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The Prosecutor v. Dusko Tadic

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THE PROSECUTOR V. DUSKO TADIC

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THE HONORABLE GABRIELLE KIRK McDONALD

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MODERATOR—PAUL HOFFMAN

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PANEL INTRODUCTION

MODERATOR, PAUL HOFFMAN
CHAIR, AMNESTY INTERNATIONAL USA

The title of our panel is *The Prosecutor v. Dusko Tadic*, assessing the International Criminal Tribunal's first trial. Our focus is on how the airplane was built, what the turbulence felt like, and whether everybody agrees that it landed without damage. As you know, this was the first major international Tribunal trial since Nuremberg. It took place in a very different political, military, and legal context. It was based on a different statute, different procedures, and confronted a different state of international law.

We have with us on the panel the major participants in the first trial. They will talk about how the trial was conducted, the problems they confronted, and how they dealt with these problems. This will allow us to enter the hangar with them. I think the goal of the panel is not only to talk about those problems, but to try to draw some conclusions about the lessons that could be learned for future cases that the Tribunal undertakes. We may also discuss the possibility of establishing a permanent International Criminal Court.

Some of the issues that the panelists will deal with include our efforts to expedite criminal trials while ensuring the fair trial rights of

criminal defendants, problems relating to evidence and witnesses for both the prosecution and the defense, issues relating to resources, how hearsay evidence was handled at the trial, and the problem of anonymous witnesses. This last issue has received a great deal of attention as a result of this trial, and is very much related to the issues regarding the protection of witnesses that Judge McDonald discussed earlier. We will also discuss whether the defense had equality of arms, or whether there were unique problems for the defense in this case.

Each panelist will speak for ten minutes. The prosecutor, as is usually the case, gets the first word. The judge, as is usually the case, gets the last word. Then the panelists will be able to speak to each other and to comment on what they have said. Hopefully we will be able to squeeze out enough time so that we can have some discussion and comments from the audience.

Our first speaker is Alan Tieger. He is currently a lawyer with the Justice Department's Office of the Inspector General, and is working on a major investigation into the Citizenship USA program, which involved the naturalization of over a million persons, and whether there were any criminal offenses committed. I know him as a Los Angeles native, as a person who helped us deal with our own impunity problem in prosecuting the Rodney King trial, *United States v. Koon*. Everybody in our community knows Mr. Tieger very well for his role in that case. It is his role as one of the lead prosecutors in the *Tadic* case that brings him before you today. I just want to mention before he begins speaking that he was also a criminal defense lawyer for a number of years after he graduated from Santa Clara Law School, so he knows both sides of the courtroom.

* * *

PRESENTATION BY ALAN TIEGER

PROSECUTOR, *PROSECUTOR V. DUSKO TADIC*, INTERNATIONAL CRIMINAL
TRIBUNAL FOR THE FORMER YUGOSLAVIA

INTRODUCTION

Thanks, Paul. It is really wonderful to see so many former colleagues. It is a great pleasure as well, although a slightly odd sensa-

tion, to sit at the same table with Professor Wladimiroff and Judge McDonald.

I arrived at the Tribunal in June of 1994. At the time, there was a staff in the prosecutor's office of about fifteen. As I recall, there were even fewer desks and computers. I left when the *Tadic* trial ended on Thanksgiving Day in 1996. In the interim, I participated in investigations in about fourteen different countries and spent nearly seven months in the Tribunal's first trial.

I mention that because it is extremely difficult now, even for me, to recall all the procedural, logistical, and legal mysteries that surrounded the Tribunal at the outset. In the beginning, nobody knew that we would be able to go to the scene of the first trial's crimes under the protection of IFOR troops and tanks, while those persons who were instrumental in the ethnic cleansing of the area remained in charge and threatened our arrest. Nobody knew that defense witnesses who expressed reluctance to come to The Hague, and thereby called into question the integrity of the trial, would be persuaded to testify via video link or under the protection of safe conduct offered by the Tribunal. No one could even be sure that the victims of war would be willing to risk re-traumatization and even physical retaliation for testifying publicly. Certainly none of us had any grasp of the complexities surrounding interpretation, with all of its ambiguities and potential for cultural misunderstanding. In sum, I think none of us really knew that the mechanisms devised for the trial process would be capable, however slow and clumsy they sometimes were, of meeting all the challenges that would be presented.

I hope that the members of the panel today can satisfactorily address the challenges and mysteries of the Tribunal with which you are most concerned. In the meantime, I would like to first briefly address these areas: a procedural issue that loomed as fairly significant before the trial began, but which I think faded into insignificance in the crucible of trial; the inevitable "big fish-little fish" issue; and finally, the reaction of prosecution witnesses to the trial.

I. EVIDENTIARY ISSUES AT THE ICTY

There was a great deal of pre-trial concern about two aspects of the Tribunal's procedures—anonymous witnesses and hearsay. That early concern seems to have left a lingering impression that those

provisions played a significant feature in the trial's outcome. Whatever the merits of those provisions, and I happen to be one of those who believes that they can play an occasional useful role in the Tribunal, they did not play a major role in the proceedings and did not meaningfully affect the outcome of this trial.

Only one witness testified anonymously, and that witness offered evidence that the defense argued was exculpatory. As for hearsay, I doubt that the *Tadic* trial saw any more hearsay than a domestic trial of comparable length. This happened for an interesting and ironic reason. The very fact that there was no specific prohibition on hearsay meant that there were no specific exceptions allowing its use. That in turn meant that every attempt to introduce hearsay was accompanied by lengthy argument about its propriety, which tended to focus more attention on that particular piece of evidence than the proponent ever intended. Since both sides wanted the court to focus on the most reliable, persuasive, and significant evidence, the process tended to become self-regulating as the parties became gun shy about hearsay. Virtually all of the hearsay admitted fell within exceptions that would be recognized in jurisdictions regarded as much more stringent with respect to that rule, and none of the hearsay dealt with the critical acts charged or the essential elements of proof.

