

## **VIEW FROM THE HAGUE**

### **THE TRIBUNAL AND NATIONAL COURTS AS PARTNERS**

The Tribunal's three court rooms are the busiest they have ever been and promise to be busier still for several years as the Tribunal completes its work. Since the Tribunal cannot try *all* perpetrators of war crimes it is focused on the most senior and most responsible perpetrators. By 2011, the Tribunal will be winding down its work, but it will not close its doors until all the highest level indictees face trial in The Hague.

The Tribunal has always shared responsibility for trying war crimes cases with courts in Serbia and Montenegro, Croatia and Bosnia and Herzegovina. It has no monopoly in carrying out war crimes prosecutions. In fact, national courts are expected to investigate all credible accusations of war crimes. Recently, the Security Council issued fresh encouragement to national jurisdictions to take up cases against low and mid-level perpetrators. The Tribunal welcomes this and is actively supporting such efforts in Belgrade, Zagreb, Sarajevo and Pristina.

In keeping with the Security Council's recommendation for the ICTY to deal with senior leadership perpetrators, the Tribunal has established a procedure to transfer cases involving mid and lower level perpetrators to national courts.

Before examining the two categories of cases that may be transferred it is important to highlight the type of case that will *not* be transferred – those that involve persons indicted by the Tribunal who held senior political office or were part of the military or police top brass.

The first type of case that may be transferred to national courts involves a limited number of intermediary or lower level accused who are indicted by the Tribunal. The decision on whether to transfer such a case will be made by the Tribunal's judges who would beforehand wish to satisfy themselves that the national court will fully respect the rights of the accused and the victims to a fair trial, and that witnesses can testify without fear. The Tribunal would monitor any such transferred case, and if international standards of a fair trial were not met, the judges could order that the case be returned to The Hague. At present, the Tribunal is not considering transferring any cases of persons under indictment to Serbia and Montenegro. However, a proper consideration by the Prosecutor will be made in early 2005 after she has completed all investigations and issued final indictments.

The second type of case is far broader and involves many more suspects, ranging from persons who have been or are under investigation but where no indictment has been issued. In such cases investigations may be transferred to national prosecutors pursuant to agreement with the Office of the Prosecutor. At present, the Tribunal's Prosecutor intends to transfer two such cases involving six accused to Serbia and Montenegro.

National courts, of course, do not need to wait for the Tribunal's Prosecutor to transfer cases to them. They can and should independently initiate investigations and raise indictments. The Tribunal's Prosecutor will favourably consider requests for assistance. Such was the case with the indictment issued last week by the Serbian judicial authorities concerning the Ovčara murders. The Tribunal's prosecution actively assisted Serbian prosecutors with bringing charges against the eight persons accused for their involvement in the killing of more than 250 prisoners of war from Vukovar in November 1991. It is pertinent to note that running parallel to the Ovčara trial that will soon be held in Belgrade, the Tribunal will next year hold its own trial of persons charged with responsibility for the crime. This is a partnership where The Hague will try the

former senior JNA officers and Belgrade the lower level accused. The truth will emerge through such a partnership.

Legal professionals have indicated that there are numerous legal, political and institutional challenges that currently face them in trying war crimes cases. Serbia does not at present have a witness protection program. Judges and prosecutors have expressed the need for training in international humanitarian law. Questions surround the admissibility of Tribunal evidence in local courts and the status of command responsibility in domestic law. These are but some of the challenges with which Serbian judicial institutions are currently grappling.

The Tribunal will do its utmost to assist Serbia in overcoming these challenges by sharing its knowledge and experience with Serbian investigators, prosecutors and judges. For example, with the cooperation of the OSCE Mission to Serbia and Montenegro, Serbian judicial officials are currently in The Hague for consultations on witness protection with Tribunal staff. The Tribunal hopes that this will be just one of many future examples of partnership in the pursuit of justice for victims of war crimes.

However, it must be clear that trying war crimes cases in Belgrade is not a substitute for cooperation with the Tribunal. Serbia and Montenegro's obligation to cooperate with the Tribunal remains unchanged. For example, Serbia and Montenegro cannot request that a case be transferred as a substitute for surrendering Tribunal indictees. It remains obligated to transfer all persons indicted by the Tribunal to its custody. The same principle goes for Croatia and Bosnia and Herzegovina, which are also in the early stages of trying war crimes cases.

There are a great many victims of war crimes in the territory of the former Yugoslavia who still await justice. The solemn responsibility of providing it to them cannot be shouldered by the Tribunal alone, but must be shared with judiciaries across the region including Serbia and Montenegro.

**Outreach Programme**

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