
THE WAR CRIMES TRIBUNAL FOR THE FORMER YUGOSLAVIA: PROBLEMS AND PROSPECTS

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The international community, in its efforts to establish peace in the former Yugoslavia, has come up with a plan that effectively partitions Bosnia-Herzegovina. Efforts to bring about an end to gross human rights abuses have been rhetorical rather than real. The only concrete step taken to address the violations of human rights and humanitarian law in Croatia and Bosnia-Herzegovina has been the creation of an international tribunal to investigate, prosecute, and punish those responsible for grave breaches of the 1949 Geneva Conventions¹ and their 1977 First Additional Protocol.² If the establishment of the tribunal is taken seriously, it will be an important first step through which justice can be served.

1. Article 147 of the *Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 13, 1949* (commonly referred to as the Fourth Geneva Convention), states: "Grave breaches . . . shall be those involving any of the following acts, if committed against persons or property protected by the present Convention i.e. [civilian persons]: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body and health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly."

"Protected persons" are defined in Article 4 of the Fourth Geneva Convention as: "Those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals."

2. The tribunal established to prosecute the violations of humanitarian law in the former Yugoslavia will be referred to as "the tribunal" in this article. It was established by U.N. Security Council Resolution No. 808 on 22 February 1993. The Security Council approved a statute for the war crimes tribunal on 25 May 1993 at The Hague. A list of 23 judges was compiled by the Security Council, from which the General Assembly elected 11 in ten rounds of balloting between 15 and 17 September 1993. The judges first met at The Hague in late November 1993, electing Antonio Cassese, an Italian law professor, president of the tribunal, and Elizabeth Odio Benito, Costa Rican Justice Minister, vice president. On 21 October 1993, Venezuela's State Prosecutor, Ramon Escovar-Salom, was appointed chief prosecutor but has since chosen not to accept the position.

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Not since World War II has Europe experienced a war so inhumane as the one being waged in Bosnia-Herzegovina and earlier in Croatia. For nearly three years the world has watched and read of massacres, detention camps, rapes, and sieges. European governments, the U.S. government, and the United Nations have each passed scores of resolutions, issued countless statements, and made repeated threats to use force to end the abuses in Bosnia-Herzegovina. A pervasive lack of will within the international community, however, has made such talk a travesty. Egregious abuses continue in Croatia and Bosnia-Herzegovina, and the world powers have taken no effective measures to bring to an end these crimes against humanity.

A Conflict Between Peace and Justice?

To some, there is a conflict between efforts to achieve peace and efforts to hold those guilty of human rights abuses accountable. They point out that participants in and signatories to peace agreements are often the very individuals who should be prosecuted for human rights abuses perpetrated by themselves or by forces under their command. In exchange for an agreement to end the hostilities, those responsible for human rights abuses are likely to seek immunity from prosecution or to stipulate that a general amnesty be granted to all combatants and others engaged in the fighting. Third-party negotiators might be inclined to agree to such demands so that a peace agreement can be reached.

Immunity from prosecution by the tribunal has not been put forward by any side as a prerequisite to the signing of a peace agreement among Serbian, Croatian, and Muslim factions at the U.N. and E.C. sponsored peace negotiations in Geneva. However, U.N. officials and those of some member states, presumably because they are eager to see peace restored, have been slow in criticizing those responsible for gross abuses and have shown little enthusiasm for the prosecution of possible war criminals. Moreover, by repeatedly meeting publicly with men such as General Ratko Mladic and Radovan Karadzic, the military commander and civilian representative of the Bosnian Serbs,³ respectively, the U.N. and E.C. negotiators have lent them legitimacy, despite the fact that war crimes have been perpetrated under their leadership. Many fear that signing a peace accord may lead to the exemption from prosecution of high-ranking officials from Serbia and Croatia as well as from Bosnia-Herzegovina.

