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## Defending a Person Charged with Genocide

Anthony D'Amato\*

In August 1997, I was asked to represent Dr. Milan Kovacevic, a Bosnian Serb anesthesiologist who had been indicted by the International Criminal Tribunal for Yugoslavia ("ICTY") for complicity in genocide. Had he lived through it, his trial would have been the first by the ICTY for the crime of genocide. I would like to describe some of the tribulations of defending clients accused of grave humanitarian offenses in the ICTY. Perhaps by relating stories of my experiences there, some insights for reform can be drawn. First, I will begin with the background of the case itself.

### I. THE HISTORY AND BACKGROUND OF THE CASE AGAINST DR. KOVACEVIC

Dusan Vucicevic, a schoolmate and fellow anesthesiologist of Kovacevic's, asked me to take his friend's case. The opportunity seemed fascinating, but the idea of defending a genocidal maniac (as I then conceived of it) was quite foreign to my world-view. There were many publicity-seeking attorneys who were anxious to defend a person accused of genocide, so he certainly could have gotten another lawyer if I turned him down. I felt free to accept or reject the case depending on what I could find out about Dr. Kovacevic and the context in which he operated.

Dr. Kovacevic was the chief anesthesiologist and chief administrator of the Prijedor City Hospital in Prijedor, Bosnia (formally known as Republica Srbska). Dr. Kovacevic also served as deputy mayor of that town, and it was in his official position that he was indicted by the ICTY for genocide. He was at work in the hospital on the morning of July 10, 1997, when some unknown individuals arrived, claiming to have a

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\* Leighton Professor of Law, Northwestern University. This essay is dedicated to Professor M. Cherif Bassiouni, who more than any other person was responsible for the coming-into-being of the international criminal tribunals for Yugoslavia and Rwanda. I met Cherif in 1967 at the Wingspread Conference, the first conference of scholars assembled to work out a plan for a future international criminal court. We both worked on the subcommittee to define "aggression," a subject that still lacks a good definition even though the court of our visions in 1967—now the International Criminal Court—is rapidly being ratified and should soon begin its work.

Red Cross package to deliver to him downstairs. He went downstairs to receive the package, but it turned out to be a set-up: North Atlantic Treaty Organization (“NATO”) detectives were waiting for him. They arrested him and stuck him on a helicopter along with the local police chief’s son. The son had been arrested by NATO after Simo Drljaca, his father (who was the indicted person) was shot to death while resisting NATO arrest. The detectives took the doctor and the young man to Tuzla and put them into a metal container, the kind used for transatlantic shipping. With the scorching July sun beating down on this metal container, the container’s heaters were turned on, and the two men were pushed against the wall. It was so hot in the container that the NATO soldiers could not bear to remain in it for more than a few minutes at a time. While the two prisoners were standing against the wall, Dr. Kovacević’s indictment of complicity in genocide was read to them—there was no indictment against the police chief’s son—by NATO personnel entering and leaving the trailer. As the indictment was slowly read, soldiers came in and out, pressing their guns against the back of the prisoners’ heads and clicking the triggers. Each time the prisoners thought they would be killed. The procedure went on for a couple of hours.<sup>1</sup> Then the two prisoners were taken out of the sealed container and transported by helicopter to the detention center in The Hague, where soon after his arrival, Dr. Kovacevic suffered his first heart attack.<sup>2</sup> I have reason to believe that when he died of an aneurysm some eleven months later (two weeks into his trial), his death may have been caused in part by the torture he endured at the hands of the NATO police.

I did not immediately accept the offer to defend Dr. Kovacevic at the time I was approached to do so in Chicago. Instead I left the question open, pending my first trip to The Hague. Before undertaking the trip, I studied the situation of a deputy mayor in a Yugoslavian city in order to obtain background about my client. I compared what I studied to the lengthy indictment issued against him.

