

The Path to Justice in Southeastern Europe



October 7, 2003

**Briefing of the
Commission on Security and Cooperation in Europe**

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The Helsinki process, formally titled the Conference on Security and Cooperation in Europe, traces its origin to the signing of the Helsinki Final Act in Finland on August 1, 1975, by the leaders of 33 European countries, the United States and Canada. As of January 1, 1995, the Helsinki process was renamed the Organization for Security and Cooperation in Europe (OSCE). The membership of the OSCE has expanded to 55 participating States, reflecting the breakup of the Soviet Union, Czechoslovakia, and Yugoslavia.

The OSCE Secretariat is in Vienna, Austria, where weekly meetings of the participating States' permanent representatives are held. In addition, specialized seminars and meetings are convened in various locations. Periodic consultations are held among Senior Officials, Ministers and Heads of State or Government.

Although the OSCE continues to engage in standard setting in the fields of military security, economic and environmental cooperation, and human rights and humanitarian concerns, the Organization is primarily focused on initiatives designed to prevent, manage and resolve conflict within and among the participating States. The Organization deploys numerous missions and field activities located in Southeastern and Eastern Europe, the Caucasus, and Central Asia. The website of the OSCE is: <www.osce.org>.

ABOUT THE COMMISSION ON SECURITY AND COOPERATION IN EUROPE

The Commission on Security and Cooperation in Europe, also known as the Helsinki Commission, is a U.S. Government agency created in 1976 to monitor and encourage compliance by the participating States with their OSCE commitments, with a particular emphasis on human rights.

The Commission consists of nine members from the United States Senate, nine members from the House of Representatives, and one member each from the Departments of State, Defense and Commerce. The positions of Chair and Co-Chair rotate between the Senate and House every two years, when a new Congress convenes. A professional staff assists the Commissioners in their work.

In fulfilling its mandate, the Commission gathers and disseminates relevant information to the U.S. Congress and the public by convening hearings, issuing reports that reflect the views of Members of the Commission and/or its staff, and providing details about the activities of the Helsinki process and developments in OSCE participating States.

The Commission also contributes to the formulation and execution of U.S. policy regarding the OSCE, including through Member and staff participation on U.S. Delegations to OSCE meetings. Members of the Commission have regular contact with parliamentarians, government officials, representatives of non-governmental organizations, and private individuals from participating States. The website of the Commission is: <www.csce.gov>.

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COMMISSION ON SECURITY AND COOPERATION IN EUROPE
WASHINGTON, DC

The briefing was held at 2:00 p.m. in Room 2261 Rayburn House Office Building, Washington, DC, Hon. Christopher H. Smith, Chairman, Commission on Security and Cooperation in Europe, moderating.

Panelists present: Judge Theodor Meron, President, International Criminal Tribunal for the former Yugoslavia.

Mr. SMITH. Good afternoon.

First, I want, on behalf of my friend and colleague, Ben Cardin, to welcome our very distinguished guest to the Helsinki Commission.

Today we are going to be hearing from a very distinguished jurist, Judge Theodor Meron, who will be speaking about the criminal proceedings at the International Criminal Tribunal at The Hague. It is a very special position that he occupies there.

However, I would like to give just a few opening comments and then turn it over to Mr. Cardin, then to our very distinguished judge.

There are many problems in the region, as we know, in southeastern Europe that have emerged from the many years of conflict, especially over the last 10 years. Our Commission has highlighted a number of those issues, including the International Criminal Tribunal. We pushed for the creation of this. We were among many who felt, in a bipartisan way, that this was a way of ensuring that those responsible for heinous crimes would be held to account, and that the only way you break the climate of impunity is by bringing justice. It really is the only way, especially for those who have been hurt and offended and killed and murdered. Only then can their families have a sense of closure if there is justice meted out at the end of the day.

Our Commission this year has again continued to focus on the ongoing effort to bring to justice those responsible for war crimes, crimes against humanity and genocide.

We have also focused very heavily on the issue of missing persons. No matter who they are, what side they are on, if they are missing, if they are held in captivity, they deserve the aggressive approach by the international community to ensure that their whereabouts, or at least what became of them, is made known.

Our distinguished guest this afternoon will speak on the question of justice in southeastern Europe. Few are more qualified to do so than he is.

Judge Theodor Meron has been a judge at the International Criminal Tribunal for the former Yugoslavia since November 2001. He became its president in March of 2003. Judge

Meron has an extensive career in international human rights, humanitarian law, and is considered a leading authority on the subject.

Judge, we welcome you here this afternoon. We are looking forward to your statement and any advice you might have.

We had Judge Del Ponte here not so long ago and the Commission picked up some very valuable, timely and useful information that both Ben and I as well as other Members of the Commission used very aggressively to try to ensure that, with the pending cutoff that then was just weeks away, the Serbian Government, the Yugoslav Government, cooperated at least on some outstanding cases—the Vukovar and other cases. Otherwise that money would have been cut off. We used that as a springboard as best we could to put additional pressure.

I now yield to my friend and colleague, Mr. Cardin, and thank you for coming.

Mr. CARDIN. Thank you, Mr. Chairman. I thank you very much for arranging for Judge Meron to be here.

Judge Meron is a very distinguished jurist, a very distinguished public servant, and it is indeed an honor to have you before our committee. Your information will be extremely valuable to us as we try to plan strategies to help you in furthering your work. You have had a distinguished career in these areas, but most importantly to us today, with the International Tribunal. We thank you for your leadership role in bringing about such an effective use of the International Tribunal, consistent with United States commitments.

The United States has played a critical role in the International Tribunal, from its creation and its work through the United Nations, through the Dayton Accords that made it clear that any settlement regarding that region must involve the compliance with the International Tribunal's ability to apprehend and try to get the necessary evidence to try those that are responsible for war crimes.

To our bilateral meetings with the major states involved in that region, our administration and Congress has been very firm in making it clear that they must comply with their obligations under the International Tribunal, as Chairman Smith mentioned, that the work of our Appropriations Committee, working with the administration to leverage best that we can so that we can get full compliance.

