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THE OMARSKA TRIAL—A WAR CRIMES TRIBUNAL CLOSE-UP

Patricia McGowan Wald*

I. THE EXPOSURE

In early August 1992, in the second year of the Bosnian war, Roy Gutman, a Newsday reporter, stunned the world with a series of terrifying revelations about thousands of Muslim civilian men and women herded into Serb-run “death camps” in Northern Bosnia. “According to former detainees, the killing went on almost everywhere.” One of these camps, Omarska, a hastily-converted mining complex with open pits and huge hangar-like buildings, housed up to 1,000 men while another thousand “had to lie on their bellies” on the tarmac outside. Armed guards ordered excruciating tortures of their civilian prisoners, forcing them to castrate other prisoners, engage in acts of cannibalism, and violate each other. The prisoners received no medical help, were kept on starvation diets, and allowed no visitors. “All the grass has been eaten by the people,” Gutman wrote. When the camp closed down, 500 to 1,000 prisoners remained “missing” and were never subsequently accounted for.

The U.S. State Department’s first reaction was skepticism as to whether there was evidence to support Gutman’s incendiary report. When actual pictures of emaciated prisoners were produced, evoking immediate comparisons with the inmates of Nazi concentration camps a half century earlier, U.S. officials labeled the war “a blood feud... a complex, convoluted conflict that grew out of age-old animosities”; no demand was made at that time that the camps close down or that the Muslim civilians be freed. Secretary of State Lawrence Eagleburger said CIA sources knew of no systematic killings at the camp—only “unpleasant conditions.” Serb officials said there were no civilians, only captured combat soldiers in the camps, but no visitors would be allowed inside because the camp was in a “high risk zone.”

Gutman’s reports continued, however, including one that “the International Red Cross has placed

* Former Judge for the International Criminal Tribunal for the Former Yugoslavia and Former Chief Judge for the U.S. Court of Appeals for the District of Columbia Court.
2. Id.
3. Id. at 93.
4. Id. at 101.
5. Id. at xxxi.
6. Id. at 92.
7. Id. at ix, 35.
Omarska on a list of camps it intends to visit but has not yet formally asked permission to do so.”

Muslim sources told of children being impaled on spikes and electric drills used to bore into men’s chests (though such atrocities were never actually alleged at trial). Less lurid but more plausible were reports that the camp had a large component of the entrepreneurial and cultural elite of the Muslim population in the region, at least 10-15 of whom were taken out each night to a nearby lake and shot. President Radovan Karadzic of the Autonomous Serb Republic in control of the region nevertheless said, “The Serbians energetically deny the existence of camps for civilians anywhere in the Serbian Republic of Bosnia-Herzegovina.” At that point, the United Nations Security Council demanded the prison camps in the region be opened for impartial international inspection. The Prime Minister of Yugoslavia retorted that prison camps were being maintained by all sides in the Bosnian conflict, and while he could not confirm or deny the existence of “death camps,” he thought all the prison camps should be closed down.

The camp commander at Omarska, Zeljko Meakic, told reporters who converged on the camp following Gutman’s articles that only two men died at Omarska, both of natural causes, and that there were never more than 270 prisoners held at a time. By the time reporters were allowed inside in late August, most prisoners had been transferred to other camps, and bunks had been hurriedly brought in to simulate dormitories. The police chief, under whose authority the camp operated, insisted men had been brought to Omarska only for interrogation and kept there for only a few days, then either released, shipped off to prisoner-of-war camps elsewhere, or referred to prosecutors for criminal trials on war crimes charges. As late as October 2002, President Milosevic of Yugoslavia was still denying at his own trial in the Hague that there were ever prison camps on Serbian territory during the Bosnian war. The camp was closed down at the end of August 1992.

II. THE INVESTIGATION

Shortly thereafter, the U.N. Security Council, in an attempt to react to the international outrage that followed Gutman’s articles, established a Commission of Experts to look into—among other possible violations of the law of war—conditions in the 333 Serbian-run prison camps scattered

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8. Id. at 34.
9. Id. at 41, 44.
10. Id. at 54.
11. Id. at 61, 63.
12. Id. at 45.
13. Id. at 93-94.
14. Id. at 94.
16. Gutman, supra note 1, at 91.
throughout Bosnia. As recounted by one of its principal authors and investigators, it found:

- In the early years of the war, and particularly after Croatia, Slovenia, and Bosnia had declared their independence from the Yugoslavia nation to which they formerly belonged, Bosnian Serbs pursued a strategy of trying to create a “Greater Serbia” by forming a corridor composed predominantly of Serbs which would link Serbia with those parts of Bosnia and Croatia which were heavily populated with Serbs. This strategy involved removing non-Serbs—mostly Muslims—from the regions slated for inclusion in the “Greater Serbia.” This “ethnic cleansing” often deteriorated into “unparalleled violence and terror” targeted at the non-Serb population in these areas.

- In the spring of 1992 heavy fighting broke out in the Prijedor corridor of Northern and Eastern Bosnia in which Omarska is located as the Serbs implemented their ethnic cleansing policy. The typical pattern was for the Bosnian Serb army to shell a village with a substantial Muslim population, then send in paramilitary units to “cleanse” the town. Muslim houses and mosques were burned and Muslim people herded into central holding places. Permanent cleansing was then accomplished either by forcibly relocating the Muslims elsewhere or by establishing camps in which the men (and some women as well) would be “interrogated,” abused, starved, and often killed. The administration of the captured towns was taken over by the Serbs.

- Because the Bosnian Serb army was not strong or well organized enough to transport all non-Serbs from captured territory, they “relied on the use of terror which entailed mass killings, torture, rapes and prison camps to eradicate the non-Serb population . . . to ensure that non-Serbs would forsake the area and never return.” They frequently used “rural, uneducated youth” operating “outside any discernible centralized command and control structure” to conduct their “ethnic cleansing” campaigns and to help run the camps. The use of terror was “their most efficient weapon.”

