



## Prosecuting War Crimes Before An International Tribunal

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**I**t is probably appropriate to begin this discussion by stating that while the author has acted as an official reviewer of records of war crimes trials, and has read and analyzed innumerable records of those trials, he has never personally prosecuted an individual accused of a war crime.<sup>1</sup> Accordingly, this discussion will necessarily be based upon what others have said and done with respect to the problem of prosecuting war crimes cases before international tribunals.<sup>2</sup> Some people would label such a discussion as “academic”, intending the word to be interpreted pejoratively. If “academic” means knowledge gained from the study of what the majority of actors in the arena have done when confronted with the problems of prosecuting charges of the commission of war crimes, then this presentation will, indeed, be “academic.” However, the author prefers to consider that a discussion based on the experiences of many such prosecutors is practical and instructive, rather than academic.

Generally speaking, except in a few specific areas, the functions of the prosecutor in war crimes trials do not differ greatly from the functions of the prosecutor in any other area of criminal law although they will, of course, differ in detail and, frequently, in magnitude.<sup>3</sup> Thus, just as the first function of any prosecutor, whatever name the locality gives to that position, is to get himself appointed or elected to office, the first function of the war crimes prosecutor is to get himself appointed to that position. Such an appointment is, in the opinion of this author, a dubious honor.<sup>4</sup> War crimes prosecutions are far more tedious, far more exhausting, than ordinary local prosecutions.<sup>5</sup> In almost every instance the prosecutor is dealing with accused persons and witnesses who speak a language which he does not understand and with documents written in a language which he cannot read. Not only must he rely entirely on his translator-interpreter, which in and of itself can be a very frustrating business, but every interrogation, both off and on the stand, consumes double the normal time—or more. In other words, only seek the job of prosecuting war crimes if the case is important enough to give you a place in history—as it did for Justice Jackson, Benjamin Ferencz, Telford Taylor, and a few others.<sup>6</sup>

Article 14 of the 1945 London Charter of the International Military Tribunal provided for four Chief Prosecutors of equal stature with their overall functions specified in detail.<sup>7</sup> Article 8 of the Charter of the International Military Tribunal for the Far East provided for one Chief of Counsel responsible for the investigation and prosecution with no other limitations on his activities, and with the other ten nations which had been at war with Japan each having the option of designating an Associate Counsel.<sup>8</sup> This latter arrangement would appear to be much more preferable inasmuch as an organizational pyramid topped by a committee is not exactly recommended as a sound management practice.<sup>9</sup>

Now, having disregarded the advice given above, and having sought and obtained the job of prosecuting war crimes before an international tribunal—or, being a military lawyer, having been told of your assignment to that job—your next function, and your primary and most important task, is the collection of the evidence that will identify and establish the guilt of the culprits, the evidence that you will produce at the trial and which will, you hope, result in the conviction and punishment of the accused.<sup>10</sup>

You will find that a great mass of material will have already been collected by various governmental and non-governmental agencies.<sup>11</sup> Unfortunately, it will all too frequently develop that many of the interrogations of witnesses were inadequate; that witnesses who have been interrogated and from whom helpful statements have been obtained have been released and have merged into the population or, if they were not local residents, they will have returned to their homes, probably halfway around the world; and that many of the documents with which you are presented have either not yet been formally translated or, if they have been, that the translations are not reliable. At some point along the way you will ask yourself why you ever sought and took the job of prosecuting war crimes. But, like any good lawyer, you will press ahead, seeking the documents and the witnesses that you need to fill the lacunae which will continuously make their appearance. Make no mistake—this will pose many problems unknown to the hometown prosecutor. Many potential witnesses will not have survived the hostilities; essential official documents will have been destroyed during the course of hostilities, or, more recently, by their custodians; others will be in the possession of uncooperative agents of the government of the potential accused, perhaps even in the hands of the potential accused himself; they will be in a foreign language and will be difficult to identify, even if you know exactly what you are seeking—and for the most part you will not have that knowledge. Prevarication and stalling by unfriendly witnesses is a phenomenon known to every prosecutor—but it is much easier to accomplish and much harder to identify when it is being done in a foreign language, a language with which the prosecutor is not familiar. Frequently, the interpreter

will omit the hemming and hawing that has taken place during an interrogation and, after what appears to have been a five-minute back-and-forth argument with the witness, he will turn from the witness to you and state: "He says 'No'"—and all you can do is shrug it off and continue plodding along.