The work of the OSCE, our delegation to the OSCE, we have raised the war crimes issues at every one of our meetings in the last decade to make it clear that we support the work and that there must be full compliance by the member states of the OSCE and the work of the Tribunal.

I do, though, want you to touch on at least two issues that I think are still very much open. One is that there are still indictees that they have not turned over to The Hague, some highly visible indictees, such as Mladic and Karadzic, we have been talking about now for too many years.

They remain at large, with many their thugs around them, openly defying the international rules.

So I am curious as to what strategies we can help you with to assist so that these individuals are brought to justice.

The second development that has been coming along is that there seems to be some desire to transfer some of these cases to states to try within their own system, hosted where their citizens are involved. I would be very interested in your assessment as to the capacity of those states properly to dispense justice to those individuals who are—have been indicted under the war crimes.

Again, let me tell you. We are so pleased to have you here. This has been a very high priority of our Commission. Your testimony and information today will only assist us in working with you for our mutual objectives.

As I told you privately—I apologize—I will be in and out. I have a group of Russian educators that are in town today that I have a commitment and must spend some time with. But I can assure you that it is not—my absence is not the lack of interest. I have a tremendous amount of interest in what you will be saying today.

Thank you.

Mr. SMITH. Judge Meron, in looking at your bio, your credentials are outstanding and impeccable. But I think for the record it is important to just make note of a few things.

Since his election to the Tribunal by the U.N. General Assembly in March 2001, Judge Meron, a citizen of the United States, has served on the appeals chamber, which hears appeals from the trial chambers of both the International Criminal Tribunal of the former Yugoslavia and the International Criminal Tribunal for Rwanda. Since March of '03, he has served as president of the ICTY.

A leading scholar of international humanitarian, human rights and international criminal law, Judge Meron wrote some books and articles that helped build the very legal foundations for international criminal tribunals.

Since 1977, Judge Meron has been a professor of international law and since '94 the holder of the Charles L. Denison Chair at New York University Law School. In 2000 to 2001, he served as counselor on international law at the U.S. Department of State. Between 1991–1995, he was also a professor of international law at the Graduate Institute of International Studies in Geneva.

He has been a visiting professor of law at Harvard and at the University of California in Berkeley.

He received his legal education at the University of Jerusalem, Harvard, where he received his doctorate, and at Cambridge. He was co-editor-in-chief of the *American Journal of International Law* from 1993—1998.

He has served on boards from America's Watch, the International League for Human Rights, two groups with whom we work very closely. He served as a public member of the United States delegation to the Copenhagen OSCE Conference in 1990. In '98, he served as a member of the U.S. delegation to the Rome Conference on the International Criminal Court, the ICC.

He has been a Carnegie lecturer at The Hague Academy of International Law, a fellow of the Rockefeller Foundation.

Frankly it goes on and on. I do not know where you get the time. But we thank you for lending your expertise again to the administration and the meting out of justice at The Hague.

Judge?

Judge MERON. Chairman Smith, Representative Cardin, I am extremely grateful to you for this very warm welcome and for your remarks. I can assure you, Representatives, that the questions that you have raised are very much on my mind, and I will address them at the conclusion of my prepared remarks.

Mr. Chairman and Members of the Commission, before I begin, I would like to introduce my chief of staff. Larry, could you raise your hand?

Larry Johnson is, as we call them at the United Nations, my Chef de Cabinet. Larry is a distinguished international lawyer, who among his many other accomplishments, was a

leading member of the United Nations group that drafted the statute of the ICTY, of our Tribunal, in 1993. I must tell you, it is still a very good statute.

I am honored to have been invited to speak to you today. For nearly 3 decades, this Commission has been a quiet, but wonderfully effective outpost of bipartisanship and multilateral cooperation in U.S. foreign policy.

Through diligent research, skillful publicity, careful diplomacy, the Commission has greatly advanced the causes of human rights, democratization and economic and social development in Europe.

Like the OSCE/CSCE, the organization of which I have the privilege to be president, represents an enormous experiment in international cooperation. Let me begin by giving you an overview of its operations as it reaches its 10th anniversary.

Created by the United Nations Security Council in 1993, the International Criminal Tribunal for the former Yugoslavia, or ICTY for short, has 16 permanent judges from 16 countries and nine ad litem judges from a further eight nations. The judges sit in three trial chambers with a total of nine three-judge benches and one appeals chamber.

The Tribunal has held 28 trials involving 44 defendants with another 31 defendants currently in pre-trial proceedings. A further 16 defendants have pleaded guilty. After nearly 10 years in operation, the Tribunals' chambers have handed down hundreds of decisions.

As you know, the United States took a leading role in the creation of the ICTY and remains a staunch supporter. The American financial contribution accounts for approximately a quarter of the Tribunal's annual budget of approximately \$120 million.

During its 10 years of life, I believe the ICTY has made a fundamental and lasting contribution to bringing justice to the peoples of the former Yugoslavia. The Yugoslav conflict involved terrible crimes that destroyed or devastated hundreds of thousands of lives. The vast scale of those crimes—the murders, the rapes and deportations, the acts of torture, destruction and cruelty—would dwarf the capacity of any single court to bring more than a partial, a very partial reckoning.

However, if with painful slowness at first, with growing confidence and efficiency the ICTY has helped bring to account a considerable number of accused who held high, or senior, rank. It has been the Tribunal's task, to use a phrase of Justice Robert Jackson, the U.S. chief prosecutor at Nuremburg, to "patiently and temperately disclose" the record of the crimes that scarred the Balkans in the 1990s. By doing so, our Tribunal has given victims a chance to see their sufferings recorded and at least in some small measure, vindicated.

The trials held to date have helped, as former President Clinton said at the opening of the Srebrenica memorial just a few weeks ago, "to lay there for all the world to see the vulnerability of ordinary people to the dark claims of religious and ethnic superiority." Thus they have helped demonstrate the viciousness of those who built their power by encouraging their followers to embrace such hate-filled claims and have sent a powerful message that only through genuine reconciliation can all the peoples of the former Yugoslavia create thriving societies. Speaking during the debate on the resolutions that committed the United Nations Security Council to the creation of the ICTY, former Secretary of State Madeleine Albright asserted that, and I quote again, "This will be no victors' tribunal. The only victor that will prevail in this endeavor is the truth."