The U.N. Security Council, having focused primarily on peace negotiations, was late in criticizing the human rights record of the warring parties, particularly the Serbian forces. The first U.N. resolution dealing with the crisis in the

3. Although some Serbs and Croats remain loyal to the Bosnian government, most Serbs and Croats living outside Sarajevo have switched allegiances to the Bosnian Serb and Croat factions, respectively. For the purposes of this article, the Bosnian government and the armed forces it commands represents primarily the Bosnian Muslim population, whereas the Bosnian Serb and Bosnian Croat authorities represent their respective nationalities.

former Yugoslavia imposed an arms embargo on the entire country.⁴ Subsequent resolutions dealt with the establishment of the United Nations Protection Force (UNPROFOR) in the former Yugoslavia and criticized the warring parties for violations of many cease-fire agreements. Not until 15 May 1992 did the Security Council adopt a resolution that mentioned respect for human rights and humanitarian law.⁵

The violations of humanitarian law in Croatia, while on a smaller scale, were virtually identical to the abuses that followed in Bosnia-Herzegovina. Throughout the war in Croatia, the Security Council failed to pass a single resolution condemning the sieges of Vukovar, Dubrovnik, and other Croatian cities, and the torture, disappearances, and summary executions of civilians by Serbian, Yugoslav, and Croatian forces. Instead, the United Nations, the European Community, and the United States focused their efforts on negotiating cease-fire agreements which were repeatedly violated.

Presently, the United Nations and the European Community are still pursuing a peace agreement that effectively partitions Bosnia. Efforts to bring about an end to the abuses and sieges and to hold accountable those responsible for such violations of humanitarian law are accorded secondary or peripheral attention. As long as the policy of "ethnic cleansing" is allowed to continue and those responsible for such a policy remain free, the effectiveness of the war crimes tribunal remains open to question. Despite the obvious difficulty of bringing war criminals to trial, any efforts by the U.N. and E.C. negotiators, or others, to bargain away justice for peace should be vigorously opposed.

Establishing Accountability of High-Level Officials

Although evidence is available to indict low-ranking soldiers and commanders of some detention camps for war crimes, many observers are skeptical of the tribunal's ability to indict and prosecute high-ranking members of the Serbian, Yugoslav, Croatian, or Bosnian governments for war crimes and crimes against humanity. To date, documents similar to Hitler's *Mein Kampf* and minutes of meetings like the Hossbach and Wannsee conferences have not surfaced to implicate high-ranking government officials directly in the planning of crimes in Croatia and Bosnia-Herzegovina. Nevertheless, testimonial, forensic, circumstantial, and other evidence exists which could serve to indict high-ranking government officials, particularly members of the Serbian government and the Yugoslav Army, for war crimes and crimes against humanity.

Unlike the Nuremberg trials, the tribunal on the former Yugoslavia does not

4. United Nations Security Council Resolution 713, 25 September 1991.

5. The first resolution that contained a reference to the violation of human rights and international law was Resolution 752 of 15 May 1992, in which the Security Council called upon all parties to cease immediately "any attempts to change the ethnic composition of the population." See Herman von Hebel, "An International Tribunal for the Former Yugoslavia: An Act of Powerlessness or a New Challenge for the International Community?" *Netherlands Quarterly of Human Rights* 11 (1993): 441.

allow for prosecution of "crimes against the peace,"⁶ defined as the "planning, preparation, initiation of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing."⁷ The exemption of such a provision from the crimes to be prosecuted will make it more difficult, but not impossible, to bring to trial high-ranking heads of state such as Serbian President Slobodan Milosevic.⁸

Despite the fact that Milosevic and high-ranking members of the Yugoslav Army (*Jugoslavenska Narodna Armija*, or JNA) cannot be tried for "crimes against the peace," they can be held responsible for the commission or the aiding and abetting of war crimes and crimes against humanity. Article 7, paragraph 2 of the tribunal's Statute stipulates that superiors, including heads of state, may not be relieved from responsibility for the crimes of their subordinates.⁹ Milosevic has long insisted that he did not have contact with nor control over Serbian forces in Croatia and Bosnia and, therefore, cannot be held accountable for their actions. Similar claims have been made by high-ranking JNA officials, who contend that the JNA pulled out of Croatia and Bosnia-Herzegovina, leaving its weaponry at the disposal of the local population, but not directly controlling its actions on the battlefield.