- According to Bassiouni, “The camps appear to have played a significant role in ‘ethnic cleansing’ by provid[ing] central locations to terrorize individuals and intimidate the entire target population.” The camps were often set up in close-by clusters and networks and prisoners were transferred freely between them.

• The Prijedor Corridor of Bosnia in which the Omarska camp was located was 44% Muslim, 43% Serb, and 6% Croat. Simon Drljaca, head of the Serbian party in Prijedor, was in charge of three police stations, including the Omarska police station. Six months before the takeover of Prijedor by the Serbs, he had begun building a Serbian police department and removing non-Serbs from all jobs involving law enforcement. Curfews were set up, travel permits required of non-Serbs, and non-Serbs were required to hand over all weapons. Drljaca ordered the establishment of three internment camps: Omarska, Karaterm, and Trnopolje.22 The U.N. Report found "little to suggest a legitimate purpose for the internment of so many noncombatant civilians."23 It also found that "the similarity in structure of the camps suggest a degree of preplanning before the war was started." Large facilities adaptable to housing thousands appear to have been selected and prepared before fighting began.24

• These camps in the Prijedor area—including Omarska—were the most brutal in all of Bosnia; the Serbs exercised absolute control over their captives. They needed the non-Serbs to be completely subjugated or to disappear if they were to attain their objective of ethnic cleansing.25

III. THE TRIBUNAL

According to one of the U.N. Report’s authors, “the discovery of the prison camps ... focused the western public’s attention on the [Bosnian] conflict as never before.”26 The western democracies and the United States were not yet willing to take a course of military intervention. As an ameliorative measure, they established an international criminal court to try the individual perpetrators of war crimes such as those that Gunman had put on center stage through his articles. Thus the International Criminal Tribunal for the former Yugoslavia (hereafter “the Tribunal”) was established in 1993 by a United Nations Security Council Resolution to prosecute and try individuals for war crimes, crimes against humanity and genocide committed on the territory of the former Yugoslavia from January 1, 1991 onward.27 New Yorker reporter, Joseph Lelyveld, wrote:

The Hague Tribunal is the first truly international criminal court that the world has seen. Nuremberg was a military tribunal under the aegis of the occupying powers in Germany. The Israeli court that tried Eichmann was a national court claiming jurisdiction on the basis of a principle of “universal jurisdiction” for crimes against humanity. The Hague Tribunal is an agency of the United Nations,

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23. *Id.* Annex 8, para. 226.
24. *Id.* Annex 8, para. 251.
25. *Id.* Annex 8, para. 252.
with a staff of nearly twelve hundred, drawn from seventy seven nations.\footnote{28}

The establishment of the Tribunal was not, however, unanimously lauded. Balkan officials labeled it "rigged justice." Other critics felt that replaying the horrendous events of 1992-95 and assessing blame on particular individuals would do nothing to bring about reconciliation between warring ethnic groups but would only prolong old animosities. Crimes of war, the critics argued, were different from ordinary crimes and defied ordinary ethical and legal "assumptions about the nature of individual responsibility, the purposes of punishment, and the normal conditions of human life" upon which a criminal court system is built.\footnote{29}

In war and especially in civil wars, they asserted, an entire nation could be regarded as criminal. "Millions of men and women [lose], for some period of time, all recognition of the humanity of their victims, and even of their own self-respect and humanity. . . . How can anyone start to assign a specific amount of responsibility to each one . . .?"\footnote{30} Hannah Arendt, the chronicler of Nazi oppression 50 years beforehand, answered these critics:

It seems to me . . . we have no tools in hand except legal ones with which to judge and pass sentence on something that cannot even be adequately represented either in legal terms or in political terms.\footnote{31}

Gary Bass, a more recent war crimes commentator, echoed the same theme:

Ultimately war crimes trials are the right choice, not because they are too morally pure to be questioned, but because they are the least bad of a number of bad choices before us. We should reject the only alternatives—summary executions or ignoring the atrocities . . . . There is no such thing as truly appropriate punishment for something as hideous as the Srebrenica massacre, in which Serbian forces killed some 7,000 Bosnian Muslim men . . . . Any situation in which there is a need for a war crimes tribunal is a situation that has gone horribly wrong. After atrocity all options are awful. War crimes tribunals are simply—in both moral and political terms—the least awful option we have.\footnote{32}

These quotes are simply particles of the much deeper debate about the legitimacy and efficiency of war crimes tribunals and serve only to provide context for a discussion of the trial in which I participated of five Bosnian Serbs indicted for operating the Omarska prison camp. Although the five and others at a higher level were indicted several years earlier, their trials did not come up until late 1999. Trial Chamber I,

30. Id. at 12.  
31. Id. at 13.  
32. Gary Bass, War Crimes and Punishment: Tribunals are Flawed, but not Futile, WASH. POST, Nov. 26, 2000, at B03.}
which began its joint trial in March 2000, comprised three trial judges: Judge Fouad Riad of Egypt, Judge Almiro Rodrigues of Portugal, and myself.\(^\text{33}\)

Here I digress to describe briefly how criminal trials are run at the Tribunal. The judges, now numbering 16, are nominated by their respective countries but elected by the United Nations General Assembly for four-year terms. No more than one judge can come from any one country. The judges are assigned to one of three three-member Trial Chambers or to the seven-member Appeals Chamber.

The working languages of the court are French and English, and all judges and Chambers staff are expected to speak and write at least one of them but not necessarily both fluently. Thus in Chamber I, two of the three judges spoke French primarily along with most of the staff; I was fluent in English only; it is self-evident that it takes much time and effort to deliberate usefully and to issue an authoritative decision that truly reflects the views of all judges in those circumstances. Even when no real substantive differences were involved among the judges, it remained a special problem to produce hundred-page-or-more judgments that all three of us were comfortable with.