I believe the ICTY has lived up to that contention. Our statute and the rules of evidence and procedure provide for independent and impartial judges, an independent pros-

ecutor, the right of appeal and an array of defendant's due process and fair trial rights recognized in our own Bill of Rights and in international human rights instruments, the right to counsel, the right to public proceedings, the right to present evidence and to challenge the evidence presented by the prosecution.

Of the 44 defendants tried at the ICTY, five from three different trials have been acquitted. As important as the Tribunal's ability to reach careful judgments of guilt for the terrible crimes that have been committed that are within its jurisdiction, one of the essential tests of its fairness and legitimacy has been its insistence on acquitting defendants when the prosecution has failed to meet the burden of proof.

Even as the ICTY is now running at full steam, we are moving forward with a completion strategy, a plan of internal reforms and external initiatives designed to enable the Tribunal to complete its mission in an orderly and equitable way within the timetable established by the U.N. Security Council.

The council has stated that the ICTY should complete all investigations by the end of 2004, all trials by the end of 2008, and all appeals by the end of 2010.

Our ability to meet these goals will depend on many factors. Above all, while states in the region have improved their cooperation with the Tribunal recently, that cooperation must still be made much more complete.

Sixteen individuals already indicted by the Tribunal remain at large. Those fugitives from justice include some figures accused of playing leading roles in the crimes committed during the Yugoslav conflict, such as Ratko Mladic, Radovan Karadzic, as well as Ante Gotovina.

The pressure must be kept on to secure the arrest and transfer of all fugitives, and the prompt provision of requested sources of evidence. The Tribunal's ability to finish its work in a timely fashion will depend as well on the choices the prosecutor makes about future indictments.

But that is a subject upon which it would not be appropriate for me as a judge to comment.

A third factor that will affect the speed with which we complete our mission is our ability always to improve and to improve again the efficiency of our proceedings.

In recent years, the judges of the Tribunal have adopted a number of changes in our procedural rules and practice in an effort to make our trials and appeals more expeditious, while at the same time protecting the defendants' rights.

We have reformed our procedures for interlocutor appeals, for example, to reduce the number of interruptions in trials. We have given trial chambers the right power to restrict the scope of the evidence presented by the prosecution when some of that evidence appears duplicative or unnecessary toward the establishment of the charges presented. We have changed our system for appointing substitute judges when one member of the three-judge bench is unable to continue sitting in a trial, thus reducing the danger of mistrials necessitating time-consuming retrials.

I myself chair a group of judges to search for additional ways to improve our efficiency, and the prosecutor, Carla Del Ponte, has also offered a number of helpful suggestions that the judges are now actively considering.

The fourth important influence on the Tribunal's completion strategy will be its ability to transfer some cases of lower and mid-level accused to competent courts in the region of the former Yugoslavia.

On this score, I have some encouraging news to report, and would like to ask for your help. Over the past year, the Office of the High Representative [OHR] for Bosnia and Herzegovina and the ICTY have undertaken a joint initiative to create a special war crimes chamber within the newly reconstituted State Court of Bosnia and Herzegovina.

This past year, my predecessor as president of the ICTY, Claude Jorda of France, and Lord Ashdown's principal deputy, Ambassador Bernard Fassier of France, initialed a joint proposal outlining the structure and the financing of that war crimes chamber. I twice had the honor to address the steering board of the Peace Implementation Council about the proposal. I am grateful that the Peace Implementation Council steering board endorsed the project in June.

I am grateful, as well, that the United Nations Security Council added its imprimatur to the war crimes chamber in Resolution 1503 of August 28, 2003—called for its expeditious establishment and urged the donor community to support the project financially.

We are now moving from plans to action. On October 30, the OHR and the ICTY will jointly host a donors' conference at The Hague, at the site of the Tribunal. That conference, which builds on two earlier meetings in Sarajevo, should put in place the war crimes chamber's financial foundations.

We will soon create a series of working groups that will establish many detailed policies needed to get the war crimes chamber running. These groups, staffed by representatives from the OHR, the ICTY, relevant departments of the Bosnia-Herzegovina Government and interested groups such as OSCE, the Council of Europe, the European Union Police Mission will address such issues as the rules of procedure and evidence, witness protection, investigation, detention and transfer of cases and evidence from the ICTY.

The United States has expressed its support for the Sarajevo war crimes chamber and its commitment, which was confirmed to me during my talks with government officials today in Washington, to make a generous financial contribution to ensure the chamber's prompt creation. I am grateful for those initiatives, and I urge you in Congress to support them.

Let me say in closing that while the work of the ICTY has been aimed principally at the people of the former Yugoslavia, it has had a broader significance as well. This Tribunal represents a historic step in the effort to end the tradition of impunity for mass crimes by establishing an effective system of international criminal law.

As I said at the outset of my remarks, our work involves a remarkable experiment in international cooperation and legal institution building, bringing together individuals from varied cultures and legal heritages. The jurisprudence we have patiently built has given new life and strength to international humanitarian law and international criminal law far beyond what anyone would have imagined prior to the Tribunal's creation. That jurisprudence will offer an important foundation upon which other criminal Tribunals, both international and national, in the United States, in Sierra Leone, perhaps in Iraq, and around the globe can build as they join in our common mission of bringing the long era of impunity for mass atrocities to an end.

Thank you very much for your attention. Before I invite questions, I would like still to add a few words about the excellent question asked by Representative Ben Cardin:

Yes, there are still at-large fugitives from justice who are alleged to have committed terrible crimes. These include particularly the trio that I have mentioned by name: Mladic, Karadzic, and Ante Gotovina.

I think it must be clear to our own nation and to the international community that the Tribunal cannot—will not—close its doors before we have been able to try those particular individuals. We need to try them to accomplish our historical mission and bring the right message of vindication and justice to the peoples of the former Yugoslavia.

