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International War Crimes Tribunal

American Bar Association Section of International Law and Practice Reports to the House of Delegates*

I. International War Crimes Tribunal**

RECOMMENDATION

BE IT RESOLVED, that the American Bar Association supports the establishment by the Security Council of the United Nations under Chapter VII of the U.N. Charter of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 ("the Tribunal").

BE IT FURTHER RESOLVED, that the American Bar Association recommends that the United States Congress promptly adopt appropriate implementing legislation to enable the President to give full support to the Tribunal, and including provisions which would:

(a) limit the discretion of courts under current U.S. law to deny assistance to the Tribunal in the service of documents and the collection of evidence;

*These Recommendations and Reports were adopted by the House of Delegates in August 1993.

**This Recommendation and Report was developed by a special Task Force on War Crimes established by the Section and chaired by former State Department Legal Advisor Monroe Leigh.

(b) recognize the obligation of the United States under Chapter VII of the U.N. Charter to arrest accused persons and to surrender them to the Tribunal.

BE IT FURTHER RESOLVED, that the American Bar Association recommends that the United States urge the United Nations to make every effort, through the rules of evidence and procedure to be adopted by the Tribunal and, if appropriate, through supplementary decisions of the Security Council, to ensure due process for the accused and adequate protection for victims and witnesses by such measures as the following:

(a) implementation of the principle of *nullum crimen sine lege* (no crime without law) by specifying (1) that offenses in violation of the laws or customs of war include those acts especially forbidden by the Hague Regulations of 1907; (2) that the phrase "other inhumane acts" in the description of crimes against humanity includes acts prohibited in common article 3 of the Geneva Conventions of 1949; and (3) that the description of rape includes enforced prostitution, enforced pregnancy, and other widespread sexual offenses;

(b) prevention of conflicts of interest within the Tribunal and the provision of institutional balance through the establishment of an Office of Defense Counsel and a prohitition against service by an indicting judge on the panel that hears the case at trial;

(c) the participation by the U.N. Security Council of the rules of evidence and procedure of the Tribunal prior to their adoption by the judges;

(d) the assurance of the right of confrontation and the prohibition of the use of *ex parte* affidavits as evidence at trial against the accused, except in highly specialized circumstances;

(e) the assurance that the Prosecutor's standard of proof at trial is at least the functional equivalent of "beyond a reasonable doubt;"

(f) the reconciliation of the defendant's right to cross-examination with the protection of victims and witnesses through special arrangements;

(g) the recognition of the defense of superior orders in cases where a defendant acting under military authority in armed conflict did not know the orders to be unlawful and a person of ordinary sense and understanding would not have known the orders to be unlawful, but treating superior orders as grounds for mitigation of punishment only in cases of duress;

(h) the protection against double jeopardy by permitting only the person convicted, and not the Prosecutor, to request an appeal after final judgment or a review proceeding;

(i) the guarantee of the rights of the accused consistent with the International Covenant on Civil and Political Rights;

(j) the assurance of uniform standards concerning the treatment of prisoners by States in which they are imprisoned and for the review of requests for pardon or commutation once the Tribunal is no longer in existence.

REPORT

I. Introduction and History

At its meeting in November 1992, the Board of Governors of the American Bar Association adopted a resolution which:

(1) urged the United States and the United Nations Security Council to investigate and, if warranted, prosecute and punish persons who have committed war crimes or crimes against humanity in Bosnia-Herzegovina; and

(2) offered the ABA's assistance to the United States and the United Nations in identifying qualified lawyers, law professors and judges to collect information, to prosecute, try and punish persons accused of such crimes.

On February 22, 1993, after repeated demands that the parties to the conflict in the territory of the former Yugoslavia cease and desist from all breaches of international humanitarian law, the Security Council of the United Nations determined that an international tribunal should be created to prosecute responsible persons in the former Yugoslavia ("the Tribunal"). The Security Council asked the Secretary-General to submit a proposal to implement this decision.[1] The Secretary-General issued a detailed report on May 3, 1993. The Security Council approved the Secretary-General's report and, acting under Chapter VII of the U.N. Charter, adopted the Statute of the Tribunal annexed to that Report ("Statute" or "Statute of the Tribunal") on May 25, 1993.[2] In doing so, the Security Council established an international tribunal for the sole purpose of prosecuting persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia between January 1, 1991, and the restoration of peace.[3]

Pursuant to the mandate of the November 1992 resolution of the ABA Board of Governors, the Section of International Law and Practice established a Task Force on War Crimes in the Former Yugoslavia to, among other things, analyze the Statute of the Tribunal and report on its implementation. The Task Force has issued a detailed report which supports the establishment of a Tribunal and which urges that the institutional arrangements and procedures of the Tribunal be fair and impartial, especially since this Tribunal could serve as a prototype for future criminal tribunals.

