Human Rights Brief

Volume 6 | Issue 1 Article 4

1998

The Rights of Defendants in the ICTY

Tom Lynch
American University Washington College of Law

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*by Tom Lynch**

In his years as a defense attorney, Nick Kostich[1] never turned down a case based solely on its content or the client. Then again, most of those cases did not involve war crimes and crimes against humanity. Dušan Tadić was not an ordinary defendant, nor was Dražen Erdemović or Slavko Dokmanović. Rather, the International Criminal Tribunal for the Former Yugoslavia (ICTY) indicted these men for their involvement in acts that stretch the limits of man's imagination. Nick Kostich, however, defends them and maintains that he does not lose sleep over defending men he knows committed some of the worst acts of violence this century. This is because these defendants have rights before the ICTY, as outlined in its statute, and he firmly believes in the importance of these rights. Due process, he asserts, is the "reflection of a civil, democratic society," which the ICTY, as well as the International Criminal Tribunal for Rwanda (ICTR), must recognize and respect. Furthermore, he lobbies for greater respect for defendants' rights in the evolving international criminal system because he believes that the ICTY has forgotten the rights of the accused. He discussed many of these concerns, as well as other issues pertaining to the defense of ICTY suspects, while speaking at the Washington College of Law on September 21, 1998.

One issue concerning ICTY defense work is the strategy that the attorneys adopt because the guilt of many defendants is not in question. Defense work before the ICTY is not a "whodunit" process; overwhelming evidence generally exists to prove that the defendants committed at least some of the acts for which they are indicted. The task of defense attorneys, therefore, is one of reducing their clients' penalties, rather than gaining their acquittals. Attorneys usually do this by arguing that their clients' actions are subject to mitigating factors. One example is "superior orders," which, although not a defense, is recognized as a mitigating factor by judges when determining sentences.

Another defense-related issue is the determination of the sources of law that attorneys and judges should apply. Kostich argues that the ICTY should rely on international law when applicable, yet also recognize the general law principles of civilized nations. The ICTY statute includes a thorough, though not exhaustive, list of rights that has roots in both the International Covenant on Civil and Political Rights and the U.S. legal system's strong guarantees of defendants' rights. However, because Kostich believes the ICTY's statute and case law do not provide adequate protection of defendants' rights, he relies more heavily on national legislation, such as the U.S. prototype, which provides greater protection for his clients, rather than international law.

The most important source for defendants' rights at the ICTY is Article 21 of the Tribunal's statute. This provision states that everyone charged with a crime has the right to be presumed innocent until proven guilty (Article 21.3); the right to be informed promptly of the charge against him (Article 21.4(a)); the right to adequate time and facilities to prepare for his defense (Article 21.4(b)); and the right to be charged without undue delay (Article 21.4(c)). Article 21 also guarantees to defendants the right to be tried while present and to defend themselves in person (Article 21.4(d)); the right to the legal assistance of their choosing or the appointment of counsel if defendants are unable to afford representation (Article 21.4(d)); the right to examine and present witnesses (Article 21.4(e)); the right to the assistance of interpreters (Article 21.4(f)); and the right to refrain from testifying against himself/herself (Article 21.4(g)). Additionally, at the ICTY, defendants' rights do not hinge on the content of their cases. A crime's relative heinousness does not result in fewer rights for the defendant.

Although Article 21 of ICTY statute provides many defendants' rights, the statute falls short in some critical categories. One such problem exists in the provisions of Rule 75 of the ICTY's Rules of Procedure and Evidence. Rule 75 authorizes protective measures that allow victims and witnesses to conceal their identities during testimony. This provision is intended for use in cases where the graphic nature of the crimes, the trauma imposed on victims and witnesses, or victims' and witnesses' fear of retribution justify such measures. In accordance, the ICTY has taken certain measures to allow witnesses to testify without actually appearing in court, such as the use of testimony via closed circuit television. Additionally, witnesses who testify in court may use voice-distorting equipment or pseudonyms. These measures limit the ability of defendants to confront the witnesses testifying against them and to challenge their testimony through cross-examination.

Another problematic ICTY Rule of Procedure and Evidence is Rule 40, which permits the prosecutor to detain a suspect without probable cause for an unspecified time. To do so, the prosecutor must present evidence to an ICTY judge that demonstrates a "reliable and consistent body of material" that "tends to show" that the person in question might have committed the crime, and the judge must approve the detention. The rule states that the Tribunal may hold a suspect for up to three months before it must release him. The ICTY can thus detain a defendant before it establishes evidence sufficient to demonstrate probable cause against him.

Aside from the issues that defendants' courtroom experiences raise, Kostich also discussed alternatives to the ICTY and prospects for healing in the former Yugoslavia. To assist in national reconciliation, he suggested that a truth and reconciliation commission, similar to the one in South Africa, might be used to expedite this goal. Its primary advantage would be that, by relaxing rules of evidence and not threatening offenders with punishment, it would encourage more people to come forth and testify about what they had seen or done. In this way, a commission would identify more culprits in a shorter time than the ICTY or national courts, which cannot possibly try everyone responsible for war crimes and crimes against humanity in this region. Additionally, by defining its mission broadly, a truth commission could unearth the political and social motives for war crimes and crimes against humanity more effectively than the criminal trial process. Rather than leaving people frustrated with the ICTY's and other courts' relatively narrow focus on individual offenders and specific events, this could help satisfy the need and desire to expose the conflict's general context and background.