As regards to the possibility of transfer of trials to the courts in the area, as I have already indicated, this is very much already in a stage of advanced planning. With regard to the Sarajevo chamber, I and my colleagues at The Hague are satisfied that that Tribunal will meet very high standards of due process and international human rights. Unfortunately, because of the fragility of the social system still in Bosnia-Herzegovina, every bench of that particular court will have, for the beginning at least, to have two international judges and only one local judge. I do hope, we all hope, that that composition will be reversed over time to give a much more significant representation to local judges.

Regarding to the possibility of transferring cases to other local or entity courts, it is my strong fear that the time is not yet right for that because I at least have not been assured that we can expect those courts and tribunals to apply the kind of international due process standards that we must have in place in order for us to pass on cases and files and evidence to those tribunals.

But in the long run, there is no question whatsoever that we need to cooperate, to encourage, in terms of rule of law and democratization and sense of justice and vindication of justice, to have more and more trials conducted in the area.

I have always believed that war crimes trials have the greatest resonance when they take place very close to the theater of crimes, the place where the crimes have been committed, where the victims or their families still live. This is certainly our objective.

Now I am open to questions.

Mr. SMITH. Let me just ...

Mr. CARDIN. Mr. Chairman, could I just follow up on that one point, very briefly: is it likely that in the other parts of the region that have war criminals at The Hague that could be transferred for local trial, that within the next couple of years they would have the capacity? I am thinking primarily of Serbia, but other countries, whether it is likely they will reach that level of confidence that we could transfer indictees or cases to those courts?

Judge MERON. Thank you. Thank you, Congressman, Representative Cardin.

I think we should keep an open mind, and approach it as the situation develops.

During my very recent official visit to Belgrade just 2 weeks ago, I had the pleasure to visit the site of the new special war crimes chamber that the Serbian authorities have committed to establish. They have already adopted a law that appears to meet most of the international requirements in terms of the articulation of crimes against international humanitarian law and international law.

They have appointed a special prosecutor. I think the international community is committed to help Serbia in making sure that the war crimes chamber meets international standards. They, I think, have already targeted quite a number of individuals who have not been indicted by our Tribunal for trials. Unfortunately, so many people have committed crimes during those terrible years that there are enough very senior people for us to prosecute and try, and there are very many still left for local courts. So they certainly would not be out of business.

I am not sure that we have at The Hague people who could be transferred, at least not during the next few years, to the war crimes chamber in Belgrade because basically most

of our indictees are of very senior rank and their transfer to courts in the area could perhaps expose the area and the social climate, which is still very fragile, to too many stresses.

However, we are keeping this under advisement. As the situation develops, we are certainly keeping an open mind about it.

Mr. CARDIN. As for the situation in Zagreb, they too have in place legal provisions that do enable them to prosecute war crimes committed by Croatians.

I do not believe that they have or are already in this advanced stage of creating a special war crimes tribunal that will be dedicated to this activity.

But then again, this is something that we have to work on to promote, to encourage. This is important, not only in terms of war crimes prosecutions, but also in terms of creating the rule of law institutions and encouraging democracy in the countries of the former Yugoslavia.

Mr. SMITH. I thank you, Mr. Cardin.

Let me just ask you a couple of questions. You have made it clear, Judge, that in Belgrade that at-large indictees cannot wait it out, they cannot wait for the court to go out of business, so to speak, or in other words, run out the statute of limitations.

What kind of pressures are you getting from the international community as part of the completion strategy? What is the United States doing regarding that? How can we be helpful?

You know, obviously justice delayed forever is clearly justice denied. It seems to me that it may be difficult, particularly with these very high-level cases, to cast the baton to a lower court, a criminal court, as you are talking about for Bosnia.

Judge MERON. Representative Smith, you are absolutely right. Those cases of the most senior people indicted for, or accused of, those terribly serious atrocities could not actually be passed on to regional courts.

I believe that the international community must, as I have indicated in my prepared remarks, continue to exert united and consistent pressure on the countries of the region to arrest and to deliver up to The Hague the principal people, the most senior people responsible for those, or allegedly responsible, for those war crimes.

I believe that there is considerable leverage that the international community has in this context. The countries of the region are hungry for acceptance, for readmission into the international community. The countries of the area would like to join the Partnership for Peace, a NATO structure. The countries of the region are desirous of joining institutions of the European Union. So I think that the international community has a very strong leverage.

I believe that the United States has been very active in trying to exert maximum pressure on all the entities and countries in the area, to deliver up, to arrest and bring to The Hague the fugitives.

Of course, there has been much less cooperation than I would have expected from Republika Srpska, which has not been executing the orders of the Tribunal. This is something that I would like to put on the record here.

Now, I think that we have been seeing considerable improvement in the spirit of cooperation in Belgrade, and in Zagreb I do believe that the people and the governments of the region will understand that cooperation with the Tribunal is not only desirable, it is also necessary, and that we will not be able to move toward any kind of closure before the principal goals of the international community, as defined by the United Nations Security

Council, and as strongly supported by the Government of the United States, will be accomplished.

Mr. SMITH. I would back you on that, and say that this Commission would fully back you, the court, the ICTY, until it has brought to justice those people. To allow people like Mladic and Karadzic to escape justice by running out the clock would be a gross violation of human rights by itself.

Judge MERON. Thank you very much ...

Mr. SMITH. That would send a message, frankly, to any other warlord or monster out there who commits crimes against humanity that given the right amount of time, a certain compassion fatigue or justice fatigue will set in, and people will just go away, and they will live on.

That would be a terrible message to send. I can assure you that this Commission will work very hard. Your words actually will act as an additional prod, and really a lightning rod, to make sure that we push in that direction.

On behalf of my fellow Commissioners, I thank you.

You mentioned ...

Judge MERON. Chairman Smith, I am very grateful to you for those comments.

Mr. SMITH. We will do it. I assure you.