But all is not as bleak as might appear. You will have some good investigators and interrogators and some good translators and interpreters and gradually you will accumulate the evidence that you believe will establish beyond a reasonable doubt the commission of war crimes by specific persons. Incidentally, the searching out, collection, analysis, and indexing of documents by the U.S. investigators in Germany during and after World War II probably contributed more than any other single factor to the success of the prosecution before the International Military Tribunal at Nuremberg and the Subsequent Proceedings conducted there.<sup>12</sup>

Now you are confronted with the next function of the prosecutor of war crimes before an International Tribunal—the decision as to the identity of the persons to be indicted and tried. In the international arena there is no grand jury to make the final decisions on this question. Unlike the hometown prosecutor, you may be selective and omit naming an individual as an accused even though you believe that you have evidence that proves his guilt beyond any possible doubt.<sup>13</sup> Leave the small fry, no matter how guilty, to some national court, military or civilian. You are going to prosecute before an International Tribunal and you want only the top people, those who established policy, those who were responsible for the decision to undertake an aggressive war, those who gave the orders for massive atrocities against the civilian population, including genocide, those who were responsible for the policies that resulted in the studied maltreatment of prisoners of war. This selection is not an easy task, particularly if it has to be done by group decision, as was the case for the International Military Tribunal in Nuremberg.<sup>14</sup> There the prosecutors included the name of one individual, Gustav Krupp, who was senile and *non compos mentis* and whose prosecution the Tribunal had no alternative but to defer indefinitely. As he was in the U.S. Zone of Occupation, the American prosecutors should have been aware of this and should not have named him in the indictment. Two other names, those of Raeder and Fritsche, were added to the list at Soviet insistence solely in order to include among the accused some prisoners who were in Soviet custody.<sup>15</sup> (Fritsche was acquitted and Raeder received a sentence to life imprisonment.)

Of course, in determining the identity of the persons to be named in the indictment charging the commission of war crimes, the most important element that the prosecutor must bear in mind is the evidence available against each individual. While acquittals are unquestionably evidence of the impartiality of the Tribunal,<sup>16</sup> they are anathema to the prosecutor, particularly when he can

be so much more selective than the hometown prosecutor in naming the persons whom he proposes to prosecute. The drafting of the indictment is, therefore, of major importance. He must ensure that while the charges correspond to the offenses listed in the Tribunal's constitutive document, they also correspond to the evidence against each named accused which he is going to be able to present at the trial.

The substantive law that will be the basis of your prosecution will not be difficult to identify. Basically, it will undoubtedly be stated in your constitutive document and will be supplemented by well-known and generally accepted laws and customs of war.<sup>17</sup> However, one problem that the prosecutor of war crimes before an international tribunal will have to face, which is unknown to his hometown counterpart, is the question of the procedure pursuant to which the trial is to be conducted. While it may happen that the prosecution and the defense in a war crimes trial have similar legal systems and trial procedures, the chances are very great that they will not—and even if they do, inasmuch as your trial is before an International Tribunal its rules of procedure will be tailored to that Tribunal and will differ markedly from most national procedural systems, probably being a composite of several systems; and if both the prosecution and the members of the Tribunal are multinational in character, as occurred in the International Military Tribunal in Nuremberg with four nations with different legal systems represented in the prosecution and on the bench and in the International Military Tribunal for the Far East in Tokyo with eleven such nations represented in the prosecution and on the bench, the problem is multiplied.<sup>18</sup> For example, the continental civil law does not know many of the traditional common law rules of evidence and such rules were generally not followed in war crimes trials, even by American military commissions; and one of the reasons for the dissent of the French judge in the Tokyo trial was that there had been no examining magistrate, the procedure which initiates a criminal trial under French law, and which he considered to be indispensable to a fair trial. (Strange to relate, the French judge at Nuremberg had apparently not found this to be a problem.)

