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War Crimes Trials— Not a Good Idea

by Herman Schwartz

The following is an excerpt from an article I wrote for the *New York Times* in April 1993:

"Despite its superficial appeal, [the establishment of a war crimes tribunal] is not a good idea. The effort to hold such trials is almost certain to fail: instead of advancing the international rule of law, it is likely to set it back.

"The need for formal condemnation of those who planned, ordered and carried out the

outrages that fill our TV screens every night is indisputable...

"But no one would expect [those charged with war crimes] to show up voluntarily. Serbia, the principal

offender, is unlikely to turn them over, despite the obligation to do so...

"Nor are nations likely to impose

meaningful sanctions on Serbia or any other country just because it refuses to turn people over to a tribunal. After all, the U.S. [was] unable to get the UN to impose an oil embargo on Libya for its refusal to turn over two suspected terrorists in the bombing of Pan Am Flight 103 that killed 270 people over Lockerbie, Scotland, in 1988...

"For the same reasons, an indictment, even if backed by an elaborate investigation, would carry little weight... If the charges cannot be tried because the defendants refuse to appear, the effort becomes another failure of the international community to advance the rule of law.

"How, then, can the world signal its outrage at the brutalities perpetrated in the Balkans? One possibility is to create a high-level U.N.-sponsored truth commission similar to the one that issued a report on atrocities in El Salvador...

"The commission on El Salvador was not limited to pursuing war crimes, nor was it bound by technical rules of evidence. It drew conclusions where testimony was corroborated or otherwise clear. It named names. And so far neither its findings nor methods have been challenged in any significant way.

"If such a commission, making no pretense that it was conducting a criminal trial, sought to carry out an investigation in the former Yugoslavia, Serbia and Croatia would be hard-pressed to refuse it access. And if the commission found that Serbian or Croatian leaders committed war crimes, if it named names, it might be able to bring about domestic action against the offenders. If those countries failed to act, the world might then be willing to consider serious sanctions...

"The Nuremberg trials were possible only because we had won World War II and had physical control of the accused... Any Serbians or Croatians likely to be accused would be victors in the Balkan war. They would be anything but under our control.

"New mechanisms and institutions are necessary for the chaotic interna-

tional arena. The El Salvador Truth Commission offers one useful model. It certainly seems better than trials that would probably be nothing more than another exercise in futility."

Since the publication of this article, a lot has happened. The UN did indeed establish a war crimes tribunal, and it is now in operation. Judges have been chosen, including one female judge from the United States; the United States has added \$24 million to the tribunal budget; investigations are under way. A great deal of evidence has been amassed, and things seem to be moving along.

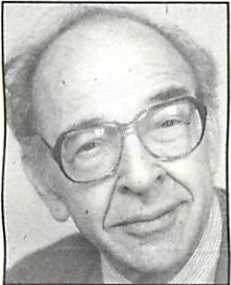
Not really. None of this deals with the fundamental question: How does the tribunal obtain the evidence and authority to bring to justice the real war criminals, those who planned, ordered, and oversaw the atrocities?

Perhaps it is useful to prosecute a few underlings who actually committed the rapes, executions, tortures, the ones who actually did the "ethnic cleansing." Most, as in Nazi Germany after World War II, will escape. And if post World War II behavior, not only in the former Yugoslavia, but throughout the world, is any indication, there will be little deterrence, if any.

The real perpetrators, today's version of the Hitlers, Himmlers, Goerings, and others, will escape. Yugoslavia's Slobodan Milosevic, who started the whole mess, is now a "statesman" and a "peacemaker." The U.S. Helsinki Commission, composed of senators, congressmen, and executive branch officials that monitor implementation of the Helsinki accords, named seven Serbs whom it considered war criminals. These included Milosevic; Bosnian Serb political leader Radovan Karadzic, considered by the co-chairs of the Commission, Sen. Dennis DeConcini and Rep. Steny Hoyer, as the person "most responsible for the atrocities and ethnic cleansing which have taken place in Bosnia"; Bosnian Serb military leader General Ratko Mladic, who has been called "the

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viewpoints as to the purpose, necessity, War Crimes Tribunal for the former of Human Rights Watch, is currently umbrella organization for the Soros outing to major publications, including *Policy*, Neier has participated in a number Yugoslavia and has played a leading n Schwartz, a leading advocate of civil ed States, is a professor of law at the merican University, and co-director of itarian Law at WCL. Schwartz is curation to the UN Human Rights t. United States at the UN World e of 1993.

