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Article 14

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## Draft Charter of the International Tribunal for Violations of International Humanitarian Law in the Former Yugoslavia

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# APPENDIX

## DRAFT CHARTER OF THE INTERNATIONAL TRIBUNAL FOR VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW IN THE FORMER YUGOSLAVIA† ††

### I ORGANIZATION

#### A. *Tribunal*

##### Article 1.

The International Tribunal for Violations of International Humanitarian Law in the Former Yugoslavia (hereinafter referred to as the “Tribunal”) is established for the purpose of the just and prompt trial of persons accused of violations of international humanitarian law, as set forth in article 10, committed in the territory of the former Yugoslavia on or after January 1, 1991.

##### Article 2.

The Tribunal shall consist of a Trial Court and an Appeals Court.

- (a) The Trial Court shall consist of nine members, who shall preside over trials in panels of three members each. The members of the Trial Court shall by majority vote select from among themselves a Chief Judge of the Trial Court, who shall be an experienced jurist. He or

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† SC Res. 808 (Feb. 22, 1993) had requested that, within 60 days, the Secretary-General submit a report to the Security Council containing options for the charter of such a tribunal and taking into account suggestions put forward by the member states. For Ambassador Albright’s statement in the Council on the adoption of SC Res. 808, see U.S. Dept. of State, Press Release USUN 18-(93) (Feb. 22, 1993).

†† Dept. of State File No. P93 0039-0255/0267. The U.S. proposal is also contained in UN Doc. S/25575 (1993).

she shall have such administrative responsibilities as the members of the Trial Court shall decide.

- (b) The Appeals Court shall consist of nine members, who shall preside over appeals in panels of three judges each. The Appeals Court may consider particular appeals in panels of more than three judges where it determines that this is warranted by the importance of the issues involved or other special circumstances. The members of the Appeals Court shall by majority vote select a Chief Judge of the Appeals Court and the Tribunal from among themselves, who shall be an experienced jurist. He or she shall have such administrative responsibilities as the members of the Appeals Court shall decide.

#### Article 3.

- (a) Each member of the Tribunal shall be a person of high moral character and shall have the legal competence and qualifications required for appointment to a criminal court of the state in which that member is resident or of which that member is a national, including preferably experience in the conduct of criminal trials or appeals.
- (b) Members of the Tribunal shall be appointed for a term of — years, and may only be removed for appropriate cause by the Security Council, which may also appoint alternate Trial Court and Appeals Court judges to serve in the event of disability, recusal, or removal of a Member of the Tribunal.
- (c) The Rules to be adopted pursuant to article 6 shall make provision for the recusal or removal of Tribunal members in particular cases, and for their replacement by alternates, when appropriate.
- (d) Except where otherwise provided herein, decisions of the Tribunal shall be made by majority vote of the panel presiding over a trial or appeal.

#### Article 4.

Subject to article 26, the Tribunal is authorized to establish a Registry and other subsidiary bodies and appoint personnel as

it deems necessary to assist it in the performance of its functions.

#### Article 5.

The Tribunal shall have such powers as are necessary and appropriate for the conduct of criminal trials and appeals, including the power:

- (a) To issue arrest warrants;
- (b) To summon witnesses, to require their attendance and testimony, and to put questions to any witness, including the accused person should he testify;
- (c) To require the production of documents and other evidentiary materials;
- (d) To administer oaths to witnesses; and
- (e) To conduct or authorize appropriate proceedings, including the taking of evidence on commission.

#### Article 6.

The Tribunal shall, with the approval of the Security Council, adopt Rules of Procedure for the conduct of trials and appeals, the admission of evidence, the protection of witnesses and other sources of information, and other appropriate matters, as well as sentencing guidelines.

#### Article 7.

The Tribunal shall have its seat at —. This shall not prevent the Tribunal from sitting and exercising its powers elsewhere if it deems appropriate. Subject to the approval of the Security Council, the Secretary General shall conclude at the earliest possible date an agreement with the Government of —, and other states as appropriate, concerning the location and operation of Tribunal Headquarters; privileges and immunities appropriate for their functions to be accorded to members and personnel of the Tribunal, the Registry and the Office of the Chief Prosecutor, and to counsel of accused persons; the incarceration of accused persons; the protection of witnesses during proceedings, and other relevant matters.

**B. *The Office of the Chief Prosecutor*****Article 8.**

The Office of the Chief Prosecutor shall be responsible for the investigation and prosecution of defendants before the Tribunal. The Chief Prosecutor:

- (a) Shall be a person qualified to perform, and with significant experience in the conduct of, investigations and prosecutions of major criminal cases in the state in which he or she is resident or of which he or she is a national;
- (b) Shall be appointed by, report to, and be removable at the discretion of, the Security Council.

