

I am not here to speak to you so much as an expert. I do have my law degree but long since it has become invaded by fungus from lack of practice. I am here to speak to you because the Tribunal and the idea and promotion of the International Criminal Court is most relevant for Bosnia and Herzegovina. That relevance translates itself into certain lessons which I would like to share with you. Rather than being general, I would prefer to focus on the following two points: the politicisation of the tribunals (i.e. the former Yugoslavia and Rwanda Tribunals) and the implications for the proposed International Criminal Court.

The creation of the International Criminal Tribunal for the former Yugoslavia in itself was a response to the immediate political pressure. There was the belief that the international community was not so willing to confront acts of genocide, war crimes and even aggression. And the best substitute to offer to the world, at least in terms of rhetoric, was to promise that the perpetrators would be brought to justice. And we kept hearing this being repeated at the United Nations Security Council debates, when people said, "We can't do too much to stop what's going on, but we will bring the perpetrators to justice". At some point in time in the summer of 1992, when some of the crimes were actually hidden from world view, the camps that were not being publicised (even though most countries, as well as UN officials knew about them) came to light because of the work of certain newspaper reporters and media. And right before the London Conference, a resolution was passed which effectively put this promise in some form of general writing. Frankly, it is my belief that many who passed this resolution and supported it really did not have the intention of seeing the resolution realised.

The continual acts of war crimes, genocide and of course, the war in Bosnia and Herzegovina, maintained the pressure for the creation

---

\*Ambassador and Permanent Representative, Permanent Mission of Bosnia and Herzegovina to the United Nations.

of the Tribunal. A commission was established under guidance of Cherif Bassiouni, and it probably did not expect Professor Bassiouni to be so dedicated and a-political about his work. And finally there were a few other Ambassadors in the United Nations and private officials amongst whom I would include Ambassador Albright, Ambassador Arabi from Egypt and Ambassador Diego Aria from Venezuela as being untiring promoters for the establishment of the Tribunal.

Maybe it is necessary, to some extent, to politicise the concept of the Tribunal, because of course, most of the acts committed in the name of ethnicity or in the name of some political cause which would be brought before the Tribunal or the future International Criminal Court are in fact political events. Maybe it is necessary to politicise and to view the Tribunal for the former Yugoslavia as a catalyst, but unfortunately I think that the tribunals, particularly those of Bosnia and former Yugoslavia, are being overly politicised.

I will now elaborate on a couple of these points, starting from the statute of the Tribunal. First of all, if one were to look at the work which has been accomplished by the judges and others since their selection, one will see that many of the initial statutes that were adopted by the Security Council had to be altered, if one can use that word, in order to accommodate the work of the Tribunal. Ideas like trials in absentia were politicised; ultimately, there was a general decision not to have them. And of course the most politicised aspect of the Tribunal has been the lack of enforcement, which is fundamental if justice is to be served.

The selection of the prosecutor, demonstrated how politicised the event was. Professor Bassiouni was considered to be one of the best candidates to take over the work. The reasons were many. Beside his knowledge and professionalism, there was a continuity, given that much of the work had already been done. I think many countries did not support his nomination because he was too diligent and in a few occasions I also heard that it was because he was a Muslim. I think that type of unfortunate reasoning still exists in many minds including those willing to develop the International Criminal Court. The election of the judges (maybe appropriately so) was reviewed by the Security Council. Judges who did not pass muster of the Security Council could not have been voted upon by the General Assembly. However, one wonders what coincidence brought about the situation, at least in the initial selection of judges, that there were only two women, when taking into consideration that so many of the crimes committed were specifically directed at women. In addition, by

coincidence or otherwise, although there were members elected from Muslim countries, actually not one member of the Tribunal happened to be a Muslim or at least of Muslim background.

In terms of the work of the Tribunal, I must say that I do have confidence in the work of the prosecutor and the judges and in their independence. However, we do have to look at the process not only of arrest but the process of investigation. Most of the evidence is in the hands of the most powerful countries, and some may have reason to deliver only particular evidence as a means of bringing about political pressure, or to avoid being judged for having omitted to do something more in the past. The speed by which the Tribunal works is also politicised. Finally, we have the double edged sword of seconded employees to the Tribunal. Whether we like it or not, there seems to be a necessary element of making sure that the Tribunal has enough people to do the work but on the other hand of course, the independence of those who are seconded could always be questioned. What is interesting to note, which in my opinion is far from being a coincidence, is that in the case of what happened in Bosnia, not one citizen of Serbia Montenegro has been indicted, and we all know Arkan and Seselj as Serbian citizens, who in the minds of all should have been indicted. However, in Vukovar they were. One cannot help but ask the question "What's the difference, is there something AT play"? Unfortunately there is. When Vukovar occurred, Croatia was still a part of the former Yugoslavia. When most of the crimes occurred in Bosnia-Herzegovina they occurred after Bosnia was recognised as an independent country. Therefore to indict people, particularly officials from Serbia, would mean to admit that there was in fact an aggression against Bosnia-Herzegovina by a neighbouring state, and that the international community had an obligation to respond to this aggression. We fought for years in the Security Council to have the word 'aggression' used. The word 'aggression' was never used except in acts of aggression and specifically I was told (and hence this should be no secret) that the international community, in fact, did not want to imply any obligation on its part to confront aggression. Of course, the word aggression and the word genocide were used in General Assembly resolutions, but as far as most were concerned, that was irrelevant. I hope this is not the type of legacy that the International Criminal Court will in fact find itself adopting. There is also a perception here, that we need to keep people like President Slobodan Milosevic of the new Yugoslavia and others in the Belgrade regime, somehow free from these trials of the Tribunal, so that they can be worked with,