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is required to make him comply with the directives of the UN Security Council. As to the second, U.S. ambassador to the UN Madeleine Albright sounded the right note in January when she said that the UN should impose sanctions, or maintain economic and diplomatic sanctions, against countries refusing to turn over for trial those indicted. If that is done, it would be very difficult for defendants to evade trial. The states of the former Yugoslavia will have great difficulty accepting permanent pariah status, such as that of Libya; unlike Libya, they lack oil. Over time, the pressure to yield defendants for trial would become irresistible. Moreover, by itself, indicting someone as a war criminal would be a greater sanction than merely naming that person in a report. An indicted war criminal would never risk

Sad to say, the enormity of the crimes that have been committed in the war in Bosnia-Herzegovina is not distinctive in our time. What is unprecedented, however, is the extent to which these crimes are known worldwide so soon after they are committed.

traveling beyond his country's borders; would be susceptible to political attacks within his own country that focus on his evasion of trial; and would always

have to fear being turned over because of political changes in his country, or because of pressures to secure an end to sanctions or pariah status. The falling out in recent months between Serbian strongman Slobodan Milosevic and his former ally militia leader Vojislav Seselj was indicated when the two traded charges of war crimes.

There seems little question that the UN War Crimes Tribunal *will* succeed. Given the UN's inability, though, to take any other meaningful action to punish those responsible for crimes committed during this conflict, effective prosecution is the last available means for the UN to redeem its own reputation. The open question is whether the UN will overcome its own lassitude and its deference to the interests of a few very powerful states that worry that prosecutions will impede a peace settlement. ☹

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Ethnic Cleanser in Chief," and whose troops are responsible for numerous atrocities throughout Bosnia; Serbian Radical Party leader Vojislav Seselj, who also heads that fascist group's paramilitary wing and is believed to have committed atrocities against civilians throughout Bosnia; and Zeljko "Arkan" Raznjatovic, leader of the paramilitary Serbian Volunteer Guard responsible for the massacre of Muslims in Bijeljina and other atrocities, who was elected to the Kosovo Serbian Parliament, by Serbs in Kosovo, where his followers harass the local Albanian population.

Is it at all plausible that any of these individuals will be brought to justice? Any settlement (if there ever is any) will require their assent and a condition of this assent will almost certainly be immunity to prosecution. Europe and the United States have shown themselves too feeble to insist on anything else.

The process itself is in trouble. There have been numerous delays

and despite the additional \$24 million given by the United States, there is still not enough money. Furthermore, the Western European nations show little enthusiasm for the whole idea,

... If the charges cannot be tried because the defendants refuse to appear, the effort becomes another failure of the international community to advance the rule of law.

making it even more unlikely that they will ever turn anyone over to be tried.

The proceeding might yet do some good. A detailed indictment that would name names and ascribe responsibility and has a mass of supporting

evidence might provide a useful record. Admittedly, this is a very imperfect alternative. But the kind of "truth commission" which operated in El Salvador and which was suggested above for the former Yugoslavia is obviously not in the cards.

Moreover, there are issues of fairness raised by accusing people who will never be tried. Such people will, however, have a chance to challenge the charges by submitting to the tribunal. This is especially true with respect to those accused who are highly placed—they will have no difficulty responding from the comfort of their palaces.

Nevertheless, even such an outcome is worth little. The South Slav tragedy is a catastrophe, not just for its immediate victims, the Muslims, Croats, and Serbs caught in these brutal and cynical political machinations, but also for the hopes of a world rule of law. The Bosnian people, in particular, have suffered too much to have to endure what is likely to be just another episode in a tragic farce. ☹