

**PROSECUTING WAR CRIMES
IN THE FORMER YUGOSLAVIA:
AN UPDATE
June 1995**



**A Report Prepared by the Staff of the
Commission on Security and Cooperation in Europe**

ABOUT THE ORGANIZATION (OSCE)

The Conference on Security and Cooperation in Europe, also known as the Helsinki process, traces its origin to the signing of the Helsinki Final Act in Finland on August 1, 1975, by the leaders of 33 European countries, the United States and Canada. Since then, its membership has expanded to 55, reflecting the breakup of the Soviet Union, Czechoslovakia, and Yugoslavia. (The Federal Republic of Yugoslavia, Serbia and Montenegro, has been suspended since 1992, leaving the number of countries fully participating at 54.) As of January 1, 1995, the formal name of the Helsinki process was changed to the Organization for Security and Cooperation in Europe (OSCE).

The OSCE is engaged in standard setting in fields including military security, economic and environmental cooperation, and human rights and humanitarian concerns. In addition, it undertakes a variety of preventive diplomacy initiatives designed to prevent, manage and resolve conflict within and among the participating States.

The OSCE has its main office in Vienna, Austria, where weekly meetings of permanent representatives are held. In addition, specialized seminars and meetings are convened in various locations and periodic consultations among Senior Officials, Ministers and Heads of State or Government are held.

ABOUT THE COMMISSION (CSCE)

The Commission on Security and Cooperation in Europe (CSCE), also known as the Helsinki Commission, is a U.S. Government agency created in 1976 to monitor and encourage compliance with the agreements of the OSCE.

The Commission consists of nine members from the U.S. House of Representatives, nine members from the U.S. Senate, and one member each from the Departments of State, Defense and Commerce. The positions of Chair and Co-Chair are shared by the House and Senate and rotate every two years, when a new Congress convenes. A professional staff assists the Commissioners in their work.

To fulfill its mandate, the Commission gathers and disseminates information on Helsinki-related topics both to the U.S. Congress and the public by convening hearings, issuing reports reflecting the views of the Commission and/or its staff, and providing information about the activities of the Helsinki process and events in OSCE participating States.

At the same time, the Commission contributes its views to the general formulation of U.S. policy on the OSCE and takes part in its execution, including through Member and staff participation on U.S. Delegations to OSCE meetings as well as on certain OSCE bodies. Members of the Commission have regular contact with parliamentarians, government officials, representatives of non-governmental organizations, and private individuals from OSCE participating States.

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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 this issue, please contact the Commission staff at (202) 225-1901.

1. BACKGROUND ON THE ESTABLISHMENT OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA (HEREINAFTER, "THE TRIBUNAL")

In the summer of 1991, Members of Congress and representatives of non-governmental organizations began to 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. As atrocities mounted over that summer and information about concentration camps became public, these calls began to reverberate at on-going meetings of the Conference on Security and Cooperation in Europe (CSCE) then being held in Prague, Vienna and Helsinki.

THE COMMISSION OF EXPERTS

In October 1992, against a backdrop of continuing debate over the merits of a establishing a full-blown war crimes tribunal, the UN Security Council established a five-member Commission of Experts mandated to investigate war crimes in the former Yugoslavia. 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 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. Testifying before the Helsinki Commission in April 1995, Cherif Bassiouni indicated he had identified 200,000 dead, most of them civilians, 800 prison camps and detention centers in which more than half a million people have been held, and 151 mass grave sites. Furthermore, he had investigated 1,600 cases of rape and forced impregnation of girls and women of all ages, and received allegations of thousands of other cases of rape, sexual mutilation, and torture.

THE TRIBUNAL

Meanwhile, 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 as an official UN document by the Swedish CSCE Chair-in-Office, and was the first concrete proposal for such a tribunal. As such, it spurred debate on this issue at the UN headquarters in New York.

Although increasing information about atrocities in the former Yugoslavia created a strong NGO lobby for establishing a war crimes tribunal, there was, at the same time, consistent political opposition to the idea for several reasons. First, some legal experts and some UN member states believed that an ad hoc tribunal for the former Yugoslavia would detract from their long-standing efforts to establish a permanent international criminal tribunal with jurisdiction over all countries. Second, at the other end of the spectrum, 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 and political observers believed that a criminal tribunal would be at odds with the so-called peace negotiations that have been conducted under UN-European Union auspices since 1991.