manipulated or they can do their own manipulation toward some political goals.

Another point I would like to raise concerns finance, which unfortunately always risks being politically controlled. This should not happen with the Tribunal. Recently, the Croatian government offered to hand over to the Tribunal seven or eight indicted people as long as the Tribunal would agree to bring them to trial within three months. Both Zagreb and the Tribunal know that unfortunately the condition cannot be met. Zagreb looks like it is making an honest offer, and the Tribunal is being undermined in its ability to respond.

Politicisation of arrest may be the biggest problem here. "There is a selective, perhaps even a racist approach here." People leading SFOR i.e. the NATO forces in Bosnia, would say things publicly like, "I cannot justify the arrest of a mass murderer in Bosnia". The only reason to justify that type of act would be to admit that a Bosnian is somehow less human than an American. I can assure you that if the crime had something to do with the perpetrators in America, as frequently is the case, there would be a response by American forces no matter what the risk might be. Of course, now we are also being told that the risks include rocking the boat - let us not rock the political boat. So, once again, justice takes a back seat. There was unfortunately a massive mistake by Edmond Snuffy Smith, the original American commander of the NATO troops in Bosnia, who effectively relied upon the expedient policy of: "Don't touch us and we won't touch you". This amounts to a protection contract normally entered into between Mafia gangs and storekeepers in small cities. There has been no realisation that the old approach (i.e. don't arrest the war criminals, avoid them at all cost) has been counter productive. It is counter productive for the essential objectives of maintaining the real peace, and most importantly from an international perspective, it is counterproductive for the exit-strategy of NATO from Bosnia and Herzegovina.

But even now, as the process of arrest seems at least to have taken one step forward, the choice of those who will be arrested is a very clear political message. They have gone after a mild-level group. Why? Because mainly they think that the low-level may not send enough of a message and going up to the highest level would mean a decisive step. An absolute decisive step is not considered necessary this time because we hope to send them a message by going after the mid-level.

Now we also see the politicisation of this issue even with

institutions like the OSCE. The Serbians are demanding that promises be kept, that those going to vote would not be arrested if they are on some sort of list; so they can actually go to vote in an official voting box and be immune from arrest. I think the exercise of democracy would not dictate such an arrangement.

There is certainly now an appearance of being subjected to political influences at the Tribunal even though I believe most of the key people are not. Belgrade continues to send the message that only Serbs are being indicted. Croatia says that the numbers indicate that substantial numbers of Croatians have been indicted, and we have therefore come down not to an issue of who is really guilty or responsible, but to an issue of what are the numbers. Even the Bosnians have been politicised by being told that only the Bosnians were fully cooperative with the Tribunal: there are actually more Muslims before the Tribunal than any other ethnic group. Obviously this would tend to turn many against the Tribunal. Succinctly put, we must make sure that the Tribunal and the International Criminal Court do not allow themselves to be subjected to political expediency. Instead justice must be perceived as politically indispensable.

One final point I would like to make concerns the idea of establishing a Truth Commission for the former Yugoslavia. If the idea of this Truth Commission is that each side would write its own version of history, then there will be no criteria for testing the reliability of the evidence of these facts. I am afraid, this would be a substitute for justice. More importantly, there would be a substitute for the independent Fact Finding Commission that was to be established under the Dayton agreement which was agreed to by Milosevic at Dayton. However, this is the only part of the agreement that he did not sign in Paris. He refused only this one provision; he signed everything else in Paris. I think the biggest obstacle of this idea is that as its starting point it assumes that there are sides involved, ethnic sides. It does not consider it as an ideological issue, and it does not understand that in this context the ideology of separatism, fascism, even illegality would in fact gain a platform through this Truth Commission to continue to promote these perverse ideas. This is not South Africa. The ideology of apartheid has not been defeated in Bosnia. In fact, it still continues to survive under the very terms of the Dayton agreement. I would hope that the idea of a Truth and Reconciliation Commission in Bosnia and Herzegovina can take the later concerns into consideration and that it can be developed into something that can be very helpful in our country.

So, in conclusion, I would ask the Conference here, as a final

step, to take a definitive position on the issue of how a proposed Truth Commission might act in this situation. Of course, this is another *ad hoc* Tribunal if you would, another *ad hoc* court, which I think can confuse the situation rather than help under the current circumstances.