>

If future war criminals are to learn anything from Tadic, it is not to vacation in a region known for war refugees. Tadic, as you recall, was arrested in February 1994 by German police while he was vacationing in Germany to visit his brother. Refugees from Serbian concentrations camps recognized Tadic as one of their tormentors.<sup>13</sup> Tadic, however, is a small fish. I assert this statement for the first time in a public forum. It is a term that ICTY Chief Prosecutor Justice Richard Goldstone resented hearing during the beginning stages of the proceedings against Tadic, and rightly so. Tadic was accused of horrendous atrocities including war crimes, persecution, and deviant sexual mutilation.<sup>14</sup> The latter charge being a very Nazi-like crime. To his alleged victims, Tadic, of course,

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10. At least one commentator has asserted that the Tadic trial may be the "most important criminal trial in this century . . . because it is a chance for the world to redeem the international rule of law and prove it learned something from the horrors of World War Two." Horne, *supra* note 3, at 5, 6 (emphasis in original). Of course, this statement was written months before the trial began.

11. Indeed, it was initially believed that "if the prosecutors are even half-right, Dusko Tadic . . . is a perpetrator of the worst sort." Horne, *supra* note 3, at 6. The American Bar Association Journal pointed out that "Tadic is charged with what history usually associates with the atrocities of the Nazis: war crimes and crimes against humanity." James Podgers, *The World Cries for Justice*, A.B.A. J., Apr. 1996, at 52.

12. Tadic was accused of raping one woman, murdering 13 men, committing repeated acts of torture, and of involvement in a brutal castration incident. In all, 132 counts were originally levied against him. Podgers, *supra* note 11, at 65.

13. Horne, *supra* note 3, at 61.

14. The prosecutor of the Tribunal v. Dusan Tadic, Case IT-94-1-T (Feb. 13, 1995).

was no small fish. That is why I believe many of us in the international community avoided the term, perhaps more out of respect for the victims and their families than any other reason. But I believe many of us harbored doubts inside as to what was to emerge from the prosecution of Tadic. We truly hoped that the prosecution of Tadic would once again send a Nuremberg-like message throughout the world — war criminals beware!

To some extent the Tribunal can not be faulted for what has transpired. Tadic was chosen as its first case for several reasons, some of which were realistically out of its control. First, the Prosecution was under intense pressure to begin a trial — any trial.<sup>15</sup> After being created in May 1993 the Tribunal sat for months with a full contingent of judges drawing comfortable salaries and no prosecutor, which was acceptable since there were no defendants.<sup>16</sup> Millions of dollars for the Tribunal's budget were being fought over and eventually allocated for nothing. Therefore, it was time to live up to expectations and begin a trial. In this vein, Tadic's arrest in Germany was a fortuitous event.

Second, in investigating the allegations surrounding Tadic's activities, the German authorities were beginning to interfere with the ICTY's investigation of the Omarska region.<sup>17</sup> German investigators were speaking to the same witnesses, gathering evidence, and interfering with the efforts of the Tribunal's investigators. This was becoming a real problem. As a result the Prosecutor acted, and on November 8, 1994, Justice Goldstone formally requested that Germany defer prosecution of Tadic to the Tribunal.<sup>18</sup>

Having watched the trial closely from the beginning, my conclusion is that Tadic was not worthy of international prosecution. Had

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15. Even the Tribunal's judges became frustrated by the perceived inertia. On February 1, 1995, President Cassese issued a press release on behalf of the judges in which they "wished to express their concern about the urgency with which appropriate indictments should be issued." Horne, *supra* note 3, at 61.

16. Although the judges were elected to office on September 15, 1993, it was not until August 15, 1994, that the Chief Prosecutor assumed office. M. CHERIF BASSIOUNI & PETER MANIKAS, *THE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA* 202 (1996).

17. Author's discussion with official in the Office of the Prosecutor, July 1996.

18. Deferral Application Submitted by the Prosecutor, Richard Goldstone, of Dusko Tadic, Case No. IT-94-I-T (Nov. 8, 1994). Tadic's actual transfer was further delayed because it was necessary to wait for the German Parliament to enact appropriate implementing legislation that would permit Germany to effect transfer to the Tribunal of an individual in their custody which they finally achieved on March 31, 1995. Dorothea Beane, *The Yugoslav Tribunal and Deferral of National Prosecutions of War Criminals*, 13 ASIL NEWSL. Sept.-Oct. 1996, at 3. Tadic was transferred to the Tribunal on April 24, 1995 and pled not guilty at his arraignment the following day.

circumstances been different, he should have been left for the Germans to prosecute.<sup>19</sup> Those who should be prosecuted by an international tribunal are those whose prosecution would make a significant difference in the international community. The Tadic's of the world will never be affected by this prosecution. Primarily because it is likely that a person such as a pre-conflict Tadic is fairly law-abiding and does not know their nature could permit a transformation into an alleged war criminal until after the event occurred. What is it that suddenly turns one's neighbor and best friend into an alleged murderer?<sup>20</sup> Why is it that one day someone decides to commit a murder based on ideological or ethnic beliefs? That answer is beyond my expertise, but it is my contention that is not necessarily those who seemingly change overnight for no apparent reason that should be brought to trial before an international tribunal, but rather those who caused the igniting spark that set that transformation in motion.