II. PROSECUTORIAL DISCRETION: THE "BIG FISH-LITTLE FISH" DILEMMA

The "big fish-little fish" issue has permeated the discussion about the *Tadic* case from its earliest stages. By now, of course, there is certainly no question that the Tribunal's mandate and its limited resources require it to focus on the persons most responsible for violations of international law. It is equally true that the Tribunal's legacy will rest in part on its capacity to do so. At the same time, one of the unique hallmarks of the Balkan conflict was its personal nature, the horror of neighbor attacking neighbor; of having drinks and dinner with someone one week and being taken to a concentration camp by the same person the following week. In many dramatic confrontations in the *Tadic* trial, witnesses looked across the courtroom to identify as perpetrator their former friend and neighbor, Dusko Tadic.

I think we should also recall that such friends and neighbors are the biggest fish of all to many of the victims. I recall reading an ac-

count of the *Tadic* case that characterized him as a bully. I understand the point that the author was trying to make in context, but that kind of characterization tends to mock the enormous sufferings of the victims.

Dusko Tadic, as one example, was convicted of persecution of the Muslim and Croat communities of Prijedor, a municipality in north-west Bosnia. Prijedor was home to 50,000 Muslims in the year before the conflict, while only 6,000 Muslims remained a year after the conflict. He was convicted of persecution because of the court's findings that, among other things, he participated in the round-up of Muslim civilians for placement in the camps after the shelling of their homes; during that process, he murdered two policemen; he participated with an armed group of men in the ethnic cleansing of a Muslim village, which left five of the men of the village dead and the others taken away never to be seen again; he came to the Omarska camp, one of the most notorious camps in the Balkan conflict, with a group of armed men who singled out defenseless prisoners for beatings and torture with metal pipes, boots, and knives, culminating in an attack that forced one prisoner to castrate another with his teeth. This was only one of the three occasions, the court found, on which Tadic was in camp for the purpose of attacking prisoners.

It is clear that Dusko Tadic was not one of the leaders of Republika Srpska or one of the primary architects of the war. International humanitarian law, however, is about individual responsibility, and there is certainly room for the message that it is not only the architects of the policies of destruction, but also the people who implement those policies who are to be held accountable.

III. WITNESSES' REACTION TO THE ICTY

I mentioned earlier that I wanted to say something about the witnesses and their reaction to the trial. We dealt with people who were asked to come to the court after experiencing terrible things and to expose themselves, their most frightening memories, and their deepest wounds to the most intense probing and scrutiny. Remember, we are talking about people who were being asked to discuss such things as being forced to fetch a son so he could be beaten to death, or being forced to commit abuses on other prisoners. In light of that, there

were certainly witnesses who were too traumatized or too embittered to testify.

There was a critical mass of witnesses, however, that somehow found the strength to testify. When they did, it was remarkable how many of them reported the sense that they had been relieved of a heavy burden that they had carried for a long time. I recall one witness in particular who left the courtroom literally looking ten or fifteen years younger than he had when he arrived a few hours earlier. I think it was at those moments, and I see some colleagues nodding, that many of us felt most proud of our participation in the Tribunal.

I recall that the Tribunal was predicated, at least in part, on the notion that peace requires the sense of closure that only justice can provide. If the experience of these witnesses serves as an example, that seemingly idealistic notion has a real basis in fact. Moreover, if it can be translated on a broader scale, on a national scale, there is real reason for hope and a further justification for the ongoing efforts of the Tribunal.

* * *

MR. HOFFMAN: Our next speaker is the defense counsel, Michail Wladimiroff. He is a graduate of the University of Leiden School. He has practiced law since his graduation from there in The Hague with Gerald Spong since 1976. He is one of the leading criminal lawyers in the Netherlands. He has written many articles and books on criminal law, and is here, of course, because he was the lead defense counsel in the *Tadic* case. We will hear from him as to what it looked like building the airplane and about some of the turbulence encountered along the way.

* * *

PRESENTATION BY MICHAIL WLADIMIROFF

DEFENSE COUNSEL, PROSECUTOR V. DUSKO TADIC, INTERNATIONAL CRIMINAL
TRIBUNAL FOR THE FORMER YUGOSLAVIA

INTRODUCTION

Thank you, Paul. Let me start by saying that I am delighted to have the opportunity to be here and to participate in this conference.

Before talking about procedural issues, let me first remind you of the remarkable moment in April 1995 when we entered the courtroom for the initial appearance of Dusko Tadic. There we were, each of us experienced lawyers with different backgrounds from different jurisdictions ready to start the first case before an unprecedented Tribunal with a brand new set of rules. We set off to sail in truly uncharted waters. Talking about the *Tadic* case, therefore, means talking about a learning process to which we all contributed to the best of our ability.

During my short presentation today, I will say little or nothing about the details of the case, since the case is still pending appeal. Rather, I will share with you some of my experiences and some observations I have made on the basis of those experiences. Let me also separate myth and reality. What we did there, at least what I tried to do there, was not very special. The event was very special, but it was a trial like all trials. We all played our role. We had different points of view for the trial chamber to decide.

One thing we had in common, at least something that was one of my goals, was to give the new ad hoc trial chamber, the new ad hoc tribunal, a fair chance because it was not very difficult to spoil the first case by obstructing anything I could, which I felt was not my duty as a defense counsel. My duty was to defend Dusko Tadic in the best way I could and at the same time to give the Tribunal a fair chance.

I. THE NATURE OF THE *TADIC* CASE

Now, talking about the *Tadic* case is not a very glamorous story. It is a story about trying to understand the new rules of the Tribunal, how these new rules would work in reality, and the limitations of what I will call "super national" trials.