The accompanying resolution contains the main recommendations of the Task Force report, and the discussion below summarizes its analysis and conclusions. The full report of the Task Force was approved by the Section Council on July 22, 1993 and is available from the ABA Policy Administration Office.

1. S.C. Res. 808, U.N. SCOR, 3175th mtg., at 2 (1993).
2. S.C. Res. 827, U.N. SCOR, ¶¶ 1-2, Doc. S/25626 (1993).
3. *Id.*

II. Comment on the Statute of the Tribunal

The ABA Section of International Law and Practice and its Task Force on War Crimes in the Former Yugoslavia support the Secretary-General's Report and the Statute of the Tribunal but recommend certain clarifications and additions. These recommendations could be put into effect through the rules of procedure and evidence to be adopted by the Tribunal, through implementing directives and interpretative statements, or, if necessary, through supplementary decisions of the Security Council.

1. *Legal Basis for Establishing the Tribunal*

The Security Council has an adequate legal basis under Chapter VII of the U.N. Charter, in conjunction with previous resolutions concerning the situation in former Yugoslavia, to establish an international tribunal to prosecute war crimes committed in this territory. Chapter VII gives the Security Council primary responsibility for maintaining and restoring international peace and security and obliges all Member States to carry out the decisions of the Security Council. An *ad hoc* tribunal to prosecute war crimes in the former Yugoslavia could be viewed as an appropriate enforcement measure to maintain and restore international peace and security. It was made clear by the Council that this tribunal would not be a permanent tribunal to adjudicate war crimes or crimes against humanity.

2. *The Definition of Humanitarian Law and Catalogue of Crimes*

Article 1 of the Statute declares the Tribunal's subject-matter jurisdiction to be the prosecution of "serious violations of international humanitarian law. . . ." Articles 2 through 5 further define that jurisdiction to include prosecution of grave breaches of the Geneva Conventions of 1949, violations of the laws or customs of war, genocide, and crimes against humanity. The list of specific offenses violative of the laws or customs of war in Article 3 should be interpreted to include those acts especially forbidden by the Hague Regulations of 1907. Such enumeration would parallel the Statute's enumeration of grave breaches of the Geneva Conventions set forth in Article 2 and would reinforce the Statute's adherence to the principle of *nullum crimen sine lege* (no crime without law).

For the same reason, the phrase "other inhumane acts" should be interpreted to include all the prohibitions in common article 3 of the Geneva Conventions of 1949. Similarly, as pointed out in the Secretary-General's report, the reference to subparagraph (g) (rape) of Article 5 should be interpreted to include enforced prostitution, enforced pregnancy, and other widespread sexual offenses.

3. *Structure of the Tribunal*

The Statute provides that the Tribunal will have three organs: the Chambers, which consist of two three-judge Trial Chambers and a five-judge Appellate

Chamber, the Office of the Prosecutor, and the Registry, which serves as a combined secretariat for the other two organs. In addition, an Office of Defense Counsel should be established to provide institutional balance and help guarantee procedural fairness to the accused. The institutional structure and procedures of the Office of Defense Counsel should include safeguards against any conflicts of interest among defense counsel. Because there will be no jury at trial and at least one judge must, under the Statute, rule on the sufficiency of any indictment, no indicting judge should serve on the panel that hears the case at trial.

4. *Rules of Evidence and Procedure*

Under the Statute, the judges have authority to adopt rules of evidence and procedure. Express guidelines in the Statute, however, circumscribe this power to some degree. It seems desirable for the Security Council to retain a role in the consideration of the rules of evidence and procedure prior to their adoption by the judges.

In principle, the Tribunal should not use *ex parte* affidavits as evidence at trial against the accused since such use may be inconsistent with the right to cross-examination which is guaranteed by Article 21(4)(e). If there is to be any derogation from this principle, *ex parte* affidavits should be permitted at trial only in extraordinary circumstances. However, such general prohibition against the use of *ex parte* affidavits would not apply to the investigatory stage.

Steps should be taken to ensure that the Prosecutor's standard of proof at trial is at least the functional equivalent of "beyond a reasonable doubt."

5. *Reconciliation of Cross-Examination with Protection of Victims and Witnesses*

A tension exists between the defendant's right to cross-examination under Article 21(4)(e) of the Statute and the "protection" granted to the victim and witness appearing before the Tribunal under Article 22. It is generally recognized that effective prosecution will depend upon the willingness of witnesses and victims of rape and torture to testify before the Tribunal. Special arrangements, consistent with the defendant's right to cross-examination, should be developed by the Tribunal to address the concerns and fears of victims and witnesses.