With respect to the war crimes tribunal you mentioned, endorsed by the United States, and the U.N. Security Council Resolution 1503, how much would the donor conference have to generate to make that work? Has the United States committed funding, based on your conversations today? Did they talk price, cost, how much they might be willing to ...

Judge MERON. You mean the donors' conference for the Sarajevo chamber?

Mr. SMITH. Yes, for the war crimes chamber for Bosnia.

Judge MERON. In comparison to costs of international justice, that tribunal will not be all that costly. I will ask my colleague Larry Johnson to correct me if I am making a gross mistake. But it is my recollection that the entire cost involved in both the construction of the courthouse, which will be required, and the start-up costs and the operating costs during the first 5 years of the tribunal's creation will be something not exceeding \$40 million. So we are not talking about a lot of money.

The United States' contribution, I have been assured, would be quite generous. During the last few days I have heard myself about generous contributions that will be forthcoming from the United Kingdom and one that apparently has already been decided upon by Germany.

The Sarajevo chamber is something from which Bosnia-Herzegovina will draw some benefit in the future because it will be an existing tribunal that they can use perhaps for other goals as well.

The training that this will provide for lawyers and judges in the area, the message of democracy and the rule of law that will be triggered by such a court, this is a very small investment of the international community.

Mr. SMITH. One point that Chief Prosecutor David Crane has made—I have met with him along with some other members frequently, and he has done a tremendous job in Sierra Leone—was that very argument that they are leaving on the ground trained indigenous people who can then carry on, as judges as well as prosecutors, with skill, with decision and with genuine justice being provided to their country.

So I think that is not just a facade, but a sustainable rule of law that they can carry on through the years.

Judge MERON. It will be an asset which they will be able to use.

I would like to add, Mr. Chairman, that actually tomorrow morning I will be appearing in the Security Council of the United Nations jointly with Lord Ashdown to lend our support to the establishment of this chamber. The council has already given its imprimatur in its last resolution (Res. 1503), but now Lord Ashdown will also report on the significance of that Tribunal in the broader context of rule of law and democracy and human rights institutions in Bosnia-Herzegovina.

Mr. SMITH. If it is helpful, we could draft a resolution and seek to get support of the House of Representatives. It would be what we call a Sense of the Congress Resolution.

Judge MERON. In favor of the ...

Mr. SMITH. In favor of this. If it adds to ...

Judge MERON. Well, I would suggest that you add to that perhaps also something about the absolute need to continue to exert maximum efforts to obtain the arrests of Mladic, Karadzic and Ante Gotovina and to continue lending all the support for us. That would be, I think, immensely useful.

Mr. SMITH. And included in that would be the war crimes tribunal, the ...

Judge MERON. Exactly.

Mr. SMITH. We will get working on that.

Let me just ask a couple of other questions and then open it up to anyone who might like to weigh in here.

You mentioned 28 trials of 44 defendants, 31 in pre-trial. Two questions, five were acquitted. On the acquittals, was it based on not enough information, a loss of witnesses, for example, due to time or perhaps intimidation? Or was there not sufficient evidence to get a conviction?

Judge MERON. Everyone knows that you have to prove guilt, Mr. Chairman ...

Mr. SMITH. Right.

Judge MERON. ... beyond reasonable doubt.

You have to prove the guilt in the specific context of the crimes alleged in the indictment. When there is not enough proof to meet those specific requirements for crimes, a tribunal that is worthy of its name has to acquit the defendant. That is what was done.

Mr. SMITH. Right. One argument that we had earlier on was that plea bargaining was precluded in this process. Has that changed so that perhaps someone at a lower level might be able to turn state's evidence to help convict someone at a higher level?

Judge MERON. This is a very good question. Actually you are asking that question in a very timely way, because after many years of neglect of possibility of guilty pleas for various reasons, perhaps including the recognition of the immensity of the crimes, and the need to have a trial run its course, and to produce that body of evidence that would give some comfort to the victims in the area, recently there has been a certain significant momentum given to plea bargaining.

Now, I can understand that some people are perhaps anxious about this and are worried about that because of those factors that I have mentioned, should there be technical pleas, or promises of some kind of leniency for the kind of crimes we are talking about?

I must say while taking these concerns seriously, I am very comfortable with this momentum for plea bargaining. I think that it is something that conserves the resources of the international community, which enables us to move faster on the trials of the principal accused.

From time to time, as you have suggested, guilty pleas produce a body of evidence, perhaps given by a lower-level defendant against somebody who bears a bigger responsibility for the crimes that have been committed.

Our own system of criminal justice in our country, as you know so well, would have collapsed were it not for the possibility of plea bargaining.

So I think if we do it in a right, deliberate way, remembering that a judge is not bound by the details of the plea agreement between the prosecution and the defendant, when this is strictly under the control of judicial authority, when there is involved in plea bargaining a real acknowledgment of the facts, particularly where you have some recognition and statement and articulation of remorse, I think this is a very good thing.

Recently, over time, we had something like 16 guilty pleas, and this of course just speeds up the other trials that are in the pipeline. I completely agree with you: justice delayed can be justice denied. We are trying to deal with that problem as much as we can.

Mr. SMITH. Any questions from the audience? Yes, you want to come to the microphone?

QUESTIONER. My name is Miroslav Sestovic, I am the Minister Counselor at the Embassy of Serbia-Montenegro.

I would like to express my gratitude that you have noticed the improvement of my country's cooperation with The Hague Tribunal. I would like to hear more if possible about—more in detail about your impressions of your visit to Belgrade in the sense of what remains to be done together? Whether this is a two-way effort or only a one-way effort expected from the parts of Serbia-Montenegro?

Thank you.

Judge MERON. Thank you for your questions. Let me start from the last question. Certainly we are expecting maximum cooperation not only from Belgrade but also from Zagreb, and let me assure you that there is no bias or preference of the target of our cooperation. We want to go to work with all the peoples and capitals in the area to obtain the fastest vindication of international justice.

