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An American Lawyer in Holland ~ By Jim Castle


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Ten years ago, my cell phone rang, and on the other end, in a tinny voice reflective of international long distance calls back in those days, was the Registrar of the International Criminal Tribunal for the former Yugoslavia (ICTY). The ICTY is a United Nations court of law dealing with war crimes that took place during the conflicts in the Balkans in the 1990s.

The Registrar asked if I would consider appointment as Chief Counsel for Momcilo Perisic. General Perisic was the Chief of Staff of the Yugoslavian Army under President Slobodan Milosevic. Perisic had been indicted with war crimes and crimes against humanity for the bombings of the cities of Sarajevo and Zagreb and the mass killings of civilians in Srebrenica.

The theory of the prosecution was that Perisic, as commander of the Yugoslav forces, had provided material aid to the Bosnian Serb army, which in turn had committed the crimes in Sarajevo, Zagreb and Srebrenica. It was a case built on the criminal doctrine of complicity (aiding and abetting).

The case was one of the last indictments of the ICTY. The case promised to be precedent setting, and it had implications far beyond the events in question. A review of the history of international criminal war tribunals revealed that at the end of each court's tenure, the prosecution sought and obtained precedent setting expansions in criminal liability. The Perisic case promised to be an attempt for just such an expansion.

Never before in the history of international criminal law had a commander of an armed force been held criminally responsible for crimes committed by the armed forces of an allied state or political entity. The Perisic case, thus, represented a prosecutorial request to expand individual criminal responsibility across national borders and to the actions of an allied force.

Prior to the Registrar's call, I had developed an interest in international criminal tribunals. These courts were necessary to combat a worldwide atmosphere of impunity which had led to atrocities throughout the globe. Any system of international criminal justice would necessarily require a vigorous defense in order to maintain legitimacy. The role of the defense lawyer was two-fold: to be the champion of the accused and to be a guarantor of a just system.

Taking an international war crimes case is not an easy mission. It required great sacrifice by our family. It meant splitting time between Denver, The Hague and Belgrade, resulting in a one-parent household for much of the time and the potential of uprooting our entire family from our chosen community. It also meant abandoning a law practice that took years to build. Most importantly, the case brought me face-to-face with the most unconscionable acts that one human being can do to another. The photos alone created indelible images that are imprinted in my soul. Long ago, I had come to terms with this moral tension and knew that my work as a defense attorney was instrumental to the representation of the accused and to the legitimacy of the courts I served.

When asked to take the case, I seriously considered declining, as my legal education did not focus on international law. But as I dug into the case, it became apparent that the concepts at issue were those with which I was intimately familiar as a criminal defense trial attorney — the issues of mens rea, complicity and responsibility. Many of the early cases at the ICTY were defended by academics, but the Perisic case demanded a trial lawyer. No lawyer in the world would be fully qualified to handle the case, but Perisic had asked for my help. After searching discussions with my wife and law partner, Liz Castle, and with great trepidation, we decided to take the case.

Throughout the process, our team fought the inadequate provision of resources to the defense. The prosecution had been investigating the case for 10 years prior to the indictment and had a huge head start. Our team eventually consisted of myself, a part-time Serbian co-counsel, one investigator and two staff members. The prosecution, on the other hand, had access to numerous attorneys who had practiced at the tribunal for years, scores of support staff, dozens of experts, etc. The lead prosecutor described the case as the most complex case in the history of international criminal law. We argued for additional resources and that additional preparatory time was necessary, but due to staffing disparities, it would also result in a widening of the gap between the readiness of the prosecution and the defense. We argued to no avail that there was no true equality of arms. These arguments were denied, and I was convinced that justice and a fair result were empty promises.

After two intense years, we filed our pretrial brief, which was, in essence, our opening statement. Contrary to what is commonplace in the U.S., defense attorneys at the ICTY almost always waived this initial opportunity as they wished to keep their options open. What I had been taught in the Colorado Public Defender's office was that waiving opening statement was rarely advisable, as it gives up the opportunity to state your case and to begin the process of persuasion. I went with my training and instincts and filed the pretrial brief.

Our pretrial brief argued that in order for Perisic to be found criminally responsible, the aid that he had provided must have been specifically directed in order to contribute directly and substantially to the perpetration of the war crimes and crimes against humanity that were charged and that since he had noble intentions in providing the aid, he must be acquitted. Although our sole focus was representing the interests of General Perisic, one can imagine the implications of the case to the U.S. and other nations' interests.

In the ensuing years of the trial and appeals in the Perisic case, the names of defense team members changed, including my withdrawal from the case in 2009. But six years after that opening salvo was volleyed, the appellate chamber of the ICTY agreed with the position argued in our pretrial brief, and Perisic was acquitted of all charges and he went home to his family. My dire prediction of injustice and unfairness proved to be wrong.

At times when I worked on the case, I believed the system that had been erected was unfair and was merely victor's justice. But I was viewing matters through the lens of an American lawyer who had been raised in a system that had been developed over many decades and that was viewed as the fairest system ever invented. I had to remind myself that our criminal justice system is still far from perfect, as we still have racial disparity, wrongful convictions, the gas chamber and the highest incarceration rate in the world that locks up more black males each year than we send to college.

At the end of the case, my conclusion was that the international criminal justice system was quite far along in achieving fair results though it was in its relative infancy. Though far from perfect, it was a much better alternative to the atmosphere of impunity that it replaced. In the end, I gained a respect for the efforts of many to achieve justice, whether from the judiciary, the prosecutors, the Registry or the defense. I was humbled to have contributed a small part in the history of international criminal justice. **D**




(http://www.dbadocket.org/wp-content/uploads/2015/12/Jim-Castle_EDIT.jpg) Jim Castle is a graduate of DU law who has devoted his 30-year career to the defense of the criminally accused, both as a public and private defender. He has handled numerous state and federal capital cases. He is one of a select few attorneys in Colorado to be designated "Learned Counsel" by the Administrative Office of the U.S. Courts and the only attorney in Colorado to be appointed by the United Nations as lead counsel to handle an international criminal defense case. Jim can be reached at jcastlelaw@gmail.com.

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