Although such arguments may be true in part, the exoneration of Milosevic and the JNA is unfounded. JNA officers are directly responsible for abuses perpetrated in Croatia and in Bosnia-Herzegovina. During the latter part of 1992, the JNA was involved in attacks against Croatia and, in some cases, perpetrated abuses against the civilian population or disarmed combatants during or after those attacks. The most glaring example of this was the siege and fall of the Croatian city of Vukovar where the Yugoslav Army, acting in conjunc-

6. The Statute for the tribunal on the former Yugoslavia stipulates that the crimes to be prosecuted are as follows: grave breaches of the Geneva Conventions of 1949 (article 2 of the Statute); violations of the laws or customs of war (articles 3 of the Statute); genocide (article 4 of the Statute); and crimes against humanity (article 5 of the Statute). See von Hebel, "An International Tribunal for the Former Yugoslavia," 448.

7. Telford Taylor, "Charter of the International Military Tribunal," Appendix A, *The Anatomy of the Nuremberg Trials* (New York: Alfred A. Knopf, 1992), 652.

8. Milosevic and high-ranking members of the Yugoslav Army appear to have planned and instigated the wars in Croatia and later in Bosnia. Milosevic's efforts to create a "Greater Serbia" began in the late 1980s, when he sought to assert political control over the rest of the then Yugoslav federation and when he exaggerated abuses against the Serbian minority in Kosovo, Croatia, and Bosnia to justify the use of force to annex territory. At the same time, according to Serbs and others interviewed by Helsinki Watch, the Yugoslav Army and the Serbian regime, particularly the Serbian Interior Ministry, were responsible for arming and training Serbian paramilitary troops that were active in Croatia and Bosnia. Also, members of the Serbian population in both countries had been armed by Yugoslav and Serbian military and paramilitary forces long before the war broke out in Croatia and Bosnia. Such actions suggest that the Belgrade regime had planned, organized, and encouraged the Serbian rebellions in Croatia and Bosnia, acts which would more appropriately fit the Nuremberg definition of "crimes against the peace" than war crimes or crimes against humanity.

9. United Nations Security Council, "Report of the Secretary-General Pursuant to Paragraph 8 of Security Council Resolution 808 (1993)," and Annex ("Statute of the International Tribunal,") S/25704, 3 May 1993.

tion with Serbian paramilitary groups trained and supported by the Serbian government, completely destroyed the city. After the fall of Vukovar, the JNA organized the arrest and detention of thousands of civilians and disarmed combatants. Approximately 200 prisoners were summarily executed, and thousands were taken to detention camps or JNA-operated prisons in Yugoslavia, i.e., in the province of Vojvodina and Serbia proper, where they were tortured and otherwise mistreated. Thousands more disappeared. The Yugoslav Army also was directly responsible for the siege of Sarajevo, the shelling of civilian targets, and the disproportionate and indiscriminate use of force during the early stages of the war. Regular JNA officers from Serbia and Montenegro later returned home, but direct Yugoslav Army military involvement in Bosnia-Herzegovina again became evident in early 1994.¹⁰

A state can be held responsible, at least in part, for the abusive actions of armed forces in a second state if the former supports the latter militarily, economically, or otherwise. This responsibility is heightened if the government or an agency thereof had information from which it could conclude that its client forces committed human rights abuses and if the supporting government or agency then did not take measures to prevent or repress the abuses.¹¹ The Croatian government's delivery of military and economic support to abusive elements of the Bosnian Croat militia renders the Croatian government partly responsible for the actions of its surrogates. The Croatian government has dismissed several police and military officers responsible for abuses in Croatia and has called for the prosecution of Bosnian Croat forces in Bosnia-Herzegovina. Although it demonstrates some concern for matters of international law, the steps taken by the Croatian government have not been sufficiently vigorous in seeking prosecution of war criminals.