The recent history of Yugoslavia revealed that as a result of the long years of rule under the progressive communist Marshall Tito, three distinct chains of command have been established throughout the state: the police, the military, and the civilian. These three “branches” of government were not just distinct, they were entirely separated. Police matters belonged to the police, army matters to the army, and whatever belonged to neither was the provenance of civilian authority. This divided structure was so rigidly enforced that I could not imagine how a civilian official such as Dr. Kovacevic, a deputy mayor, would have any authority over detention camps set up by the army or the police. In fact, if a civilian official tried to exert any authority

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1. The indictment was read in English and Serbian, and it was a lengthy document.

2. I stated these allegations in full in open court at a pretrial stage in the case of Dr. Kovacevic. The prosecutor made no comment nor objection, and the judges asked me no question about my account of what had happened.

over the camps, he would probably have found himself joining the camp's population. In short, no one crossed governmental power lines. Of course, this system was found to be quite useful in avoiding responsibility. As I discovered by reading news articles and books by investigative reporters on the Yugoslav civil wars, when reporters tried to inspect the various detention camps spread throughout Yugoslavia, the army officials guarding the camps claimed to lack authority to let the reporters in. The reporters knew that this was not true. They suspected the army officials to have been ordered to deny any authority over the camps so as to protect all army personnel against future indictments if war crimes occurred in the camps.

I must add that such future indictments were not expected to come entirely from international tribunals. Violations of the laws of war were also crimes under Yugoslavian law. Yugoslavian leaders such as Slobodan Milosevic, Radtko Mladic, and Radovan Karadzic—perhaps on the advice of their attorneys—sent out many directives to the army and police not to engage in any kind of criminal activity prohibited by The Hague and Geneva Conventions, and if they did so they would be court-martialed and prosecuted for those crimes by Yugoslavian authorities. Thus it became standard operating procedure for army and police officials to deny any knowledge of torture, rape, brutality, and especially genocide. And as I have said, they denied any authority for setting up the detention camps where torture and rape allegedly occurred, and instead claimed that authority and control over the camps was in the hands of the civilian authorities.

If the official documents contained blanket prohibitions on criminal activities, I wondered how the “real” orders were conveyed to the army and the police. I discovered, by reading histories of the brave Serbian resistance movement during World War II, that the Chetniks (the original “freedom fighters”) were able to frustrate the Nazi occupiers by never wearing any military insignia or identification of any sort, by never accepting written orders from anyone, and only by obeying comrades in the resistance movement who were personally known to them. The Yugoslav resistance against the German Army was tremendously effective, thus testifying to the efficacy of a system of oral orders sent down through a rigid chain of command. This tradition of non-identification, facial recognition, and verbal orders of course carried through the army and police after the Tito regime ended, and has made it especially difficult for the prosecutors at the ICTY to obtain evidence of “command authority” to prosecute Yugoslavian leaders for war crimes committed by the regular army, the paramilitary army, and the police.

With this general background in mind, I tentatively signed up to represent Dr. Kovacevic subject to the possibility of withdrawing after I had checked the case out at The Hague. Once in The Hague, I watched the process of selecting defense counsel. Belgrade, the capital of Serbia, provides lawyers free of charge to Serbians on trial at The Hague. Dr. Kovacevic had been provided one of these attorneys before I was contacted, and after he accepted me he dismissed his Serbian counsel. Dr. Kovacavic did not trust the Belgrade lawyer and he told me that he was not sure that the lawyer

