The Gamekeeper-Turned-Poacher's Tale

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1. Introduction

The International Criminal Tribunal for the Former Yugoslavia (ICTY) resembles the US Central Intelligence Agency in at least this respect: it is said of the latter that '*you never really leave the Agency*'. Equally, many (myself being among the chief culprits) first joined the former thinking it would be a six-month assignment and then ended up spending a substantial part of their life (for better or for worse) in The Hague, albeit perhaps with intervals in other occupations. We sometimes wonder if we will ever 'leave' the ICTY.

For myself, my experience at the Tribunal started on a November day in 1994, when the then-President, Antonio Cassese, interviewed me for the post of law clerk in a hotel lobby in New York, whence he had travelled to deliver the Tribunal's first Annual Report to the United Nations. It was a great privilege and honour subsequently to work for Judge Cassese for several years, after a first, very rewarding year spent working as a law clerk and then legal officer in the ICTY Registry. My involvement with the Tribunal continues to this day, as I am defending Naser Orić, before the ICTY, as Co-Counsel with Ms Vasvija Vidović, from Sarajevo, as Lead Counsel.

As far as defence matters are concerned, as the title of this short piece suggests, I have passed from guardian of the ICTY's legal aid funds, when I was a Registry Legal Officer in charge of defence matters under the supervision of the intrepid Dominique Marro, the Tribunal's first Deputy Registrar, to being (after a similar advisory role at the International Criminal Tribunal for Rwanda (ICTR) in 1998) a supplicant for those same public funds. A couple of years after I had left the ICTY, I acted as co-counsel for Mehmed Alagić, until his untimely death in early March last year (the *Hadžihasanović and Kubura* trial continues without him). I then spent three months (gamekeeper again) as acting Principal Defender of the Special Court for Sierra Leone, setting up the defence office of that Court, assigning defence teams and devising a system of reimbursement for Defence Counsel. Now I am poacher again, as Defence Counsel representing Orić.

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Following the Tribunal's jurisprudence over the past decade is, as I have learnt to my chagrin, like trying to get a glass of water from a fire hydrant. The sheer volume of case law that is continually gushing from the ICTY, and from the ICTR and, now, the Special Court for Sierra Leone (SCSL), practically defies any comprehensive attempt at exegesis. It follows that, even in a Symposium as wide-ranging as this, the most that can be achieved is a review of the *trends* which have manifested themselves in the Tribunal's 10-year history, rather than detailed analysis.

When writing (or speaking) about defence matters, it is always very tempting to be anecdotal about one's own case. As a moderately famous actor once remarked about giving endless interviews, 'it is easy to keep talking, so long as it is about yourself'.

The same applies to speaking about one's own cases at the ICTY. Whilst the temptation should be resisted (not least due to restraints imposed by the rules of the profession), it is of course necessary to draw on one's own experiences in order to explain the legal issues that arise for defence counsel before the ICTY. Hence, this piece will be a combination of anecdote and law, which is, after all, the stuff of which the ICTY is made.

2. Investigating and Defending: the Janus-like Role of the Defence

Just as the ICTY Prosecutor is responsible both for 'investigation and prosecution',[1] the defence is responsible both for investigating the case before trial and then for defending the case in court. In England, these functions are divided between solicitors and barristers. The solicitor is the first interface with the client and prepares the case by finding witnesses, seeking disclosure of relevant documents and records and instructing experts. Barristers are specialist consultants and advocates who present the case at trial and draft relevant motions and other pleadings. At the ICTY, as perhaps in most parts of the world, this distinction does not exist. Defence counsel appearing before the Tribunal must, therefore, be both investigator and advocate, sleuth and trial lawyer. Whilst the Tribunal's Office for Legal Aid and Detention Matters (OLAD) does, of course, provide funding for investigators,[2] with respect to certain witnesses, only counsel has either sufficient grasp of all the details of the case or sufficient authority to make contact with them and to interview them and to obtain proofs of their evidence. Counsel is therefore inevitably engrossed in the day-to-day investigations in the pre-trial phase.