Finally, with strong U.S. leadership, agreement was reached in February 1993 to establish the Yugoslav Tribunal; in connection with that step, the Security Council instructed the Commission of Experts to conclude its work in order to fold it into a prosecutor's office.

2. DESCRIPTION OF THE TRIBUNAL AND ITS JURISDICTION

TITLE AND PURPOSE

A statute for the Tribunal was adopted by the Security Council in May 1993; its formal title is: International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1981. (It is more commonly known as the International Criminal Tribunal for the Former Yugoslavia or the Yugoslav War Crimes Tribunal.)

The Secretary-General's report adopted by the Security Council along with the Tribunal's statute states that the Tribunal's 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 Tribunal 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. In establishing the Tribunal, the Security Council relied on Chapter VII of the UN Charter, relating to threats to international peace and security (the same provisions that are used to authorize peacekeeping missions).

JUDGES, CHIEF PROSECUTOR AND STAFFING

The selection of judges by the Security Council was highly contentious and, consequently, only completed in September 1993. The eleven judges chosen serve in their individual capacity (i.e., they do not take instructions from the governments which nominated them) and 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. Given that victims of this war have been, in many instances, targeted because of their gender or religion, the failure of the Security Council to include only two women and no Muslims among the judges was highly criticized by many non-governmental organizations.

The selection of a chief prosecutor was even more politicized than the selection of the judges and was marked by numerous delays and set-backs that have served to undermine public confidence in the Tribunal. In July 1994—more than a year after the adoption of the Tribunal's statute—the Security Council unanimously selected South African Justice Richard J. Goldstone to serve as chief prosecutor of the Tribunal. Goldstone, a highly regarded jurist within the human rights community, came to the Tribunal having earned respect for his role in heading South African commissions of inquiry that revealed police violence and abuse and led to criminal prosecutions. Since his selection, some degree of public confidence in the Tribunal has been restored.

Goldstone's Deputy is Graham Blewitt, who previously served as Director of the Australian War Crimes Prosecution unit. Together, they have hired a staff of approximately 90 people to serve as prosecutors and investigators. In addition, on January 27, 1995, three senior lawyers were named to present the prosecution's case at trials expected to start later this year: Eric Ostberg, a Swede who was chief public prosecutor for special cases and financial cases in Stockholm; Minna Schrag, an American who has previously served as an assistant U.S. attorney and is a partner in New York law firm Proskauer Rose Goatz Mendelsohn; and Grant Niemann, an Australian who was formerly deputy director of public prosecutions for South Australia in Adelaide.

Dorothee de Sampayo, formerly the Vice-President of the Dutch appeals court in The Hague, currently serves as Registrar of the Tribunal.

In addition to these core personnel, the Tribunal will also require extensive additional staff, including for security, interpretation, forensic investigation, and witness interviewing.

SUBJECT MATTER JURISDICTION

The subject-matter jurisdiction of the Tribunal covers "serious violations of international humanitarian law," including the Geneva Conventions, the Genocide Convention, and crimes specified by the 1945 Charter of International Military Tribunal. It does not include the two Protocols to the Geneva Conventions, except to the extent that they may have become part of the customary international law binding on all countries. In essence, the three types of crimes which fall within the scope of the Tribunal's jurisdiction are: 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. Accordingly, 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 each and every single member of the group be targeted or 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.

Article 5 of the Tribunal's statute specifies that rape, when committed in armed conflict and directed against any civilian population, constitutes a crime against humanity. In addition, forced impregnation is likely to be treated in an analogous fashion. Depending on the particulars of the crime—how the rape was committed, by whom, with what coordination, etc.—it may also be punishable as an act of genocide.

Crimes committed against United Nations peacekeepers and humanitarian aid workers are violations of international law and punishable by this Tribunal.

PERSONAL JURISDICTION

The personal jurisdiction of the Tribunal extends to individual "natural" persons, but not to "juridical" persons such as organizations or corporations. Mere membership in, for example, Arkan's Tigers or Seselj'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. (In contrast, the Nuremburg prosecutions made membership in the Nazi party a punishable offense.)

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, 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 him or her of criminal responsibility. ("Superior orders," combined with other defenses such as coercion or lack of moral choice, may be a mitigating factor during sentencing.)

