



National Security Law Report

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Part II: An Overview

Proposed Rules for the War Crimes Tribunal in the Former Yugoslavia

by Walter G. Sharp, Sr.

Editor's Note: Part I of this series, detailing the provisions of the Statute of the International Tribunal, appeared in the February issue of the Report.

United Nations Security Council Resolution 827, of 25 May 1993, established the International Tribunal for the purpose of prosecuting serious violations of international humanitarian law committed in the territory of the former Yugoslavia. This resolution also encouraged States to submit suggested rules of procedure and evidence for approval by the tribunal. On 28 May 1993, a Department of Defense (DoD) *ad hoc* working group of eight military attorneys met to draft proposed rules of procedure and evidence. The resulting set of proposed rules was presented to the tribunal by the Department of State last November.

The goal of the DoD working group was to provide a comprehensive set of rules in a "trial manual" format which incorporated and complemented the provisions of the statute. Thirty-one proposed rules are grouped into six sections: authority of the tribunal, miscellaneous powers, investigations and suspects' rights, indictment and pretrial proceedings, trial procedures, and post-trial procedures. In the commentary which follows each rule, cross-references, related or unresolved issues, and specific concerns of the working group are surfaced.

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The proposed rules address a number of important substantive issues not resolved by the statute. The most important was establishing a standard of proof that requires guilt to be proven beyond a reasonable doubt. Two other contentious issues addressed the protection of victims and witnesses *vis-à-vis* the accused's right of confrontation, and the tribunal's procedures to procure the presence of the accused for trial. Issues beyond the scope of the proposed rules, such as the place and conditions of pretrial and adjudged confinement, were identified, but left to future arrangements by the United Nations. The proposed rules allow the judges of the tribunal a great amount of discretion to ensure that the proceedings are fair and just.

Section one is structured around the statute's provisions which prescribe the authority of the tri-

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June 10-11 at International Club Nonproliferation Conference to Feature All-Star Lineup

Arguably the most important single national security law issue facing the United States and the world community in the post-Cold War era is the danger of the proliferation of weapons of mass destruction. To help promote public understanding of that issue, the Standing Committee and the University of Virginia Center for National Security Law will bring together leading experts from the State Department, the Pentagon, Commerce, the National Security Council, the Intelligence Community, the Arms Control and Disarmament Agency, and the private sector to examine "Nonproliferation of Weapons of Mass Destruction." The conference will take place at the International Club, 1800 K Street NW, Washington, DC, on Friday and Saturday, June 10-11, 1994.

Confirmed State Department participants include Ambassador Robert L. Gallucci (Assistant

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War Crimes Rules . . .

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bunal, personal and subject matter jurisdiction, and the primacy of the tribunal's jurisdiction. Subject to review by the Appeals Chamber, the judges of a Trial Chamber are given the authority to amend the rules for a specific proceeding if necessary for a fair and expeditious trial. Another proposed provision provides that a failure to comply with the rules does not require that charges be dismissed or that evidence be excluded unless specifically required by the rules or required to prevent a miscarriage of justice or serious damage to the integrity of the proceedings. This section also adds that there shall be no statute of limitations.

Miscellaneous powers of the tribunal are covered in section two. These rules set forth the procedures for scheduling, appointment of officials, disqualification or recusal of the judges, testimonial immunity, and contempt of court. When necessary to ensure the protection of a victim or witness, the Trial Chamber is permitted to conceal their identity, to allow *in camera* proceedings, or to use other alternatives to live testimony; however, the commentary cautions that the use of protective measures must always be balanced against the accused's rights and should be limited to necessary situations. Specific examples of alternatives to testimony are provided in the commentary. The Trial Chamber may issue protective orders to ensure the safety and security of a victim or witness, protect the national security of a state, protect the confidentiality of investigations, prevent the flight of suspects or accused, or to seal an indictment.

Section three details the rights of suspects and assigns the overall responsibility for the conduct of investigations and safeguarding of evidence to the Prosecutor. During questioning, suspects have the right to be informed of the nature of the crimes for which he or she is suspected, the right to remain silent, and the right to assistance of legal counsel. Suspects have the right, at no expense to the tribunal, to reasonably available counsel of his or her choosing, or, if determined indigent by the Registrar, the right to have counsel assigned free of charge.

The fourth section discusses in detail: the form, content, confirmation, dismissal, and withdrawal of indictments; actions to procure the presence of the accused; the accused's initial appearance; confinement prior to judgement; the production of evidence; motions practice; and, depositions. The proposed rules rely upon the good faith of States to comply with the procedures for arrest warrants and

other orders of the tribunal; however, the tribunal may report noncompliance to the Secretary-General for transmission to the Security Council. The Prosecutor is required to provide the defense copies of all exculpatory evidence and evidence which accompanied the indictment at the time of confirmation. The defense may inspect any evidence in the possession, custody or control of the Prosecutor, and is required to notify the Prosecutor of its intent to offer a special defense. If the defense has requested to inspect the Prosecutor's evidence, it is required then to permit the Prosecutor to inspect all evidence within its possession, custody, or control and which the defense intends to introduce at trial on the issue of guilt.

