

COPYRIGHT / USAGE

Material on this site may be quoted or reproduced for **personal and educational purposes** without prior permission, provided appropriate credit is given. Any commercial use of this material is prohibited without prior permission from The Special Collections Department - Langsdale Library, University of Baltimore. Commercial requests for use of the transcript or related documentation must be submitted in writing to the address below.

When crediting the use of portions from this site or materials within that are copyrighted by us please use the citation: *Used with permission of the University of Baltimore.*

If you have any requests or questions regarding the use of the transcript or supporting documents, please contact us:

Langsdale Library
Special Collections Department
1420 Maryland Avenue Baltimore, MD 21201-5779

COMMISSION ON
SECURITY AND COOPERATION IN EUROPE

234 FORD HOUSE OFFICE BUILDING
WASHINGTON, DC 20515

(202) 225-1901

PROSECUTING WAR CRIMES
IN THE FORMER YUGOSLAVIA:
AN UPDATE
24 June 1994

This memorandum is part of a continuing series of reports prepared by the staff of the Helsinki Commission on the conflict in the former Yugoslavia. An update on efforts to prosecute war crimes follows; for additional information on this or other aspects of the crisis, please contact the Commission staff at (202) 225-1901.

* * * * *

I. BACKGROUND ON THE ESTABLISHMENT OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA

The call for the establishment of a war crimes tribunal that would hold those responsible for war crimes in the former Yugoslavia personally and individually accountable for their actions was issued as early as the summer of 1991, by both Members of Congress and non-governmental organizations. As atrocities mounted over that summer and information about concentration camps became public, these calls began to reverberate at meetings of the Conference on Security and Cooperation in Europe (the CSCE or the Helsinki process). Eventually, acting on a mandate from the CSCE Council of Ministers, a small group of experts issued a report in February 1993 which contained a proposal for an international war crimes tribunal for the former Yugoslavia. *This proposal was submitted to the United Nations by the Swedish CSCE Chair-in-Office as an official UN document and was the first concrete proposal for such a tribunal. As such, it spurred significant momentum on this issue at the UN headquarters in New York.*

Nevertheless, there has consistently been significant opposition to the idea of establishing a war crimes tribunal based on one or more of the following views. First, some UN member states believed that an ad hoc tribunal for the former Yugoslavia would detract from long-standing efforts to establish a permanent international criminal tribunal. Second, *some UN member states saw an ad hoc tribunal as a dangerous precedent that might lead to demands for international accountability for wrong-doing committed within their own countries. And third, some member states felt a tribunal could have a detrimental effect on the peace negotiations that have been conducted under UN-European Union auspices over the past two years.*

In spite of this opposition, agreement was reached by the Security Council in February 1993 to establish a criminal tribunal for the former Yugoslavia in the Hague, the

Netherlands, and the tribunal's statute was adopted in May 1993. Significantly, the Secretary-General's report that was adopted by the Security Council along with the tribunal's statute states that its purpose is to "contribute to the restoration and maintenance of peace" and to facilitate the cessation of violations of international humanitarian law in the conflict. In characterizing the court in this way, the Security Council has rejected the view that *seeking to hold violators of international humanitarian law personally accountable might intensify fighting by the warring factions*. On the contrary, the Council implicitly supports the argument that *accountability may play a deterring role, even in an on-going conflict*. The tribunal was established under the same provisions of the UN Charter that is used to authorize peacekeeping missions.

The adoption of this statute was no small feat and required addressing a host of extraordinarily complex questions relating to the synthesis of civilian and military law, domestic and international law, and civil and common law. But the adoption of the statute was only the first of many hurdles that this tribunal has faced. In order to move the tribunal from theory to reality, several other steps had to be taken.

2. JUDGES

First of all, judges had to be appointed. Their selection dragged on for several months after the adoption of the statute and was only completed in September 1993. Of the eleven candidates chosen, they include only two women and no Muslims. These judges serve in their individual capacity, which is to say they do not take instructions from the governments which nominated them and they are paid by the United Nations, not their native countries. Their nationalities are American, Australian, Canadian, Chinese, Costa Rican, Egyptian, French, Italian, Malaysian, Nigerian and Pakistani.

The judges convened their inaugural session on 17 November 1993, in the Hague. As a first order of business, they elected Antonio Cassese of Italy as their president and Elizabeth Odio Benito of Costa Rica as their vice-president. They also decided on the composition of two trial chambers, each of which are made up of three judges, and its appeals chamber, which is made up of five judges. Judge Cassese was also elected president of the appeals chamber. Gabrielle Kirk McDonald of the United States was elected president of one trial chamber; Adolphus Godwin Karibi-Whyte of Nigeria was elected as president of the other.