I think super national trial is the proper way to indicate what we have done. It is not an international trial. It is not a matter of cooperation between states. It is really a super national trial. Super national trials require super national rules of procedure and evidence. Those rules should favor what modern domestic legal systems have to offer in order to achieve a fair trial. Such rules should also reflect internationally accepted standards. By creating such a new super na-

tional system, it introduces a system that was meant to meet the specific needs of a super national trial, but also to provide for a fair trial.

I have now mentioned "fair trial" twice. What does fair trial mean? A fair trial is not a concept of a very transparent nature. On the contrary, I would say the concept of a fair trial is very ambiguous. Criminal lawyers working in common law jurisdictions may say things about the requirements of a fair trial that may differ from what criminal lawyers working in the civil law jurisdiction would say. The problem is that the concept of a fair trial should and can only be understood in the context of the system in which it functions.

From a defense lawyer's perspective, the whole issue comes down to the practical question of what kind of legal instruments are available to allow the defendant a fair trial. The theoretical component of this approach is to question whether the system gives full credit to the underlying principles of the concept of a fair trial. Answers to these kinds of questions are difficult to find in a domestic system derived from the checks and balances within the system, structured and restructured by generations of legislators, and refined by case law. It is even more difficult if you are looking for the right answer in a new system to find the right answers to these questions within the new system of the Tribunal. This was the main burden on the defense.

Given the limited time, I will quickly touch on two connected issues in this context. A cardinal right of defendants is the right to establish a defense of his own choosing; and to that end, calling witnesses and examining the witnesses who testify against his defense in the presentation of his case.

II. TADIĆ'S RIGHT TO CALL WITNESSES

Let us start with the first issue, the right to call witnesses. What legal instruments does a defense lawyer have under the present rules of procedure and evidence? First, I think we should recognize that the Tribunal does not function, as already mentioned by Judge McDonald, as a domestic judicial body within the legal system of a state. The participants to the trial before the Tribunal, therefore, cannot rely on the usual institutions, authorities, administrative systems, and other provisions of the state. We work in a legal vacuum and the only way to get fresh air is through the cooperation of states under Article 29 of the Yugoslavia statute and Article 28 of the Rwanda

statute. The prosecutors of the Tribunal compensate for this lack of supporting conditions, since the prosecutor is, according to Article 11 of the Yugoslavia statute, an organ of the Tribunal. States and authorities are inclined to cooperate with an organ of the Tribunal and to assist the work of the Office of the Prosecution.

You may have heard different words about it when Judge McDonald spoke to you, but I think that most states, except for the former entities of the former Yugoslavia, were inclined to cooperate with organs of the Tribunal. For example, I tried to locate and contact witnesses who were living in Germany and Austria. Although those countries are not known for not cooperating with the Tribunal, they actually did not assist the defense in any way.

The reality was that the defense was not an entity, not an organ of the Tribunal, and therefore, non-existent for those states. I had no access to any official authority and I had no way to track down the witnesses. In the end, I had to contact the trial chamber and the prosecution to get this support. We could only achieve that through the organs of the Tribunal. The answers of these states were typical for states working within a civil law system: the defense can only achieve their own goals through the legal system, such as through the court or through the prosecution. That is exactly what happened here. That is fine within a civil law system, but it does not work within the system of the Tribunal. There we lacked proper instruments.

It was even worse when it came to locating and trying to speak to witnesses in the main entity of the former Yugoslavia, in Republika Srpska, for the purpose of discovery. That rebel republic or rebel entity of Bosnia did not recognize the International Criminal Tribunal nor did the International Criminal Tribunal recognize that entity as an independent republic. Inherent to the nature of the reason why the Tribunal was established, local authorities simply obstructed anything the defense undertook. They were, in one way or another, at fault themselves.

For example, local authorities initially denied access to their territory. Later on, they denied access to specific areas, to specific regions. They also ordered officials—policemen and civil servants—not to speak with the defense. They kept people away. They removed people from their houses in order to prevent them from speaking to us. They threatened people if they spoke to us. When we found peo-

ple and we spoke to them, they were threatened again not to contact the defense ever again. They also harassed and jailed people after we spoke to them. On top of this, we faced problems that witnesses, once located, disappeared, not only because of the threats of local authorities, but also as a result of the ongoing conflict. They simply were displaced. They were refugees. We could no longer locate them.

These kinds of problems improved slightly after the Dayton Agreement. This resulted and, as I understand, still results in the present cases slowly proceeding to trials with much lost time.

III. PROPOSALS TO SPEED TRIALS

What can we do to improve the expediency of trials before the Tribunal? As a lawyer from a civil law jurisdiction, I would say that the system of investigating judges might provide for improvements such as the prompt availability of a judge to provide for specific orders to facilitate access to evidence, to conserve evidence, to be present on location to assist in discovery or in the collection of evidence, and to preside over depositions of witnesses to be used during the trial.

So far the case law of the trial chambers is moving in this direction, but perhaps a more radical approach might be considered. If so, one may also consider having investigating judges available for specific issues such as hearing evidence related to specific legal elements of the crimes and of the jurisdiction of the Tribunal. The issue of internationality under Article 2 of the statute serves as a strong example. That kind of evidence can be dealt with by investigating judges, and can be presented to the Tribunal or to the trial chamber at a later stage during the trial. Such an investigating judge could also deal with issues essential to understanding facts, such as identification problems or forensic matters.

The introduction of an investigating judge may not only speed things up in the pre-trial stage, but also may encourage defense counsel to collect evidence when a judge is available to invite the prosecution to be present. Then the defense counsel can conserve the evidence for a time when the victim or the witness is available. It may also make the trial more effective. The trial would be reduced to the real issues at hand—to hear only witnesses who are dealing with

facts and who are available to come to The Hague or to the Rwanda Tribunal.