was entirely on his side. As I discovered, it is possible, in high profile political cases, that the home country is more interested in protecting officials at home who have not been indicted than in protecting an arrested person like Dr. Kovacevic. Indeed, at my first meeting with the prosecutor, I was told that what the Office of the Prosecution most wanted from Dr. Kovacevic was his testimony as a witness against other high officials in Serbia. For this cooperation, the prosecutor was willing to plea-bargain. It was certainly clear to me, at that meeting, that if I could get a good deal for my client, I might reach a tentative agreement with the prosecutor subject to my client's approval. I would not protect any at-large war criminals in Serbia. In fact, my sympathies were entirely on the side of the job the tribunal was doing, and I regarded myself as an officer of the court whose responsibility it was to help the tribunal be fair and render justice by virtue of the adversarial process. In contrast, the many Yugoslavian lawyers representing defendants at the ICTY contemptuously referred to it as a kangaroo court. Before seeing Dr. Kovacevic in the detention center, I had a preliminary meeting with the prosecutor assigned to the Kovacevic case. Mr. Michael Keegan had been in the office of the Judge Advocate General and served as a prosecutor in the US military in numerous court-martials. A relatively young and no-nonsense kind of person, Mr. Keegan met me in the hallway of the tribunal building. I suggested that we go to his office on the top floor of the building, but he said that the entire prosecutor's offices were off-bounds to defense counsel. Having seen the cramped little room in which I was supposed to do my work, I asked him rhetorically if the reason for that rule was to keep defense counsel from drawing comparisons.

But what I was really thinking about in my meeting with Mr. Keegan were two questions: first, what hard evidence did he have against Dr. Kovacevic, and second, if he did have hard evidence, was there room for reasonable plea bargaining? In my own mind I had no intention of going to trial if there was evidence beyond a reasonable doubt that Dr. Kovacevic was complicitous in the commission of genocide. In that case, I would have met with him in the detention center and told him frankly that I would use my best efforts to get him the best possible deal with the prosecutor, but that I would not be effective as his trial attorney. He would be better off finding an attorney who had no psychological difficulty in the possibility of freeing a genocidal killer. On the other hand, I thought, if Mr. Keegan had no hard evidence to tell me about and my best judgment indicated that Dr. Kovacevic was not in fact complicit in the commission of genocide, then I could defend him zealously.

There was no doubt that Dr. Kovacevic had foolishly shot his mouth off during the crisis. Like many people interviewed by a TV crew, he launched into his personal ideology and "wisdom" about the situation in Yugoslavia. Mr. Keegan showed me the transcripts of Dr. Kovacevic's television interviews (which were widely broadcast at the time), and I later had occasion to view the tapes. The deputy mayor of Prijedor had no reservation in telling the television cameras that the Serbs and the Muslims in Prijedor could no longer live peacefully together, and that if the Muslims were wise they would move out of town. He said that there were many other cities where the

majority Muslim population had expelled the Serbs. Resettlement and home-swapping is inevitable, Dr. Kovacevic said, because he foresaw violence erupting in the increasingly volatile town of Prijedor.

Now perhaps a deputy mayor should have been more politically correct, more inclusive, more pluralistic. But from what I could determine, he had committed no crime in stating his personal opinions, no matter how forcefully and no matter how strongly he held them. And indeed, in the bloody aftermath, it would seem that any Muslim citizens of Prijedor who had taken Dr. Kovacevic's advice and moved out of town might today owe their lives to him. The Dayton Accords, promising a unified, pluralistic Bosnia, have never even gotten off the ground, and a great deal of blood has been shed since the Accords were signed in 1994.

I also knew, from reading documents prior to my meeting with Mr. Keegan, that Dr. Kovacevic seemed to have no personal prejudice against Muslims or Croats. As director of the city hospital, he had insisted on the retention of Muslim doctors at a time when other civilian authorities were clamoring for their removal. After the civil war started to reach Prijedor, he insisted that the hospital take in and care for Muslims who had been shot or otherwise wounded by the Serbian army and paramilitary forces, even though enormous pressure was put upon him to bar the hospital doors to such persons. The population of Prijedor at the time was evenly divided between Serbs and Muslims, and Dr. Kovacevic had the respect of both groups.