Such arrangements might include hearing evidence *in camera* in extraordinary circumstances relating to the most sensitive crimes or through the use of one-way closed circuit television; conducting fact-finding hearings and depositions close to Bosnia-Herzegovina; prohibiting public disclosure of the victims' identities; developing evidentiary rules limiting the introduction into evidence of the victim's past sexual history; providing special training for judges and using expert witnesses to assist judges in their understanding of the testimony of a victim suffering

from the effects of severe trauma; and making available support services for victims and witnesses.

As the Statute only provides for the right to cross-examination under Article 21(4)(e) rather than a broader right of confrontation, Article 21(4)(e) should be clarified to assure the right of confrontation, unless highly specialized circumstances require different treatment.

6. *The Defense of Superior Orders*

Article 7(4) provides that acting pursuant to superior orders is not a defense to criminal responsibility but may be considered in mitigation if "justice so requires." Article 7(4) should be clarified to include a limited exception recognizing the defense of superior orders in cases where a defendant acting under military authority in armed conflict did not know the orders to be unlawful and a person of ordinary sense and understanding would not have known the orders to be unlawful. On the other hand, Article 7(4)'s treatment of superior orders as grounds for mitigation of punishment should be restricted to apply only in cases of duress. These changes would make the implementation of the Statute more nearly consistent with standards adopted in the Nuremberg proceedings subsequent to the trial of major war criminals.

7. *Double Jeopardy: Prosecutorial Appeals*

The Statute provides that either the person convicted by the Trial Chambers or the Prosecutor can seek an appeal from judgments by asserting commission of errors of fact that have "occasioned a miscarriage of justice," or errors of law "invalidating the decision" by the Trial Chamber. Similarly, the Statute allows the convicted person or the Prosecutor to apply for a review of judgment if they discover a new fact, not known at the time of trial, "which could have been a decisive factor in reaching the decision." An appeal or review proceeding brought by the Prosecutor, which results in a reversal of the judgment of the Trial Chamber, could necessitate a new trial for the same offense, thus violating the principle of double jeopardy. In practice, the language of the Statute can be applied to permit only the person convicted by the Trial Chambers to request an appeal after final judgment or a review proceeding. However, either the defendant or the Prosecutor should be permitted to seek interlocutory appeals of issues of law.

8. *Double Jeopardy: Multiple Trials Before National Courts and the Tribunal*

While the Statute incorporates some protection against double jeopardy arising out of separate prosecution before national courts and the Tribunal, it does not address the possibility of double jeopardy before the Tribunal itself. The Statute's exceptions to the general rule against retrial before the Tribunal after trial before a national court for an "ordinary crime" or in sham proceedings require great

care in application in order to ensure that the accused is not tried twice for the same crime.

9. *Treatment of the Accused Pending Trial*

The Statute does not contain a provision for pre-trial release or for bringing a *habeas corpus*-type motion. Both of these rights are contained in the International Covenant on Civil and Political Rights. Guaranteeing the rights of the accused is particularly important here, where the arresting authority may not be subject to strict political accountability. The Tribunal should provide for each of these rights in its rules of procedure.

10. *Equal Treatment Concerning Enforcement of Sentences*

The Statute provides for the enforcement of sentences ordered by the Tribunal by and in accordance with the laws of various States, subject to the supervision of the Tribunal. The Statute further provides that the State in which a person is imprisoned shall notify the Tribunal if a prisoner becomes eligible for pardon or commutation of his or her sentence. Under Article 28, the President of the Tribunal, in consultation with the judges, would then "decide the matter on the basis of the interest of justice and the general principles of law."

The Statute raises the possibility of unequal treatment since the laws of the States in which prisoners may be serving their sentences could vary dramatically. Since States are required to notify the Tribunal only when a prisoner becomes eligible for pardon or commutation of his or her sentence under the laws of the State, a prisoner in one State could be eligible for release while a person serving a prison sentence for the same crime in another State could remain imprisoned. Moreover, the Tribunal may no longer be in existence at the time the prisoner becomes eligible for release, and the Statute does not provide for an alternative forum to review requests for pardon or commutation. It will be necessary for the Tribunal to adopt a uniform standard concerning the treatment of prisoners. An alternative forum for review of requests for pardon or commutation should be provided once the Tribunal is no longer in existence.

11. *Judicial Assistance*

Existing statutes on international judicial assistance provide an adequate basis for the obligations imposed by the Statute on the United States with regard to assisting the Tribunal in the service of documents and the collection of evidence. However, the wide discretion of courts under current U.S. law to deny assistance should be restricted in U.S. implementing legislation.

Under the Statute of the Tribunal adopted under Chapter VII of the Charter of the United Nations, the United States has an obligation to arrest and surrender accused persons to the Tribunal. However, as U.S. law requires an extradition treaty with a foreign government before allowing extradition, the implementing legislation should include provisions that would (1) specify that orders of