

VIEW FROM THE HAGUE

FAIR AND IMPARTIAL INDICTMENTS

Some critics of the Tribunal have alleged that the organization is biased and only indicts persons on the basis of their ethnicity. Interestingly, the Tribunal hears this criticism in Croatia, Bosnia and Herzegovina and Kosovo, as well as in Serbia, when it issues an indictment against nationals from these territories.

The Tribunal does not indict individuals based on their ethnicity. It indicts them only on the basis of evidence. The process of bringing an indictment is designed in such a way as to ensure impartiality and to guarantee that individuals are not accused without evidence.

The Tribunal's Chief Prosecutor does not order an investigation into the acts of a particular individual. The Prosecutor orders an investigation of a crime. A prosecution team consisting of investigators, attorneys, and analysts from over a dozen different countries, take statements from witnesses and conduct forensic analysis of the crime scene in order to identify the direct perpetrators of the crime and the military, police or paramilitary forces to which they belong.

Lawyers and analysts investigate the command structure of those forces according to the domestic laws which govern it. They identify individuals in the direct perpetrators' chain of command and interview witnesses, analyse documents, in some cases intercepted telephone communications, the suspects' public statements and other evidence in order to determine whether they participated in the crime and in what manner: that is, whether individuals in the chain of command planned, ordered, aided or abetted the crime, or whether they knew about it and failed to do anything to prevent or punish it.

Throughout the entire investigation process, lawyers review the collected evidence. They are the ones who recommend to the Prosecutor who should be the subject of an investigation. An investigation against an individual is formally opened once the Prosecutor reviews the evidence and agrees that it is sufficient to merit the investment of resources that large investigations require.

Once the prosecution lawyers determine that there is sufficient evidence, they begin drafting an indictment. This indictment, together with the evidence on which it is based, is presented to a panel of Tribunal lawyers and other personnel who did *not* work on the indictment. The purpose of this indictment review is to obtain an independent assessment of the quality of the evidence; that is, to determine whether there is reason to believe that the accused committed the crimes with which he is to be charged and, as such, a basis to bring him before the court to answer the charges (called a *prima facie* case), as well as whether the evidence will be sufficient to obtain a conviction in the absence of contrary evidence from the defence. An important part of the indictment review is to discuss weaknesses in the evidence and possible defenses the accused may argue.

The indictment review panel submits its recommendations directly to the Prosecutor. Sometimes it does *not* recommend that the Prosecutor sign the indictment. If there is insufficient evidence, the Prosecutor will sometimes send an indictment back for further investigation and sometimes she will close the investigation without issuing an indictment at all. The Prosecutor will only sign the indictment once she is satisfied that sufficient evidence exists to support a solid case against the accused.

The Prosecutor's signature on an indictment does *not* mean that the indictment is in effect. The Prosecutor is required to submit the indictment together with the evidence on which it is based,

called the supporting material, to one of the 16 permanent Tribunal judges, who are completely independent and who had no part in the Prosecutor's investigation. The Judge reviews the indictment and confirms it only if he or she deems that the supporting material establishes that reasonable suspicion that a case against the accused exists in relation to all points in the indictment.

In this regard, a Judge can request additional evidence, he or she can throw out certain charges or refuse to confirm the indictment. For the indictment to be confirmed, the Prosecution does not have to submit *all* the evidence that it has against an accused, but only that which shows that there is a reasonable suspicion that the accused committed the crimes with which he is charged. Once the Judge confirms the indictment, it becomes an official document of the Court.

All the Tribunal's indictments issued to date have gone through this process. In April of this year, the Tribunal made changes to its rules which add an additional step in the Judges' indictment confirmation process. Before the indictment can go to a Judge for confirmation, the President and Vice-President of the Tribunal, both of whom are Tribunal Judges, together with the Presiding Judges of all three Trial Chambers review the indictment to determine whether it concentrates on the most senior leaders suspected of being most responsible for crimes in the Tribunal's jurisdiction.

Whether we are speaking of the indictment against police and army generals Sreten Lukić, Vlastimir Đorđević, Nebojša Pavković and Vladimir Lazarević, the indictment against Croatian general Ante Gotovina, or that against Kosovo Liberation Army leader Fatmir Limaj, all have been subject to independent scrutiny within the Office of the Prosecutor and all have been independently confirmed by a Tribunal judge. All of them are supported by evidence which is on file with the court and is submitted to the accused once he arrives in The Hague.

The fact that the Tribunal has indicted many accused who are not of Serb ethnicity - including senior leaders such as Croatian generals Ante Gotovina, Ivan Čermak and Mladen Markač, former Herzeg Bosna leaders Dario Kordić, Jadranko Prlić and Milivoj Petković, Bosnian generals Enver Hadžihasanović, Mehmed Alagić and Šefer Halilović, and Kosovo Liberation Army leader Fatmir Limaj - is one indicator that the process of bringing indictments is fair and impartial.

Outreach Programme

outreach@icty.org