IV. DEFENDANT'S RIGHT TO CONFRONT WITNESSES

Another issue I want to touch on is the right of an accused to have witnesses against him examined. It is in this context that witness protection and hearsay evidence may cause trouble. So far, in my limited experience of the *Tadic* case, witness protection only crippled the instrument of an effective examination in one case.

At the beginning of the trial, I thought witness protection was going to become an enormous problem. It was a problem, however, only in one case—Witness L. In that case, the witness received not only protection for himself but also protection for his family. This posed a significant problem for the defense. Due to the protection order, we had many problems with proper investigation of whether the witness was reliable or not.

For example, the protection was also related to his father, mother, brothers, and sister. This meant that in investigating the reliability of this witness, we could not mention the name of the witness nor could we mention any relatives or others in order to locate where he had lived, what he had done, and who his relatives were. We were extremely crippled.

We accidentally stumbled on to someone who spontaneously started to talk about this witness. Then we heard the astonishing story about what the witness told the prosecution and later told the court. The story he told was that he was just by himself with his mother and his sister, and that his father died. This was a lie, however, because his father and brothers were still alive.

We met with the father and that brother, and we had significant problems during the trial attempting to explain the true story to the trial chamber. In addition, we had difficulty trying to present a father who we were not allowed to talk about. That was a big problem. The matter resolved itself, but I think we came close to an unacceptable situation.

In other cases, we felt very uncomfortable because of the lack of information and the large amount of delayed information, but we managed. In these cases, the name of the witnesses were disclosed to us several weeks before the trial. During that short period of time we

had little possibility of investigating the matter properly. We were able to manage, however, and I felt we were not crippled in cross-examination.

The up side of all this was that the rulings of the trial chamber on witness protection also served the purposes of the defense. This was a very astonishing thing to me. In context of equality of arms, the defense filed motions for witness protection and these motions were granted. We filed those motions because many of witnesses living in Republika Srpska thought, with good reason, that there might be a problem if they arrived in The Hague to give evidence in court. They needed some kind of protection. They could have protection by being an anonymous witness or they could have protection by safe conduct, which is what we asked for and that is what we were given.

Other witnesses who were not really in danger but were told by the local authorities that everyone that went to The Hague would be arrested, felt it was too dangerous to come to The Hague. We had no legal instrument to force them to come and the only way to get the feeling of safety was to provide for anonymity or to provide for safe conduct. Anonymity, or at least witness protection, was clearly a good instrument in the hands of the defense.

Another way we tried to solve the witness protection problem was by hearing witnesses on location. That is, hearing the witnesses through video link. This method also served the purposes of the defense to produce witnesses.

V. HEARSAY

The other feature of the right to examine witnesses is hearsay evidence. Alan already told you that we did not offer very specific cases of hearsay evidence. Indeed, it was the usual issues. We complained on several occasions that we felt the borderline was crossed; but, as a whole, I think we were able to manage.

After the ruling of the trial chamber in the *Tadic* case, the case law of the Tribunal progressed. I am not satisfied, however, with what is happening after the *Tadic* case. It worries me. I am referring to the ruling of the trial chamber in the *Mucic* case and the ruling on hearsay in the *Blaskic* case. According to this case law, hearsay is "completely admissible evidence" and the steps taken by judges are as follows: Subrule 89(c), stating that a chamber may admit any rele-

vant evidence that it deems to have probative value is considered by the judges to be a clear and unambiguous rule, permitting interpretation. As held in the *Mucic* case, reliability is not required for admissibility. That is really a bold point to make.

In addition, the trial chamber stated in both the *Tadic* case and the *Blaskic* case that the admissibility of hearsay evidence may not be subject to any prohibition principle, since the proceedings are conducted before professional judges who possess the necessary ability to begin by hearing hearsay evidence and then to evaluate it for admissibility. My question remains how to evaluate the evidence if reliability is not a requirement of admissibility.

The answer of the case law of the Tribunal is that it is up to each of the parties to provide the elements that allow the trial chamber to evaluate, and I quote the ruling in the *Blaskic* case in particular, "the defense is free to demonstrate that hearsay testimony which was declared admissible must in the end be excluded because its probative value is sufficient."

I have two comments to make to conclude my observations. Hearsay evidence eases the burden of proof by the prosecution without compensation for a defense, when the witness is only the transmitter of the information. Hearsay evidence cripples the right to examine. That right is not limited to witnesses in trials. As the trial chamber held in the *Blaskic* case, it derives from the principle that a defendant should have the proper and effective opportunity to test and challenge the evidence itself against him, not the transmitter.

Thank you very much.

* * *

MR. HOFFMAN: Our next speaker is Kitty Felde, who is also from my home town. She is a radio journalist. Many of you have probably heard her reports on the Rodney King trials, the trial of the people who beat Reginald Denny, and the O.J. Simpson trial.

Kitty has received numerous awards for this coverage, including the Golden Medallion Awards for four consecutive years from the State Bar of California and Silver Gavel Awards from the ABA. I know personally that I would never trust anything that I heard about any of these trials if I had not heard Kitty's report about it on WHIC-WALA. I would rely on Kitty for accurate and interesting informa-

tion about these trials. Since that time, she has spent more time than any other American journalist covering the work of the international Tribunal. She spent five months in The Hague covering the *Tadic* trial and reporting on it to people in this country.

She is going to address some of the issues the other panelists have raised. In addition, she is going to speak about issues of media access and the difficulties of communicating this story to people in this country.