This investigative activity, while occurring outside the Court's precincts, is nonetheless subject to the overall legal regime of the Tribunal, and is thus governed by

1 Article 16(1) ICTYSt.

2 In accordance with Article 22(B) of the Directive on the Assignment of Defence Counsel (IT/73/Rev. 9), the costs of legal representation of a suspect or accused to be met by the Tribunal

> ... shall also include expenses resulting from the assignment of legal and investigative assistance, expenses relating to the production of evidence for the defence, to the ascertainment of facts, expenses relating to temporary consultancy on specific questions, expert opinion paid at the rates established in Annex I, and accommodation and transportation of witnesses.

the Tribunal's Rules of Procedure and Evidence (Rules). In order to carry out defence investigations, counsel may have to enlist the aid of the Court, by applying, under Rule 54 of the Rules, for the issuance of orders, summonses or subpoenae, as required, by the Trial Chamber. In accordance with Article 29 of the Statute, states are obliged to comply '*without undue delay*' with such orders issued by a Trial Chamber.

In this brief article, I will explore some of the jurisprudence that has emerged in relation to defence investigations. While little discussed, this is, in my view, an extremely important issue, for cases are won and lost on *facts*, and those facts, or at least the evidence relating to those facts, are uncovered in the pre-trial, investigative phase of the proceedings. If defence investigations are not properly carried out by the defence, or not properly facilitated by the Tribunal, or if investigative leads are stalled or thwarted by states or reluctant individuals, then the accused cannot receive the fair trial that is his due as a fundamental human right.

3. The Need for Cooperation with the Defence

As Judge Cassese often recalled when President of the Tribunal, the ICTY is like a giant which needs artificial limbs to move, the limbs being the state authorities:

> For its day-to-day operations, the Tribunal operates under the assumption that States will provide their full and unreserved cooperation. Unlike domestic criminal courts, the Tribunal has no enforcement agencies at its disposal: it cannot execute arrest warrants, nor can it seize evidentiary material, compel witnesses to give testimony or search the scenes where crimes have allegedly been committed. For all these purposes, the Tribunal must turn to State authorities and request them to take action. Thus, it can only work to the extent that States are ready and willing to cooperate. The adoption by States of all the legislative, administrative and judicial measures necessary for the expeditious implementation of the Tribunal's orders is therefore of crucial importance.[3]

While this was most likely drafted with the prosecution in mind, at a time when very few arrests were being made, the same holds very much true for defence counsel. The defence also needs states, state organs and individuals to cooperate with it, and they are all equally obliged to do so as part of their obligation to cooperate with the Tribunal. Cooperation does not mean cooperating only in prosecuting accused persons. It means cooperating in ensuring fair trials for all defendants.

A. *The ICTY Disclosure Regime*

It is necessary briefly to set out the disclosure regime under the ICTY Rules before examining the problem areas in defence investigations. There are essentially four categories of disclosure. The first item that defence counsel will receive by way of disclosure is the *supporting material* that accompanied the indictment against the accused, i.e. the witness statements and other documents that were put before the Judge reviewing the indictment and which set out the prima facie case on the basis of

3 *Second Annual Report of the ICTY*. UN docs A/50/365; S/1995/728, 23 August 1995, para. 129. See also paras 191–193 thereof.

which the Judge confirmed the indictment.[4] Secondly, the defence will receive, within a prescribed time limit, which must give the defence adequate time to prepare for trial, 'copies of the statements of all witnesses whom the Prosecutor intends to call to testify at trial, and copies of all written statements taken in accordance with Rule 92*bis* . . .'.[5] Thirdly, the prosecution must disclose to the defence, 'as soon as practicable', exculpatory material, i.e. '. . . material known to the Prosecutor which in any way tends to suggest the innocence or mitigate the guilt of the accused or may affect the credibility of prosecution evidence.'[6] Fourthly, and finally, and only if the defence choose to 'trigger' reciprocal disclosure under Rule 67(C) of the Rules, then:

> The Prosecutor shall, on request, permit the defence to inspect any books, documents, photographs and tangible objects in the Prosecutor's custody or control, which are material to the preparation of the defence, or are intended for use by the Prosecutor as evidence at trial or were obtained from or belonged to the accused.[7]

These are the basic building blocks of disclosure in the ICTY's architecture. From disclosure of the supporting material, and then disclosure of the evidence upon which the Prosecutor intends to rely at trial, the defence should have a sense of the case against the accused and, hence, of where defence investigations need to be conducted.

At the same time, the defence will have their own leads from the accused's instructions and can proceed to contact witnesses and search for documents — so far, so good.

