THE LIKELY LEGACIES OF TADIC

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How will historians and others judge the Balkan war crimes tribunal? In my brief time, I would like to indicate how the prosecution of Tadic, the first case before that tribunal, has raised some doubts about that body's legitimacy and likely legacy.

It is clear the creators of this tribunal attempted to correct some of the obvious problems with Nuremberg and Tokyo. The legitimacy of those earlier prosecutions had been attacked on a number of grounds:

1) as *revenge trials* subject to *double standards* wrought and conducted by the victors against the vanquished;

2) for violating the rights of defendants through such questionable practices as trials in absentia and *unfair* evidentiary rules that subjected defendants to *trial by document* subject to no appeal or review with little attempt to equalize the opportunities between prosecution and defense;

3) for violating the rule against ex post facto imposition of criminal liability, principally through charges invoking crimes against aggression, crimes against humanity, and for membership in criminal organizations;

4) for dishonoring the memory of Holocaust victims by artificially limiting all prosecutions to crimes committed in the course of aggressive war by one state against another thereby denying victims of German atrocities, particularly against the Jews and gypsies, from presenting the world with an accurate picture of the nature of the Holocaust (both during the War and before) and the very real complicity of ordinary German citizens.[1]

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1. For a summary of some of these critiques, *see, e.g.*, DAVID LUBAN, LEGAL MODERNISM 335-78 (1994); Kevin R. Chatey, *Ptifalls and Imperatives: Applying the Lessons of Nuremberg to the Yugoslav War Crimes Trials*, 14 DICK. J. INT'L L. 57 (1995); for partial responses combined with additional critiques, *see, e.g.*, TELFORD TAYLOR, THE ANATOMY OF THE NUREMBERG TRIALS: A PERSONAL MEMOIR (1993).

The creators of the Balkan tribunal sought valiantly to anticipate and correct these possible problems. Thus, they created an institution that they believed would not be subject to the charge of *victor's justice* since the tribunal was created by the *world community* in the form of the United Nations Security Council and not merely through the action of incidental victors of a war. They sought to ensure that the tribunal's judges would reflect the world's diversity and not merely the interests of the five permanent members of the Council. They further attempted to defuse accusations of partiality by giving the tribunal jurisdiction over all crimes committed in the former Yugoslavia by any side They incorporated the guarantees of modern international human rights to ensure fairness to defendants and gave solace to victims by providing mechanisms in the tribunal's procedures to protect them from harm should they testify. In response to fears of ex post facto law, they restricted the tribunal's jurisdiction to crimes based on those "rules of beyond any doubt part of customary law."[2] With an eye on the ultimate legitimacy of the tribunal, they omitted the death penalty, trials in absentia, or liability for mere membership in a criminal organization.[3]

Despite all these ostensible improvements vis-à-vis Nuremberg and Tokyo, the legitimacy of the tribunal remains an issue. The most obvious set of constraints for the Tribunal has been ably suggested by others and I need not dwell on them in my remarks. There are grave doubts about the likely efficacy of the tribunal's efforts given the unstable nature of the former Yugoslavia itself, and most significantly, the fact that many of those responsible for heinous crimes remain at large and some in positions of considerable influence and power. Whatever else might be said about Nuremberg and Tokyo, those proceedings at least succeeded in convicting some of high official and not merely *small fry* like Tadic. Critics charge that by comparison, the enormity of crimes that are likely to remain unaddressed in the former Yugoslavia *mocks justice* and that the tribunal's efforts are likely to be as ludicrous as an effort to conduct Nazi war crimes prosecutions would have been in the absence of D-Day.[4]

Less obvious legitimization issues have become clearer as a result of the Tribunal's responses' to pre-trial motions filed in the Tadic case. In an unsuccessful attempt to resist trial, Tadic argued that the tribunal was

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2. *See Secretary-General's Report Pursuant to Paragraph 2 of Security Council Resolution* 808, U.N. Doc. S/25704 (1993).