Approximately one-third of all of the rules are in the fifth section on trial procedures. These procedures permit the Trial Chamber to close a session of trial, control spectators, remove a disruptive accused from the courtroom, and allow audio or video recording by the public. Since a number of civil law systems do not permit a prosecutor to offer immunity or enter into plea-bargain agreements, this section offers two options. The first follows a common law approach and allows the Prosecutor to grant immunity and enter into plea-bargain agreements, while the second option is more of a civil law approach which permits an abbreviated proceeding in which the accused may acknowledge guilt before the Trial Chamber. These abbreviated proceedings will permit the tribunal to more efficiently process a large number of cases and allow an accused to provide cooperation in exchange for mitigation of punishment.

The most extensive proposed Rule sets forth the rules of evidence. Generally, any material evi-

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dence is admissible unless it is specifically excluded by another rule, or for other good cause, such as the needless presentation of cumulative evidence, would result in undue delay, or would otherwise represent a waste of time. The parties may offer stipulations of fact or testimony, and the Trial Chamber may take judicial notice of certain facts which are not subject to reasonable dispute. Hearsay is permitted when probative and circumstantial guarantees of trustworthiness exist, and all evidence is subject to a rule of completeness. Witnesses have the right against self-incrimination and may not be required to incriminate themselves without a grant of immunity. Evidence of the past sexual behavior of an alleged victim of rape or sexual assault is only admissible under very strict circumstances similar to those under the U.S. Federal "rape shield law," and only then after the Trial Chamber has reviewed an offer of proof outside the presence of the public. The remaining proposed rules in this section provide for the mode and order of case presentation, deliberations, standard of proof, form of judgment and opinion, the rights of the accused, and sentencing procedures.

Post-trial procedures in section six complete the draft. All trials are required to have a verbatim record authenticated by the Trial Chamber after review by the Prosecutor and defense. The record must include the indictment, a copy or description of all evidence, the judgment, and all separate or

dissenting opinions. The Prosecutor may immediately appeal to the Appeals Chamber a dismissal with prejudice and an order which suppresses evidence. The Appeals Chamber reviews, upon appeal, allegations of error on a question of law and errors of fact. The Appeals Chamber may affirm, reverse, modify, or remit the decision of a Trial Chamber. Its decision is not subject to any further review. Periodic review of sentences are provided for in the proposed rules, but only the tribunal, or an entity designated by the Security Council, may pardon or commute a sentence. Individual States are specifically prohibited from unilateral action on a sentence.

The precedential value of this tribunal and these proposed rules has already been validated. Several countries have suspects in custody and recognize the jurisdiction of the tribunal. A copy of the proposed rules have been provided to Ethiopia as a guide to draft the rules for an *ad hoc* domestic tribunal which will prosecute over 1100 war criminals under arrest for crimes committed during the Ethiopian civil war. The DoD working group is continuing to work on a proposed Definition of Offenses.

Major Sharp is a Marine judge advocate currently assigned to the International Law Division of the Office of the Judge Advocate General, Department of the Navy.

New Orleans Annual Meeting—August 6

Luncheon to Honor Heads of State and CEELI *Pro Bono* Participants



The Standing Committee is pleased to announce the co-sponsorship of a luncheon on Saturday, August 6, 1994, at the ABA Annual Meeting in New Orleans, to honor several presidents of emerging democracies in Central and Eastern Europe and the New Independent States of the former Soviet Union (NIS), including His Excellency Kiro Gligorov, President of the former Yugoslav Republic of Macedonia. The luncheon—which is also being hosted by ABA President Bill Ide, the Section of International Law and Practice, and the ABA Central and East European Law Initiative (CEELI)—will provide an opportunity to recognize the efforts of individual ABA members who have contributed their time and effort to CEELI over the past few years. The luncheon will help showcase the ABA's past and ongoing commitment to providing technical legal assistance to Central and Eastern Europe and the NIS. It will be held in Ballroom 1, Lobby Level of the Morial Convention Center beginning at Noon. Advance reservations are required. Tickets may be purchased by calling the CEELI offices at (202) 331-2691.

Lucinda Low Testifies on Foreign Aid Reform

Standing Committee member Lucinda Low, who also serves as Vice Chair of the ABA Section of International Law and Practice, recently testified on behalf of the American Bar Association before the House Committee on Foreign Affairs on proposed reforms in the U.S. foreign aid program. Her testimony was based upon the recommendations of a bipartisan ABA Working Group that were adopted as official ABA policy at the mid-year meeting.