* * *

PRESENTATION BY KITTY FELDE

KPCC PUBLIC RADIO AND KCET PUBLIC TELEVISION, L.A.; ICTY
CORRESPONDENT, MONITOR RADIO—CHRISTIAN SCIENCE MONITOR

INTRODUCTION

I always call the Tribunals the world's best kept secret. Aside from scholars and people in the legal profession who find the subject interesting, if you mention the Tribunals to the person on the street, they say, "Excuse me?"

Even news organizations find the Tribunals a mystery. The morning I was going to interview David Scheffer on a talk show I do in Los Angeles, I heard a National Public Radio ("NPR") news story that talked about how the "International Criminal Tribunal in The Hague" had decided that it had the authority to determine where the two Libyans accused of bombing Pam Am Flight 103 should be tried. That woke me up. I thought, "My goodness, the Tribunal is expanding its powers." David Scheffer told me he spilled his coffee when he heard that same report.

I tracked down the story and discovered that NPR newscasters had read wire copy from the Associated Press ("AP"). The American AP editor who writes the broadcast wire had re-written a story by a very good reporter from The Hague, Mike Corder. By the time the story made it on the air, it had been reduced so many times by the editors that the International Court of Justice and the International Criminal Tribunal for the former Yugoslavia ("ICTY") became mixed up because they were both in The Hague. If the media cannot get this right, then how can we expect the American public to figure out what the hell is going on.

I. GETTING THE STORY TO THE MEDIA

The first time I heard about the Tribunal was during my coverage of a trial in Los Angeles that shall remain nameless. I thought that if I consider myself a trial reporter, and I was too young for Nuremberg, then how can I not find a way to go to The Hague and cover this important historic first trial.

What I did was a little unconventional. I found some underwriters to cover the cost of travel from Los Angeles to The Hague. People who believed this was an important story came up with the funding. People like the Wiesenthal Center, Stephen Spielberg's Righteous Persons Foundation, and many defense attorneys and law professors who I had encountered over the years funded my trip. These were the people who believed this was an important story that deserved to be covered.

Finding a news organization to take daily stories was another battle. More than one news organization told me—and I will use Alan's language here—that Tadic was just a trial of a little fish and that it really did not matter. Now, if they catch any of the big guys, they said, come back to us and we will talk to you. Monitor Radio was very interested in the story and believed it was important. They said they would run any story I could file.

II. THE PRESENTATION OF THE STORY

I found that once the story was on the air, another problem developed. Actually, two problems developed. I spent the first half of the report trying to explain a mini-history of the Bosnian war, and the second half trying to explain the Tribunal itself. By the time I made it to the news of the day, I had about twenty seconds left of a one minute story to explain what had happened *that* day. Half of *that* time was spent pronouncing the names of the people. Then when I came to the news of the day, I found that editors did not want any "gory details." They did not want the specifics. I was not the only reporter who had that problem. When AP reporter Mike Corder's stories come to the United States, they are edited for United States content because Americans do not want to hear the details either. What my editors wanted me to say was "rape, murder, and torture," which after you have said it three or four times starts sounding like eggs, milk,

and a loaf of bread. The public does not have any concept of what we are really talking about.

I will provide you with two brief examples. One piece of tape I had was a witness describing what he heard going on in the jail cell next door. My editor said, "My God, that sounds like the play by play of a rape." That is exactly what it was; it was a witness overhearing what was going on in the jail cell next door. They said, "My God, we can't put that on the air." It did not make the air.

Another example that did not make air was a piece of evidence, the only bit of evidence that something had happened, which were the traces of brain matter on the walls of the jail cell. It was too graphic for morning drive audiences, I was told, and therefore did not make the air.

III. RECOMMENDATIONS FOR INCORPORATING MEDIA COVERAGE OF THE TRIBUNALS

This is the media's responsibility. And this is where the media has failed. I also believe that the Tribunal has to share some of the blame for not getting the word out. I will just mention some specific ways the Tribunal could help. For the most part, it is just a lack of understanding about what we in the media need. The ICTY has a press office and some of the nicest people in the entire world work there. I think, however, that they view their role a little differently than how we in the media would like them to view it. They see themselves as gatekeepers. There is a bulletproof glass wall that separates the press area and the lobby area from the inner sanctum where everyone works. Getting passage to the other side is a great treat, indeed. The press people control the distribution of information, printed materials, and also, most important for us, interviews with people behind those glass walls.

If you are a journalist who has a limited amount of time to spend on site, you want to get as much information as possible in order to write as many stories as possible to take back with you. The press people prefer to parcel out information so that they are not giving you a bundle of stories at one time. Information is very guarded. It is very difficult to obtain. What you end up doing is finding your own sources. Like Alan Tieger. He did not actually talk to me during the trial, but I found other people from Los Angeles who would talk and

who helped pave the way, introducing me to people, and helping me obtain interviews.

The Tribunal has only one person who is allowed to speak on tape officially whenever there is a need for a comment. If someone has been captured in Yugoslavia, there is only one person allowed to speak. That is fine. Except, unfortunately his accent is so heavy that my editor said he could not be understood. As a result, I was not allowed to use him in my pieces. I had no voice from the Tribunal to use in my radio pieces at all.

There are other ways that the Tribunal is just not thinking in terms of the media. I do not mean to be flip about this, but take, for example, the day the Tribunal released its first indictment that elevated rape to the status of a war crime. That was truly a historic day. Yet, all the Tribunal provided for reporters was a copy of the indictment and the unusable spokesman with the heavy accent.

The timing was correct for the Tribunal to capture worldwide media attention. The indictment was released at the time of the Rule 61 hearings, where Radovan Karadzic and Ratko Mladic's indictments were being discussed publicly. This meant that there was a great deal of media there to cover the event. But while this particular press conference about the rape indictment was going on inside the building, the flamboyant attorney from Belgrade representing Radovan Karadzic was conducting his own impromptu press conference outside the building, where the television cameras could see him. That is because television cameras are not allowed in the area where the press spokesman was giving the briefing on the rape indictment. The television cameras were out in front with this attorney. Also outside, a group of protesters were chanting. Guess what the lead story was that day on the news? It was not the indictments. They were buried, if they were mentioned at all. What ended up on the air was the story with the more compelling pictures and sound.