Typically trials at the Tribunal last a year or longer; several have gone on for two years. Everyone in the courtroom—defendants, counsel, prosecutors, judges—has access to simulcast translations in three languages—French, English, and Bosnian/Croat-Serb—and accompanying video transcripts. But under the imperative of continuous translation, sharp-paced question and answer dialogues among prosecutors, witnesses, defense counsel, and judges are impossible and trials are greatly lengthened. A witness is interrogated by an English-speaking prosecutor, the question is translated into Serb-Croat, and the answer then translated back into English. The entire dialogue may then have to be translated into French for one or more of the judges. Witnesses come from a dozen countries and their scheduling frequently engenders further delay. Prosecutors often indict only after five years of field investigations and are understandably reluctant to withhold from the court any piece of evidence they think relevant. Defense counsel may be unfamiliar with the procedures of the Tribunal—very different from their national systems—and their questioning, arguments, and objections consequently are attenuated; some have never previously engaged in cross-examination, a talent which is only slowly acquired. Many defendants, including four out of five of the Omarska accused, spent two years or more awaiting trial in the U.N. detention unit on the outskirts of the Hague. Some judges have been assigned to preside over complex trials with no prior courtroom experience, which can be an excruciating process.

The Tribunal makes its own rules and has changed them continually over the years. They provide basically for an adversarial trial. Although

there is no grand jury, a judge must confirm the indictment to assure that there is evidence to support the charges *prima facie*. After a pretrial period, in which motions to dismiss, to sever, of special pleas of insanity, or of diminished responsibility are made and judicial efforts are exerted to limit the areas of dispute, reduce the number of witnesses, and set the approximate length of trial, the prosecution puts on its case-in-chief. The defense then puts on its case; the prosecution has an opportunity for rebuttal; the defense for surrebuttal; and the case is submitted for judgment. The court's deliberations may take weeks or even months. Guilt must be found beyond a reasonable doubt, but requires the consensus of only two of the three judges. The sentence is entered at the time of verdict. Both the defendant and the prosecutor may appeal the verdict and/or sentence to the Appeals Chamber.

Article 20 of the Tribunal Statute contains the rights of the accused and follows the lines of the European Convention on Human Rights; the accused has the right to be notified in his own language of the charges against him; to appointed counsel if he is indigent; to be present at trial; not to incriminate himself; to be brought to trial within a reasonable time; to examine the witnesses against him; to put on his defense; and to be informed of any evidence in the hands of the prosecutor that tends to show his innocence or mitigate his guilt or impugn the credibility of a prosecution witness.\(^\text{34}\)

The Tribunal is now in its tenth year and is expected to finish its last trial at the end of the decade and its last appeal a few years later. The *New Yorker* article to which I referred earlier rendered this evaluation of its performance to date:

The early indictments were notable for their vagueness, not to mention the relative insignificance of those who were indicted. The early judgments were long and, not infrequently, loosely reasoned. More recently the Tribunal has managed to put together a respectable record: twenty seven people have so far been convicted and five have been found not guilty.... It is running six trials at once. It has set its own judicial precedents and tightened some of its procedures, and it now functions, like an established institution, in a hermetic, security-conscious world of its own. Among staff members, human-rights advocates, and some students of international law, there is hope, approaching pious faith, that the Tribunal is doing more than righting Balkan wrongs. Its real work, in this view, is to secure the foundation of an international jurisprudence on war crimes and crimes against humanity which can be brought to bear globally.\(^\text{35}\)


\(^{35}\) Lelyveld, *supra* note 28, at 86.
IV. THE DEFENDANTS—“LITTLE FISH”

But significant issues about the Tribunal's mission continue. There has, for example, been controversy, almost from the beginning, about the legitimacy and wisdom of indicting and trying "little fish" for war crimes while the "big fish"—the principal military and civic leaders who planned and strategized the worst of the war crimes—continue to walk free because the governments of the countries where they reside will not turn them over and the Tribunal has no police force of its own to go after them. This issue was present at the Omarska trial—none of the five defendants in that trial—all Bosnian Serbs—was a top-level military or civic official in the region or even at the camp itself. The lead defendant, Miroslav Kvocka, had been a patrol leader in the police station in the town of Omarska, a de facto deputy to the Omarska Police Chief, Zeljko Meajic, who became the commandant of the camp and who in turn served under the command of the Chief of Public Security, Simon Drjlaca, in the region where Omarska was located; Drjlaca had signed the order establishing the three prison camps. Neither of the latter two officials, though indicted, was involved in the Omarska trial of the five guards on which I sat in 2000-2001; Drjlaca killed himself in the course of being apprehended, and Meajic was not captured until a few months ago. Kvocka claimed throughout the Omarska trial that he was simply an aide to the Police Chief with no independent authority to order other guards around or to change conditions at the camp.\footnote{Kvocka, Case No. IT-98-30/1-T, paras. 330-386.} No persuasive evidence was shown at trial that he personally mistreated any prisoners, and there was some evidence that he tried to deflect other guards' abuses of prisoners on at least a few occasions.\footnote{Id. paras. 395, 397 nn.678 & 386-396.} Nonetheless, the court ultimately found Kvocka had “some degree of authority over the guards” and was “the functional equivalent of deputy commander,” though whatever degree of authority he possessed pertained only to security; no one suggested he had any ability to order changes in the foul conditions in which the prisoners were kept or to order their release.\footnote{Id. para. 372.}

Kvocka freely admitted that he knew the detainees were being mistreated by other guards and that the food and sanitary conditions were “below an acceptable level.”\footnote{Id. para. 375.} He saw dead bodies piled up, men lying unmoving on the tarmac exposed to the elements, he heard from inmates and other guards the stories of men beaten on their way to the toilet and dragged out at night for abuse by undisciplined and untrained guards. He said he reported these events to the camp Commander, who said nothing could be done. Still Kvocka did not willingly leave his job—he was removed from the camp command after only seventeen days because of his efforts to aid his two incarcerated Muslim brothers-in-law to escape. He said on the stand that given the chance he would have remained in his