3. For a favorable assessment of the tribunal in light of these changes, *see, e.g., Chaney, supra* note 1.

4. *See. e.g.*, Kenneth Anderson, *Nuremberg Sensibility: Telford Taylor's Memoirs of the Nuremberg Trials*, 35 HARV. INT'L L. J. 281, at 292-93 (1994).

illegal because the United Nations drafters had not envisaged it; because the United Nations General Assembly was not involved in the tribunal's creation; because the text of the United Nations Charter did not grant the United Nations Security Council authority to create such a judicial organ; because the Council had not consistently created such tribunals in other instances; because the Council could not act on individuals; because there had been no real *threat to the peace*; and because the Council could not displace national courts and therefore had illegally violated national sovereignty. It surprised no one that both the trial and appellate chambers of the tribunal dismissed all of Tadic's arguments and upheld the legality of the tribunal X indeed a cynic would say that judges had little choice but to uphold the legality of the enterprise of which they were such an important part. Nonetheless, the judges' responses demonstrated how difficult it is to legitimize this tribunal given through traditionally legalistic, as opposed to policy-driven, arguments.

The trial and appellate chamber's diverse responses to Tadic's contentions show that novel issues of United Nations Charter interpretation, including contestable propositions about the *reviewability* of Security Council decisions, are posed by the tribunal's creation and continued operation.

From the perspective of an academic, Tadic's arguments put the tribunal's judges between a rock and a hard place. In order to justify the legality of their tribunal, Tadic's judges found that they either had to modestly defer from Tadic's questions in deference to an *non-reviewable* Security Council or boldly proclaim review authority over the Security Council while affirming in substance all that the Council had done. The trial chamber in its response of August 10, 1995, took the first tack while the appellate chamber took the second in its opinion issued on October 2, 1995. Neither response is likely to be entirely acceptable to both permanent and non-permanent members of the United Nations and the chambers' opinions are provoke further debate about the viability and wisdom of the ad hoc war crimes tribunals.

The weakest set of responses to Tadic's arguments came from the trial chamber. In an opinion signed by Judge Gabrielle MacDonald of the United States, that chamber attempted to put off these issues by relying on the *political question* doctrine imported from U.S. constitutional law.[5] Essentially, the trial judges demurred on Tadic's substantive arguments on the grounds that the Security Council is all-powerful and non-reviewable. Although the heart of a criminal trial such as Tadic is the need to resolve

5. Dusko Tadic, Case No. IT-94-I-T, Balkans war Cr. Trib. (Aug. 10, 1995) (hereinafter "trial chamber"), in particular paras. 6, 23-24.

the rights of individuals X both Tadic's and the rights of his alleged victims the trial judges opted to privilege state power embodied in the Security Council over the human rights integral to the tribunal's enterprise. In suggesting the Council had done presented a non-reviewable political question, the trial chamber came very close to suggesting that the judges need to follow the Council's dictates, even if this were to violate defendants (or victim's) human rights or even if the Council were to mandate selective enforcement of international humanitarian law. In deference to the likely reaction this conclusion was likely to provoke (and not just among human rights lawyers), the trial chamber straddled a number of inconsistent propositions to the satisfaction of no one. Thus, for example, while the tribunal affirmed that individuals gain human rights under applicable law, including the individual right to be tried by courts *established by law*, it also simultaneously tried to affirm that individuals have no standing to assert these rights because states generally and the Council in particular have said otherwise.

The most withering critique of the trial chamber's approach came from the tribunal itself, namely the appellate chamber. As the majority of the appellate judges pointed out, the trial chamber's answers to Tadic are inconsistent with international law principles granting all international adjudicative bodies *competence de la competence* — that is, the power and the duty to determine the legality of its own jurisdiction.[6] The majority of the appellate judges wisely decided that refusing to answer Tadic's questions by relying a variant of the political questions doctrine would not be a credit to the tribunal. They wisely decided in a case in which the freedom of an individual was at stake, the tribunal's own judges needed to defend why this tribunal was as legitimate a body to render such a decision as any national court. The appellate chamber decided that it could ill afford to avoid an opportunity to justify their tribunal's existence.

