



California lawyers say The Hague is every bit as laid back as California—but with better public services. The Binnenhof complex (below) houses the Dutch Parliament and other government offices in the center of the older portion of the city.

Californians at The Hague

A look inside the International Criminal Tribunal for the former Yugoslavia finds it staffed by a brain trust of California lawyers.

BY GERALD F. UELMEN

I recently returned from a unique adventure: guiding 19 law students from Santa Clara University School of Law and UC Berkeley's Boalt Hall School of Law through a two-week immersion at the International Criminal Tribunal for the former Yugoslavia. We observed war-crimes trials in progress and met many of the prosecutors,

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defense lawyers, and judges who work at the court, which is housed in a converted office building at The Hague, Netherlands, three tram stops from the Peace Palace.

There we found a cadre of California lawyers hard at work, several of them serving as lead prosecutors or defenders in the most significant trials. In fact, some of the most successful innovations in seeking justice for the victims of European genocide have come from the ingenuity and creativity of California lawyers.

A HYBRID IS BORN

The Yugoslav tribunal—the first international war-crimes tribunal since Nuremberg—was established by the United Nations Security Council in 1993. It is a unique court—a hybrid, a bit like a cross between a horse and a donkey. It combines elements of the Anglo-American common law adversarial system and the civil law system prevailing in Continental Europe—very different systems, based on very different visions of how best to achieve justice.

In our common law system, factual determinations are driven by lawyers, with a judge perceived as an impartial umpire. The rules of evidence assume that most cases will be submitted to juries, which must be shielded from evidence that might lead them to erroneous conclusions.

In the civil law system, factual determinations are driven by the judge, who decides which witnesses to hear after all the evidence has been submitted in a dossier. Few rules of evidence exist because, as a professional, the judge is trusted to sort out the evidence and give it the appropriate weight.

The Yugoslav tribunal combines facets of both systems, and the “mule” that results has some of the best and worst features of each. The judges and lawyers who populate the court come from both common law and civil law traditions in almost equal proportions. The question of who is more adept at riding the mule creates a tension that energizes the trials.

Clearly, the best feature of the adversarial system that the hybrid court has incorporated is the cross-examination of witnesses—and in that facet, the common law lawyers have an advantage. For example, during our visit we observed a master of cross-examination, Alan Tieger, carving up the lead defendant, Momcilo Krajisnik, the co-president of the Bosnian Serb Republic. Krajisnik had already been on trial for more than a year, charged with genocide and crimes against humanity in the “ethnic cleansing” of large areas of Bosnia. Prosecutor Tieger began 15 days of cross-examination of Krajisnik with an intensity that obviously unnerved the defendant. On September 27, Krajisnik was convicted of

persecuting, exterminating, murdering, deporting, and forcing the transfer of civilians and sentenced to 27 years. He was acquitted of the genocide charges.

AMERICAN LEGAL INGENUITY

Tieger and his friend and fellow prosecutor from California, Mark Harmon, arrived at the tribunal in 1994, before any indictments had been returned. Among the other prosecutors on loan was Terree A. Bowers, who later served as U.S. Attorney in Los Angeles.

Tieger and Harmon became partners in the Krajisnik prosecution, which moved to marquee status after Slobodan Milosevic died last March. Their experience investigating and

prosecuting cases together for the U.S. Department of Justice was excellent preparation for the role they would play in the Balkans, interviewing witnesses and gathering evidence of war crimes. When they arrived more than a decade ago, prosecutors at The Hague were relying on “requests for assistance” to gather evidence from governments that were often complicit in the very crimes being investigated. Harmon persuaded the Office of the Prosecutor to simply issue subpoenas duces tecum, a procedure never before used by an international tribunal to compel a country to produce documents.

Although the tribunal subsequently quashed the subpoenas, it held that it could issue an order to compel production. Harmon also pioneered the use of summonses to compel witnesses to appear

for questioning, much like grand jury subpoenas.

LESSONS TO BE LEARNED

Harmon makes a convincing argument that the Yugoslav tribunal’s trials are superior to American trials at ferreting out the truth. The best feature of the civil law approach incorporated there is the judge’s determination to resolve all ambiguities—even when the lawyers would prefer to leave some things ambiguous for fear that resolving them will hurt a case. In all of the major trials Harmon has handled at the tribunal, including that of Radislav Krstic—the court’s first successful genocide prosecution—the judges called witnesses who had not been summoned by either side.