\footnotesize{36. Kvocka, Case No. IT-98-30/1-T, paras. 330-386.}
\footnotesize{37. Id. paras. 395, 397 nn.678 & 386-396.}
\footnotesize{38. Id. para. 372.}
\footnotesize{39. Id. para. 375.}
Dragoljub Prcac was a sixty-three year old retired reserve police officer with two disabled children, called back to service during the war. The prosecution had originally claimed that he replaced Kvocka as Deputy Commander but the evidence at trial sustained only a finding that he was a kind of administrative aide, a paper pusher at the camp who "called out names" of prisoners for interrogations or transfers and seemingly had some authority to decide in which building they would be housed. There were no substantiated allegations he either personally abused prisoners or ordered their abuse by others. He worked at the camp only twenty-two days. Prcac claimed he didn’t want to serve at Omarska at all but did so only under “duress”—the Head of Public Security threatened him and his family if he refused—a claim the trial court did not ultimately accept. The evidence mainly showed that he walked around the camp doing his administrative chores in full view of the dead bodies piled up and the men lying face down on the tarmac. His office was located so that he could hear the cries of prisoners beaten during interrogations, and he could see their bloody and broken bodies as they emerged. He could also see prisoners beaten on their way to being fed and, because he arranged the assignment of prisoners to buildings, he knew firsthand the filthy and crowded conditions in which they lived. One of the victim witnesses said Prcac called names of women out at night for other guards to sexually abuse; another woman, however, testified that without his help she would not have survived the camp. The court concluded he had “some influence in the camp” due to his position as an “administrative aide.”

Milojca Kos, the third defendant, was a younger, poorly educated former waiter drafted into the police reserve, one of three guard shift commanders at Omarska who stayed the 36-day course from the opening to the closing of the camp. Several prisoner witnesses said his shifts were the least abusive; one incident, however, implicated him personally in extortion of money and there was evidence that guards on his shift sometimes beat prisoners in his presence.

Mlado Radic, the fourth defendant, was also a shift commander but he differed from Kvocka, Prcac, and Kos in that there was stronger and much greater evidence involving him personally with prisoner abuse. Prisoners testified that his was the most dreaded of shifts—more prisoners were beaten and killed than on any other shift, and the guards that served under him were the most brutal and uncontrolled. Radic was also personally charged with rape and sexual offenses against female prisoners in the camp.

40. *Id.* paras. 374-85, 399.
41. *Id.* paras. 422-424.
42. *Id.* paras. 438, 439.
43. *Id.* paras. 472-489, 490-496.
44. *Id.* paras. 506-561.
The fifth defendant, Zoran Zigic, was indisputably shown to have committed heinous acts against Muslim prisoners. He was not a guard at Omarska; yet, because of close connections with influential Serbs he was allowed to enter the camp at will and to torture prisoners. He forced prisoners to crawl like animals, beat them, then made them wash their bloody faces in puddles of muddy water. A few prisoners tried to commit suicide rather than face his assaults.45

V. THE TRIAL

These, then, were the five defendants brought to the International Criminal Court at The Hague to be tried on charges of war crimes and crimes against humanity. Essentially, the Omarska trial turned on what law was to be applied to the conduct of these five accused; there was no significant dispute at trial about the horror of life at Omarska. Indeed, the defendants stipulated to the deplorable conditions in the camp, conditions which had already been amply documented in an earlier trial of Dusco Tadic, an abusive companion of Zoran Zigic, who had also tortured and killed inmates in the camp.46

The prosecution, for obvious reasons, however, wanted to take full advantage of the shock effect of the live testimony from victim witnesses about the hellish conditions in the camp: 139 witnesses appeared personally; nearly 500 exhibits were introduced; and the trial consumed 113 days.47

The principal defense of all accused, except Zigic, was that in the anarchic camp hierarchy they had no control over anyone else's behavior; they neither committed abuses personally nor ordered others to do so; and they performed assigned guard or administrative duties in a proper manner. Indeed, the Trial Chamber ultimately found that "none of the accused was instrumental in establishing the camps or determining official policies practiced on the detainees therein."48 So the critical question was a legal one: on what recognized theory of international law could these camp functionaries be held liable for war crimes and crimes against humanity based on inhumane treatment of civilians in detention?

Given that the quality and quantity of food and water, medical services, and even facility maintenance were controlled by authorities outside the camp; that the dreaded interrogations were conducted by outside security police who came and went every day; and that the guards, including the

45. Id. paras. 581-511. Zigic was convicted of even more vicious crimes against prisoners at the nearby Keraterm camp where he did serve as a guard for a brief period. Simultaneously with the Omarska trial, trials were being conducted of several camp officials from the Keraterm camp which operated in close proximity to Omarska in an abandoned ceramics factory. The Keraterm trial ended in guilty pleas to a single count of persecution for which the shift leaders who had not engaged in any personal abuse and who had tried to minimize the abuse of others were sentenced to prison within the three to seven year range. The commander for six weeks who had himself committed a murder received ten to seventeen years. Id. para. 710 n.1181.
46. Id. para. 790.
47. Id. paras. 768, 796, 798.
48. Id. para. 4.
defendants, were basically responsible only for the security of the inmates, i.e., not letting them escape and had no power to release prisoners, was the record here sufficient to hold the five accused as war criminals?\textsuperscript{49} Even if as the Trial Chamber ultimately found, Omarska breathed an “atmosphere of sweeping impunity and consuming terror”\textsuperscript{50} run by anarchistic and untrained guards—often intoxicated. According to one detainee, “When they were feeling bored, they would just lash out at you for no reason at all.”\textsuperscript{51} But, was the mere status of being a guard supervisor or administrative aide enough to qualify a man as a perpetrator of a war crime or a crime against humanity? Was there a viable legal theory or precedent in international law to support such convictions? The defendants were charged in the indictment with crimes against humanity (persecution and inhumane acts) and with crimes against the law and customs of war (outrages upon personal dignity). Under either charge, murder, confinement in inhumane conditions, torture, beating, and sexual abuse would meet the standards if these acts could be attributed to these defendants.\textsuperscript{52}