I asked Mr. Keegan whether he had any evidence in his possession that Dr. Kovacevic had ordered any acts of genocide? No. I asked whether the prosecutor had any evidence that Dr. Kovacevic had ever participated in any acts of genocide? No. Was there any evidence that he had ever seen or otherwise witnessed the commission of any acts of genocide? No. Was there any evidence that Dr. Kovacevic was connected in any way to the commission of acts of genocide? No. Was there any evidence that Dr. Kovacevic was in the chain of command that could have orally ordered the commission of any acts of genocide? He signed some orders that arguably facilitated the commission of genocide. As deputy mayor of Prijedor, which was home to a major Serbian detention camp, Dr. Kovacevic would have had substantial local knowledge and some connection to the camp by virtue of his municipal duties such as making sure that transportation to the camp was available and that electric lights in the city were on. These were the kinds of municipal orders that Dr. Kovacevic had signed, and a great deal would be made of them at trial.

What I heard was enough to convince me that I could defend Dr. Kovacevic in good faith. I did not know what the factual evidence might eventually show, but he was entitled to have those facts tested for accuracy, sufficiency, and relevance at trial. He was entitled to the vigorous cross-examination of witnesses against him.

After a brief meeting and consultation (the Registrar provided a translator) with my client at the detention center, I met again with Prosecutor Keegan. We discussed a plea bargain. In return for Dr. Kovacevic's plea of guilt of genocide, his total

cooperation regarding the identification of other perpetrators, and his willingness to appear as a witness against them if they are apprehended, Keegan said that the Office of the Prosecutor would ask the tribunal to impose a lighter sentence. "No deal," I replied. I would not have my client admit that he was guilty of the worst crime in the world—genocide—if in fact he was innocent. I would have considered, however, a plea bargain to a lesser crime. It was Mr. Keegan's turn to say "No way." Dr. Kovacevic was the biggest "fish" caught so far and this was the first trial for genocide at the ICTY. I could see that there were political issues here. In its first genocide trial, the ICTY was not about to explain to the world that it was wrong in indicting Dr. Kovacevic for genocide. Would reporters then ask the tribunal the embarrassing question whether Simo Drljaca, who was accused along with Dr. Kovacevic of genocide, was also not guilty? If so, did not the British NATO soldiers overreact by shooting him in the back when he was resisting arrest?

However, an idea occurred to me that Mr. Keegan said he had never heard before. I suggested that if the prosecution would put a cap of five years on my client's sentence in the event that he was found guilty of complicity in genocide, I would then arrange for my client to provide the prosecution with all the names and information that he had, along with a promise to be a witness against these named suspects. But if Dr. Kovacevic were acquitted, then he would have no obligation to cooperate with the prosecution. Mr. Keegan did not like this proposal—I did not think he would.

At the end of our meeting it was quite clear that the prosecutor would be going all-out to convict Dr. Kovacevic. It was going to be a rigorous and difficult trial. When the trial was only into its third week, as I have previously mentioned, Dr. Kovacevic died. But there had already been voluminous pretrial proceedings, oral arguments in open and closed sessions, examination of documents, and viewing of videotapes.

## II. OBSERVATIONS ON THE OPERATIONS OF THE ICTY

In the course of preparing for trial, it became clear to me that my client knew a great deal about the chain of command in Bosnia and Serbia. His information would be valuable to the Office of the Prosecutor. It stood to reason that many people in Belgrade who may have commanded the commission of war crimes, who had not been arrested or even indicted, would have considerable interest in encouraging a person who is on trial, through his Belgrade attorneys, not to divulge such information with the prosecutor. To be sure, some of the lower-level defendants at The Hague—those who served as camp guards, for example—may not have figured this out. But Dr. Kovacevic was a learned man, and quite skeptical to boot. He was primarily concerned with the quality of his legal defense, and not the quality of his lifestyle in the detention center. (Indeed, he often reassured me that he was comfortable there, and that he was not mistreated.) He decided to substitute me for the Belgrade attorney who had initially been assigned to him because, as he put it, he was not sure he would be getting a good defense at the hands of "the boys from Belgrade."

