Testimony before House Armed Services Committee on Military Tribunals

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Mr. Chairman and members of the Committee: Thank you for inviting me to testify today about the rules and procedures under which the ad hoc international criminal tribunals, particularly the Tribunal for the former Yugoslavia, operate. I served as a judge in one of the Trial Chambers of ICTY from 1999 until the end of 2001. Before that I had been a judge on the U.S. Court of Appeals for the D.C. Circuit for over 20 years and its Chief Judge for 5. Since leaving the ICTY I have participated in the training of both Prosecutors and defense counsel for the several international criminal courts. In the brief time allotted, I will try to describe the way in which the Yugoslav Tribunal, in which the U.S. has been an active participant since its establishment in 1993, deals with problem areas that military commissions will also encounter. ICTY is a U.N. court which adjudicates war crimes, crimes against humanity, grave breaches of the 1989 Geneva Convention and genocide, committed on the territory of the former Yugoslavia from 1991 forward. It has an Office of the Prosecutor, several Trial Chambers of three judges each, nominated by member countries and selected by the General Assembly, and an Appeal Chamber of seven. Judges are to have experience in international law; many American lawyers serve as both Prosecutors and defense counsel at the ICTY as well as an American judge. Two American judges have been past Presidents of the Court. The ICTY is authorized to sentence convicted defendants to prison terms up to life, but not to impose the death penalty. To date 161 indictments have been issued; in 95, proceedings have been completed; 48 are serving or have served sentences; 34 are awaiting trial; 11 are in trial; and 13 are pending appeal.

Rules of Procedure

The Rules of Procedure and Evidence for the ICTY must be agreed to by at least 10 of the 16 permanent judges in plenary session. There is a Rules Committee of judges on which I served during my tenure that screens rule change proposals and makes recommendations to the full court. Most of the practices in the courtroom are governed by these Rules which are frequently amended to reflect the experience of the court and to allow for flexible adjustments to new situations. Article 21 of the ICTY Statute passed by the Security Council contains a brief list of rights of the accused to which the Rules must conform but it is couched in quite general terms; it mandates a fair and public hearing, the presumption of innocence, notice to a defendant of the charges in his own language, time to prepare a defense, trial in his presence and without undue delay, a right to counsel, assigned if he cannot afford his own, a right "to examine or have examined the witnesses against him and to obtain the attendance of witnesses ... on his behalf," a right not to be compelled to testify against himself, and the right to an interpreter, if necessary. There are over 125 Rules elaborating on the provisions of the basic ICTY Charter. For instance, the requirement of guilt beyond a reasonable doubt is found in the Rules not in the Statute. I have a copy of the ICTY Rules here, but I will describe only and briefly the ones I think relevant to military commission power.

Rights of Suspects During Investigations: A suspect who is questioned by a Prosecutor must be informed of his right to assistance of counsel and to an interpreter, his right to remain silent and told any statement he makes will be recorded and may be used in evidence. The suspect must voluntarily waive counsel for the questioning to continue. He receives a copy of any statement recorded (R.42-3). Once he is charged, no questioning by the Prosecutor can take

place without counsel unless there is a recorded waiver of that right. (I note Article 55 of the Rome Statute governing the International Criminal Court forbids any coercion, duress or threat during an investigation, including torture or any form of cruel, inhumane or degrading treatment.) After arraignment before a judge who reads the indictment to the accused and assures he understands it, the defendant is brought personally before the court every 120 days thereafter, with counsel, for a status hearing and is asked by the court if he has any complaints about his physical or mental treatment (R. 65bis).

Rights to Pretrial Discovery: The Prosecutor at a time set by the pretrial judge must file with the court and defense a summary of the evidence the Prosecutor intends to introduce at trial, any admissions by the parties and a statement of matters not in dispute and those in dispute, a list of witnesses the Prosecutor intends to call (by name or pseudonym) and a summary of the facts about which each witness shall testify, and the parts of the indictment to which their testimony applies, as well as whether the witnesses will testify in person or pursuant to R.92bis (more on 92bis later) in audio or video form or by transcript from a prior proceeding, and, finally, a list of exhibits the Prosecution will offer. The defendant in turn files before trial a general statement on the nature of his defense and matters he takes issue with in the Prosecutor's pretrial statement and the reasons therefore. At the end of the Prosecutor's case the defendant files a list of his witnesses (name or pseudonym), a summary of facts about which his witnesses will testify and the part of the indictment to which they are relevant, whether they will testify in person or pursuant to 92bis, and finally his exhibits. The accused need not be present at these discussions of the Prosecution and defense work plans (R. 65ter).