The Tribunal statute defined as criminally liable anyone who planned, ordered, committed, or otherwise aided and abetted in the planning, perpetration, or execution of a war crime or crime against humanity.\textsuperscript{53} An earlier Tribunal decision in the Tadic case had included within the term “committing,” “those modes of participating in the commission of crimes which occur where several persons having a common criminal purpose embark on criminal activity that is then carried out either jointly or by some member of this plurality of persons.”\textsuperscript{54} A variant of this theory had been used in the Nuremberg cases to impose liability on persons at all levels who knowingly participated in the operation of the “death camps.”\textsuperscript{55} The Omarska court now took that “death camp” theory and extended it to the facts in the case before it. It is a theory not dissimilar from our homegrown criminal conspiracy theory, but not one frequently used outside the continental United States. Indeed, the common purpose or criminal enterprise doctrine, as it has come to be called, had not been specifically charged in the Omarska indictment at all, though the court found that language in an earlier case and the facts pleaded in this one put the defense on notice that such a theory might be employed.\textsuperscript{56} The defense argued persistently, nonetheless, that it was wrong to proceed on

\textsuperscript{49} Id. paras. 28-39.
\textsuperscript{50} Id. para. 43.
\textsuperscript{51} Id.
\textsuperscript{52} Id. paras. 119, 200. The crime of persecution requires proof that the prohibited acts were committed with an intent to discriminate on political, racial, or religious grounds (in this case being non-Serbs).
\textsuperscript{53} ICTY Statute, supra note 34, art. 7; Prosecutor v. Kvocka, Case No. IT-98-30/1-T, para. 240 (Nov. 2, 2001).
\textsuperscript{55} The Nuremberg precedents are discussed at length in Prosecutor v. Krocka, Case No. IT-98-30/1-T, paras. 268-306 (Nov. 2, 2001).
\textsuperscript{56} Id. paras. 245-248.
a theory not specifically charged, an argument, I hasten to add, that they have continued to argue on an appeal that is still pending.

The Omarska court went decidedly further than any prior decision in applying this "criminal enterprise" theory. It decided that depending on the level of participation of an accused in a criminal enterprise it was possible to be either a co-perpetrator or, less culpably, an aider and abettor in that enterprise who could be held criminally liable for all the alleged acts of the other participants in the enterprise. The court held that Omarska was a criminal enterprise designed to persecute Muslims and that all five Omarska defendants were co-perpetrators in that enterprise.\(^57\)

The court found support for its ruling in the Nuremberg prosecutions that established that an accused could be a co-perpetrator of a criminal enterprise if he joined up or participated in an ongoing operation even if he was not involved in its original planning or design, so long as he knew at the time of joining about the illegal purpose of the enterprise. Nuremberg prosecutions of participants in the Nazi concentration camps—Dachau, Belsen, and Mauthausen—had used the theory extensively, but not always consistently. Some of the Nuremberg cases seemed to require nothing more than passive inaction by camp workers, but most such cases involved death camps where the annihilation of the inmates was notorious to everyone who worked there. And one strain of Nuremberg camp cases suggested that if the accused had not personally participated in criminal acts or ordered them, he must be shown to have had the requisite authority to change abusive conditions; if he were merely a guard or prison functionary, he must be shown to have misused his camp position to ill-treat the prisoners.\(^58\) Thus Nuremberg precedent definitely left some doubts as to whether mere participation as a guard in a non-death camp—however pervasive the brutality and deprivation—was enough to justify liability as an international war criminal.

The Omarska court opted for a middle ground between absolute guilt for members of a camp staff and a need to prove active participation in prisoner abuse. It said: "When a detention facility is operated in a manner which makes the discriminatory and prosecutory intent of the operation patently clear, anyone who knowingly participates in any significant way in the operation of the facility or assists in facilitating its activity, incurs individual criminal responsibility. . . ." Thus, "This does not mean that anyone who works in a detention camp where conditions are abusive

\(^{57}\) Id. paras. 319, 408, 470, 504, 566, 610, 707.

automatically becomes liable as a participant in a joint criminal enterprise. The participation must be significant. . . [But] a person with significant authority or influence who knowingly fails to complain or protest automatically provides substantial assistance or support to criminal activity by their approving silence, particularly if present at the scene of criminal activity.” 59 In deciding the threshold level for significant participation, factors such as the size of the enterprise, the position of the accused, the amount of time spent in the camp after learning of the criminal nature of the enterprise, efforts made to prevent criminal activity, nature of the crimes committed, and any gratuitous cruelty shown by an accused in performing his functions would be taken into account. 60 The value of the criminal enterprise theory to the prosecution of a war crime is obvious: If an accused is found to be a significant participant he can be held responsible for crimes he may not even have known about which were committed by other participants to further the purpose of the enterprise or foreseeable from the common purpose. The theory is being extensively employed at this moment in the Milosevic trial.

The court thus found all five defendants guilty of the war crimes and crimes against humanity visited upon the hapless inmates of Omarska during the time each defendant was there. The court first dismissed out of hand the notion that anyone working there would not have known of the brutal assaults and foul conditions—all but one admitted they did. The court said they must also have known that the purpose of the assaults was to intimidate and terrorize the inmates because they were non-Serbs whose disappearance from the region was devoutly sought. This sufficed to show the necessary discriminatory intent required under international law for persecution as a crime against humanity:

Omarska was not a place where occasional random acts of cruelty against inmates occurred or where living conditions were simply hard. This was a hellish environment in which men and women were deprived of the most basic needs for their survival and of their humanity. . . . Omarska was a place where beatings occurred daily and with devilish instruments of torture. No one could mistake Omarska for merely a badly run prison; it was a criminal enterprise designed to operate in a way that destroyed the mind, body, and spirit of its prisoners. 61

But still there was the crucial question of whether these defendants’ participation in the Omarsaka criminal enterprise was significant enough to invoke criminal liability. While an accused’s mere presence in the camp might not be enough for guilt, that presence, “particularly when coupled with a position of authority, is a probative, but not determinative, indication that an accused encouraged or supported the perpetration of the