When accused persons accept the legal services of lawyers from back home, they obtain a large number of benefits that an outside counsel such as myself could not easily provide. For example, the lawyers at The Hague from Croatia, Bosnia, and Serbia were all being paid a salary by the ICTY that was far above their hourly rate back home. For me, however, the same salary was far below my hourly rate in the United States. Thus I operated with as much efficiency as possible, whereas the Yugoslav lawyers seemed to have an endless amount of time on their hands for meeting, talking, and reminiscing with their clients. In turn, the clients at the drab detention center welcomed the attention and conversation of their lawyers. The Yugoslav lawyers provided their clients with packs of cigarettes, food from the local restaurants, news from back home, and messages from the clients' relatives and friends. More importantly, they were adept at arranging for family members to travel to The Hague to meet with the accused persons in the detention center. Perhaps their home governments paid for these visits and expedited the travel arrangements. These were the benefits to the clients of counsel from back home, but there were probably costs as well. The Yugoslav lawyers did not seem well prepared for trial; they did not initiate motions on behalf of their clients (with the exception of many complaints about conditions in the detention centers); and their briefs did not reflect (in my opinion) much comprehension about the relevant substantive rules of international humanitarian law. So far, the decisional record at the ICTY indicates that nearly all accused persons who have achieved any success (either in acquittals, or getting charges dropped, or obtaining lighter sentences) have been represented by attorneys from the United Kingdom, the Netherlands, Canada, and the United States.

I certainly do not claim that every lawyer out of Serbia may have had a conflict of interest. But international war-crimes prosecutions are quite different from domestic-law criminal cases regarding the assignment of counsel. Within a non-totalitarian country, it is relatively easy to find defense counsel who will use their best efforts for a client; after all, their own reputation is at stake. However, in international tribunals such as the ICTY, lawyers from the home country also may feel a patriotic duty to protect other citizens back home from international prosecution. Moreover, after the case is over, they themselves have to go back home. Their own practice and livelihood might be negatively affected if their client at the ICTY cooperated with the prosecutors and became a witness against fellow citizens.

Another strange element of choosing defense counsel at The Hague is not familiar to US lawyers accustomed to common law courts. This is the controlling role of the Registrar. The Registrar, one might think, ought to be a glorified clerk. However, the Registrar at The Hague wields a great deal of decision-making power. The Registrar occupies a huge suite of offices at the ICTY, and has an enormous operation. The rooms for defense counsel, in comparison, are tiny and under-equipped.

Registrars rule with an iron hand, making key decisions that would, in the United States, be decided by judges or counsel. Prosecutors and judges defer to them. They are powerful and power-hungry civil servants of the European bureaucratic/technocratic tradition. I have discovered, through my experience with another European international court, the European Court of Human Rights, that the Registrar is even used as an informal conduit for messages to counsel of substantive matters in their cases. What apparently goes on behind the scenes is that a judge tells a Registrar official about the judge's impression on a substantive issue in the case, and the Registrar then conveys that information to counsel as if it is the Registrar's own thinking independent of the court's.

I do not see anything really wrong with this, even though it is quite contrary to US litigation practice where clerks' messages to counsel deal only with matters of compliance with procedural rules. In fact, as I have learned at the European Court of Human Rights, it can be useful to counsel to obtain informal word from the judges through this kind of intercession by the Registrar. The judge avoids official commitment on the issue, and counsel has a chance to revise a brief or a pleading to take care of the objection "suggested" by the Registrar. Even so, the more the Registrar deals with substantive matters, the more likely over time the Office of the Registrar will increase in power and prestige. The aggregation of power in an officially "neutral" Office of the Registrar inserts an unpredictable third element into the adversary process. It can be extremely disconcerting. My initial impression of the Registrar upon arrival at The Hague was that the officials in that office were emotionally supportive of the prosecutors. They seemed to regard me and other defense counsel as necessary evils.