On February 11, President Cassese announced that the Judges had completed preparation of rules of evidence and procedure. Those rules provide that the court's procedures will be largely adversarial in nature, rather than the inquisitorial approach generally followed in continental Europe; that immunity will not be granted as a form of plea bargaining, although cooperation with the court may be considered at sentencing; that methods are envisioned for protecting witnesses, including through the establishment of a special "victims unit" within the office of the prosecutor; and that the Court will receive

amicus curiae briefs from interested parties (such as states or non-governmental organizations) on request.

Since that time, the Judges have adopted rules governing the detention of indicted persons, have adopted at least one amendment to the rules of evidence and procedure, have begun work on rules for the protection of witnesses, and are considering questions relating to ensuring adequate defense counsel for defendants. The Tribunal has scheduled its 1994 sessions for January 17-February 11, April 25-July 29, and September 19-November 4.

3. THE PROSECUTOR

The selection of a chief prosecutor has proven much more difficult than the selection of judges. In September 1993, the Security Council approved the Secretary-General's nomination of Venezuela's attorney general, Ramon Escovar Salom. Unfortunately, in early February of this year Escovar Salom formally resigned as chief prosecutor in order to accept a top cabinet position in the newly formed Venezuelan government, thus delivering a serious blow to the prestige of the tribunal. That damage was rapidly mitigated, however, by the Secretary-General's relatively speedy appointment of Graham Blewitt, on February 8, to serve as Acting Deputy Prosecutor until a new Chief Prosecutor can be selected.

Blewitt comes to the UN from his position as Director of the Australian War Crimes Prosecution unit. He has the authority to proceed with establishing the infrastructure of the court, to sign long-term contracts and leases, and to staff the prosecutor's office. Most importantly, he has the authority to issue indictments and bring cases to trial. Since February, he has been in the Hague proceeding with this work. As it now stands, the prosecutor expects to submit indictments for confirmation by this fall, and to begin trials by the beginning of next year.

4. THE COMMISSION OF EXPERTS

In October 1992, while the Security Council still lacked the consensus necessary to establish a tribunal, agreement was reached to set up a UN commission mandated to investigate war crimes. A five-member team, formally titled the Commission of Experts, was established for this purpose. Ultimately headed by an American scholar from Chicago, Cherif Bassiouni, this Commission spearheaded the arduous work of compiling the mountains of reports on war crimes produced by the public, the press, the non-governmental community, and eventually UN member states themselves.

In fulfillment of its mandate, the Commission, among other things, established an extensive database to compile information on individual cases, conducted studies on specific battles and instances of ethnic cleansing, and laid the ground work for investigations of several mass grave sites in the former Yugoslavia. After agreement was finally reached to establish the tribunal, the Security Council instructed the Commission to conclude its work in order to fold it into the prosecutor's office. The work of the Commission, as reflected in

its two interim reports and the final report issued last month, will serve as a significant foundation for the investigations of the prosecutor.

5. WHAT KINDS OF CRIMES ARE INCLUDING WITHIN THE SCOPE OF THE TRIBUNAL'S JURISDICTION?

Basically, there are three types of crimes which will fall within the scope of the tribunal's jurisdiction: war crimes, crimes against humanity, and genocide. Under international law, the right of parties to a conflict to choose the methods or means of warfare are not unlimited; military practices that are prohibited by international law constitute war crimes. Genocide requires an intent to destroy a specific group in whole or in part; the law of genocide does not require that every single member of the group be destroyed. In contrast, crimes against humanity, while directed against a specific group, do not require such intent. Genocide and crimes against humanity differ from war crimes in that they are offenses whether committed during international or internal armed conflict.

6. WHO CAN BE INDICTED BY THIS TRIBUNAL?

The personal jurisdiction of the tribunal extends to individual "natural" persons, but not to "juridical" persons such as organizations or corporations. Mere membership in an organization, then, is not be grounds for criminal liability. This contrasts with the jurisdiction exercised by international and military tribunals at the end of World War II, at which time membership in the Nazi party was deemed to be, in and of itself, illegal. In this case, mere membership in, for example, Arkan's Tigers or Scselj's White Eagles will not be considered in and of itself criminal activity; the prosecutor will still have to prove that the defendant engaged in acts that constitute war crimes, crimes against humanity, or genocide.

Heads of State, government officials, and persons otherwise acting in an official capacity may not receive from that status immunity or a mitigation of punishment. On the contrary, such persons are to be held responsible not only for the orders they give directly but, under the principles of imputed responsibility or criminal negligence, they may also be held responsible for the failure to prevent crimes committed by subordinates. Correspondingly, a subordinate may not rely on the defense of "superior orders" to relieve himself or herself of criminal responsibility. (The claim of "superior orders," combined with other defenses such as coercion or lack of a moral choice, may be a mitigating factor at sentencing.)