59. Kvocka, Case No. IT-98-30/1-T, paras. 306, 309.
60. Id. para. 311.
61. Id. para. 707.
crime."62 The higher the accused's position in the camp hierarchy the more his tacit approval of misdeeds by others would contribute to carrying out the invidious purpose of the enterprise. Applying this principle to the five defendants, the court found them all guilty as co-perpetrators63 in the running of the Omarska prison camp, itself a criminal enterprise:

[Defendants were not . . . mere lowly cogs in the wheel of the camp's operation. They were not janitors who swept the floors or even cooks who served the meals. Their function was the raison d'etre of the camp: to ensure that these thousands of men and dozens of women remained captive in their deplorable surroundings, subject to the whims of errant groups, opportunistic visitors, or the official interrogators who came to abuse them. Without their guarding function . . . there could have been no camp at all.64

According to the trial court, Kvocka's continued presence, even for only seventeen days, "sent a message of approval to other participants in the camp's operation, specifically guards in a subordinate position to him and was a condonation of the abuses and deplorable conditions there."65 Whatever his actual role in the administration and functioning of the camp he was widely perceived as the camp commandant's deputy and as an experienced police officer. The prosecution sought a thirty-five-year sentence; the court gave him seven years, half of which had already been served awaiting trial.66

What about Prcac, the wounded old man who seemed to do little more than carry lists of prisoners and call out their names? Was this enough to qualify him as a war criminal? The court found that despite the banal

62. Id. para. 257.
63. All five defendants were found to be co-perpetrators rather than aiders and abetters of the criminal enterprise. Under Tribunal jurisprudence an aider and abettor is one who provides tangible assistance or active moral support to the perpetrator that has a substantial effect on the commission of the crime. He need only have the knowledge that his acts may facilitate the commission of the crime, not necessarily an intent that the crime be committed. See id. paras. 253-265. In the case of persecution, an aider or abettor must be aware the crimes he assists or supports are being committed with a discriminatory intent. Id. para. 262.
64. Kvocka, Case No. IT-98-30/1-T, para. 706.
65. Id. para. 405.
66. Id. para. 708. On December 17, 2003, the Appeals Chamber of the ICTY granted provisional release pending appeal to Kvocka who by that time had served over 80% of his sentence. Decision in the Request for Provisional Release of Miroslav Kvocka, Prosecutor v. Kvocka, Case. No. IT-98-30/1-A (Dec. 17, 2003).
nature of his duties Prcac occupied a position different from ordinary guards: he walked unhindered about the camp; witnesses said he was "calmly efficient" or "callously indifferent" even while witnessing abuses by others; "his administrative duties constituted one of the many integral cogs on the wheel of a system of gross mistreatment"; he had "some influence over guards..."; he was "responsible for the movement of detainees within the camp"; his cardinal sin was "he remained impassive when crimes were committed in his presence"; and "his silence can be regarded as giving moral support or approval to the perpetrators." He received a sentence of five years, taking into account his ill health and post-arrest cooperation with the prosecutor. By the end of the trial he had already served 19 months.67

Kos and Radic were the shift commanders, one with the least, the other with the most drastic reputation for tolerating cruelty by guards on their shifts. The court found that the fact Kos stayed until the camp closed, along with his authority as a shift commander to order other guards around, was a "sufficient basis" on which to convict him. His job as shift commander "was integral to the efficient and effective functioning of the camp." It also credited the testimony of inmates that on one occasion he spurred on other guards to beat prisoners who had to run the gauntlet to get food.68 Kos received 6 years in prison, 3½ of which he had already served.69 Parenthetically, 9 months after the sentence was handed down in November 2001, Kos was released for good behavior, provoking outraged comments reported in one newspaper from victim advocates that "the worst fears are now realized. Even the relatively lenient sentences are only a fig leaf... 'What were they [the judges] thinking' when they handed down these sentences for concentration camp shift commanders that would free them in 9 months... [i]s this what all this vast effort, skill, dedication, and funding went to accomplish?"70

At the other end of the spectrum, the court found "a substantial amount of credible and consistent evidence that a large number of crimes were committed by guards on Radic's shift... and Radic... never exercised his authority to stop the guards from committing such crimes... his failure to intervene gave the guards a strong message of approving of their behavior. Given his position of authority over the guards, his non-intervention condoned, encouraged, and contributed to the crimes' commission and continuance."71 Radic was additionally convicted of personal involvement in sexual crimes against the women in the camp and received a sentence of 20 years.

Finally Zigic, the opportunistic abuser who did not even hold a camp position but gratuitously imposed his own reign of terror as a random

67. Kvocka, Case No. IT-98-30/1-T, paras. 438, 459, 460, 461, 462, 726.
68. Id. paras. 489, 490, 497.
69. Id. para. 735.
70. The Worst Fears About the ICTY are Confirmed, Posting of Michael Sells, msells@haverford.edu, to just-watch-l@listserv.acsu.buffalo.edu (July 31, 2002).
71. Kvocka, Case No. IT-98-30/1-T, paras. 538, 745.
night visitor to the camp was sentenced to 25 years. He was found to be a co-perpetrator in the criminal enterprise, though he had no position of authority.

Omarska functioned as a joint criminal enterprise and Zigic played a significant role in perpetrating crimes . . . as part of that enterprise . . . . The Trial Chamber finds that Zigic's participation in Omarska camp was significant. 72

I note again that appeals by all defendants are still pending.

VI. IMPLICATIONS

What lessons can we draw from the Omarska case about international norms of criminal liability and the legitimacy of international courts that must apply those norms to the citizens of individual sovereign states? The question is particularly apt as the new International Criminal Court becomes operational.