But while the majority of the appellate judges attempted to give more substantive answers to Tadic's challenges, the implications of their answers are likely to be contested by many United Nations members as well as the human rights community. Among the contestable conclusions of the majority of the appellate judges were the following:

1) That notwithstanding Chapter VII of the United Nations Charter, sitting judges like themselves were empowered to pronounce on the legality of Security Council action a conclusion that permanent

6. Dusko Tadic, Case No. IT-94-I-AR72, Balkens war Cr. Trib. (Oct. 2, 1995) (hereinafter appellate Chamber), in particular paras. 11-12,14, and 18.

members of the Council are not likely to find altogether comforting and one that the World Court itself has to date resisted;

2) That (at odds with one above) the validity of Council action can be presumed, even when not supported by either the text of the Charter or its negotiating history, particularly if supported by the Council's prior practice a conclusion that neither nonpermanent members nor some segments of the human rights community concerned by recent Council actions (as with respect to the conduct of the Gulf War) are likely to altogether favor;

3) That the Security Council can *delegate* its functions to another body (even one that is not subject to the veto), can act prosecutions conclusions that are as likely to prompt discomfort in permanent as well as non-permanent United Nations members and even more so in the human rights community;

4) That "it is only for want of resources that the United Nations has to act through its Members"[7] a recipe for institutional override over any and all sovereign rights that would have surprised the original drafters of the limited security regime which is the United Nations Charter;

5) That *internal armed conflicts* may constitute *threats* to the international peace notwithstanding the language of article 2(4) banning only inter-state force another conclusion that is not likely to win the hearts and minds of any state with unruly internal disputes who naively believes that such matters are within their protected *domestic jurisdiction* and is not subject to forceful Council intervention;

6) That criminal defendant's rights to be tried before courts *established by law* merely means a right to be tried by any court that respects a defendant's other procedural rights — a result at odds with the position of human rights advocates before other tribunals. As a result of the Tadic case, defenders of the tribunal may now find it necessary to defend contestable readings of the United Nations Charter and the powers of the Security Council which go to the heart of post-Cold War debates about that body's newly flexed muscles. Today, the United Nations finds itself in a quandary with respect to legitimacy and future direction of the Security Council.

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7. *Id.* at 36.

Increasingly, non-permanent members question the representative nature of that body as well as the scope of many of its post-Cold War precedents. As is clear from recent opinions of the World Court as well as scholarly debates, many United Nations members resist giving that body unchecked authority as much as permanent veto-wielding states such as the United States resist any suggestion that what the Security Council does is ultimately reviewable by any court even one that the Council itself has created.[8] The appellate body's response to Tadic's pre-trial motions manages to offend all sides in this debate without settling the underlying issues.

Of more immediate concern to litigants in the Balkan tribunal is that the appellate body's response to Tadic does not answer important questions concerning the future relationship between that tribunal and the Security Council. While the tribunal is, of course, financially dependent on the Council, as well as on the generosity of particular United Nations members, it remains unclear the extent to which the rights of defendants and victims remain legally subservient to the demands of the Council or even to the General Assembly. Could those political bodies interfere with on-going trials or investigations? Does the Security Council retain the authority to, for example, instruct the tribunal not to try prominent Serbs because of the supposed threat to the peace process or to the reconciliation of the country? Could the Council direct a United States national court not to pursue the on-going civil case against Karadzic?[9] If Security Council or General Assembly *override* remains a possibility, what does that possibility never mind its exercise mean for the fulfillment of the tribunal's grand goals, especially its claim to be non-partial and devoted to the equal application of established law?

These are not the only difficult issues that have been presented by this initial prosecution. In response to Tadic, the tribunal has also determined that charges can be brought against Tadic even for acts committed in the course of an internal conflict. The judges specifically found that the nexus required at Nuremberg between crimes against peace and crimes against humanity is no longer required by modern international law.[10] Because of the nature of the Balkan conflict, the tribunal has seen fit

8. For a review of these debates both on the World Court and off, *see, e.g.*, Jose E. Alvarez, *Judging the Security Council*, 90 AM. J. INT'L. L. (1996).