Let me examine briefly the events that transpired during the May–November 1996 trial of Dusko Tadic.

- 1) Rape Charge: The sole rape charge against Tadic was withdrawn early in the proceedings. This was obviously very disappointing to many. The alleged victim, despite assurances provided by the Prosecutor's Office, refused to testify. Such occurrences, of course, are not uncommon in rape cases and while the fact can not be viewed as the fault of the Prosecution, it nevertheless harmed the case — particularly the case of public perception — against Tadic.
- 2) Sexual Mutilation Charge: In the indictment, Tadic was alleged to have participated in ordering or overseeing the sexual mutilation of a prisoner by having one male inmate bite off the testicles of another who subsequently died. Of all the charges levied against Tadic, this was the true Nazi-like crime. Yet, as far back as 1994, I recall discussions with colleagues who participated in the United Nations investigation of war crimes in the Former Yugoslavia which preceded the creation of the ICTY. They expressed grave doubts regarding the inclusion of this charge against Tadic. It was not Tadic, I was not told, who was involved in the incident. Unfortunately, it was this charge that so intrigued the international community. As much as we all shuddered at our mental pictures of how the incident was being described, we relished in the charge being proven true. This was the

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19. The president of the Tribunal, Antonio Cassese, has publicly stated that “[m]inor thugs who rape or kill, without command responsibility, should be [handled] by the state courts.” Horne, *supra* note 3, at 61.

20. Tadic was accused of participating in the death of Emir Karabasic who was allegedly one of his best friends.

act of a true war criminal. Again, it was a Nazi act. And when the Prosecution failed to even link Tadic to the crime scene, we were very disappointed, although perhaps not yet dejected. True, the case had now lost a great deal of its glamour, but, after all, Tadic still stood accused of ethnic cleansing and murder. Soon, however, these charges as well would seem to be slowly vanishing.

- 3) **Murder Charges:** Tadic was accused of participating or committing over one dozen murders. The Prosecution, however, found it difficult to directly link Tadic to almost all of them. Although several witnesses testified that Tadic beat them severely, a bully — which is the picture of Tadic that has seemingly developed during the course of the trial — justifies an international prosecution even less so than a murderer. Only one witness truly provided strong eyewitness testimony that Tadic had committed murder. Nihad Seferovic stated categorically that Tadic had slit the throats of at least two men. In fact, he had seen it happen. Quite compelling testimony, but one small problem. The indictment against Tadic states that Tadic shot the victims to death. The two types of death seem so glaringly different that one is compelled to seriously question the discrepancy and perhaps discount the eyewitness.
- 4) **Witness L, Draco Opacic:** As the Prosecution's case seemed to be slowly collapsing, a quick burst of strength appeared late in the case in the guise of Witness L, of whom little we were initially told. A young man who had previously pled guilty to war crimes in Croatia and whose identity was withheld from the public, he appeared to tell the Tribunal of horrific accounts that directly implicated Tadic in mass murder. Tadic, Witness L testified, had ordered him to kill ten people and when Witness L refused, Tadic killed several of them himself right in front of witnesses. Rapes were committed in public as well. Tadic, again, was becoming the Nazi we hoped to see prosecuted. But something was glaringly wrong from the start. Witness L set forth some very damaging and specific allegations which alone would likely result in Tadic receiving a life sentence. Yet not one — not one — of these allegations was contained in the indictment. It was too good to be true, and it was. Witness L, or Draco Opacic, as we later discovered his name to be, was completely lying. The entire story was a fabrication made up at the insistence, according to Draco Opacic, of the Bosnian government. Draco

Opacic had never met Tadic and none of the events ever happened. Another devastating blow to the Prosecution.<sup>21</sup>

In closing his final report on Nuremberg, Justice Jackson wrote President Truman that:

it would be extravagant to claim that agreements or trials of this character can make aggressive war or persecution of minorities impossible, just as it would be extravagant to claim that our federal laws make federal crime impossible. But we cannot doubt that they strengthen the bulwarks of peace and tolerance.<sup>22</sup>

It is undoubtedly unfair to rest the legacy of the ICTY on the shoulders of Tadic. But for now, unfortunately, the Tadic case conveys the message of the ICTY — its song perhaps. It is a song very much out of tune, but one that has just begun and will hopefully change and evolve. Tadic is but the first to stand before the Tribunal. How many others will follow, however, is unclear. And whether the leaders of the Yugoslavian conflict such as Radovan Karadzic and Ratko Mladic, both of whom have been indicted by the ICTY, or Slobadon Milosovich, will ever be brought before the ICTY for a judgment of their guilt or innocence remains a difficult question to answer. Yet if the leaders who served as the spark to encourage people such as Tadic are not be brought before this international criminal tribunal, then the ICTY will never live up to the expectations, however unfair they may be, of Nuremberg.

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21. However, it must be said that the Prosecution acted with utmost integrity and forthcominess by its acts to denounce Witness L and request that the Court disregard any of the testimony introduced therefrom.

22. DEP'T ST. BULL., *supra* note 7, at 775-76.