First, I would affirm that those persons indicted for war crimes and crimes against humanity who come before the Hague Tribunal receive a fundamentally fair trial. Despite differences from our own system, such as the absence of jury trials, the appealability of acquittals by the prosecution, and the less stringent rules against hearsay evidence, I never felt that any defendant failed to receive his full due process—indeed the time consumed with insuring defense rights was more than adequate. 73 In some ways the processes of the court could have been more efficient—and they are improving with time and experience—but those managerial deficiencies did not detract from the fairness of the trials. I cannot, accordingly, subscribe to the objections so frequently voiced against the new International Criminal Court that it would not accord due process to defendants before it. Nor did I ever see indications of bias against any of the defendants by judges from other nations based on ethnic, racial, or religious grounds. So, on balance, procedural fairness was not a problem in the

72. Id. paras. 610, 682, 684, 750.
73. A few interesting procedural sidelights on Zigic. He did not take the stand as a witness, but under Tribunal Rules he was allowed to make an unsworn, uncross-examined statement about the merits of the case, which he did. He also tried to plead an intoxication defense, that he was addicted to alcohol and did things under its influence he would not ordinarily do. The court rejected the legitimacy of an alcoholism defense for a persistent pattern of violent abuse involving brutality and weapons.

Like the other four accused, Zigic had a self-chosen counsel paid for by the Tribunal assisted at various times by nine defense team members. (Virtually all defendants ask for and receive assigned counsel.) Subsequently, after the trial, the Registrar determined that in fact Zigic had sufficient means to pay for his own counsel and withdrew the assignment for purposes of the appeal. (The costs of the appeal were estimated to be $32,000.) His current "substantial means" were acquired by cash transfers from members of his defense team who in turn diverted monies from their compensation as assigned counsel. Two apartments, a truck, and a commercial business were purchased with such revenues. Altogether, Zigic got $175,000 from his defense team. The Tribunal had spent, up to July 2002, almost $1.5 million on his defense.

Omarska or any other trial I am aware of, including the Srebrenica massacre trial on which I also sat.

As to substance, international humanitarian law is a work in progress. Except for the Nuremberg prosecutions fifty years ago and a few isolated national prosecutions, there was almost a complete absence of judicial precedent applying the various treaties and compacts and formulations of customary international law as the basis of individual criminal liability at the time the ICTY was set up. It was inevitable that the court had to flesh out bare boned doctrines that had never or only fitfully been applied to individuals before. Indeed, that may be one of the Tribunal’s long-lasting legacies—it has resulted in a virtual explosion of concrete applications of international law doctrines that had resided mainly in treatises and in the halls of diplomacy. That law inevitably had to be different from any one nation’s law but yet had to encompass acceptable norms of the civilized world.

The criminal enterprise doctrine that figured so prominently in the Omarska trial is an example of this developing jurisprudence. It is not only extremely useful, if not indispensable, in detention camp prosecutions, but, I believe, is conceptually valid. An entire operation may be tainted or contaminated with an illegal purpose—in Omarska the purpose was to terrorize the Muslim inmates and reduce them to subhuman status. That said, the criminal enterprise doctrine must have outer limits if the notion of individual criminal guilt is to be maintained, rather than replaced by notions of collective guilt which was, after all, the very evil the Tribunals were set up to avoid. Nuremberg spawned the doctrine but did not complete the refining process. I would hope that the continuing jurisprudence of the ICTY and the evolution of the ICC can complete the process.

The five accused in Kvocka have, I believe, been placed on the proper side of the dividing line between legal culpability and mere passivity; the Omarska accused had in varying degrees somewhat more authority than ordinary guards; their knowledge of how the camp operated could not be denied. Still some commentators might balk at the idea that a police officer ordered to duty at the camp as an administrative aide, who bears no demonstrable ill will against the inmates, who does not participate in the barbarities and remains there only briefly, should be held as a co-perpetrator of the criminal enterprise. Indeed, one moderate American judge with whom I discussed the case on my return worried that when the United States sets up a temporary prison camp in Afghanistan or Iraq or Guantanamo and if assertions are made that prisoners are being mishandled on a widespread basis, the U.S. soldiers who acted as guards or supervisors could be brought before an international tribunal (if there were one with jurisdiction) and charged with war crimes. Though at this point theoretical, that scenario is not totally implausible. Even less theoretically, I have myself wondered whether the abuse of prisoners in some U.S. prisons has not on occasion been so endemic and brutal that any
guard (were ordinary guards to come within the sway of the doctrine) could be found guilty of human rights violations of prisoners.

Although the Kvocka decision goes out of its way to distinguish the case of a prison where abuses are “occasional,” we all have come into contact with prisons in our own country where abuse is longstanding, rampant, and pervasive. Would it be enough in such places to implicate all non-abusive guard supervisors who remain on the job with knowledge of what is going on? Must they walk away from their jobs or turn in the miscreants to higher authority to escape criminal liability? To take the point even further, is the corporate employee who knows of but takes no part in corporate wrongdoing harmful to investors criminally liable if she does not become a whistleblower? The criminal enterprise doctrine is being increasingly employed in international criminal courts where crimes are committed in the context of military campaigns and prison camps. But its future development and further extension must be carefully monitored.

Second, there are and will continue to be endless debates about the nature of evil and whether international and internal civil conflicts inevitably demonize ordinary citizens into doing terrible deeds or tolerating terrible deeds done by others which they would not countenance in ordinary times. Some say that full-scale criminal trials are not the answer for such passive involvement and find preferable truth and reconciliation commissions which require the people who merely executed or stood by while the nefarious policies instituted by others were executed to hear the victims’ stories, to confront and respond to them, and eventually to do community penance. The apparatus of criminal trials would then be reserved for the leaders who initiated these policies and assigned their implementation to underlings as did the commandant of Omarska and the police chief who setup the camps. Indeed, some of the more recent hybrid tribunals set up in the wake of brutal civil wars like Sierra Leone have announced that prosecutions will be limited to twenty to thirty of the leaders, and the rest of the wrongdoers left to national courts or to truth and reconciliation commissions. In Rwanda, indigenous tribal courts—gacaca—have been established to drain off tens of thousands of accused Hutus which the international court and the domestic courts in Rwanda can never be expected to reach. But here again experience shows that more informal tribunals can themselves stray into abuse of human rights and must be vigilantly watched.