When I attend press conferences in Los Angeles at the United States Attorneys Office, they force-feed information to reporters who are all on a deadline, do not have a lot of resources, and do not have a lot of time. If I show up at the United States Attorneys Office and there has been a big bust, there will be a press spokesman, FBI agents who did the investigations, cocaine stacked to the ceiling, stacks of money, or guns. All images for the television cameras. Lit-

erally, all you have to do is walk in, take pictures, walk away, and you have your story. This is not to say the Tribunal should pander to lazy reporters, but some degree of awareness of what the media needs would be helpful.

The Tribunal press office is not alone to blame for the lack of coverage. Tribunal prosecutors must also share a portion of the blame. The first day of the *Tadic* case, there were hundreds and hundreds of reporters there to cover the event. They used to say proudly at the press office that "the Simpson case may have been a media circus, but at least we provided tents." And that is exactly what they did. There were two circus tents right out in front, albeit with no telephone outlets, so there was no way to file a story, but at least it was a place with electricity in which you could work.

By day five, almost everybody had gone. Maybe half a dozen people from the entire world were left, that was it. Some of the most compelling stories of the witnesses were never heard. People were gone. There was no one there to report the story.

As a prosecutor, if you are presenting a case to a jury, generally what you do is start by keeping in mind that you are trying to woo a jury. Often you present your strongest evidence first, your most compelling witnesses. But, because this trial was being presented before trial judges who were very interested in the legal basis, the legal groundwork had to be laid, and that is how the case began. I spent ten weeks in The Hague during the first part of the *Tadic* case, and the witnesses arrived at about week seven or eight. I believe the rest of it was legal, professional issues. Again, not pandering to the media, but if the jury the prosecutor wants to convince is the jury of public opinion, then he at least has to take the media into consideration, and that opportunity I think was lost.

Why is this important? Why should anyone care what the hell the media thinks? Well, there was a piece by John Bolton in the *Wall Street Journal* recently that pronounced that the war crime courts in Bosnia and Rwanda are failing. That is what the American public is reading. That is the *only* thing they are reading. If they are not reading accurate information about what is actually going on in Rwanda or in The Hague, then that is the only information they are going to take away with them.

CONCLUSION

How does this court of public opinion affect the Tribunals? It affects funding decisions. It affects funding decisions by Congress with regard to the Tribunals. It affects support for the permanent International Criminal Court. I dare say there would be a hell of a lot more pressure on the United States government and other governments to go out and catch those people who are still out there after having been indicted by the Tribunals.

I will conclude by saying the Tribunals do not have to be hucksters to the media, but I do think it would help to be a little bit more media savvy. Thank you.

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PRESENTATION BY THE HONORABLE
GABRIELLE KIRK MCDONALD

JUDGE; PRESIDENT ICTY AND PRESIDING JUDGE
FOR *PROSECUTOR V. DUSKO TADIC*

INTRODUCTION

Actually, I have had the last word because we have already issued the judgment in *Tadic*. In that decision, I dissented on an evidentiary point during the trial that was very hotly contested. I still believe in my position, but it does not make any difference.

Let me just put the trial in perspective. The trial lasted seventy-three days. We met only four days a week and the other day we judges were handling pre-trial matters in *Celebici*. That means that the trial lasted approximately three and a half months. People say, "Oh, what a long trial," but it was not a long trial. First of all, it was the first trial involving international humanitarian law since Nuremberg. We heard 120 witnesses. We had 350-plus exhibits. We had 7,000 pages of transcript. I do not think it was long. I think that we used our time efficiently and effectively. I am saying that as a judge, because although I am a lawyer, I was not one of the prosecutors or defense lawyers.

When the trial began, I had the feeling that Mr. Wladimiroff looked across the courtroom and saw all of these Americans sitting as prosecutors and then looked up at me as the presiding judge and

said to himself, "I wonder what is going to happen here." I hope by the end of the trial I was able to convince him that I was not there as an American; I just happened to be the presiding judge. That was the first trial. Yes, I think we handled it effectively and I think it flowed very well.

I. THE COMPOSITION OF THE PROSECUTION AND DEFENSE TEAMS

Good trials require good lawyers. We had good lawyers. We had quite a combination though, even in the defense itself. They had two lawyers, Dutch lawyers, who came from the civil law system and two lawyers from Great Britain who came from the common law system. Mr. Wladimiroff did not talk about that, but I imagine on some days that must have caused some difficulties just in coordinating the defense because the systems are very different. The common law has a strong cross-examination procedure whereas civil law does not. Of course, with the prosecutors coming from the United States and Australia, and our rules providing for cross-examination, this could have been a real problem for the civil law lawyers, but they had two very competent British lawyers. Mr. Wladimiroff is either instinctively able to cross examine or he learned very quickly because he handled a number of cross-examinations very effectively.

To put it in perspective, there were several systems represented in the trial. On the prosecutor's side, the lead counsel was from Australia. There were two Americans from military systems—one from the Marine Corps and one from the Air Force, I believe—and then Mr. Tieger, of course—from the United States Attorneys Office with civilian federal law experience.

On the other side, you had civil law (Dutch) and common law (British) traditions represented. Then we had these new rules that we three judges had to apply. Of course, people look at the lawyers and the lawyers do have a very difficult job. Having been a trial lawyer for many years before handling civil rights cases, I understand they have a hard job. Judges have a hard job, too. We had to apply rules to lawyers coming from basically five different systems. That was not an easy task, believe me. I do not expect any sympathy for the judges, but it was not easy. As I heard the testimony and having been a Federal judge in the American system where we have so many technical objections, every time a question was asked, I was waiting

for an objection. I thought of what the objection would be and then decided on my ruling, but I did not hear an objection.

