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Introduction

THE INTERNATIONAL TRIBUNAL FOR THE FORMER YUGOSLAVIA: A CASE STUDY IN SECURITY COUNCIL ACTION

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The International Criminal Tribunal for the Former Yugoslavia (the Tribunal) was established in May 1993 by the Security Council of the United Nations acting under Chapter VII and Article 25 of the United Nations Charter.¹ Chapter VII permits the Security Council to take action in situations where there is a threat to international peace.² Article 25 obligates members of the United Nations to accept and carry out decisions of the Security Council.³ This is the first time in history that an ad-hoc non-military international criminal tribunal has been established. By the same process, a number of nations hope that the United Nations will establish a similar tribunal to deal with humanitarian abuses and crimes in Rwanda. Whether the United Nations will create a completely new tribunal or whether the Tribunal will have its jurisdiction expanded to include Rwanda is a matter of current debate.⁴

* Justice of the Constitutional Court of South Africa, Chief Prosecutor of the International Criminal Tribunals for the former Yugoslavia and Rwanda. This Article was presented on November 5, 1994, at a Conference entitled, "Deterring Humanitarian Law Violations: Strengthening Enforcement".

1. The Security Council established the Tribunal in Security Council Resolution 827. S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/Res/827 (1993).

2. U.N. CHARTER ch. VII. Chapter VII of the Charter of the United Nations is entitled, "Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression." *Id.*

3. U.N. CHARTER art. 25. Article 25 of the United Nations Charter states, "[t]he Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter." *Id.*

4. In Resolution 955, the Security Council established an international criminal tribunal for the prosecution of persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda. S.C. Res. 955, U.N. SCOR, 49th Sess., 3453rd mtg., Annex, U.N. Doc. S/RES/955 (1994).

Before addressing the Tribunal, it is important to bear in mind that the establishment of ad-hoc tribunals under Chapter VII of the Charter is not an acceptable legal route for the establishment of a permanent international court of criminal justice. Chapter VII is concerned exclusively with situations where peace is threatened. A permanent international criminal court would have jurisdiction over offenses committed in a variety of circumstances. A permanent international criminal court should be established by treaty, and it would be up to each member state of the United Nations to decide whether to accede to such a treaty. Having said that, it nevertheless would be conducive to creating a favorable atmosphere with respect to the creation of a permanent court if the proceedings of the Tribunal are seen by the international community, and especially the human rights community, to be successful.

The judges of the Tribunal were appointed from a list of nominees submitted by member states of the United Nations.⁵ The Security Council narrowed the list to twenty-two judges, and the General Assembly chose the final eleven. The judges come from eleven countries: Australia, Canada, China, Costa Rica, Egypt, France, Italy, Malaysia, Nigeria, Pakistan, and the United States. Two of the judges are women—those from the United States and Costa Rica. The eleven judges have divided themselves into an Appeals Chamber of five judges and two Trial Chambers of three judges each. The Trial Chambers are not obliged to sit in the Hague and may sit elsewhere as they may determine.

The second organ of the Tribunal is the Registry⁶ which is presently under the direction of the Acting Registrar, Professor Theo van Boven, a well known and respected international lawyer from the Netherlands. The Registry will govern, apart from the general administration for the court, the witness protection program and the appointment of counsel for impecunious accused. An adequate witness protection program is a vital instrument in an endeavor such as the Tribunal, and it will have to be efficiently organized not only in the Netherlands, but in other countries as well if needed.

The third organ of the Tribunal is the Office of the Prosecutor.⁷

5. Statute of the International Tribunal, *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council 808*, U.N. SCOR, 48th Sess., Annex, art. 13(2), U.N. Doc. S/25704 (1993).

6. *Id.* art. 17.

7. *Id.* art. 16.

The Office of the Prosecutor is divided into a number of sections. First, there is a Secretariat advising the Prosecutor and Deputy Prosecutor. The Secretariat's office includes a number of special advisors with respect to gender related crimes and political issues. Second, there is a Prosecution Section with prosecuting attorneys and legal advisors, an Investigation Section consisting of investigators, analysts and interpreters, and a Special Advisory Section consisting of advisors on such matters as international law, military organization and the history of the former Yugoslavia. Finally, there is an information and records division consisting of the Computer Operation Section and the Administration Record Section.

The Prosecutor will adhere to the following strategies and principles:

1. Decisions with regard to indictments will be taken solely on a professional basis and without regard to political considerations or consequences.
2. Persons indicted will be those who appear to the Prosecutor to be most guilty and most culpable on the evidence available from time to time.
3. With regard to the seriousness of the crimes, the most guilty are those who ordered them. At the same time, all efforts will be taken to ensure that those who executed such orders are also brought within the net of indictments.

A major problem facing the Prosecutor at the present time is the conflict between the urgency in putting out indictments and the necessity for ensuring that all indictments, and particularly the first indictments, are appropriate. The urgency arises from the delays which have unfortunately dogged the creation of the Tribunal. Most of the delays can be ascribed to the difficulty in setting up a court by a U.N. administration which is completely unaccustomed to such a form of proceeding. The establishment of an international prosecuting office containing the departments I have described is not a matter of ease and is not something that can be achieved overnight. The Deputy Prosecutor was appointed in February 1994, and, fortunately for me, he was able, with a tremendous amount of work and application, to establish the nucleus of an appropriate Office of the Prosecutor. When I took office in the middle of August, there was an office operating. However, it is only in the past six weeks or so that we have had a sufficient number of investigators to go into the field.