9. Kadic v. Kadic, 70 F.3d 232 (2d Cir. 1995).

10. Appellate Chamber, Case No. IT-94-I-AR2, paras. 138-42.

to go beyond the Nuremberg precedents, thereby raising some doubts about the application of ex post facto law.[11]

Finally, the trial court's answer to at least one pre-trial motion by the prosecutor in the Tadic reveals one likely point of contention with respect to the perceived fairness of the tribunal's procedures. The trial chamber ruled that the prosecutor is free to present defense witnesses without identifying these to either Tadic or his defense counsel.[12] While the prosecutor has decided not to take advantage of this ruling during Tadic's trial, the possibility that she may resort to unidentified witnesses in other cases involving, for example, charges of mass rape is likely to prompt a barrage of criticism by many common law lawyers to whom cross-examination is sacred. Indeed, one prominent U.S. lawyer, a former legal adviser to the State Department, has argued that if this were to occur, he would support amendment of the United Nations Charter to add a *bill of rights*.[13] On the other hand, should the prosecutor respond to such fears by dropping charges of mass rape against other defendants, she is apt to be criticized for ignoring one crucial aspect of *ethnic cleansing* as practiced in the former Yugoslavia: its brutally gendered nature. Indeed, if future trials fail to deal with the rape charges because of the difficult evidentiary issues, historians are likely to say that this tribunal sanitized *ethnic cleansing* as much as Nuremberg did the Holocaust. Those who have been raped in order to *cleanse* parts of the former Yugoslavia will not forgive this tribunal if it ignores their stories or if it fails to condemn the guilty for this particular crime. For many, a failure to acknowledge this aspect of ethnic cleansing would betray one of the tribunal's principal goals: an accurate rendering.

Some of the doubts about the legitimacy of this tribunal emerge because its composition is as cosmopolitan as it is. Some of the doubts arise because of the judges' differing answers to the pre-trial motions made in the Tadic case. Even those most concerned with the tribunal's legitimacy its judges individually differ on such basic questions as the reviewability of Security Council decisions, the nature of the underlying

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11. For more thorough discussion of some of the tribunal's innovative findings with respect to international humanitarian law, *see, e.g.*, Theodore Meron, *The Continuing Role of Custom in the Formation of International Humanitarian Law*, 90 AM. J. INT'L L. 238 (1996); Christopher Greenwood, *International Humanitarian Law and the Tadic Case*, 7 EUR. J. INT'L L. 265 (1996). *Cf.* DAVID LUBAN, LEGAL MODERNISM 349-357 (1994) (discussing the ex post facto problem as applied to Nuremberg).

12. Dusko Tadic, Case No. IT-94-I-T (Decision on Prosecutors motion Aug. 10, 1995) (Stephens, J. dissenting in part).

13. Monroe Leigh, *The Yugoslav Tribunal: Use of Unnamed Witnesses Against*, 90 AM. J. INT'L L.

conflict in the Balkans, the extent to which *internal* conflicts can be said to trigger *threat to the peace*, and the need to resort to unidentified witnesses. Yet, as the dissent of Judge Pal in the Tokyo trials[14] should remind us, some degree of judicial unanimity between east and west, north and south may be necessary if this international tribunal is to retain (or acquire) true international legitimacy. The Tadic case shows that we have not yet reached closure with respect to fundamental jurisprudential issues about this tribunal. Instead, one gets the strong sense that, at least with respect to some basic issues, Tadic's judges simply turned to circular arguments such as their all-purpose answer that the legality of the tribunal needs to be affirmed because "the very purpose of the creation of an international criminal jurisdiction" would otherwise be defeated.[15]

Such arguments, though grounded in political necessity, encourage a search for alternatives to ad hoc war crimes tribunals created on the mere whim of the Security Council. The proceedings in Tadic have not stemmed a growing skepticism that, despite the stenuous efforts of its drafters, the Balkan tribunal has not (yet) overcome the flawed legacy of Nuremberg.

14. Justice Pal, Dissenting Opinion, *in* 21 Tokyo War Crimes Trial (R. Pritchard & S. Zaide, eds. 1981).

15. Dusko Tadic, Case No. IT-94-I-AR72, Balkans war Cr. Trib. (Oct. 2, 1995).