As I stated publicly during my visit to Belgrade, I am encouraged by the emerging spirit of cooperation in Belgrade that has produced some significant results during the last year. Much remains to be done. I came to Belgrade to express our gratitude for those positive developments and to ask and request that those positive developments continue, continue even at a greater speed.

There is, of course, the first question that comes to mind, and you are as aware of that as I am, the need to arrest Mladic, Ratko Mladic and to deliver him up to The Hague. As I have indicated a few moments ago, we will not move toward any closure before we have people like Mladic, Karadzic and Ante Gotovina at The Hague.

There are also additional issues. There are issues with access to archives. As you know, the prosecutor is concerned that access has not been as forthcoming as she would have wanted.

There are problems with slowness—far too great slowness—with regard to waivers of State Secrets Act for people who have been requested by The Hague to testify in The Hague, or send their testimony otherwise to The Hague. There has been a real bottleneck in the demands presented by the prosecutor for a speedy processing of those waivers.

Again, I believe that I can say that I found goodwill and that there is a real interest in addressing those issues. But what we need there is results and speed.

I am convinced that the goals of the Tribunal and the goals of the government in the area are in the final result identical, very close to each other. We want to have an end to impunity. We want to bring to justice people who have been responsible, or allegedly responsible for serious crimes. Belgrade and Zagreb wants to move more rapidly to its fuller integration in the international community. They are making progress on that.

That progress, as we all know, will not be complete unless we get hold of those fugitives from justice and unless we have complete cooperation. I for one, after my visit to Belgrade, am fairly optimistic that things will happen the right way. But only the future will show whether I was right or wrong.

Mr. SMITH. Let me just ask, is there sufficient understanding in the international community that the new war crimes chamber you are talking about is not in lieu of, but is in addition to The Hague Tribunal, the ICTY? Because my concern would be that there is a surface appeal argument that somehow they might be in competition in 2 or 3 years and any remaining cases could then be vested into the other court, thereby allowing somebody like Mladic or some other notorious alleged war criminal to get away with murder.

Judge MERON. Thank you, thank you, Mr. Chairman.

I think that the United Nations Security Council in its pronouncement on this question and more particularly in Resolution 1503 of August 28, 2003, made it very clear that only cases of lower-level and intermediate-level defendants could be considered for transfer to the courts in the area.

There is no way in which the courts in the area could deal with the most senior defendants without both raising very basic questions about the quality of justice and due process and also without imposing at the same time too many dangerous pressures on the social environment still very fragile in the countries concerned.

Mr. SMITH. Bob?

QUESTIONER. Bob Hand from the Helsinki Commission.

I have two questions, Judge Meron, that I hope you would be able to answer.

First, in talking about what the Tribunal has accomplished over the years, one thing that sometimes gets focus, but perhaps not enough, are the sentences that people receive when found guilty for the crimes.

Here at the Commission I sometimes hear people say that the sentences are not commensurate to the crimes committed, that the people, once found guilty, should receive longer sentences. Others have said that the sentences some defendants received were much greater than, say, somebody else committing a similar type of crime.

Could you address the issue of how the sentences are decided—I assume you could only address this more generally, not specific cases—and whether you feel that the sentences are in fact commensurate to the crimes? Or whether you would advocate that maybe there would be an allowance for greater sentences in terms of the time served in prison?

The second question revolves around your comment about having the greater resonance to have the trial where the crime was actually committed. It is not entirely clear to me, for example, with the crimes committed at Srebrenica, if there is some lower-level person who helped commit those crimes who is found in Serbia, would they try that person in Serbia? Or would that person be transferred to Bosnia?

I assume that the answer to that question has enormous implications for witness protection, defendant protection, the credibility of the trial. Could you elaborate exactly how that would be decided, which country a person's trial would be, where the crime was committed or where they are from, where they are found, whatever criteria?

Judge MERON. You are speaking of a person who is in the custody of the Tribunal?

QUESTIONER. No, for the transfer of cases, for example. If there is a lower-level person involved in a case in Bosnia but that person is located in Serbia or in Croatia—does the case get transferred to the country where the crime was committed? Or to the country of which the person is a citizen? Or is there some other determination for where the accused would actually stand trial if it is transferred to a court in the region?

Thank you.

Judge MERON. Thank you very much, Mr. Hand, for your questions.

Let me first briefly address the question of sentencing, because sentencing is something that has not been addressed except in most general terms in the statute established, as you know, by the Security Council. This is something on which the Tribunal had over time to create its common law. Sentencing is, of course, within the authority of the trial court. I would hope that the sentences that have been meted out, which have been decided upon, are commensurate with the gravity of the crimes.

When there are serious challenges in a particular case to such an assumption, sentences would be appealed, would come before us in the appeals chamber, which is, as you know, a body over which I personally preside.

I do believe that—I have no reason to believe that as a general proposition our sentencing has not been within the parameters of what I would consider to be just and reasonable.

At the same time, I would like you to know that we do not have in the Tribunal something that would parallel the federal sentencing guidelines, which we, for example, have in the United States.

Recently, among the various reforms that we have been considering in the Tribunal is really to give further thought to the general principles and practices of sentencing I have established a working group of several judges that will focus on that particular problem, because there is no aspect that cannot be improved further.

So I do not see a major problem on that. But why not try to have even a better system?

Regarding the transfer of cases, should one go by the place of the crime or the nationality, I do not think that we should have a completely rigid system, and that cases of course should be transferred to courts that can apply the entire panoply of due process protections without racial or ethnic or religious antagonism, and we would approach that question in broad terms.

Of course, it is desirable that a trial would be held in one's own home country, but given the history of Yugoslavia, again, this is something that must be worked out when we establish the modalities of those transfers in the future.

QUESTIONER. Marlene Kaufmann with the Commission staff. I have two questions.

Are the authorities in Belgrade seeking the participation of international lawyers in the Tribunal that they are setting up? The second question is off the topic of this briefing, but I would be really interested to hear your thoughts about should there be such—what type of tribunal should be set up in Iraq to handle the atrocities that were committed there?

Thank you.