The Tribunal does not have the authority to consider the responsibility of states as such; a state-to-state suit brought by Bosnia-Herzegovina against Serbia-Montenegro for a claim of genocide was lodged before the International Court of Justice on March 22, 1993 and is still pending. In addition, two cases brought before U.S. courts alleging violations of the Alien Tort Act and the Torture Victims Protection Act by Bosnian-Serb leader Radovan Karadzic are still pending.

TEMPORAL AND TERRITORIAL JURISDICTION

The Tribunal is authorized to punish crimes committed on or after January 1, 1991 on the territory of the former Yugoslavia. Crimes which continue to be committed in the on-going war are therefore also punishable.

National courts in the countries of the former Yugoslavia continue to have the authority to punish war crimes, crimes against humanity and genocide arising out of the war. However, the Tribunal has primacy over such national courts and may at any stage of their proceedings require these cases be transferred to the Tribunal.

SENTENCING AND RESTITUTION

The Tribunal may impose prison sentences but not the death penalty. In addition, it is authorized to order the return of any property and proceeds acquired by criminal conduct (including by duress).

OTHER MATTERS

The eleven judges of the Tribunal constitute themselves in two trial chambers of three judges each and one appeals chamber of five judges. 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. Antonio Cassese of Italy was elected president of the appeals chamber.

In February 1994, the judges adopted rules of evidence and procedure. Those rules provide that the Tribunal'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 Tribunal may be considered at sentencing; that methods will be established for protecting witnesses, including through the establishment of a special "victims unit" within the office of the prosecutor; and that the Tribunal will receive amicus curiae briefs from interested parties (such as states or non-governmental organizations) on request. The statute of the Tribunal precludes holding trials *in absentia*.

The Tribunal is located in The Hague, Netherlands, and its official languages are English and French. Chief Prosecutor Goldstone has not ruled out the possibility of convening trials in the former Yugoslavia.

RELATIONSHIP TO RWANDAN TRIBUNAL

In November 1994, the Security Council established an International Tribunal for Rwanda (the Rwanda Tribunal). The Yugoslav and Rwandan Tribunals have some separate and some joint elements. In practice, this means that the two Tribunals will share the chief prosecutor (Richard Goldstone of South Africa) and some of his staff and utilize the appeals chamber judges of the Yugoslav Tribunal.

In establishing a Rwandan Tribunal, a decision was made to share the Appeals chamber with the Yugoslav Tribunal in order to ensure consistent interpretations of international law. The decision to add additional tasks to those of the Yugoslav chief prosecutor may overburden his already heavily taxed (and underfunded) effort.

3. CURRENT STATUS OF INVESTIGATIONS AND PROSECUTIONS

The Tribunal issued its first indictment on November 7, 1994, charging Dragan Nikolic, a Serb, with crimes against humanity and other violations of international law. Nikolic is currently at large in Serb-held territory in Bosnia. At almost the same time, the Tribunal began proceedings to require Germany to surrender to it another accused Bosnian Serb, Dusan Tadic, who was then under investigation—and in custody—in Germany. (Germany subsequently complied with the Tribunal's order and Tadic was formally arraigned in April 1995.)

In February 1995, the Tribunal indicted more than 20 other Serbs on charges ranging from war crimes to genocide. In addition, the prosecutor's office has announced it is conducting investigations into the possible criminal responsibility of Bosnian Serb leaders Radovan Karadzic, General Ratko Mladic, and former secret police chief Mico Stanisic for their role in ethnic cleansing. In early May, the Tribunal requested the government of Bosnia to transfer proceedings against those three to the Hague. Bosnian

officials have indicated they will comply fully with the request. Most recently, Chief Prosecutor Goldstone has indicated that he is investigating crimes alleged to have been carried out by Croats in the Lasva Valley of central Bosnia-Herzegovina.

