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.
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 mistakes 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 "hybrid" is a system that results from some of the same and worst features of both. 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 denying the entire system 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 context, the common law lawyers have an advantage. For example, during our visit we observed a master of cross-examination, Alan Teger, harrying the lead defendant, Momcilo Krajevski, the co-president of the Bosnian Serb Republic. Krajevski 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 Teger began 15 days of cross-examination of Krajevski with an intensity that obviously unnerved the defendant. On September 27, Krajevski 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 INNOVITY
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 Terence A. Bowers, later serving as U.S. Attorney in Los Angeles.

Tieger and Harmon became partners in the Krajevski 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 trials are superior to American trials at ferreting out the truth. The best feature of the civil law approach incorporated into the tribunal 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 Radovan Karadzic—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 Security Council. Most are professional judges who have the highest rank 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 Theodore M. Kerwin of
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. Indictment accused are provided with appointed defense counsel, who often work in pairs—a common law lawyer teaming up with a criminal law lawyer. Four years ago defense counsel organized an Association of Defense Counsel (ADC) to protect 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...

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**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 the representation of former Symbionese Liberation Army member James Kilgore, who pleaded guilty to charges of forgery and possessing a pipe bomb.

**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 J. Flaherty, then moved on to the California State Public Defender's office, where she did death penalty work.

**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 of Justice prosecuting civil right cases—including the case of Los Angeles Police Department officers convicted of beating Rodney King—Tieger was hired 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 two-year stint as a deputy public defender in Santa Clara County, Harmon then spent two years prosecuting federal civil rights cases, and another two prosecuting federal environmental crimes, including the Exxon Valdez oil spill case.

**PETER MOOLDSKEY**

Mooldskey came to The Hague in 1999, 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 colleagues at the U.S. Department of Justice, investigating and trying racial-vote and police brutality cases throughout the United States.) Mooldskey is now 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.

**MILBRET SIRH**

Sirh graduated from UC Berkeley's Boalt Hall in 1983, then spent two years as an associate at Stumman & Sterling in San Francisco, where her mentor was Terrie Silver. She later signed on as a U.S. observer, monitoring the activities of local police and courts in Croatia.

**ARTHUR DUCK**

Duck is the most recent California arrival at The Hague, but he is hardly a neophyte. After a Peace Corps stint in Benin 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 10 years in a small civil litigation firm in San Diego. He came to The Hague after an 18-month tour as attorney general of Koroza, a tiny island in Micronesia with a population of 2,000.

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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 ABC, Guy-Smith hears frequent complaints about the lack of investigative resources and funding for translations 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 cochair of Ticker and Harmond 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 judgments 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 an investigation in Bosnia; he attributes his success to an auxilium combination of persuasive charm and skillful, the public widely 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. Only 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 7,300 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.

Gilbert Shin, formerly of San Francisco’s Sherman & Sterling, was hired six years ago as a trial attorney in the Office of the Prosecutor. 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 prior 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, and all proceedings are simultaneously translated into English, French, and Serbian/Croatian.

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 Hamon 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; nudes cannot reproduce. But in its short, twelve-year history, the tribunal already has enormous progeny. The new International Criminal Court (ICC) will borrow heavily from the procedures devised at the Yugoslavia 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 Yugoslavia 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 marking this milestone, 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.
Call for special tribunal to investigate war crimes and mass atrocities in Syria

Amid Russian and Chinese opposition to an ICC referral, the UN commission of inquiry seeks other ways to find justice for mass crimes committed in Syria

Julian Borger in Geneva
Tuesday 17 March 2015 15.10 EDT

United Nations war crimes investigators called on Tuesday for the establishment of a special tribunal to prosecute cases of mass atrocities in Syria, and said they had begun to share evidence and names of suspects with state and international prosecutors.

The UN commission of inquiry said it would still like the UN security council to refer the Syrian conflict to the international criminal court (ICC) for prosecutions. But after four years of war and over 220,000 dead, and in the face of continued Russian and Chinese opposition to an ICC referral, the commission said it was looking at other means to bring a measure of justice for mass crimes committed in Syria.

One of the commissioners, Carla Del Ponte, was the former chief prosecutor of the international criminal tribunal for former Yugoslavia (ICTY), created to investigate the Balkan conflicts in the 90s. She said that the ICTY example showed that an ad-hoc tribunal could eventually work in Syria.

“At the beginning I was for the ICC but now with the changing situation, I think an ad-hoc tribunal could be more efficient and work faster,” Del Ponte told the Guardian in an interview in Geneva. “First of all, the ICC would prosecute only three, four, five perpetrators, not more. I think an ad-hoc tribunal could prepare a list of over a hundred, like the tribunal for the former Yugoslavia... An ad-hoc tribunal could also be based near the region, facilitating access of witnesses, documentation and so on.”