Likewise, the JNA and Milosevic can be held partially accountable for the abuses perpetrated by Serbian forces in Croatia and Bosnia-Herzegovina, which they continue to arm, supply, and train. The JNA and the Serbian government have not taken steps to pressure, condemn, or prosecute their surrogate forces in Croatia or Bosnia-Herzegovina to cease their abusive practices and the commission of war crimes. In most cases, the Serbian government has denied that such crimes took place, has laid the blame on the other parties to the conflict,

10. See John Kifner, "Yugoslav Army Reported Fighting in Bosnia to Help Serbian Forces," *New York Times*, 27 January 1994; and John Kifner, "Bosnian Serbs Order General Mobilization for Conclusion of War," *New York Times*, 1 February 1994. Although this section of the article deals with the involvement of the armed forces of the Yugoslav government (i.e. Serbia and Montenegro), it should be noted that armed forces representing the government of Croatia are also involved militarily in Bosnia-Herzegovina. See Chuck Sudetic, "Asserting Croatia Invaded, Bosnia Appeals to the UN," *New York Times*, 29 January 1994.

11. Article 86 of *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts* (otherwise known as Protocol I) states: "The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be, if they knew or had information which could have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach."

or has tried to justify them as retaliation. The JNA has promoted, rather than dismissed and prosecuted, officers responsible for the destruction of cities in Croatia and Bosnia-Herzegovina. Such indifference makes the Serbian government and the Yugoslav Army accountable for many of the crimes in Serbian-controlled or besieged areas of Croatia and Bosnia-Herzegovina.

Prospects for Cooperation with the Tribunal

The tribunal was established by a resolution of the U.N. Security Council, which is binding on all member-states including the parties to the conflict in the former Yugoslavia. Unlike the Nuremberg trials, however, this tribunal is in the unprecedented position of bringing indictments against members of the victorious as well as the losing states in the conflict. Although Bosnia-Herzegovina and Croatia have stated their support for and willingness to cooperate with such a tribunal, the Yugoslav and Bosnian Serb authorities have explicitly refused to cooperate with the tribunal.¹² This undermines the ability of the tribunal to prosecute members of the Serbian and Yugoslav forces or to obtain evidence from areas under their control.

The cooperation of one party should not preclude exerting pressure on the others to cooperate with the tribunal and its prosecutor and investigators. Serbian forces have blocked efforts to collect evidence that could be used against them by the tribunal. For example, Serbian forces have consistently blocked U.N.-sponsored efforts to exhume the bodies of an estimated 180 Croats who were summarily executed after the fall of the city of Vukovar. Conversely, Croatian authorities have cooperated with recent efforts by the United Nations to exhume the bodies of an unspecified number of Serbs executed by Croatian forces in the area known as *Pakracka Poljana*. Presuming continued Croat cooperation, forensic evidence of crimes committed by their forces will be made available to the court. On the other hand, if evidence of such crimes committed by Serbian forces continues to be blocked, it may preclude the ability to indict and prosecute Serbian war criminals. The international community must explore ways in which both of the parties to the conflict can be forced to relinquish evidence requested by the court or the prosecutor.

The lack of a mechanism through which one can extradite a person indicted for war crimes or crimes against humanity to stand trial at The Hague has been the subject of much criticism. In response to such criticism, some have called for the maintenance or imposition of sanctions against parties that do not cooperate with the tribunal. According to this view, such sanctions would not be lifted until a state extradites indicted criminals.¹³ Although Serbia may be willing to tolerate sanctions for the sake of the "Serbian nation," it is questionable, such proponents argue, that the Serbs, Croats or Muslims would be willing to live

12. von Hebel, "An International Tribunal for the Former Yugoslavia," 443.

13. See Aryeh Neier, Letter, "The Nuremberg Precedent," *The New York Review of Books*, 4 November 1993, 72.

under the hardship of sanctions in order to protect several individuals accused of war crimes.