The major procedural change included in the 1945 London Charter and in the laws under which trials were conducted in the American and British Zones of Occupation in Germany after World War II, the one that will undoubtedly be included in any charter or law under which you will act as Prosecutor, and the one which was found to be most repugnant by American lawyers bred on the common law system, was the provision exempting the tribunals from "technical rules of evidence."<sup>19</sup> Three aspects of this matter do not appear to be so widely known: first, that while the use of affidavits was and is contrary to traditional common law rules of evidence, it was not and is not contrary to the rules of evidence of many other legal systems; second, that where an affidavit

was introduced in evidence by either side, the other side had the right to demand the production of the affiant on the witness stand, a right which was rather infrequently exercised; and third, that the defense use of this affidavit privilege, as compared to its use by the prosecution, was on the order of more than ten to one.<sup>20</sup>

Article 19 of the 1945 Charter of the International Military Tribunal stated not only that it was not bound by technical rules of evidence, but that the Tribunal should admit “any evidence which it deems to have probative value.”<sup>21</sup> Article 13(a) of the Charter of the International Tribunal for the Far East was to the same effect.<sup>22</sup> Article 14 of the Statute of the International Tribunal for the Former Yugoslavia authorizes the judges of that Tribunal to adopt rules for “the admission of evidence.”<sup>23</sup> Rule 85(C), adopted by the judges of that Tribunal, provides that “A Chamber may admit any relevant evidence which it deems to have probative value.”<sup>24</sup> Article 14 of the Statute of the International Tribunal for Rwanda requires the judges of that Tribunal to adopt the rules of procedure and evidence adopted by the International Tribunal for the Former Yugoslavia “with such changes as they deem necessary.”<sup>25</sup> It would appear obvious that the international community does not intend that international tribunals should be bound by technical rules of evidence such as those which are typical of the common law system.<sup>26</sup>

Finally, you have collected your evidence, you have reached a decision as to whom you will charge, you have drafted your indictment, you have served it on the persons accused, you have filed it with the Tribunal, and you are ready to go to trial. There we will leave you. Apart from the different rules of evidence discussed above, and some comparatively minor variations in other aspects of the trial procedure, the trial itself should present few novelties for any attorney who has previously tried a criminal case in an American court.

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### Notes

1. Together with Colonel (later Major General) George Hickman, then the Command Staff Judge Advocate of the United Nations and Far East Command, in Tokyo, and Major (later Colonel) Toxey Sewell, a member of the Command Staff Judge Advocate's Office, the author, then the Chief of the War Crimes Section of that office, spent the 1950 Thanksgiving weekend as a member of a Board charged with reviewing the records of the last three Japanese war crimes trials in which some of the accused had received death sentences and in writing one opinion and reviewing the two other opinions written with respect to these cases. (Due to clemency granted by the Supreme Commander for the Allied Powers, General Douglas MacArthur, none of these accused was executed.)

2. In addition to the records of trial themselves, see, for example, Telford Taylor, *Final Report to the Secretary of the Army on the Nuremberg War Crimes Trials Under Control Council Law No. 10*, 15 August 1949 [hereinafter Report]; Clio Straight, *Report of the Deputy Judge Advocate, War Crimes, European Command*, 29 June 1948; Kerr Memorandum, Archives of the Hoover Institution, Owens Collection, File No. 79084-A.

3. While the hometown prosecutor prosecutes for a single murder, the prosecutor before an International Tribunal may prosecute for genocide—the murder of entire ethnic groups with members of those groups numbering in the thousands.

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4. Raman Escovar-Salom, the first individual named as the Prosecutor of 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 (S/RES/827 (1993), 23 May 1993, *reprinted in* 32 I.L.M. 1203 (1993)), resigned that office in order to accept what he must have considered to be a more favorable appointment without having instituted any proceedings before the Tribunal [this Tribunal is hereinafter referred to as the International Tribunal for the Former Yugoslavia].

5. However, they are also far more gratifying when brought to a successful conclusion by the prosecutor.

6. The present Prosecutor for the International Tribunal for the Former Yugoslavia is Judge Richard J. Goldstone of South Africa. He is also the Prosecutor for the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda (S/RES/955 (1994)) 8 November 1994 [the latter Tribunal is hereinafter referred to as the International Tribunal for Rwanda]. It remains to be seen whether he will join the elite group mentioned above.

7. Charter of the International Military Tribunal, 8 August 1945, 566 Stat. 1544, 82 U.N.T.S. 279, *in* 3 TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES OF AMERICA, 1776-1949, at 43 (Charles Bevans ed.) [hereinafter BEVANS]; HOWARD LEVIE, *TERRORISM IN WAR: THE LAW OF WAR CRIMES*, Appendix VIII, at 549 [hereinafter LEVIE].