Disclosure of documentary evidence poses, however, some of the most complex problems for the defence in their pre-trial preparation. There is not space here to examine the topic, but common difficulties are: differences in views between the prosecution and the defence as to what constitutes 'exculpatory' material, the relationship between rules 68 and 70, access to documents in other ICTY cases, in particular so-called 'flip-side' cases (i.e. cases where the prosecution has prosecuted members of the other side to the conflict in the same time and place, and where, therefore, the evidence is of mutual relevance to the defence in each case), and access to UN and government archives in the prosecution's possession. At the time of writing, the whole disclosure system is under review and in the process of being replaced, at least in part, by a system of electronic disclosure.

4 See Rule 66(A)(i) RPE, which provides that the prosecutor shall make available to the defence in a language which the accused understands '(i) within thirty days of the initial appearance of the accused, copies of the supporting material which accompanied the indictment when confirmation was sought as well as all prior statements obtained by the Prosecutor from the accused . . .'.

5 Rule 66(A)(ii) RPE.

6 Rule 68 RPE. For a more detailed discussion of this provision, see M.B. Harmon and M. Karagiannakis, 'The Disclosure of Exculpatory Material by the Prosecution to the Defence under Rule 68 of the ICTY Rules', in R. May et al (eds), *Essays on ICTY Procedure and Evidence: In Honour of Gabrielle Kirk McDonald* (The Hague: Kluwer Law International, 2001), 315–328.

7 Rule 66(B) RPE. Disclosure is then '*reciprocal*' in that, if the defence makes a request pursuant to this Rule, then 'the Prosecutor shall be entitled to inspect any books, documents, photographs and tangible objects which are within the custody or control of the defence and which it intends to use as evidence at the trial', pursuant to Rule 67(C) RPE.

B. *Locating and Contacting Witnesses*

In some circumstances, locating and contacting defence witnesses does not pose great difficulties. If the witness is a private individual, with knowledge of the events that are the subject of the indictment, he may be contacted directly and may be willing to testify for the defence. The ICTY's Victims and Witnesses Section, established under Rule 34, may then simply facilitate the witnesses' travel to The Hague to testify at trial.[8] Here, however, it is necessary to draw a distinction between international and Bosnian witnesses. Most eyewitnesses to events during the conflict in Bosnia will be Bosnians, and private citizens. There were, however, a great many international witnesses present throughout the war in the former Yugoslavia, and most of them were there in some official capacity or other. These sorts of witnesses will often prove difficult to contact, and even more difficult to compel to testify.

In any modern war zone, you will typically find all or some of the following 'internationals' present on the scene: war correspondents, army officers, UNHCR staff,[9] NGO workers, EU and OSCE officials, politicians and diplomats. It is worth examining some of these categories of potential witness to illustrate the problems that arise.

1. War Correspondents

War correspondents are typically a fiercely independent and often fiery breed of people. If they wish to testify for the defence, there will generally be no problem (moreover, journalists are typically fairly easy to track down through their newspapers). If they are, however, *not* willing to testify, it may prove impossible to compel them to testify.

One of the landmark ICTY rulings in recent years came in the *Randal* case. Jonathan Randal, a journalist who wrote an article for the *Washington Post*, was subpoenaed by the prosecution to testify in the *Brdjanin and Talić* case. Randal applied to set aside the subpoena. He did not contest the Tribunal's power to seek the attendance of witnesses by way of subpoena, but argued that this power was not absolute, but limited by public policy concerns.[10] The matter eventually reached the Appeals Chamber, which accepted a qualified privilege from testifying for war-zone correspondents, provided that the criteria of a two-step test were met: first, the petitioning party must demonstrate that the evidence sought is of direct and important value in determining

8 It may, however, be necessary to reassure the witnesses that they may travel to The Hague without fear of prosecution by the Prosecutor by seeking the issuance of a safe conduct. See, e.g. Order on Defence Motion for Safe Conduct, *Dokmanović* (IT-95–13a), Trial Chamber, 27 August 1997.

9 In several cases, defence counsel have had to seek orders from the Trial Chamber to solicit the assistance of the UNHCR (see, e.g. Decision on the Motion for the Protection of Defence Witnesses, *Kayishema and Ruzindana* (ICTR-95–1), Trial Chamber, 6 October 1998).