Calling for "fundamental reform" of the U.S. foreign assistance program in the post-Cold War era, she set forth three central components of the ABA position:

- the promotion of democratization, human rights, and the rule of law;
- the promotion of the establishment of the legal infrastructure necessary for economic development and international commerce; and
- the promotion of sustainable development that is environmentally sound.

Addressing the important question "Why is foreign assistance in the U.S. national interest?," Ms. Low argued that foreign aid both helps us extend our core values in the international arena and promotes more parochial interests: "For instance, democratic systems that follow the rule of law may be better places for our companies to do business—because they may be less corrupt, for example." She continued:

[W]e believe foreign assistance should not take place in a vacuum. The rationale for a foreign assistance program depends on a thoughtful identification and articulation of national goals and interests. As the Committee knows well, the American people will not tolerate vast amounts of money being spent on foreign aid for ill-defined goals. On the other hand, where goals are well-articulated and specific, we believe public support will be forthcoming. These goals and interests should be defined as universally, and on as much of a long-term basis, as possible. In our view, even though foreign assistance is inextricably tied to foreign policy, the U.S. foreign assistance program should not be held hostage to the vagaries of politics.

Bilateral and multilateral aid are both necessary, she argued. "Multilaterally-delivered aid can offer a greater diversity of models, greater freedom from political constraints, and a more consistent

and long-term effort." At the same time, "specific U.S. political, economic, or security interests in providing foreign aid may be diluted, or not reflected in the same way, in a multilateral program," and thus "a bilateral program will still be necessary."

Ms. Low set forth five ABA goals for a reformed U.S. foreign assistance program:

- Creating a structure that has the institutional ability to respond rapidly to changing circumstances and needs;
- Maintenance of a consistent, long-term effort where goals cannot be achieved quickly;
- A willingness to permit the aid-delivering agencies to experiment, and to find creative solutions to difficult problems;
- An ability to maintain simultaneous activity on a variety of fronts; and finally
- De-policization of the aid program to the maximum extent possible.

Her testimony emphasized in particular the importance of promoting the "rule of law," arguing:

One of the overarching goals of the ABA is the promotion of the rule of law throughout the world. . . . The rule of law should be the cornerstone of any effort to promote democracy, human rights, and economic development that is sustainable and environmentally sound. In our view, the United States is uniquely positioned to offer expertise in this arena, and can itself expect to benefit from the fruits of its assistance in these areas. Not unimportantly, we recognize that such efforts are perhaps easier for a U.S. population generally unsupportive of foreign assistance to embrace. At the same time, however, we recognize that the U.S. model will not, and should not, be the only relevant model for a developing country. Other donor countries may provide civil law models, parliamentary systems, and perhaps

Calendar of Events

May 26— "Partnership for Peace" Program at University Club, 5:30-7:30 PM (see p. 6).

June 10-11—Conference on "Nonproliferation of Weapons of Mass Destruction" at International Club (see p. 1).

June 16—Breakfast Meeting, International Club (Speaker: Lynn E. Davis, Under Secretary of State for International Security Affairs)

August 6—Luncheon to honor Heads of State and CEELI *Pro Bono* Participants (see p. 3).

others, for consideration. Ultimately, the recipient country must choose which model suits it best.

Issues of specific application aside, however, it is well-recognized that democratic societies are in general more pacific (internally as well as externally), more stable, and better able to provide for their people.

Although she recognized that "[t]here may also be security interests that can be furthered through a foreign-assistance program," she did not comment upon them because the ABA Working Group had not focused upon them. This may be an aspect of the foreign assistance issue worthy of further consideration by the Standing Committee.

Nonproliferation Conference ...

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Secretary for Political-Military Affairs) and Ambassador James E. Goodby (Chief Negotiator for the Safe and Secure Dismantlement of Nuclear Weapons). The Pentagon will be ably represented by Ashton B. Carter (Assistant Secretary for International Security Policy), Mitchel B. Wallerstein (Deputy Assistant Secretary for Counterproliferation Policy), and Lisa Bronson (Director of Negotiations and Implementations Counterproliferation Policy). Colonel William R. Faircloth, head of the Nuclear Arms Control Division in the Office of the Joint Chiefs of Staff, will be one of the military participants.

Former Standing Committee member Ambassador Richard Schifter—who now serves as Counselor to the National Security Council—will be joined by the Honorable Daniel B. Poneman (Senior Director for Nonproliferation and Export Control) and by William L. Clements and Elisa D. Harris (both Directors for Nonproliferation and Export Controls) as well as by other members of the NSC staff.

Under Secretary Davis to Address June 16 Breakfast

Under Secretary of State for International Security Affairs Lynn E. Davis will address the Standing Committee's June 16 breakfast at the International Club on the topic of U.S. non-proliferation policy. For further information, contact Holly Stewart McMahon (see below for address and phone).