The United States has voiced its support for the use of sanctions to force cooperation with the tribunal. Madeleine Albright, the U.S. representative to the United Nations, has warned that the United States "may use its Security Council veto to maintain an economic blockade of the Yugoslavian federation of Serbia and Montenegro until Belgrade hands over those accused of war crimes."¹⁴ She further claimed that the United States "favors Security Council sanctions against countries that do not cooperate with [the tribunal] by refusing to surrender citizens accused of war crimes or by withholding evidence."¹⁵

European countries such as France and Great Britain are less enthusiastic about the establishment of a war crimes tribunal, claiming that a peace agreement should be signed before those guilty of war crimes and crimes against humanity are tried by an international court.¹⁶ Some European countries, including Great Britain, have been reluctant "to share evidence of war crimes they have collected with the tribunal's prosecutors."¹⁷ It will be the responsibility of the tribunal and its supporters to urge cooperation from U.N. member states when this is not immediately forthcoming.

Some have claimed that detailed indictments would, by themselves, punish the war criminals by severely restricting their ability to leave their countries and by making them vulnerable for prosecution should they leave. War crimes are subject to universal jurisdiction, which means that any court may try an alleged offender, without regard to territorial or other traditional bases of jurisdiction.¹⁸ Even if alleged war criminals are not immediately extradited to The Hague to stand trial for war crimes, their eventual apprehension and trial would still be possible in the future.

Due Process Guarantees

During the trials of Nazi figures at Nuremberg, the crimes to be adjudicated were, in part, set forth and defined by the tribunal despite the fact that they had not been recognized as crimes at the time of their commission. For example, many of the Nuremberg defendants were found guilty of "crimes against the peace" and "crimes against humanity" despite the fact that such crimes were not part of the existing body of international law prior to 1946. Although the Nuremberg court set forth a new body of international laws and established

14. Paul Lewis, "U.S. Official Visits Graves in Croatia," *New York Times*, 7 January 1994, A3.

15. *Ibid.*

16. *Ibid.*

17. *Ibid.*

18. The prevailing view of universal jurisdiction in the United States is stated in section 404, *Restatement (Third) of the Foreign Relations Law of the United States (1987)*: "A state has jurisdiction to define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern, such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism, even where none of the bases of jurisdiction indicated in [section] 402 is present."

important legal precedents, the Nuremberg trials themselves employed such laws *ex post facto*, thereby violating due process in some cases.

The same cannot be said for the Statute adopted by the Yugoslav tribunal. The law to be applied is not in dispute: The commission of crimes against humanity as defined by the Nuremberg court, violations of the Geneva Conventions of 1949 and their 1977 Protocols, and breaches of other international and customary laws will be prosecuted by the tribunal.

The tribunal for the former Yugoslavia also will include an Appeals Chamber, allowing the convicted to appeal his or her sentence. Such an appeal was not available to the defendants at Nuremberg.¹⁹ The Yugoslav tribunal's Statute also forbids the conduct of trials *in absentia*, further guaranteeing that the accused has a right to be tried in person.²⁰

Although the Statute for the Yugoslav tribunal provides guarantees of due process to the defendants, it inadequately provides for the protection of victims and witnesses. Article 22 of the Statute provides for *in camera* proceedings and "the protection of the victim's identity" but gives no further guidance in this matter.²¹ The Statute does not provide for monetary or other compensation for damages suffered by the victims in this war. The tribunal's primary purpose should be justice for the victims. For this reason, the tribunal must take further steps to ensure the rights and safety of the victims who are called upon to cooperate with it.

Conclusion

Despite the procedural and political difficulties facing the tribunal, its creation and operation are important to the international human rights movement, to the victims of this war, and to all the peoples of the former Yugoslavia. It has the power to establish truth and determine individual accountability for crimes, both of which are important steps toward reconciliation.