The most contentious issue surrounding the establishment of a truth and reconciliation commission concerns the issue of amnesty for human rights offenders. Amnesty would probably be a component of a commission's procedures to encourage witnesses, including offenders, to come forward and make full disclosures. Many observers reject this avenue because it would allow many offenders to go unpunished, which would leave the victims' calls for justice and retribution unsatisfied. Although criminal trials in the ICTY and national courts may result in punishment and thus satisfy these demands, the courts may drag out the process so long that it does not allow the necessary healing of the people that the region needs. However, amnesty

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LEGISLATIVE FOCUS

The Lack of Equal Representation: The Hate Crimes Prevention Act

*by Mair McCafferty**

On October 12, 1998, millions of people worldwide reacted with shock, sadness, and anger to the death of a young man from Wyoming. Matthew Shepard, a 21 year-old college freshman in Laramie, Wyoming was abducted, pistol-whipped, tied to a fence, and left to die after his sexual orientation became known to two strangers in a local bar.

Over 100 vigils were held in the United States to mourn this hideous crime. Perhaps you watched one of the many news reports that detailed the hours of Matthew's torture, and felt a sense of relief that, at the very least, the responsible individual(s) would be prosecuted to the fullest extent in Wyoming. The outcry of the American people reflected the support for strong punishments for those that commit hate crimes based on sexual orientation. The majority of states, however, do not consider crimes like the murder of Matthew Shepard a hate crime as defined by state law.

Twenty-one states and the District of Columbia have hate crime laws that include "sexual orientation" in the list of protected categories. Eighteen states have hate crime laws that do not include sexual orientation, and eight states do not have hate crime statutes at all.

The need for stronger laws to protect gays, lesbians, and bisexuals is not limited to the lack of uniformity in hate crime definitions. Unfortunately, what happened to Matthew Shepard is not uncommon. In fact, crimes based on sexual orientation are up from 8.9% in 1991 to 11.6% according to the 1995 FBI Uniform Crime Reports.

Two federal hate crime laws do exist that include "sexual orientation" as a protected group. The Hate Crimes Statistic Act (P.L. 101-275) came into force in 1990 and requires the Federal Bureau of Investigation (FBI) to collect statistics on the basis of race, religion, ethnicity, sexual orientation, and disability. Under this law, the federal government is required to examine statistics from local and state authorities, but local and state agencies are not required to provide these statistics to the federal government. The Hate Crimes Sentencing Enhancement Act (P.L. 103-322), which was included in the Violent Crime Control and Law Enforcement Act of 1994, provides for sentencing enhancements of at least three offense levels for sexual orientation hate crimes. This law is limited, however, to crimes committed on federal property.

This October, the same month Matthew Shepard was buried, Congress failed to address the lack of legal protections for gays, lesbians, and bisexuals prior to the *sine die* adjournment of the second session of the 105th Congress by neglecting to pass the Hate Crimes Prevention Act (S. 1529/H.R. 3081).

The Hate Crimes Prevention Act, sponsored by Senators Kennedy (D-MA) and Specter (R-PA) and Representatives Schumer (D-NY) and McCollem (R-FL), would amend 18 U.S.C. § 245. 18 U.S.C. § 245 is one of the primary statutes used to combat violence based on race or religious preferences. This statute currently prohibits intentional interference, by force or threat of force, of the enjoyment of a federal right or benefit, such as education or employment, on the basis of race, religion, national origin, or color. The Hate Crimes Prevention Act would allow the federal government to investigate crimes when the crime causes death or bodily injury because of prejudice against the victim's sexual orientation and there is an element of interstate commerce affected. The Act would not require that the violent act occur while the victim was engaged in a federally protected activity. This would make federal hate crime investigations available in those states that do not include sexual orientation as a hate crime under state law. In addition, federal law enforcement could assist local and state investigators with sexual orientation hate crimes.

Despite the growing need for greater protection against violence based on sexual orientation, public support for such laws, and heightened global awareness of these problems, the Hate Crimes Protection Act still was not enacted into law. The ability of Congress to avoid passing this bill for yet one more session proves that gays, lesbians, and bisexuals are a class that do not receive equal treatment within our society and are in need of greater protections under our current system of laws. Agreement within the community that these crimes need to be addressed is not enough. For there to be true equal protection from violence under the law, *de jure* and *de facto* protections already granted to other distinct groups need to be extended to gays, lesbians, and bisexuals.

** Mair McCafferty is a third year J.D. candidate at the Washington College of Law and Editor-in-Chief for* The Human Rights Brief.

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could induce more people to reveal greater amounts of information in shorter time, satisfying the people's desire for closure.

These critiques and suggestions come at a pivotal time in the history of international law. On July 17, 1998, the Rome Diplomatic Conference adopted an international treaty to create a permanent International Criminal Court. The international community has given attention to war crimes throughout modern history, as evidenced by the current *ad hoc* tribunals in the former Yugoslavia and Rwanda and their 1945 Nuremberg and Tokyo predecessors. The Rome Conference, however, established a permanent International Criminal Court, which will eliminate the need for future *ad hoc* tribunals and hopefully deter future war crimes. As this possibility moves closer to reality, it is imperative that those who are responsible for establishing the rules of the permanent tribunal keep the rights of all participants, including defendants, firmly in mind.

** Tom Lynch is a first year J.D. candidate at the Washington College of Law and a Junior Staff Writer for* The Human Rights Brief.

[1]Nick Kostich worked as an Assistant District Attorney for Milwaukee County from 1973 to 1977, and has continued to practice defense work since then in the private sector. His current international work grew out of his position as lead counsel for the Republic of Srpska (Republic of Serbia), where he assisted the Republic in peace and arbitration issues.