II. THE TRIBUNAL'S RULES OF EVIDENCE

The reason I heard so few objections is that the Tribunal's rules include ten rules of evidence, and we admit all evidence that is relevant and has probative value. We do not have this rule, this hearsay rule, with twenty-four exceptions. In a sense, it was an easier job for a judge because of the lack of technical rules. Even though we do not have the technical rules, we heard things like, "This is beyond the scope of direct examination." Then, as a judge, I had to say, "We do not have a rule like that, but let's think about what is fair and develop a fashion of conducting the trial without having a rule that would give us explicit direction." So it was not an easy task.

Most often I ruled alone on the objections. Sometimes we would have a little football huddle with my fellow judges—one from Australia, one from Malaysia, both from the common law systems, yet still different from the legal system in the United States.

I suppose that is my first point. Just to talk a little bit about what we did. Of course, we dealt with hearsay. I heard what Mr. Wladimiroff said regarding *Mucic* and *Blaskic*.

We issued a decision on the question of hearsay. As I said, we have ten rules of evidence and the standard is that all evidence that is relevant and probative is admissible. Further, we have a rule that says we may exclude evidence that has probative value if the need to provide a fair trial for the accused outweighs the value of that probative evidence. It is kind of a catch-all phrase, similar to Rule 403 or 404 from the United States Federal Rules of Evidence.

We issued a decision on hearsay. It was originally challenged. I wrote the decision. There was a concurring opinion by Judge Stephen from Australia. In the decision joined by Judge Vohrah, I imposed a requirement of reliability and I said a number of things. I said we are focusing on evidence, but the real test is whether it has trustworthiness and reliability. That comes from my system, where we have a hearsay rule and if there are law students here, that is the bane of our existence. There is a rule and there are twenty-four exceptions.

All of the twenty-four exceptions really focus on reliability and trustworthiness. In my opinion, hearsay evidence should be admissi-

ble. One, we are professional judges and there is this idea that somehow we are above the jury system. I believe in the jury system, so I do not know whether that is definitely true. I have handled many jury trials where they come together and form a good consensus; but, at least in our decision, we required reliability. The real issue is whether you hear the testimony without a predicate being laid for reliability or whether you just hear the hearsay and then as you are hearing it decide after you have heard it whether there is an indicia of reliability, which is a bone of contention. We feel we can do it.

III. STRUCTURING THE TRIAL

Kitty Felde spoke about the beginning of the trial, and, again, this was the prosecution's decision. I hope they have learned something, although I am not certain they have. The prosecution began with an eminent professional who took us back to 1389 at least, and he began to talk about the conflict. As the presiding judge, I knew the testimony by the end of the trial because I concentrated very carefully and I was expecting objections and rulings that never came. I was very high strung and very focused.

After that, we heard testimony from policy witnesses who were necessary. Alan Tieger is a fine lawyer. I was going to consider him a friend, but now that the matter is on appeal, no, I do not consider him a friend. As a matter of fact, I even called him a "persecutor." There were fifteen policy witnesses. I remember this because it is still in my head. They had to offer this evidence to show why it is systematic, so we listened to it. Mr. Tadic's name did not come up for several weeks.

After seventy-three days, I really formed a relationship with Mr. Tadic. I did. I would look at him often and he would look at me because the case is about Mr. Tadic. I am sure he and the judges wondered when we were going to get to the point of why we were there. This "party" was about Mr. Tadic and he had not been mentioned. It was like he was a fixture in this whole important trial.

IV. ANONYMITY OF WITNESSES

The question of anonymity came from a decision, and I will tread very lightly on this. We had the initial appearance of Mr. Tadic in April 1995. He was the first accused person who appeared before the

Tribunal. He came from Germany, which had to pass this implementing legislation for the first time. He could not be transferred until they passed this implementing legislation, so he was in custody until they passed it. Finally, Germany sent him to the Tribunal in April 1995, and we had the initial appearance, which is like an arraignment here in the United States.

The conflict was ongoing then in the former Yugoslavia. The Dayton Agreement was not rendered until December 14, 1995. We began the process while there was an ongoing conflict. The protective measures decision, which provides for anonymity, was issued in August 1995.

Thus, the decision provided for anonymity and confidentiality, which would never work in the United States because confidentiality really protects the witness against the press. The press would have been rushing to the bench saying, "We are going to file a lawsuit against you if you don't let us know more about this witness." In any case, that decision was issued before the Dayton Agreement. At the time, the conflict was ongoing and the needs in terms of the motivation for the protective measures should be taken in that context.

Subsequently, in the *Blaskic* decision, they had issued a decision on anonymity and they noted the fact that Judge Vohrah and I had noted in our decision—Judge Stephen dissented—that this was an extraordinary situation and that there was an on-going conflict.

Now, without getting into too much detail, it really boiled down to Witness H, who allegedly was required to hold a person while Witness G bit off one of his testicles. Witness G did not testify, although he was listed as a witness. Witness H did testify. Witness H said, "I didn't see Mr. Tadic during this incident." His face was pushed to the ground, but he did not see Mr. Tadic.

Plus, Mr. Wladimiroff, contrary to the decision that had been issued, was able to see the witness and question him. There is a decision from the European Court of Human Rights, *Kostovski*, that talks about a number of things. It said if the counsel knew his name, that might help matters; but Mr. Wladimiroff, being a very honorable lawyer, said, "I don't want to get in the middle of my client and know the name—if he does not know the name, I do not want to know the name." I think he said, "We believe that we know who he is, but we want confirmation." As to Witness G, they knew his real

name, but he was in protective custody in a location so they did not know where he was. We did grant anonymity as to Witness H. I do not want to discuss that too much. First of all, there is no confrontation clause in our statute. The confrontation clause is Amendment 6 of the United States Constitution. Our statute says the accused has the right to examine or cross examine witnesses against him. The whole question of the relationship between the confrontation clause of the American system and the statute that provides rights for the accused is a little bit different. I do not want to spend too much time on that. That gets to be too "legalese."