Additionally, the Prosecutor must make available to the defense within 30 days of the initial appearance copies of all material supporting the indictment and all prior statements obtained by the Prosecutor from the accused, copies of all statements of all witnesses the Prosecutor intends to call and any statements taken pursuant to Rule 92bis, and he must let the defense inspect all objects or documents material to preparing his defense or intended to be introduced at trial, or materials previously taken from the defendant (R. 66). The defendant has a reciprocal obligation to let the Prosecutor view his evidence. Under Rule 68, the Prosecutor must disclose any material it has knowledge of that suggests the innocence of or that may mitigate the guilt of the accused or affect the credibility of a Prosecution witness. (This is the ICTY version of the Brady Rule.)

Limits on Disclosure: The ICTY Rules anticipate that there will be types of evidence that Prosecutors (or possibly defense) will not wish to disclose publicly. Thus, Rule 66 provides that if the Prosecutor believes information, otherwise disclosable, may prejudice ongoing investigations or be contrary to the security interests of a State, he may apply to the Chambers *in camera* to be relieved of his disclosure obligation but he must show the evidence to the Chambers judges. Similarly, Rule 69 says that in "exceptional circumstances" the Prosecutor may apply to Chambers to order nondisclosure of the identity of a victim or witness who may be in danger until such person can be brought under the protection of the Tribunal, i.e., a witness coming from afar who fears reprisal in her home village. Rule 70 also provides for confidentiality of the identity and origin of information provided to the Prosecutor on a confidential basis which is to be used only to generate other evidence. The initial information may not be disclosed without permission from its original source and cannot be itself introduced

into evidence without being shown to the accused who, if it is put into evidence, is allowed to challenge it. Rule 59bis makes special provision for a State to object when it is directed by the Court to produce documents. If it proclaims that production of certain documents will endanger national security it can ask for protective measures such as an *ex parte* or *in camera* hearing, disclosure in redacted form, disclosure without recording in the transcript and immediate return of the document to the State. Although measures to ease the concerns of States and witnesses are thus provided, nothing in the Rules permits evidence to be used to convict a defendant that is not shown to him and that he is not allowed to challenge. I know of no case in which evidence not disclosed to the defendant has been admitted. Rule 75 sets out a list of protective measures for witnesses at risk: they include orders of nondisclosure to the public or media of the witness' identity, expungement from the record of any identifying data, imagery or voice-altering mechanisms if, as at the ICTY, the proceedings are televised, one-way closed circuit TV, assignment of a pseudonym and closed hearings. Rule 79 permits hearings to be closed for security or witness protection. It must be the Court who orders it, however, and the reasons for closing must be made part of the public record. Otherwise the sessions are to be open (R. 78) and a full and accurate record is to be kept of all proceedings (R. 81). The Court may delay disclosing the identity of a victim or witness to several days before trial but that identity must be disclosed in time to allow the defendant to prepare for trial. An early declaration by the Trial Chamber in *Prosecutor v. Tadic* (IT-94-1-J, Op. & Judgment, 1 May 1999) that in some cases the witness' identity might be permanently kept from the defendant provoked such an uproar, especially from American lawyers, that the Court ultimately rejected it as a possibility. (Rule 81 of the ICC also allows the Court on petition of the Prosecutor and after an *ex parte* hearing to

permit nondisclosure of information prejudicial to national security or an ongoing investigation.) But again the Prosecutor cannot introduce that information into evidence without disclosing it to the accused.