More fundamentally, the level at which complicity with evil should be legally sanctioned—as opposed to morally condemned—remains a dark underside of international criminal law. A biography of the Nazi leader,

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Albert Speer, refers to the "lingering question of when, in any polity, compliance with injustice turns into complicity" and stresses "how easily, given appropriate conditions, people will allow themselves to be mobilized into violence, abandoning the humanitarian traditions they have built up over centuries to protect themselves from each other."75 We have seen it in our own time—Chechnya, East Timor, Sierra Leone, Cambodia, Bosnia, Rwanda.

But then should we give up on the task of laying down rules for tolerated behavior in war? To do so consigns a century of slow progress beginning with the Hague and Geneva Conventions through the Genocide Convention and ending with the permanent ICC to the ash heap of history. War itself may be madness, but—while it remains resistant to cure—we must still deal with its cruel side effects, the brunt of which are visited on women and children.

Third, the Yugoslav Tribunal has been criticized for focusing too much of its resources on "little fish," as in Omarska, while the "big fish"—Serbian President Radovan Karadzic and Serbian Commander Ratko Mladic—swim free. I have no doubt that had Karadzic and Mladic been apprehended, the prosecutors would have leaped at the chance to try them.76 And the situation has improved of late. Slobodan Milosevic—perhaps the biggest fish of all—is currently on trial as are other highly-placed Serbian and Muslim generals and political leaders. While the question persists whether if these leaders remain at large it is just to go ahead and try the lesser functionaries, and while an observer of the Omarska trial might well ask, would not the trial have been different if Meakic—the acknowledged camp commander—had been there to weigh in on the command structure among the guards in the camp, on whether he did receive complaints from some of the defendants about prisoner abuses, and on whether he reported abuse to his own higher ups, still some ICTY veteran prosecutors object to that line of thought. In the words of one ICTY prosecutor:

Talk of big fish and little fish implies that unless you are high on the scale of authority, you are not worth going after and that's an insult to the person whose family was blown away by a little fish.77

Others say that telling and retelling the terrible tales of these concentration camps—both the Nazi camps and the Bosnia ones—is vital for history's sake: a precaution against future revisionists who claim such

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77. Peter Ford, *How to Prosecute a War Crime*, CHRISTIAN SCI. MONITOR, Mar. 13, 2000, at 6 (statement of Brenda Hollis); see also Ian Buruma, *How Iraq Can Get Over Its Past*, N.Y. TIMES, May 9, 2003, at 31. ("Getting rid of the top leaders is the easy part. Those still alive can be taken care of by international tribunals.... The difficulty begins with the middle ranks: the prison wardens, university professors, army officers and pen-pushers who carried out murderous orders. How far down the ranks should you go in purging them? Should they be punished, or simply removed from public office?")
events never took place and a cathartic for the societies—especially the victims—where they took place.\(^7\)

Yet even its ardent supporters admit that the Hague Tribunal has not succeeded in changing the culture of the Balkan region. According to one highly-placed former ICTY official:

It has made scant contribution to the prosecution of war crimes and crimes against humanity—the pillars of its subject matter jurisdiction—in the courts of the states of the former Yugoslavia. Thus, the irony may be that despite the millions of dollars spent on building a judicial infrastructure in the Hague, there is virtually no effective enforcement of these important laws in the courts that ultimately matter most, i.e., the regions’ domestic courts.\(^7\)

And, I know of no systematized program yet in place for transferring technical or legal experience from the Tribunal to national courts or for training national judges, prosecutors, or investigators in war crimes prosecutions. That same former ICTY official concludes:

The possibility that local prosecution of war crimes can be conducted in a reasonably fair and impartial manner in the former Yugoslavia is now a very distant prospect indeed. The people of the region will, therefore, probably not see the many perpetrators who were not sent to the Hague face justice. This is a tragedy that may have been avoidable. Hopefully, it is a lesson from which the ICC, as well as other international efforts to promote and deliver justice, will learn.\(^8\)

Finally, sadly, it is not at all clear that the ordinary citizens in the countries where the war crimes were committed have taken away any messages from the Hague trials that would prevent recurrence when the next crises occurs or the next ethnic hate campaign is launched. A recent story in a London newspaper makes the point all too graphically. It concerns the return, 10 years later, of Nusreta Sivac, one of the Omarska trial’s rape victim witnesses, to Prijedor:

[T]he only memorials are large cruciform monuments to the Serb “liberators” of Prijedor—those who drove out and murdered its non-Serb inhabitants. . . .

. . . . [O]f the 200 who ran the Omarska camp, fewer than 10 have been arrested. These men still live on the land they “cleansed.” Nusreta knows them. She recognizes their faces and often knows their names. And as one of the most public survivors and witnesses of Omarska, they know her. Nusreta has testified in trials at The

\(^{78}\) See, e.g., Should We Let the Death Camps Die?, \emph{Parade Mag.}, Nov. 20, 2002, at 16 (debating the best way to remember victims of the Holocaust).


\(^{80}\) Id. at 17.
Hague. She has appeared in television documentaries and newspaper articles.

This summer, Nusreta returned to Prijedor to reclaim the apartment that was stolen from her when she was taken to Omarska. The flat was occupied and its contents looted by one of her former colleagues at the Prijedor courthouse where Nusreta worked as a judge.

Nusreta says Serb acquaintances, including former friends, turn their heads when she walks by. She locks her door at night and pulls the shutters down. In Banja Luka, a hand grenade was thrown into the home of another returnee.

But Nusreta believes she has no choice but to be here. She has no home but here, no belongings except her property here which, perversely, she must now buy back from the local authorities even though it was stolen from her. Having survived what she thought was a certain death in Omarska, she feels compelled to broadcast her testimony so those who suffered and died are not forgotten.

And back at Omarska, the grass grows and the sheep graze around the peaceful red sheds where now only memory testifies to what happened 10 years ago.81

Have the war crimes tribunals been worth the candle? Will the lessons learned from their mistakes as well as their successes be put in practice in the new International Criminal Court which the United States so bitterly opposes? Most importantly, will international courts be the well-spring of significant new developments in humanitarian law in the new century, or simply relegated to a footnote in history? Your generation will write the answers—ours has only posed the questions.

Articles