The U.N. General Assembly will consider the budget for 1995, the crucial year for the Tribunal, during this or next month. Budget considerations have raised issues regarding the credibility of the Tribunal. On the political front, there have been fairly widespread allegations of cynicism and a lack of resolve on the part of the international community and the United Nations with regard to the Tribunal being rendered effective. From the point of view of the victims, the value of the Tribunal is not apparent because the Tribunal was set up in May 1993 and no prosecutions have yet begun. As a result of this delay, a sense of urgency has arisen with regard to the first indictments. On the other hand, there is a realization that the persons indicted should be the appropriate persons and not people at the bottom of the ladder of command. But for the delays and the credibility problems, the Prosecutor's Office would surely benefit if the office could have more time before having to issue the first indictments. However, the Prosecutor's Office will have to compromise in this regard in order to get indictments out quickly.

The other problem facing the Tribunal is the massive amount of information that flows into the Office of the Prosecutor. The biggest single source of information received by the office has been the report of the Commission of Experts. The office also receives a great deal of information from governments and non-governmental Organizations. All of the information the office receives serves as important signposts that indicate where the Prosecutor should look to indict individuals responsible for humanitarian crimes. However, it would not be appropriate or indeed possible for the office to issue indictments on the strength of such reports alone. The Prosecutor has to be satisfied from his own investigations that there is at least a *prima facie* case justifying the issue of an indictment and evidence available to establish that case.⁸ In this regard, it should be borne in mind that the standard of proof required is that beyond a reasonable doubt.

The eleven judges adopted their Rules of Procedure and Evidence on February 11, 1994. The Rules attempt to achieve to the greatest extent possible "equality of arms" between the Prosecutor and those indicted. The Prosecutor and the members of his office fully support this approach, as every attempt has to be made to ensure that the procedure of the Tribunal is above reproach and an example to national courts.

The Report of the Secretary-General, which contains the draft

8. *Id.* art. 18(4).

statute of the Tribunal that was subsequently adopted in Security Council Resolution 827 of May 25, 1993, emphasizes the traditional nature of the law which the Tribunal is to apply.⁹ Paragraph 29 states:

[i]t should be pointed out that, in assigning to the International Tribunal the task of prosecuting persons responsible for serious violations of international humanitarian law, the Security Council would not be creating or purporting to “legislate” that law. Rather, the International Tribunal would have the task of applying existing international humanitarian law.¹⁰

Paragraph 34 of the same report states:

[i]n the view of the Secretary-General, the application of the principle *nullum crimen sine lege* requires that the international tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law so that the problem of adherence of some but not all States to specific conventions does not arise. This would appear to be particularly important in the context of an international tribunal prosecuting persons responsible for serious violations of international humanitarian law.¹¹

These comments notwithstanding, there is a degree of legal creativity which will be required when proceeding before the Tribunal. It is necessary to develop a body of criminal procedural law and of criminal evidentiary law which adequately safeguards the fundamental rights of the accused, and, at the same time, makes it possible for a tribunal to handle cases involving extremely complicated facts in a reasonably expeditious manner. We cannot merely dust off the rather skeletal evidentiary and procedural rules used at Nuremberg. International human rights law is essentially a post-Nuremberg development and, in any event, we have not yet noticed a Balkan penchant for meticulous record keeping to assist us in our work. One underlying principle which must govern the work of the Prosecutor and of the Tribunal is perhaps best expressed in the words used by Robert Bolt in his play, *A Man for All Seasons*:

9. *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808*, U.N. SCOR, 48th Sess., U.N. Doc. S/25704 (1993).

10. *Id.* ¶ 29.

11. *Id.* ¶ 34.

This country's planted thick with laws from coast to coast - Man's laws, not God's - and if you cut them down . . . d'you really think you could stand upright in the winds that would blow then? Yes, I'd give the Devil benefit of law, for my own safety's sake.¹²

We too must give the Devil benefit of law, for our own safety's sake.

Finally, I should like to refer to the issue as to whether the work of the Tribunal is inimical to the peace process. In my view, it is not. Where, as in the former Yugoslavia, there are many hundreds of thousands of victims, a complete failure to act in trying to bring the criminals to justice is a recipe for long term violence. If there is no official acknowledgement of the crimes that occur, or if there is no punishment of those most responsible, then real or lasting reconciliation will be impossible to achieve. From time to time, this or that indictment could make current negotiations more difficult to carry out. However, if an enduring peace is the aim, as it must surely be, I would suggest that the expression of truth and justice, even if symbolic, can only serve to assist. This, I am happy to report, is the opinion of the senior officials of the United Nations and in particular, those involved in the negotiations.

12. Robert Bolt, *A Man for All Seasons*, in *NEW ENGLISH DRAMATISTS* 21, 60 (Penguin Books, 1963) (1960).