What Kind of Evidence is Admissible?: The ICTY Rules allow for a range of ways in which evidence may be admitted. Rule 71 permits depositions to be taken for use at trial whether or not the deponent is able physically to appear. A Tribunal presiding officer is appointed (usually a senior legal officer) to supervise the deposition which can be held away from the site of the court; the defense must be allowed to be present and to examine the deponent; the deposition may also be conducted by videoconference; a record must be made and the request to proceed by deposition must be approved by the court after an explanation of the circumstances which justify it. Rule 71b provides for testimony by video link in real time in the courtroom. I have personally seen this done and was satisfied that it provided adequate opportunity for both sides and the court to examine and observe the witness. Rule 94 provides for judicial notice of facts of common knowledge and also of adjudicated facts or documentary evidence from other Tribunal proceedings. An example of the latter would be the judicial notice taken in a case I sat on involving a prison camp in which the deplorable camp conditions had already been proven in a prior case and valuable time would have been wasted if they had to be proven all over again. The defendants did not in fact disagree. (*Prosecutor v. Kvocka*, IT-98-30/1-T, Judgment, 2 Nov. 2001.) Parties, of course, can stipulate to evidence. (The ICC Rules also allow for video and audio testimony on order of the Court "provided the technology permits the witness to be examined by the Prosecutor, the defense and the Chamber," and the venue chosen is "conducive to the giving of truthful and open testimony" and to the safety and privacy

of the witness (ICC R. 67). ICC Rule 68 allows prior recorded testimony or transcripts to be admitted but only if both parties had an opportunity in the prior testimony to cross-examine the witness or if the witness is present currently and does not object to being cross-examined in the present proceeding.) I mention in passing, special limitations on evidence in sexual violence cases in both the ICTY and ICC that: do not require corroboration of a victim's testimony, do not accept a defense of consent where the witness was in a coercive atmosphere such as a prison camp or was threatened with violence if she did not succumb, and do not permit examination of her prior sexual conduct. The Trial Chamber *in camera* examines any proffered evidence of consent to determine before admission if it is reliable and relevant. Expert evidence must be submitted ahead of trial in writing and if the other party does not object, the expert need not appear; if there is an objection, the expert must appear for cross-examination.

When Can Written Testimony Take the Place of Live Witness Testimony?: Rule 89 is often cited, I believe, inaccurately for the proposition that the ICTY may consider any kind of evidence, including hearsay, it finds probative on any matter. Rule 89(c) does say a Chamber may admit any relevant evidence which it deems to have probative value. But Rule 89(f) says a Chamber may receive the evidence of a witness orally or, where the interests of justice allow, in written form. From the beginning, however, the Court has put limits on the circumstances in which written evidence may substitute for oral testimony. The Rules originally expressed a preference for live testimony unless it was impracticable and decisions of the Appeal Chamber during my tenure refused to admit unsworn statements of a dead witness taken by investigators in the field as not having sufficient indicia of reliability. In 2000 the Court adopted a new comprehensive Rule 92bis setting out the kinds of non-live evidence admissible and the

circumstances in which they could be used. In sum, R. 92bis, which details when written testimony can be admitted, overrides Rule 89(c)'s general grant of authority to hear any relevant or probative evidence. Rule 92bis says that a court can only admit written evidence of a witness "which goes to proof of a matter other than the acts and conduct of an accused as charged in the indictment." It then lists factors militating in favor of allowing written testimony: evidence of a cumulative nature where other witnesses have given oral testimony to the same effect, relevant history, political or military background, statistical surveys on demographics, etc., the impact of crimes on victims, the character of the accused and sentencing evidence. Factors militating against the substitution of written for live witness testimony include an overriding public interest in an oral presentation, where the objecting party can demonstrate the nature and source of the written evidence renders it unreliable or where its prejudicial effect outweighs its probative value, and any other factor making it more appropriate for the witness to be subjected to cross-examination. To be admissible the written statement must have attached to it a declaration by its author that the contents are true to the best of his knowledge and it must be witnessed by an official of the State where the witness is located or by an officer of the Tribunal. The witnessing official must declare that the identity of the author has been verified, that the statement maker told the official that the facts represented therein were true to the best of his knowledge, that the author knew he could be prosecuted for falsehoods and it must contain the date and place where the statement was made. If a person has died or cannot be found or is unable to testify for health reasons, the trial court can waive the required form of the written statement if it finds the circumstances in which it was made satisfy sufficient indicia of reliability. Similarly, 92bis allows for admission of transcripts of prior testimony before the Tribunal—again only if the

transcripts do not go to the acts or conduct of the accused which have been charged in the current proceeding. (Compare ICC Rule 68, which requires for prior recorded testimony that the parties and court had opportunity to examine the witness at the time of the transcript.)