Judge MERON. There has been considerable international involvement in establishing the model of the Tribunal in Belgrade. The OSCE, the International Bar Association and other institutions have already assisted the Belgrade authorities in elaborating the basic legal provisions that would guide that Tribunal.

That is a very good thing. For instance, the definition of crimes against humanity, which has been somewhat problematic under previous arrangements, now in the code adopted in the statute of the law adopted by Serbia, refers to the definition of crimes against humanity that we have at The Hague in our own statute. That is a good development. To what extent they will require or need or want international cooperation in the future I do not know. I certainly would expect that there will be a very considerable international interest in monitoring some principal cases, and I would hope that they will be—that the authorities will be receptive to such offers of assistance, which can only improve things.

I spoke of our own Tribunal in acknowledging that this is a work in progress, and that we can always improve on things.

On Iraq, I will pass that question, simply because I do not know enough about it. This is something that you really have to know, to be in the loop, to be able to make significant comment about. I do not want just to speculate.

Mr. SMITH. Judge, let me ask you with regards to the 44 defendants, of whom 31 are in pre-trial proceedings, that you mentioned earlier. Are there new names surfacing all the time, or is this pretty much the universe of people? If the three people that you mentioned earlier, including Mladic and Karadzic were to be apprehended, could this remaining work be done at a more local level? Or are there others whose names are on a list somewhere but have not come forward, or the prosecutor has not come forward yet to say we really want to go in this direction?

Judge MERON. Thank you, thank you, Mr. Chairman.

Now, cases that are in pre-trial stage all involve people who have been indicted, who have been indicated and with regards to whom the prosecution has come up with significant amounts of evidentiary material. Those cases are in various stages of planning for actual trial. Those cases will be planned—will be tried, of course, at The Hague.

Mladic and Karadzic already appear in earlier indictments. So in order to obtain confirmation of those indictments, the prosecutor had to come before the judge with enough of supporting material to enable a judge to confirm those indictments. When those indictments produce, which I very much hope soon, arrest and delivery up to The Hague of those persons, then those—they will be dealt with like any other case, without any prejudice. Karadzic and Mladic will be presumed innocent before the court, as everybody is before our courts.

Now, the prosecutor has indicated that she will be—during the time left for the completion of her work of investigations, which is until the end of 2004, that she will produce a number of additional indictments that will target a certain number, I believe something like 30 additional individuals, 14 indictments. Those indictments have not yet been produced, so those names would be still not within the public domain.

I think that the prosecutor probably will be also working on other investigations and maybe some of those other investigations would produce the kind of data and files and evidence that would be suitable for transfer to the area in the sense that they might involve those lower-level defendants who could be transferred to courts in the region.

Mr. SMITH. Appreciate that.

If you could, Judge, maybe touch on some lessons learned. As a matter of fact, I mentioned your Chairmanship of the oversight board that was constantly coming up with ideas that needed to be put into practice, that the chief prosecutor made recommendations herself. Are there some lessons learned that can be reduced to writing concerning

the original regional tribunal; this is how we thought it might go; but now this is what we have really learned needs to be for future efforts. It seems to me that each time we establish one of these something has been learned and lessons gleaned that can be applied, regrettably, because there will be a next one some time down in the future?

Judge MERON. Thank you very much for those questions.

I think that our work has been a remarkable work in progress and a great school from which we have ourselves learned a lot. We tried to articulate lessons or results that I believe would be extremely important for all international criminal tribunals, indeed for all criminal tribunals, whether domestic or national or international.

We started basically from the scratch—from the scratch because there had been no international tribunals or international prosecutions between Nuremburg and the events in the former Yugoslavia. Half a century during which the international community produced some conventions and perhaps some scholarly writings, but no actual international prosecutions.

So one of the very first things that our Tribunal when it was established, long before I had the honor to join the ranks of the judges, its judges had to write its own rules of procedure and evidence. This in itself proved to be a remarkable experiment in judicial law making.

So we basically started from the common law model, partly because the U.S. Government was among the first governments that produced papers which we could—my predecessors could base themselves on, a model of rules of procedure and evidence. The Anglo-Saxon model certainly gained ascendancy during the first year, the second year of the creation of the tribunal.

But it has been a continuing work. I believe that we have now revised the rules of procedure 27 times. What do my colleagues say there? Something like that, right?

Now, you could ask yourself, “Well, it is strange to have so many revisions.” I would say, “It is good to have so many revisions,” because we are ready to learn from our own mistakes or imperfections and constantly say to ourselves, “This is something that should not be left for future generations of lawmakers or judges. We must apply those lessons immediately to what we are doing so we are constantly improving that process.”

One of the—perhaps the most interesting lessons in international cooperation, judicial cooperation, has been the need to find workable compromises between the majority of the judges, who come from civil law disciplines—they are from civil law discipline—and there is a minority of judges, who like myself, come from common law countries.

As time went on, we realized that there are many things that civil law, the European model can offer, which would speed up the trials—for instance, in establishing a function that we call the pre-trial judge, who prepares complex cases with the cooperation of the parties, of the prosecutor and the defendant, for a speedier trial and so on in balancing various considerations regarding rules of evidence, allowing perhaps for more written testimony than a common law judge could apply, but allowing that subject to safeguards and guarantees that also common law judges would feel comfortable with, that all the rights of the defendant are addressed.

So it has been a remarkable experiment in judicial cooperation, in judicial lawmaking I do believe that the legacy that we will leave behind in our rules of evidence, in our rules of procedure and the judgments that we will leave behind, articulating the basic crimes under international humanitarian law in a very context-specific way.

In other words, during my civilian life, as you know, I was a professor. But the requirements of a judge and of an academic are quite different here.

A judge must be focused on the case at hand and produce the result or results that would be commensurate with international justice. A professor attempts to cover the entire field. Judgments require detailed definitions of international crimes, interpretation of the evidence, resolution of conflicts of evidence, on how to reconcile the notions of common law and civil law will prove to be, I think, a very important legacy to us all.

Mr. SMITH. Let me just ask you, if I could. I really appreciate that answer.