Evidence presented at the tribunal should dispel the misconceptions and fallacies promulgated about the war in the former Yugoslavia. Inter-ethnic conflict is the result of the war, not its cause. The war was waged because state actors, through the state-owned media, manipulated facts, fears and historical

19. Article 26 of the Charter of the International Military Tribunal at Nuremberg stated that "the judgement of the Tribunal . . . shall be final and not subject to review." The Nuremberg defendants were permitted to appeal their convictions to the Allied Control Council for Germany, comprised of "the commanders of one of the four zones into which occupied Germany was divided." The Control Council was not a court and it rejected the appeals and confirmed all convictions and sentences. See Taylor, *The Anatomy of the Nuremberg Trials*, 573, 601-607, and 652-53.

20. Although Helsinki Watch supports the position that trials held *in absentia* violate due process norms and should not be employed by the tribunal, it should be noted that the U.N. Human Rights Committee and the European Strasbourg organs have allowed for the possibility of *in absentia* trials. See von Hebel, "An International Tribunal for the Former Yugoslavia," 453.

21. For a critique of the tribunal's Statute, see Helsinki Watch, "Procedural and Evidentiary Issues for the Yugoslav War Crimes Tribunal: Resource Allocation, Evidentiary Questions and Protection of Witnesses," August 1993.

memories of the various nationalities, exploiting the differences between former Yugoslavia's religious and ethnic groups. Prolonged exposure to state-sponsored propaganda and the general exclusion of independent sources of information convinced the majority populations in Serbia, Croatia, and Bosnia that their respective cause was righteous and that the aims of their enemies were unjust. This manipulation encourages the collectivization of guilt among the country's nationalities: *all* Serbs are held responsible for the abuses perpetrated by Serbian and Yugoslav forces in Croatia and Bosnia, *all* Croats are held responsible for Croatian abuses against Serbs and Muslims, and *all* Muslims are blamed for their abuses in the war. By collectivizing guilt, the warring parties are able to legitimize their attacks against individual non-combatants solely on the basis of their ethnic or religious affiliation. The tribunal will hold *individuals* responsible, not entire nations, for the crimes perpetrated in the war. The individualization of guilt may help prevent an unending cycle between the various ethnic groups that have suffered in this war.

The creation of an international tribunal will also do much to strengthen the validity of international humanitarian and human rights law. A multi-national court's application of internationally recognized principles would set an important precedent for adjudicating violations of international law in other parts of the world.

The successful functioning of the *ad hoc* tribunal for the former Yugoslavia might also advance the cause of establishing a permanent tribunal to adjudicate war crimes and crimes against humanity in the future. Article VI of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide makes reference to the fact that "persons charged with genocide or any of the other acts enumerated in article III [of the Convention] shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such an international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction."²² Despite such pronouncements, efforts to establish a permanent tribunal have not come to fruition, possibly because some U.N. member states do not wish to come under scrutiny for crimes their troops may commit in various places throughout the world. Nevertheless, the establishment of a permanent tribunal may be accelerated if the *ad hoc* tribunal on the former Yugoslavia proves successful.²³

Ultimately, it is the victims of the abuses who will determine whether justice has been served. Although the establishment of an *ad hoc* tribunal for the former Yugoslavia may be important for the international human rights movement and the handing down of detailed indictments against the absent accused may serve to stigmatize war criminals, such an answer is clearly inadequate for the victims. The Muslim woman who was raped repeatedly in Bosnia, the Croatian mother whose family was summarily executed in Vukovar, and the Serbian man whose ancestral home was burned to the ground because he was of the "enemy" group will not be satisfied with diplomatic statements and legal machinations. The

22. von Hebel, "An International Tribunal for the Former Yugoslavia," 441.

23. *Ibid.*

existence of detailed indictments in the halls of The Hague can hardly bring true justice to these victims. Nevertheless, it is a necessary step. The international community has lacked the will to bring about a cessation of war crimes and crimes against humanity in Croatia and Bosnia; the least it can do is to bring the criminals to justice.