10 See Decision on Motion to Set Aside Confidential Subpoena to Give Evidence, *Brdjanin and Talić* (IT-99–36), Trial Chamber, 7 June 2002.

a core issue in the case, and, secondly, it must be demonstrated that the evidence cannot reasonably be obtained elsewhere.[11]

In casu, the Appeals Chamber set aside the subpoena. While this decision may bring comfort to war correspondents, it poses potentially grave problems for defence counsel, particularly if the '*Randal* doctrine' is extended further to cover other categories of persons who travel to war zones on official business, e.g. representatives of humanitarian organizations. A journalist contacted by the defence might, for example, insist on the two-prong *Randal* test's being met before even agreeing *to speak* to the defence. Yet, the defence will need, in the course of their investigations, to speak to a large number of sources, simply in order to form an idea of the background to the case and to suggest further lines of enquiry. Correspondents reluctant to speak with the defence will no doubt rely on *Randal* to forestall even an initial approach.

Moreover, the reasoning behind the ruling is not convincing. The Appeals Chamber, in essence, ruled that it would endanger war-zone correspondents if they could be compelled to testify, as they would then be seen as potential witnesses by the perpetrators of crimes, and therefore targeted as such. But, the fact is that, despite *Randal*, war correspondents will *always be potential witnesses*: first, because they could still be compelled to testify if the two-prong test is met and, secondly, because, even if not compellable when that test is not met, they could still *voluntarily* testify. So, a perpetrator of a crime would still have an incentive, if he or she were so minded, to eliminate a journalist who was a witness to his or her misdeeds.

It is also unclear from *Randal* why war-zone correspondents should benefit from a special privilege. Surely, there should be an equal concern for the safety of *all categories of witnesses*. In fact, a Bosnian villager may well have a lot more to fear in terms of retaliation for testifying than a *Washington Post* journalist, living several thousand miles away.

In terms of international witnesses, there appears to be no reason why a journalist should be more exempt from being compelled to testify than, say, soldiers, relief workers and human rights monitors who are also risking their lives and who also may be targeted by perpetrators who wish to eliminate prospective witnesses. Therein lies the real danger of *Randal*: how far and to what other categories of people it will be extended. Nearly all internationals who were in the former Yugoslavia were there for a reason, i.e. on some sort of official business. The prospect of being a witness may not always sit comfortably with that official business. Nevertheless, we need them to be witnesses or else justice cannot be done. The International Committee of the Red Cross already claims an immunity from testimony for its workers which has been recognized

11 Decision on Interlocutory Appeal, *Brdjanin and Talić* (IT-99–36), Appeals Chamber, 12 December 2002, para. 50. See also the Separate Opinion of Judge Shahabuddeen. This case, and the decisions of the Trial and Appeals Chambers, are discussed in detail in J.R.W.D. Jones and S. Powles, *International Criminal Practice* (Oxford/Ardsley: Oxford University Press/Transnational Publishers, 2003), at paras 8.4.40–8.4.44.

by the ICTY,[12] and many other humanitarian organizations (as opposed to their workers, who are often more than willing to help with the pursuit of truth and justice) would like to have a similar immunity. It is, therefore, the sincere hope of this writer that *Randal* will remain an isolated case, and not be extended to any further categories of witnesses.

2. Soldiers

A large number of soldiers from many nations were deployed to the conflict in the former Yugoslavia, most being in the Peacekeeping mission, UNPROFOR, but also as UNMOs (United Nations Military Observers) and even remaining members of their own armed forces (e.g. British SAS soldiers deployed as forward observers). Soldiers are potentially an extremely important source of information, particularly in cases involving charges of command responsibility, where their observations about the state of the army and the potential for control by army commanders are highly significant. They are also generally excellent witnesses, as they are trained in making accurate observations and often retain notes, minutes, photographs, etc. from their time in Bosnia from which to refresh their memories.

My personal experience with members, or former members, of the British army has been excellent. They understand that they are not for one side or the other, but are simply witnesses to the truth, and seem to be as willing to speak to the defence as to the prosecution. Moreover, the channels for communicating with them are not excessively bureaucratic.

The experience with members of other armed forces is, on occasion, however, different. Increasingly, and, no doubt, in response to the rise in the number of approaches to members of their armed forces, states are insisting that requests to contact their soldiers who served in the former Yugoslavia be channelled through a central agency. This in itself is an understandable concern to manage these contacts. However, what starts as a management exercise can very easily turn into a vetting procedure (where the questions that the defence would seek to put to the witness must first be screened by army lawyers) and from that into a brick wall.