Over time, I modified this initial assessment. Nevertheless, it still seems to me that there is a kind of institutional bias at work. The offices of the Registrar, the judges, and the prosecutors take up most of the space in the building; these people see each other socially in a relatively small city like The Hague; and they tend to share a sense of pride and accomplishment when a war criminal is convicted. I am sure if I worked there full time as a judge, prosecutor, or registrar, I would soon come to feel the same way. Perhaps the establishment of a "Defense Counsel Bar" might help to redress the institutional imbalance, and indeed at the time I was defending Dr. Kovacevic I talked with a number of defense counsel about this possibility. The idea may someday get off the ground. The crunch, as I see it, is if a Defense Counsel Bar lobbies for better offices and facilities in the ICTY building, the Registrar will perceive this as a budgetary threat to the Registrar's own plans for expansion and improvement of its services. The number of people employed by the Registrar has skyrocketed from a handful at first to over 300 employees at the present time. Hence, there is a possibility that the Registrar may find it institutionally upsetting to allocate any budgetary assistance to an association of defense counsel.

I believe it is important for lawyers who may be thinking of serving as defense counsel at the ICTY or other international criminal tribunals to know of some

examples of the obstacles that can be placed in their path by the Office of the Registrar. At the outset of my representation of Dr. Kovacevic, I announced to the Registrar my intention to bring in co-counsel. I was flatly informed that the Registrar has discretion to approve or disapprove such a request. I did not contest the Registrar's power to pay or refuse to pay fees to my co-counsel. But the Registrar informed me that even if I paid for co-counsel out of my own pocket, they still had to approve the selection. I was told that this is what the rules require, and if anything is a conversation-killer in dealing with the Registrar it is when they invoke "the rules." (These rules can defy all reason, such as the rule that requires all counsel to provide a photocopy of their actual law school diploma in order to practice in the Court.) When they do so, they do not genuflect and lift their eyes slowly toward the ceiling. But they convey that picture anyway.

If the Registrar makes it tough to get co-counsel, what follows is a compounding of troubles. I had invited some Northwestern Law students to come over for a few weeks in the summer to help me prepare the Kovacevic case for trial. I assigned one to become familiar with the topics of the voluminous documents already filed in the case and to be prepared to locate them when needed from a huge stack of three-ring binders. We had the binders spread out in the courtroom on several of the tables and chairs that were set aside for the defense attorneys. During the morning proceedings, this student was allowed to be inside the courtroom. But when the court recessed for lunch, the guards told her to leave. We had planned to use the lunch break together to prepare for the afternoon's arguments. Indeed, the Registrar personnel, the translators, and all the prosecutors and their assistants regularly used the courtroom during the lunch break. I was allowed to use it, but my assistant was not. The reason: "Security." This word is even holier than "the rules." I told the guard that my assistant would stay there with me because we were working on the case, and it would be impossible to move all the documents and ring binders to the small table in the defense counsel office without thoroughly rearranging them and setting us back considerably in our work. The guard argued with me, and I told him that unless he arrested me, my assistant and I were not moving.

The guard left to call in reinforcements. Meanwhile another guard who had observed the situation told me that the sergeant in charge is new on the job, and that the sergeant who was usually there would have understood my need for workspace.

The Deputy Registrar then showed up with a contingent of guards who threatened my student, and she decided that it was wise to leave the courtroom. Respectfully and patiently, I explained to the Deputy Registrar that it was unfair to allow the prosecutors' assistants to use the courtroom during lunch break but not the assistants for the defense counsel. "The rules," he said, "do not provide for people who are not admitted to practice before this tribunal to be in the courtroom during the lunch break." Why? I asked. "Security," he said (and there was a virtual thunderbolt outside the building).

"Well," I protested, "you can look again inside her briefcase to see if there are any Molotov cocktails." (We both knew that my student, as well as every person in the building, had previously been searched carefully by the guards at the entrance gate.) That's not the point, he replied; the point is that a rule is a rule. True, a different head security officer might have interpreted it differently, but this one did not, and he was not necessarily wrong. I asked the Deputy Registrar what he was going to do about it. "As a favor to you," he said, "I won't do anything. Normally I'd write this incident up as a breach of your obligations to the tribunal, and you would receive a letter of reprimand from the court."