4. AMNESTIES AND IMMUNITIES

As stated above, the Tribunal's statute does not permit the granting of immunity as a form of plea bargaining. Nor does the Tribunal have the authority to offer amnesty. No other entity, whether it be a government of any of the former Yugoslav states or the UN-EU peace conference, has the authority to require the Tribunal to recognize any amnesties it might purport to grant. The International Criminal Tribunal for the Former Yugoslavia has been established by the Security Council as an independent body. The only way it could be required to recognize amnesties would be for the Security Council to amend its statute or to abolish the Tribunal altogether—acts which would require the express and public consent of the United States. Thus far, the United States has indicated no willingness to take such actions; on the contrary, the United States has repeatedly confirmed its commitment to hold war criminals accountable and to support the work of the Tribunal. Chief Prosecutor Goldstone has repeatedly signalled that he would not recognize putative amnesties, stating that he will follow the evidence where it leads him, including to the highest political levels. In addition, there is an emerging view that suggests such amnesties are in and of themselves violations of international law.

5. FUNDING

Although public debate on the ultimate effectiveness of the Tribunal often centers on its relationship to peace negotiations, the greatest threat to the work of the Tribunal is a lack of sufficient funds to carry out its mandate. If the prosecutor's investigations are dictated by his budget director rather than the merits of the evidence before him, his hands will be tied.

As with most murders or other serious crimes, there will be few confessions on which to base convictions; the effective investigation and prosecution of war crimes will require building cases based on victims' accusations, eye-witness accounts, assessments of command responsibility based on military intelligence and other public sources, and extensive forensic and medical evaluations. Accordingly, these investigations will require significant funds to pay for interpreters, exhumation of mass grave sites (estimated to cost \$2 to \$3 million per site), defense counsel, travel for witnesses and accused, security, witness protection, forensic laboratory expenses, Tribunal salaries, and administrative costs. The expansion of the chief prosecutor's tasks to include responsibility for Rwanda further burdens his office.

In 1994, the Tribunal received an \$11 million budget from the United Nations, supplemented by a \$3 million voluntary contribution by the United States. The United States has also seconded approximately two dozen people from the Departments of Defense, State, and Justice to support the work of the Tribunal. (More than a dozen other countries have made voluntary contributions in cash and/or in-kind as well.)

The UN has thus far been unable to reach agreement on full funding for the Tribunal for 1995, although it has granted the Tribunal's request for a 1995 budget of \$28.4 million on a pro-rated basis through June 1995. This budget request, however, does not provide funding for several significant items at all, such as mass grave exhumations, witness protection programs, and forensic laboratory expenses. According to an expert consultation prepared under the auspices of Yale Law School, other items in the

budget which are underfunded include defense counsel, travel for witnesses, witness counseling and security, travel of accused, and expert witnesses for the prosecutor. Collectively, these unfunded or underfunded items are estimated to run \$14.8 million to \$24.8 million (the variable being the number of mass grave sites exhumed). Funding for these items, therefore, must come from voluntary contributions such as those provided by the United States and other countries.

6. GAINING CUSTODY OF WAR CRIMINALS

Several Western governments (German, Danish, Swiss, and Austrian) 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 as many as 45 people in Germany are under currently investigation for crimes they may have committed in the former Yugoslavia. These suspects may be tried in those countries or, as in the case of Dusan Tadic described above, transferred to the Tribunal. In any case, it is clear that some fugitives from this war can be found and can be brought to trial.

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

Faced with a state's refusal to cooperate, the Tribunal's prosecutor may re-confirm 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. These super indictments are extremely important in and of themselves, in that they will 1) establish a public record of the crimes that have been committed in this war—a record that, in many ways, will speak for itself; 2) cause the perpetrators of these crimes to become notorious and hunted outlaws; and 3) provide some measure of accounting for the victims of these crimes. Accordingly, the initiation of the super indictment process will signify some measure of success for the Tribunal.

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.

7. U.S. COOPERATION WITH THE TRIBUNAL

As indicated above, the United States has made financial contributions to the Tribunal in cash and in-kind, in addition to supporting it through our regularly assessed contribution to the UN. The U.S. has also provided to the Tribunal eight public war crimes reports and at least two confidential war crimes reports based on hundreds of refugee interviews and other intelligence.

The United States must also pass implementing legislation in order to have the legal basis to surrender persons to the Tribunal if ordered to do so. 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. Since early 1994, Members of the Helsinki Commission have called

upon the administration to move forward with its draft implementing legislation. Currently, draft legislation has been completed by the Department of Justice and is undergoing an inter-agency review prior to being sent to Congress.

Appendix:

Cases under Indictment or Deferral by the International Criminal Tribunal for the Former Yugoslavia as of May 30, 1995 (Available with text of this report from the Commission on Security on Security and Cooperation in Europe)