V. PROCURING WITNESS TESTIMONY

The defense had problems of its own. I begged, borrowed, and almost stole video conferencing equipment so that the defense could offer the testimony of witnesses who were unwilling or unable to come to The Hague to testify. Eleven witnesses testified. They testified via video conferencing from a location in the former Yugoslavia. It was not provided for in the rules. We have a rule that calls for depositions, but this was not provided for. The judges thought it was necessary. We were carving out procedures to provide a fair trial. We did finally get the conferencing equipment. We also, as Mr. Wladimiroff said, granted safe conduct to some of his witnesses.

The defense witnesses came from the territory, the former Yugoslavia. Almost all of the prosecution witnesses, if not all of them, came from areas outside of the former Yugoslavia. The defense, as Mr. Wladimiroff pointed out, had a very difficult situation.

After we had a final pre-trial conference, and quite an exchange as I recall between Judge Stephen and Brenda Hollis, who was a very good lawyer on the American team, we spoke about this business of safe conduct.

We did grant safe conduct, meaning that the people were able to come to the Tribunal and not be in fear of prosecution or indictment by the prosecutor.

We provided the opportunity to the defense to have additional time after the close of the prosecution's case-in-chief to prepare for trial, which they were entitled to because of the circumstances we were operating under.

At one point, the defense said, "Well, you know, we cannot get police officers to come and testify." Someone who is now deceased held that position and would not let the officers testify. We asked then-President Cassese to write a letter to this person, but to no avail. We were able, however, to get some records that related to the check point—the duty list that they had not been able to get.

Witness L has been given a lot of publicity. Witness L was not an anonymous witness in the traditional sense. When Judge Vohrah and I entered an opinion granting anonymity to some witnesses, Judge Stephen dissented, and we can talk about that at a later time. As to Witness L, it was a majority opinion and we all agreed that we should give the protective measures that were given, but there were limitations on questioning the name of his father. Witness L came and testified. He said this morning on X date, Tadic came out and "I saw him slit ten people's throats and rape forty people." Then the next morning, something else happened. Then the next morning. It went on and on. He spoke like an automaton. I have had a lot of experience with judging people and I looked at him and I could not possibly believe his demeanor. It was unusual, let us put it that way. He spoke almost like a robot. Every now and then, I would look at Mr. Tadic. I looked at him quite a bit. Anyway, it was finally revealed that such were not the circumstances.

RECOMMENDATIONS AND CONCLUSION

Employing investigating judges, as Mr. Wladimiroff recommends, may not be possible because of the present structure of the statute, which requires that the prosecutor initiate the investigation. Tomorrow, when we are on the panel, I will talk about the rules that the judges are looking at, and how we are looking carefully at the rules that require more active management by judges. I think a single judge who would come from the trial chamber and act as a pre-trial judge is a good idea. This judge could work with both the prosecution and the defense to assure that they are able to obtain the evidence that they may need, as well as push the lawyers to ensure an efficient trial. You have to herd lawyers, if not like cattle then like sheep. They sometimes move at their own pace. It has caused a lot of problems currently in our Tribunal. That is the message that I get, but we were very fortunate to have good lawyers. They fought hard, but I could see the relationships between them. I think they generally had

a good relationship. I have not been told this, but I could see it. I think they respected each other. The defense worked very hard for their client and the prosecution worked hard to obtain a conviction. Most importantly, they did it with a professionalism that made it easy for the judge, so that we were not required to encounter some of the difficulties that we have seen in subsequent trials.

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PANEL DISCUSSION

MR. HOFFMAN: It is traditional, I think, for the prosecutor to get the closing argument before the jury. You have been sitting and listening to all the other panelists and you are the only one that stayed within the ten minute limit. I think that you should have the bulk of that two minutes.

MR. TIEGER: Thank you, Paul. I am going to decline to take the bulk of the two minutes. Although there are a variety of things to comment on, insignificantly enough, the thing I was most struck by was the lavish praise given for the video link. Michail, I do not remember. You were in Bosnia?

MR. WLADIMIROFF: Yes.

MR. TIEGER: Then you did not have the experience of cross-examining a television screen in a foreign language, one which I hope not to have again. Some day, I will offer a response to Judge McDonald's comments on the decision to lead with expert witnesses, but this is not the time or place.

MR. HOFFMAN: Michail, would you like to give a closing thought?

MR. WLADIMIROFF: Indeed, it is quite tough to make a very short comment. The other thing I want to say is after all, I felt that case management from the trial chamber by one of the judges could have been the confirming judge during the pre-trial stage. We would be in favor of a speedy trial. That was really the problem, to get to people at the right time, the right place, and get the right decisions. That could be done in a more effective way.

MR. HOFFMAN: Kitty?

MS. FELDE: I would just like to comment on Witness L and why the media fixated on it. It was a fascinating story. We did not see

Witness L testify so we could only imagine his veracity, how truthful he appeared. It was fascinating to hear Judge McDonald say that the judges did not believe him.

JUDGE McDONALD: I did not say judges, I said that I looked at him with amazement.

MS. FELDE: Bad reporting, Kitty. Bad reporting.

JUDGE McDONALD: Just me.

MS. FELDE: Sorry. I correct myself. But the thing that we in the media wondered was: "If you do not believe one witness, will you believe the rest?" That was the question, that was why it played such an important role in the coverage of Witness L.