Nevertheless, it should be understood that building the case against higher ranking military officials and political leaders will not be easy and, indeed, it is unlikely that these will be the first cases brought by the prosecutor. Many observers of the tribunal have speculated that cases against higher ranking individuals will be built, in part, on the testimony of rank and file soldiers who may be tried first.

7. WHAT IS THE LIKELIHOOD THAT ANYONE IS ACTUALLY GOING TO BE BROUGHT TO TRIAL, LET ALONE RESPONSIBLE LEADERS? IN OTHER WORDS, WHAT IF THEY HOLD A TRIAL, AND NOBODY COMES?

Significantly, the German, Danish and Swiss governments have already made arrests of persons suspected of committing war crimes, crimes against humanity, or genocide in the former Yugoslavia. In these cases, the alleged criminals had gained entry to those countries as refugees. The German Minister of Justice has also announced that another 45 people in Germany are currently under investigation for crimes they may have committed in the former Yugoslavia. It is expected that Germany, Denmark and Switzerland will initiate trials of their suspects, as the tribunal is not yet prepared to issue indictments.

How will the tribunal gain custody over those who remain in the former Yugoslavia, or flee to states that are less forthcoming than Germany, Denmark, or Switzerland? To begin with, an order to surrender creates an immediate and legally binding obligation on all member states of the United Nations to surrender indicted persons when so directed by the Tribunal.

Faced with a state's refusal to cooperate, the tribunal's prosecutor may re-submit the indictment in open court (dubbed by some a "super indictment") and the Trial Chamber may issue an international arrest warrant to all member states of the United Nations. This step would, in effect, brand the perpetrators of these crimes notorious and hunted outlaws. Super indictments will also establish a public record of the crimes that have been committed in this war.

The Security Council may also punish non-compliance by maintaining sanctions against Serbia or, in the case of other defiant countries, imposing sanctions until they cooperate. Other tools to foster compliance with the orders of the tribunal have been suggested as well.

In particular, the Chairmen of the Helsinki Commission, Senator Dennis DeConcini and Representative Steny H. Hoyer, have advocated the creation of a public review process by the multinational Conference on Security and Cooperation in Europe (CSCE). Their proposal would seek to ensure that any country that gives refuge to accused and indicted war criminals must be reminded at every turn that it stands apart from the community of civilized nations and must pay a political price for doing so.

The public review process they envisage would draw on a now-established track record of cooperation between the UN and the CSCE regarding the former Yugoslavia and would complement the issuance of super indictments by the tribunal. Although this effort is not likely to have much effect as long as a shooting war persists, it may produce results as the parties to the conflict seek to normalize their relations with the rest of the world.

Specifically, they have proposed a two-pronged role for the CSCE. First, its Parliamentary Assembly should be utilized to facilitate the adoption of implementing legisla-

tion necessary for the surrender of indicted persons, beginning with its July 1994 meeting in Vienna. Without such legislation, a technical loophole would exist in most countries -- including the United States -- that would give indicted persons the legal grounds to challenge jurisdiction and avoid trial.

Second, in December 1994 the CSCE will hold a summit meeting of Heads of State and Government in Budapest. At that time, the participating States should appoint a high-level person of impeccable qualifications to serve as Special Rapporteur on the War Crimes Tribunal. He or she would be tasked with monitoring compliance by CSCE participating States with the orders of the Tribunal and reporting back to the decision-making bodies of the CSCE.

8. HOW MUCH FINANCIAL SUPPORT DOES THE TRIBUNAL HAVE?

For 1994, the tribunal has an operating budget of \$11 million. In addition, the United States has made a \$3 million voluntary contribution and Pakistan has made a \$1 million voluntary contribution. Congress has also authorized the President to provide up to \$25 million in goods and services to the Tribunal. In March 1994, the President approved the first drawdown of these funds, of about \$6 million.

Using that drawdown money, the United States has selected about 25 prosecutors, investigators, area specialists and others from the Departments of State, Defense, and Justice and the Federal Bureau of Investigation to work directly with the tribunal. Once those persons are seconded to the tribunal, they receive their instructions from the tribunal, not the U.S. government.

This fall, the budget authority within the United Nations will again review the financial needs of the tribunal. As it now stands, the tribunal does not have adequate funding to carry out the investigations it needs to; this is an urgent priority if the Tribunal is to be able to undertake these investigations by the first half of next year.