The subject is permeated by questions of national security. States may, and often will, see a threat to state secrets by former employees' speaking to defence counsel (or indeed to the prosecution) and subsequently testifying publicly. Hence, in *Blaškić*, when General Philippe Morillon was subpoenaed by the Trial Chamber to testify, Morillon raised objections based on the French law of 'national defence security' and the duty of 'discretion of public servants': '... his testimony might disclose information whose disclosure would run contrary to the essential security interests of France.'[13]

12 See, e.g. Decision on the Prosecution Motion under Rule 73 for a Ruling Concerning the Testimony of a Witness the Trial Chamber's, *Simić et al.* (IT-95–9), Trial Chamber, 27 July 1999. It should be noted, however, that Judge Hunt attached a Separate Opinion to this Decision, in which he held it not to be established that the ICRC enjoyed an absolute right of non-disclosure under customary international law.

13 Decision of Trial Chamber I on Protective Measures for General Philippe Morillon, witness of the Trial Chamber, *Blaškić* (IT-95–14), Trial Chamber I, 12 May 1999.

When General Wesley Clark was called to testify in the *Milošević* trial, he was only permitted to do so by the US government provided that protective measures were put in place to ensure protection of confidential sources within the framework of Rule 70 of the Rules.[14] This included editing of his testimony before transmission to the public (which, in the event, proved unnecessary). Solutions such as this show that problems of national security concerns may not be insurmountable. It is to be hoped, however, that the process of contacting witnesses does not become excessively protracted or bureaucratic. Moreover, it must be appreciated that obstacles to contacting witnesses pose a greater problem for the defence than for the prosecution. The prosecution begins with a 'head start' over the defence, in that, when it issues an indictment, it has already contacted the relevant witnesses. The defence at that stage still has all its investigations to undertake. Therefore, in order to respect the principle of equality of arms, enshrined in Article 21(4)(e) ICTYSt. as far as obtaining witnesses is concerned, the Trial Chamber should, it is submitted, show itself extremely willing to assist the defence in gaining access to witnesses, wherever possible.

4. Final Reflections

Reflecting on the ICTY's decade, I cannot refrain from making two final observations. The first arises from a conversation which President Cassese and I had with a government official in Belgrade in 1996, as we sped from an appointment in which we had failed to convince the Serbian officials of the imperative need to arrest accused persons on the territory of Serbia and Montenegro to another appointment with a Serbian military judge who was dealing with the '*Vukovar Three case*' with what suspiciously resembled a complete lack of zeal. The Serbian official remarked how, under Tito, if a Serb were prosecuted one week for nationalism, Tito would make sure that a Croat was prosecuted the next week and a Muslim the week after. This 'appeasement' policy kept all the nationalities satisfied and the SFRY at peace with itself. He suggested that the Tribunal should adopt the same approach.

It appears to me, reflecting on developments in the past couple of years, that the ICTY Prosecutor *is* increasingly adopting this 'Titoist' tactic. This is the strategy of a *politician*, however, and, as a political strategy, it has no place in a court of law. Justice does not consist of indicting all 'sides', irrespective of the comparative seriousness of the crimes charged. The survivors of the Warsaw Ghetto Uprising were not prosecuted for fighting for their survival, even if the odd act of misappropriating foodstuffs might be considered by an overzealous prosecutor to constitute 'plunder' — a violation of the laws or customs of war. Nor, in my respectful opinion, should those who were besieged and fighting for their lives in Bosnia be prosecuted in the name of 'even-handedness'. The 'Titoist' strategy appears, moreover, to be a way of assuaging the West's guilt over its failure to intervene in Bosnia. If all sides to the conflict were equally guilty, then

14 See Order on the Testimony of General Wesley Clark, *Milošević* (IT-02–54), Trial Chamber, 17 November 2003.

that omission is not so terrible. Whereas, if the premise is false, then the shame of not intervening to stop the carnage is too much for the West to bear.

The second, entirely unrelated observation is that the defence as a whole only thrives as a fiercely independent profession. A strong defence Bar is an essential component of this independence. The Association of Defence Counsel Practicing before the ICTY (ADC–ICTY) is now some two years old and finding its feet as a proper Bar, responsible for policing its members and for representing their interests before the Tribunal. It is vitally important that it should prosper. For justice to be done, a vibrant and autonomous Bar is what is required — not a compliant, obsequious body, set up to serve the Court's interests. The International Criminal Court (ICC) is taking careful note of these developments and, it is hoped, will encourage the emergence of a vigorous international criminal defence Bar, which will possess the authority and integrity to represent and regulate its members, thereby promoting the establishment of genuine, permanent and global justice.