8. Charter of the International Tribunal for the Far East, 19 January 1946, T.I.A.S. 1589; 4 Bevans, *supra* note 7, at 27; Levie, *supra* note 7, Appendix XII, at 571.

9. The single Chief Prosecutor has been adopted for all of the more recent International Tribunals. *See* the International Tribunal for the Former Yugoslavia, *supra* note 4; the International Tribunal for Rwanda, *supra* note 6; and the International Law Commission's 1994 Draft Statute of an International Criminal Court, *infra* note 26.

10. Omitted are such mundane tasks as the need to obtain funding, the securing of office space and, perhaps, a courtroom, the organization of a staff of attorneys, technicians, computer operators, investigators, interrogators, translators, secretaries, etc.

11. By the end of hostilities in the Persian Gulf Crisis the United States Army had one War Crimes team on location and one in Washington and a lengthy Report on Iraqi War Crimes (Desert Shield/Desert Storm) was prepared. Amnesty International also prepared a lengthy report on the subject. For a considerable period before the International Tribunal for the Former Yugoslavia was established a Commission of Experts created by the Security Council of the United Nations was collecting evidence which became available to the Prosecutor of that Tribunal. S/1994/674, 27 May 1994. *See also* the data submitted by the United States, U.S. Department of State Dispatch, Vol. 4, No. 15, at 24 (12 April 1993). Human Rights Watch Helsinki also produced a number of reports containing evidence of specific war crimes committed in the former Yugoslavia.

12. *See, e.g.*, FRANCIS BIDDLE, *IN BRIEF AUTHORITY*, 401 (1962); *see also* Report, *supra* note 2, at 17-18.

13. The failure of the prosecution in Tokyo to include the Emperor, Hirohito, among the accused was the only decision not to prosecute that engendered controversy—and that was a political decision made by other than the Prosecutor. LEVIE, *supra* note 7, at 144.

14. For the more or less haphazard manner in which the accused to be tried by the International Military Tribunal at Nuremberg were selected, *see* TELFORD TAYLOR, *THE ANATOMY OF THE NUREMBERG TRIALS*, 85-90 (1992).

15. Telford Taylor, *Nuremberg Trials: War Crimes and International Law*, *International Conciliation* No. 450, at 260 n.25 (April 1949) [hereinafter *Nuremberg Trials*].

16. There were three acquittals by the International Military Tribunal—Fritsche, Schacht, and von Papen. LEVIE, *supra* note 7, at 57 n. 76. There were no acquittals by the International Military Tribunal for the Far East. *Id.* at 143. Of the 177 individuals actually tried in the "Subsequent Proceedings" at Nuremberg, 35 were acquitted. *Nuremberg Trials*, *supra* note 15, at 371.

17. However, even in this area some problems will be encountered. Thus, the crime of conspiracy, well-known to the common law, is not known to the civil law, a matter which caused problems for the draftsmen of the London Charter of the International Military Tribunal, *supra* note 7; *see also* Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials vii (1949); *see also* NAZI CONSPIRACY AND AGGRESSION, *OPINION AND JUDGMENT* 54-56 (1949) (for the Tribunal reaching judgment at Nuremberg).

18. The International Tribunal for the Former Yugoslavia, *supra* note 4, likewise has a bench drawn from eleven different nations, as does the International Tribunal for Rwanda, *supra* note 6.

19. Charter of the International Military Tribunal, art. 19, *supra* note 7.

20. LEVIE, *supra* note 7, at 259-60.

21. *See supra* note 7.

22. *See supra* note 8. Paragraph c of that article was quite detailed in enumerating items which would be admissible in evidence, most of which violate the traditional common law rules of evidence.

23. *See supra* note 4.

24. International Tribunal for the Former Yugoslavia, Rules of Procedure and Evidence, adopted 11 February 1994, 33 I.L.M. 484, 533 (1994).

25. *See supra* note 6.

26. Article 19(b) of the International Law Commission's 1994 Draft Statute of an International Criminal Court (Report of the International Law Commission on the work of its forty-sixth session, G.A.O.R., 49th Sess., Supp. No. 10 (U.N. Doc. A/49/10, 1994)), provides that the judges of the Court may make rules regulating "the rules of evidence to be applied." There appears to be little doubt that any rules adopted by the judges of such a Court will closely resemble those referred to in the text.