The 16 permanent judges are elected by the United Nations General Assembly. Most are professional judges who rose to the highest ranks of judicial office in their home countries, with an occasional academic or diplomat sprinkled into the mix. The American judges have included Gabrielle Kirk McDonald, the first black woman appointed to the federal court in Texas; Patricia M. Wald of the U.S. Court of Appeals for the D.C. Circuit; and Theodor Meron, a professor of

The Yugoslav tribunal is a hybrid, combining elements of the common law adversarial system and the civil law system.

international law at New York University, who stepped down as president of the court in 2005 and now hears appeals. Assisted by up to nine ad litem judges appointed for single cases, a panel of three judges sit in separate chambers for trials, and a panel of five sit for appeals.

The guilt of the accused must be proved beyond a reasonable doubt in cases brought to the Yugoslav tribunal. Indigent accused are provided with appointed defense counsel, who often work in pairs—a common law lawyer teaming up with a civil law lawyer. Four years ago defense counsel organized an Association of Defense Counsel (ADC) to protest the lack of resources allocated to them. The current president of the 200-member ADC is a San Francisco attorney, Gregor D. Guy-Smith. He and Colleen Rohan, another lawyer who handles cases at The Hague, have spent most of the past two

years there with their three children. They found it virtually impossible to commute from California when engaged in the intense preparation required for an ongoing trial.

Until recently it was rare for women to serve as lead counsel for the defense at the Yugoslav tribunal. Rohan attributes this to cultural factors: Virtually all the defendants are males with traditional views of women's roles, and they are allowed to choose their appointed counsel. But in a signal of change, Rohan is one of three women serving as lead counsel for the defendants in an eight-defendant trial that began in July.

For Guy-Smith, the biggest initial adjustment in handling cases at the Yugoslav tribunal was learning to address evidentiary issues in terms of weight rather than admissibility. Very little evidence is excluded, but a lawyer must anticipate how to persuade the judges to give evidence the weight he or she

A CLOSER LOOK AT THE CALIFORNIANS

GREGOR D. GUY-SMITH

In 1978 Guy-Smith was a member of the first graduating class from the law school of New College of California, and he immediately went into solo practice, doing criminal defense work. Most of Guy-Smith's legal experience in California was in federal court, including his representation of former Symbionese Liberation Army member James Kilgore, who pleaded guilty to charges of forgery and possessing a pipe bomb.



of Justice prosecuting civil rights cases—including the case against Los Angeles Police Department officers convicted of beating Rodney King—Tieger was loaned in 1994 to help get the Yugoslav tribunal established. He returned to the U.S. Department of Justice in 1996, but came back to The Hague in 2001.

MARK HARMON

Harmon arrived at The Hague in 1994, recruited by his friend Alan Tieger. After graduating from the University of California, Hastings College of Law, in 1971, he completed a twelve-year stint as a deputy public defender in Santa Clara County. Harmon then spent five years prosecuting federal civil rights cases, and another five prosecuting federal environmental crimes, including the *Exxon Valdez* oil-spill case.



a senior prosecutor at The Hague. He graduated from Santa Clara University School of Law in 1980 and is the son of former California congressman Paul "Pete" McCloskey.

MILBERT SHIN

Shin graduated from UC Berkeley's Boalt Hall in 1993, then spent two years as an associate at Shearman & Sterling in San Francisco, where his mentor was Tower Snow. His interest in the international protection of human rights was piqued in 1995, when he won a fellowship that took him to Bosnia, where he learned Serbo-Croatian. He later signed on as a U.N. observer, monitoring the activities of local police and courts in Croatia.



COLLEEN ROHAN

Rohan and Guy-Smith were law students together at New College of California. She graduated in 1980. Rohan has worked in criminal defense her entire career. She began with the law office of Patrick Hallinan, then moved on to the California State Public Defender's office, where she did death penalty work.



PETER McCLOSKEY

McCloskey came to The Hague in 1996, attracted by the enthusiasm of his friends Alan Tieger and Mark Harmon, both of whom he had faced in his career as a prosecutor in the Santa Clara County District Attorney's office. (Both were also his colleagues at the U.S. Department of Justice, investigating and trying racial-violence and police-brutality cases throughout the United States.) McCloskey is now



ARTHUR BUCK

Buck is the most recent California arrival at The Hague, but he is hardly a neophyte. After a Peace Corps stint in Senegal and seven years at a California forest-fire lookout station, he graduated from the University of San Diego Law School. He then served as a U.S. Foreign Service press officer and practiced for 18 years in a small civil litigation firm in San Diego. He came to The Hague after an 18-month tour as attorney general of Kosrae, a tiny island in Micronesia with a population of 8,000.



ALAN TIEGER

Tieger served as a deputy public defender and a civil litigator after graduating from Santa Clara University School of Law in 1975. After seven years with the U.S. Department



thinks appropriate. Guy-Smith says he is impressed with the quality of the judges, describing the judge who presided at his first trial as one of the best he has ever appeared before.