The foregoing account of the Registrar's mind-set is reflected to an extent in the rule-bindedness of the judges themselves. In the early days of the ICTY, various procedural rules were drafted by a committee of international experts. Naturally, though they thought they had done a brilliant job, in fact they failed to anticipate many of the problems that would come up. Unintended consequences then arose, but "a rule is a rule." Only the judges could ever permit a departure from the rules, and then, only after counsel had filed a motion, supporting briefs, asked for oral argument on the point, and made a convincing showing that an absurd rule was in fact absurd.

One example may illuminate the hassle—but also the ultimate fairness of the judicial proceedings. At the pretrial stage in my case, the prosecutor wanted to amend the indictment to include more counts against my client. The rules of the tribunal provided that, with respect to all indictments, the prosecutor submits the indictment to a reviewing judge who passes on their sufficiency and approves or disapproves them. The framers of the rules had in mind the initial indictment process, prior to the arrest of any person. But since the rule on its face applied to all indictments, the prosecutor figured that he could add new indictments to the Complaint in an *ex parte* proceeding before the reviewing judge. Without notice to me, he approached the reviewing judge (the judge who had initially approved the genocide indictment against Kovacevic and Drljaca), and she simply approved the added counts. At this point, Dr. Kovacevic was already in custody and I was already defending him. Yet the prosecutor resorted to this *ex parte* procedure because the rule seemed to authorize it. As soon as I received a copy of the Amended Indictment (listing a great many more counts against my client), I filed a motion in protest. A hearing was held before our pretrial panel (three judges). I argued as vigorously as I could that an *ex parte* procedure, once a person has been arrested and is represented by counsel, is fundamentally unfair. The prosecutor was seeking to change the entire nature of the case against my client without allowing me to object to the evidentiary sufficiency of the added indictments. The prejudice to my client, and to the reputation for fairness of the tribunal, was compromised by such a procedure, even if the rules of the tribunal appeared to allow for it. I argued that any rule that frustrates fundamental fairness should not be allowed to stand.

The tribunal took the motion under consideration. I went back to Chicago (where fortunately I had a semester's leave for research) and continued to work on the

merits of the case from my office. Two months later, on my next trip to The Hague, I heard informally that the judges had met in plenary session and made several amendments to the rules of procedure. I went to the Registrar's office and obtained a copy of the changes. I discovered that the judges had amended the indictment rule so that once an accused person is in custody, an indictment cannot be amended on an ex parte basis. The rule was also made retroactive. So I discovered, in this totally informal way, that I had won my motion. But the panel never issued a decision on my motion. Indeed, the motion was now moot because the rule had been changed. Future counsel, faced with an amendment to the complaint against their clients, would simply assume that the rules always provided for representation by counsel if the prosecutor sought an amendment to the indictment. Although I was glad to have won even a silent victory, future counsel may be inhibited from challenging the rules of procedure assuming that such motions are never granted (the court simply changes the rule in closed session). Therefore it is important for defense counsel to know that rules can be challenged and that judges can be persuaded that a given rule is unfair. Unfortunately, because the tribunal hides in secrecy their reasons for changing a rule, the rules may appear over time to acquire an imperviousness that renders them virtually unchallengeable. This false history may operate as a deterrent to any defense attorney who might otherwise wish to challenge a rule. Perhaps these European tribunals are influenced by canon law, which traditionally is changed in secret meetings of the church hierarchy who then tell the world that the canon law has never been altered.

For counsel trained in the common law tradition, civil law courts such as the ICTY may seem to be unfair venues to defend clients accused of a crime. There is no doubt that the job is difficult. Yet the recent international criminal law tribunals have taken on a grave and historic responsibility for making hitherto immune state officials responsible for their criminal conduct. I left the ICTY with the same total commitment to its goals as when I first took on the Kovacevic case. Perhaps the foregoing comments may aid in improving the fairness and efficacy of the tribunal.