Thursday's luncheon speaker will be Ambassador Rolf Ekéus, Executive Chairman of the U.N. Special Commission on Iraq, and Friday's luncheon will feature Deputy Under Secretary of Commerce Barry E. Carter. The conference dinner on Friday evening will be addressed by the Honorable John D. Holum, Director of the Arms Control and Disarmament Agency. Several other senior ACDA officials will participate in other parts of the program, as will former ACDA Director Ronald F. Lehman, II, now of Lawrence Livermore National Laboratory.

Standing Committee member and CIA General Counsel Elizabeth Rindskopf will be joined by legal experts from her staff as well as by the Chief of the Policy Support Group at the CIA Nonproliferation Center in representing the Intelligence Community. Ambassador Richard H. Solomon, President of the U.S. Institute of Peace, has agreed to take part in the conference; and private sector experts will include David A. Kay, former chief U.N. arms inspector in Iraq.

For further information about the conference, contact Standing Committee Staff Director Holly Stewart McMahon at the address below.

Standing Committee on Law and National Security

Chairman: John H. Shenefield. *Members:* Richard E. Friedman, Edward Hidalgo, Harold H. Koh, Lucinda A. Low, J. Michael McWilliams, Elizabeth R. Rindskopf, L. Britt Snider, Paul Schott Stevens, Richard K. Willard, Diane P. Wood
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The National Security Agenda

Standing Committee Seeks Part-Time Summer Intern—The Standing Committee is seeking a part-time, unpaid, summer intern to assist Staff Director Holly Stewart McMahon with administrative responsibilities and to work with one or more task forces on issues such as weapons of mass destruction, counter-terrorism, and the rule of law. Applicants must be graduate students or unusually able undergraduates in their junior or senior year. Interested students should submit a cover letter and resume to Ms. McMahon at the address at the bottom of page 5.

"Partnership for Peace" Program to be Discussed May 26—To help people understand and evaluate the "Partnership for Peace Program"—recently tabled by NATO members to provide an alternative to immediate NATO membership for Central and Eastern European nations interested in joining the alliance—the Standing Committee will cosponsor a program with the International Law and National Security Committee of the ABA Section of International Law and Practice on Thursday, May 26, 1994, from 5:30 to 7:30 PM at the University Club (1135 16th Street, Washington DC). Participants will include a spokesman for the National Security Council and representatives from the embassies of Germany, Hungary, Poland, and the Russian Federation. There will be a wine and cheese reception, and there is a nominal fee ranging from \$10.00 for students to \$30.00 for nongovernmental/nonacademic members of the ABA and the general public. For further information, call Ms. Sushan Demirjian at (202) 331-2239.

Ukraine Project Seeks Experts in Export Control Law and Administration—The Lawyers Alliance for World Security (LAWS) and the Washington Council on Non-Proliferation (WCNP), two nonprofit, nongovernmental organizations, are seeking American lawyers with expertise in the area of export control law and administration and an interest in participating in a joint project to help Ukraine—and perhaps eventually other governments in the Baltics or Central Asia—to develop and implement laws and administrative practices necessary to prevent the "leakage" of sensitive and dual-use goods, technologies, and know-how related to nuclear and other advanced military weapons systems. Contemplated activities include a preparatory trip in June, and perhaps ultimately a series of short-term export control training seminars in Ukraine for national and regional officials, industrial representatives, and scholars; longer visits (4-6 weeks) by American experts, and perhaps "training tours" in Washington, DC for visiting officials and representatives. (Consideration is also being given to bringing Ukrainian lawyers to the United States for legal training in U.S. firms.) A knowledge of Russian or Ukrainian language is desirable but not essential. The project will fund all travel, accommodations, and related expenses. For further information, contact Adam Scheinman (202) 745-2454.

American Assembly Issues Report on Post-Cold War Intervention Policy—A distinguished group of about 50 experts from government, the media, and the private sector gathered in New York in early April for the 85th American Assembly and produced a 16-page report on "U.S. Intervention Policy for the Post-Cold War World: New Challenges and New Responsibilities. Arguing that coercive intervention is a "fact of life" in an era characterized by "growing instability," the report notes the "crucial" need for strong U.S. leadership, calls for "a new vision to give coherence to our foreign policy," and recommends that President Clinton direct a "sweeping examination of the post-cold war world" along the lines of NSC-68 prepared during the Truman Administration. Questioning whether current defense cutbacks will leave adequate U.S. forces to meet the nation's needs, the report calls for enhanced military training (including language training) and increased human intelligence along with a review of nonlethal and other new technologies to enhance America's ability to protect its interests. Copies of the report are available without charge from the American Assembly at Columbia University (212) 870-3500.