When the Tribunal was getting off the ground, we, on the Commission, worked very hard to encourage our government to do the max. While several donor countries were a little bit slow in ponying-up the money, I offered an amendment that actually was defeated that would have increased the amount of money the United States contributed to try to prime the pump. We were concerned we were losing evidence, we were losing witnesses who might, through forgetfulness or intimidation, lack of witness protection, might not want to come forward. Delay would inhibit prosecutions.

So I take a back seat to no one concerning support for regional tribunals like the one that you so ably preside over.

Now the question arises, when we got to the ICC and their own statute. One other footnote—years in and years out, I have made the trek over to Geneva for the U.N. Commission on Human Rights, and have been appalled at the hypocrisy of having rogue nations sitting in positions where they can inhibit progress, whether it be Cuba, or Libya or Sudan or other countries, where human rights violations are rife.

You have a situation where they get on these panels, and they are able to water down language, if not obstruct completely.

It was not until Armando Valladares in the late '80s led the U.S. delegation, having been a longtime political prisoner in Castro's Cuba, that we actually got a resolution on Cuba because they had done such a skillful job in thwarting justice, or at least scrutiny.

There was a horrible set of crimes committed over the course of many years by many participants on all sides of the fight. We have had judicial cooperation.

My question is, how do you guard against rogue prosecutors and potentially politically motivated judges in an ICC-type of tribunal where it becomes institutionalized, where the rules of evidence do not seem to be as standardized as I would like? I have read the Rome statute, and of course, it is still in emergence, at least a part of it hasn't even been written in terms of definitions.

I loved what they did in Sierra Leone, Rwanda too. I think the regional idea has tremendous merit, but I am concerned about the political mischief of turning everything into a war crime.

I asked our U.S. State Department when the Rome statute and the question arose whether or not the Clinton administration would sign it—if you look back at all of the U.S. conflicts and battles, Hiroshima, Nagasaki, the Dresden bombing, the fire bombing in Tokyo, could they be construed to be war crimes? Those pilots, bombardiers, anyone who participated—could they be hauled off by a victor and told that they committed war crimes?

I have been against the ICC. I want to be for it, frankly, because I want to see justice. But to think that a Qadhafi or somebody of his ilk could be providing judges to thwart efforts to liberate people genuinely, not the bogus kind that we see so often, concerns me. Can you comment on that?

Judge MERON. Well, I will comment very briefly. This is something that is beyond my competence as president of the ICTY.

But let me start by saying that fortunately, we at the ICTY, and I believe the same can be said for our sister institution, the war crimes Tribunal in Rwanda, have been blessed by having very good judges. For that we actually owe thanks to the nation countries that have nominated very competent lawyers, jurists, with tremendous criminal experience to be judges. So the phenomenon of the politicized or political ...

Mr. SMITH. Present company included.

Judge MERON. Thank you very much.

In other words, the phenomenon or the danger of the political judge, politicized judge, incompetent judge is something that fortunately we did not have to address at The Hague. Most of our judges are distinguished criminal judges who have spent years on the highest benches and courts in their countries.

My colleague from Germany, for example, was a member of the criminal section of the Supreme Court of Germany. Very difficult to find people of the same caliber.

As for ICC judges, again, without speaking with any particular competence that, if bad judges are nominated—or political judges, this would be the responsibility of states. It would be a shame if governments would, in fact, propose people who are not good, but the election of judges is by various segments of the international community.

In my own case, of course I have been elected by the U.N. General Assembly. One advantage of the type of model of international tribunal that we are now talking about, the ICTY, is that, in fact, judges have to be elected by the entire international community, which gives a certain guarantee that a judge would have to have strong credentials to be elected. Sometimes governments present candidates who do not obtain the required majority, and you need the absolute majority in the general assembly to be elected.

So I think that some concerns that you have expressed are not concerns that face us.

As regards the Hiroshima phenomenon, and the danger that countries would be prosecuted for this kind of warfare, the fact is that the United States delegation in Rome has been successful in avoiding the inclusion among the crimes in the ICC statute the use of nuclear weapons.

In the ICC statute, those would not be offenses under international humanitarian law, so this is something also if you add up the prohibition of retroactivity, this is not something that our country that has to worry about.

I think that the one particular provision of the ICC statute that would be of tremendous importance in protecting, say, United States' interests and in avoiding a problem for the United States is that the ICC is rightly based on the principle of complementarity, namely that the ICC can only deal with crimes that have not been investigated and prosecuted by national courts or national institutions.

As a country that has always accepted the principle of rule of law domestically and internationally, I cannot conceive serious international law violations of the types that come under the ICC statute that would create a problem for the United States.

If something might *prima facie* appear to be a problem, all that we would have to do in the United States is simply to have our armed services, which are second to none in applying and respecting international law, to investigate and when they come up with a conclusion that there was no crime, that should be, must be also conclusive for those who sit according to the statute.

So I would hope that the type of system of justice that we have in the United States would, in fact, perhaps preclude or avoid problems in the future.

Let us hope that the countries associated with the ICC will feel the required sense of responsibility to nominate only people who are not political judges or who try to make political mischief.

Mr. SMITH. I appreciate that answer. Any other questions from anybody else in the audience? I have one final question. We deeply appreciate your words of wisdom today. With respect to Republika Srpska, do you have any specific recommendations on what we might do to ratchet up the pressure there?

Judge MERON. Mr. Chairman, Republika Srpska has not been cooperating at all. The more pressure the better. I know that you, Mr. Chairman, in your wisdom, could think about much more effective means of pressure than perhaps I could, and here in Washington you are particularly well-situated in that respect.

There has simply been no compliance on their part, and much more international pressure is needed.

Mr. SMITH. I want to thank Judge Meron for your outstanding and very incisive commentary today. Thank you for responding to our questions. You give us a tremendous amount of information and, I would say, guidance as to how we go forward here. We are deeply appreciative of your being here today and gracing us with your presence.

Thank you.

Judge MERON. I am extremely grateful to you, Mr. Chairman, for your support and your comments.

Thank you so much.

[Whereupon the briefing ended at 3:28 p.m.]

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