A resolution being drafted by the UK and due to be presented to the UN human rights council next week calls for the commission to brief the UN general assembly on its findings and for the assembly in turn to present its reports to the security council. The move is intended to increase international pressure on China and Russia by demonstrating an international consensus behind war crimes prosecutions.

Del Ponte suggested that Russia, which has been a staunch ally of the Assad regime, could be more amenable to a special tribunal on Syria than an ICC referral, as a tribunal would be able to handle more cases. That would mean it would pursue more prosecutions of atrocities carried out by extremist elements of the opposition as well as members of the regime. The Swiss former prosecutor said she was ready to travel to Damascus herself to gather information and to talk to the regime, if the Syrian government confirmed she was still welcome.

war crimes suspects, but it stopped short of taking that step on Tuesday. Instead, it said it had started sharing evidence, including names of suspects, with national prosecutors and judiciaries which are considering launching their own investigations.

Up to now, the state prosecutors it has cooperated with have been investigating the role of their own citizens in atrocities carried out by Islamic State or extremists among the opposition. However, another commissioner, Vitit Muntarbhorn, said the commission would also share evidence with national prosecutors pursuing cases under universal jurisdiction, by which national courts can try cases involving crimes against humanity or large-scale war crimes committed elsewhere.

“At this moment, we are not going to release the lists publicly,” Muntarbhorn said. “However... we are open to cooperating with state authorities, particularly prosecution and judicial authorities, where they are investigating crimes and prosecuting alleged perpetrators. We are hoping to cooperate in terms of sharing some information in terms of incidents and alleged perpetrators on a confidential basis.”

“But there has to be a written request,” he added. “Those states would have to have independent, impartial judiciaries and to show respect for human rights.”

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LONDON — Prosecutors in Serbia said on Wednesday that eight men suspected of having participated in the 1995 Srebrenica massacre, Europe’s bloodiest slaughter since World War II, had been arrested. The arrests were described by prosecutors as the first by the Serbian police of anyone accused of doing the killing at Srebrenica, where 8,000 Muslims died.

The arrests apparently represented a widening of the prosecution beyond high-level officials and commanders. They also seemed to be part of a Serbian attempt to come to terms with the recent past as the authorities in Belgrade, the capital, pursue membership in the European Union.

Police officers seized the men in several places across Serbia, and prosecutors accused them of killing more than 1,000 Bosnians at a warehouse in Kravica, near Srebrenica — a name that has become a byword in modern European history for genocide.

Bruno Vekaric, Serbia’s deputy war crimes prosecutor, said the case was the first related to people directly involved in the killings.

“We have never dealt with crimes of this magnitude,” he said. “It is very important that Serbia take a clear stance toward Srebrenica through the judicial process.”

He added, “We have sent a clear message that the Srebrenica victims, perpetrators or even potential war crimes will not be forgotten.”

The police had initially put the number of suspects at seven, arrested early Wednesday. But Mr. Vekaric later said that an eighth man had been
arrested during the day in the northern city of Novi Sad.

The seven men initially reported to have been arrested were identified only by their initials, and the police were also said to be pursuing suspects in neighboring countries. Mr. Vekaric said five more suspects were still at large.

The massacre took place over several days after Serbian forces overran Srebrenica, which had been designated as a United Nations “safe haven” under the control of Dutch soldiers during the fighting and ethnic cleansing that marked the breakup of the former Yugoslavia.

Some of the most prominent figures of the era, including the Bosnian Serb leader Radovan Karadzic and his military commander, Ratko Mladic, are standing trial in separate cases at the International Criminal Tribunal for the Former Yugoslavia in The Hague, where they are facing charges including genocide.

Serbian officials said the latest arrests were the first of people accused by Serbian authorities of killing Bosnians who had been rounded up, their hands bound, before the massacre. The tribunal in The Hague has prosecuted several low-ranking Bosnian Serbs in connection with the killings. The new suspects are likely to be tried in Serbia, not in The Hague, because the tribunal will soon close, officials said.

In 2007, a war-crimes court in Serbia convicted four former Serbian security officers from a paramilitary unit called the Scorpions of killing six Bosnian men from Srebrenica near the village of Trnovo around the same time as the massacre. But the judge, Gordana Bozilovic-Petrovic, said there was no evidence to tie the killings to the slaughter in Srebrenica, 90 miles away.

The newest arrests are likely to be closely followed in parts of the former Yugoslavia. “This has already had a major impact on the people here and it will be very important in the process of reconciliation in the region,” said Novak Vuco, a legal officer in the prosecutor’s office in Belgrade.

“The hope is to have the indictments ready before the June anniversary of the breakup of former Yugoslavia,” he said.

“I’m not a politician, but I imagine that this willingness to confront its own past will be a huge step for Serbia on its way to joining the European
Union,” Mr. Vuco said.

Joanna Berendt contributed reporting from Warsaw.