These are all general criteria to be sure and call for individual judgments by the finders of fact when substitution of written for oral evidence is permissible, but they do nonetheless represent a requirement that the judges justify substitutions for live testimony and indicate, in general, the outer perimeters of their discretion. In several cases, though admitting 92bis statements, the judges have nonetheless required the witness to be available for cross-examination if requested.

Rule 92bis, while providing for admission of written statements or transcripts of past testimony in lieu of live witnesses, still retains two essential elements of the time-honored right to face one's accusers. It requires that opportunity for cross-examination by the opposing party be retained in the case of past transcripts and forbids written statements that involve evidence of acts or conduct of the accused that go to proof of the wrongdoing charged. As far as the different types of oral testimony—video and audio recordings, and depositions—the right of cross-examination is retained (though with depositions judicial questioning is not possible). No secret testimony kept from the defendant is allowed into the record.

Exclusion of Illegally Obtained Testimony: Rule 89(d) provides for exclusion of evidence if the judges find its probative value is substantially outweighed by the need to assure a fair trial. Rule 90 also provides for a right against self-incrimination. Rule 95 underscores the ban: "No evidence shall be admissible if obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to or would seriously damage the integrity of the

proceedings." The ICC Rule is virtually identical, though more specific that no evidence obtained in violation of the Statute or recognized human rights will be allowed.

Conclusion

The ICTY Rules in my experience provide flexibility in obtaining testimony through deposition, judicial notice, video recording for witnesses who are in distant countries and will or cannot appear live at the Hague. These modes allow for cross-examination and some for judicial questioning. I admit to being critical of the substitution of written witness statements for oral testimony in general, based on my preference for our own system of adversary hearings, but on balance I found the 92bis route allowing for such written submissions on peripheral and background matters not unduly prejudicial to a fair trial. The Rules also allow measures to protect the confidentiality of evidence that could involve national security but in the final analysis do not allow the material to be used to convict the accused unless he has an opportunity to challenge it. Similarly at least one-half of all witnesses who testify request some form of protection of identity by way of pseudonym or ban on disclosure of their identity to the public, but again their identity must eventually be disclosed to the defense. To my knowledge the Prosecution at the ICTY has not found these Rules impossible to operate under—nor has the defense. A record number of convictions have been secured.

Thank you. I hope these observations on the practice of international criminal tribunals will be of use in locating the right balance between the dictates of fair trials and deserved punishments for perpetrators of war crimes in the military commission context as well.

ADDENDUM

Heresay within Live Testimony: The ad hoc tribunals do not have any bar against heresay evidence per se. This is in line with the practice of many Continental countries. This does not mean however that there are no restraints on its use: not only must the trier find it relevant and probative under Rule 89© but several trial /chambers have refused to admit it if they find it unreliable. I will admit that depending on the background of judges at the ICTY some chambers were stricter than others in screening heresay in this regard.; the common law judges being not surprisingly more strict than those from civil law countries. I myself was uncomfortable with the use of heresay and like many of the judges asked searching questions about the circumstances in whichthe witness on the stand learned of the heresay material. There is a tradition among heresay country judges aswell that even though heresay may be admitted, the judges should be cautious in the weight they give it; there are many expressions in the judgements that it is not deemed of the same weight as directly observed testimony. That is certainly the way in which I approached it. It is also extremely important that the Tribunal abides by the standard laid down by the European Court of Human Rights that a conviction may not be based on heresay alone or principally. Thus I donot think a conviction based on a staff officers affadavit that he had beentold by line officers that they saw a defendant do something would pass muster. In general the ICTY has been sticky about the qualityof evidence, even eyewitness testimony; I presided over anAppeal panel which reversed the convictions of 3 Croats based on eyewitness testimony aunanimous panel found unreliable.