But as president of the ADC, Guy-Smith hears frequent complaints about the lack of investigative resources and funding for translators and expert witnesses for the defense. Mounting a successful defense often requires significant effort in persuading the court to provide the resources necessary to adequately prepare a case.

In civil law systems, an admission of guilt by the accused is treated simply as one more item of evidence to be evaluated by the judge in the course of the trial. Peter McCloskey, a former cohort of Tieger and Harmon's with the U.S. Department of Justice, has been working at The Hague for the past decade. When he first offered the argument at the Yugoslav tribunal that you don't need a trial after a guilty plea is negotiated, it was regarded as revolutionary. Now it is institutionalized in the tribunal's rules of procedure, and a number of indictments have been successfully concluded with plea agreements.

McCloskey relishes the role that prosecutors play in investigating cases. Among the most compelling evidence in the Yugoslav war-crimes trials have been the logs of military communications intercepted by warring factions. Military commanders were very reluctant to give up these logs, even to prosecute their former adversaries. McCloskey led a team of investigators to a significant cache of interception logs in one investigation in Bosnia; he attributes his success to an adroit combination of persuasive charm and slivovitz, the plum brandy popular with locals.

UNFINISHED BUSINESS

If the Yugoslav tribunal is not renewed by the United Nations in 2008, it will likely leave a substantial trail of unfinished business. Barely half of the 161 suspects indicted by the court have been brought to trial so far. Two of the chief perpetrators the court has indicted still remain at large: Radovan Karadzic, former president of the Serbian Republic of Bosnia and Herzegovina; and Ratko Mladic, general colonel of the Bosnian Serb Army, who is accused of complicity in the slaughter of 7,500 Muslims in Srebrenica whose remains are still being discovered in mass graves.

Milosevic's death in the midst of his trial was a profound disappointment for the attorneys prosecuting him. The meticulous record they compiled of the atrocities he unleashed will never be memorialized in a legal judgment.

Milbert Shin, formerly of San Francisco's Shearman & Sterling, was hired six years ago as a trial attorney in the Office of the Prosecutor, and he spent three years assisting the Milosevic prosecution. In one of the related Kosovo cases, Shin persuaded the court to follow the California approach of admitting prior statements of trial witnesses who had repudiated their videotaped pretrial statements.

Public documentation and recognition of the responsibility of perpetrators is a key goal of trials at the Yugoslav tribunal,

Shin observes. Every effort is made to maintain the transparency of the proceedings: streaming video of the trials is posted at www.un.org/icty, and all proceedings are simultaneously translated into English, French, and Serbo-Coatian.

Prosecutors from California who serve at The Hague occasionally express disappointment over the lenient sentences imposed after conviction. The tribunal does not impose death sentences, and it has imposed only one term of life imprisonment. Most frequently, sentences range between 10 and 20 years, to be served in the prisons of cooperating nations such as Finland and Denmark. Noting that California courts often impose the death penalty for a single murder, Mark Harmon asks, "What's the appropriate penalty for murdering 7,500 people?" With judges coming from 16 different countries, consistency in sentencing is a perennial problem. Both sides frequently appeal sentences, and prosecutors are allowed to seek longer sentences on appeal, but they rarely succeed.

Arthur Buck, the California lawyer who arrived most recently, finds little difference between appellate practice in California and in The Hague. Unlike California practice, however, interlocutory appeals are common, and oral argument is not strictly limited; it can go on for days. The judges have adopted the practice of informing counsel in advance of the issues on which they are most interested in hearing oral argument. The longest delays are the time it takes to translate the trial court judgment—which often runs more than 300 pages—and the two-year wait between briefing and argument.

PROCEDURAL PROGENY

In one important respect, the Yugoslav tribunal is not a hybrid court. Hybrids are sterile; mules cannot reproduce. But in its short, twelve-year history, the tribunal already has numerous progeny. The new International Criminal Court (ICC) will borrow heavily from the procedures devised at the Yugoslav tribunal and also from its sister court for Rwanda.

The lack of American participation in the ICC, however, may severely limit its resources and its impact. The current annual budget for the ICC is \$70 million; at the Yugoslav tribunal, funded by a trust fund to which the United States has contributed, the annual tab is about \$276 million. Nonparticipation will also severely limit the opportunity for American lawyers to shape the work of the ICC in the same way they have at the Yugoslav tribunal.

National courts set up in Kosovo, East Timor, Lebanon, and Sierra Leone to deal with war crimes have also borrowed heavily from the Yugoslav tribunal. Its growing body of judicial precedent will have enormous importance in the burgeoning field of international criminal law.

In addition to making this mark, the California lawyers who pass through The Hague leave with a clearer vision of what it means to practice law in a world that is "flat"—and a keen appreciation of the lessons that can be learned from other systems of criminal justice. **CL**