**Article 9.**

The Chief Prosecutor is authorized to:

- (a) Investigate allegations of violations set forth in article 10 and to collect and preserve evidence relating to those violations;
- (b) Request warrants of arrest pursuant to article 14;
- (c) Request states to arrest, detain, and transfer accused persons pursuant to article 15;
- (d) Request assistance from states, including but not limited to the provision of evidence, the identification and location of persons, the taking of testimony, and the serving of Tribunal documents;
- (e) Issue Indictments and accompanying documents. The Indictment shall include full particulars specifying in detail the charges against the accused person. A copy of the Indictment and of all the documents lodged with the Indictment, translated into a language that he or she understands, shall be furnished to the accused person as provided in article 17;
- (f) Conduct examinations of witnesses and accused persons, consistent with the rights contained in article 20;
- (g) Prosecute individuals against whom Indictments have been issued;
- (h) Appoint subordinates to carry out such duties as may be assigned to them;

- (i) Perform such other acts and functions as may be necessary and appropriate for the purposes of investigation, indictment, and prosecution in accordance with this Charter.

## II JURISDICTION AND GENERAL PRINCIPLES

### Article 10.

The Tribunal shall have the power to try and to punish persons for any of the following violations of international law arising out of the conflict in the former Yugoslavia on or after January 1, 1991:

- (a) Violations of the laws or customs of war, including the Regulations Annexed to the Hague Convention IV of 1907 and grave breaches of the Geneva Conventions of 12 August 1949. For this purpose, the conflict in the former Yugoslavia on or after June 25, 1991 shall be deemed to be of an international character.
- (b)(i) Acts of murder, torture, extrajudicial and summary execution, illegal detention, and rape that are part of a campaign or attack against any civilian population in the former Yugoslavia on national, racial, ethnic, or religious grounds; and
- (ii) Acts that violate the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948.

### Article 11.

There shall be individual responsibility for the violations set forth in article 10.

- (a) The fact that an accused person acted pursuant to order of his or her Government or of a superior shall not free him or her from responsibility, unless the accused person did not know and could not reasonably have been expected to know that the act ordered was unlawful. In all cases where the order is held not to constitute a defense, the fact that the individual was acting pursuant to orders may be considered in mitigation of punishment if the Tribunal determines that justice so requires.

- (b) **An accused person with military or political authority or responsibility is individually responsible if violations described in article 10 were committed in pursuance of his or her order, directive, or policy. An accused person is also individually responsible if he or she had actual knowledge, or had reason to know, through reports to the accused person or through other means, that troops or other persons subject to his or her control were about to commit or had committed such violations, and the accused person failed to take necessary and reasonable steps to prevent such violations or to punish those committing such violations.**
- (c) **The official position of an accused person, including as a Head of State or a responsible official in a Government, shall not be considered as freeing him or her from responsibility or grounds for mitigating punishment.**
- (d) **Those who conspired to commit or who were accomplices to any of the violations in article 10 are individually responsible for such violations.**

#### **Article 12.**

- (a) **The fact that a person has been detained, tried, acquitted, or punished by a state or states shall not preclude the detention, trial, or punishment of that person by the Tribunal for the same acts if the Tribunal determines that there were violations of this Charter not comprehended in the prior prosecution or that the prior prosecution was not diligently prosecuted before an impartial tribunal. In considering the punishment of such a person, the Tribunal shall take fully into account any punishment of that person by a national court for the same acts.**
- (b) **The Tribunal may, at its discretion, defer to the prosecution of an accused person by a state or states, when it is satisfied that such trial will be in the interests of justice and without prejudice to its authority under paragraph (a). The Office of the Chief Prosecutor may also assist in the investigation and prosecution of persons by a state or states.**

**Article 13.**

The Tribunal shall not initiate the trial of a person charged with violations under this Charter in his or her absence.

**III: APPREHENSION AND DETENTION OF ACCUSED PERSONS  
AND LEGAL ASSISTANCE****Article 14.**

- (a) At the request of the Chief Prosecutor, the Trial Court shall issue warrants of arrest for an accused person, upon a finding that there is a reasonable basis to believe that he or she had committed a violation as set forth in article 10.
- (b) From the time of coming into the custody of the Tribunal, accused persons shall have the right, which they may waive:
  - not to be compelled to testify against themselves or to confess guilt and to be informed of this right;
  - to legal assistance; to have legal assistance assigned to them, without payment by them in any such case if they do not have sufficient means to pay for it; and to be informed of this right.

**Article 15.**

Upon presentation of a warrant of arrest and supporting documentation by the Chief Prosecutor that there is a reasonable basis to believe that he or she has committed a violation as set forth in article 10, a state shall arrest, detain, and transfer persons identified in the warrant and in its custody or found within its territory to the custody of the Tribunal.

**Article 16.**

- (a) Upon receiving an order of the Tribunal pursuant to article 5 for the production of evidence, the identification and location of persons, the taking of testimony, and the service of Tribunal documents, a state shall provide the assistance ordered by the Tribunal.
- (b) States shall give prompt consideration to other requests for assistance by the Chief Prosecutor pursuant to article 9.

**Article 17.**

- (a) Without delay after an accused person comes into the custody of the Tribunal, there shall be a hearing at which an Indictment shall be presented to the Trial Court and to the accused person.
- (b) The accused person shall have the right to give an explanation relevant to the charges made against him or her and to enter a plea.
- (c) After this hearing, the Trial Court shall decide whether there is reasonable cause to hold the accused person over for trial.

**Article 18.**

The Trial Court has the authority to order pretrial detention or to grant conditional release. Any such detention shall be in a state chosen by the Tribunal from a list of states that have agreed to detain persons for this purpose.

**Article 19.**

The Trial Court shall ensure fair and expeditious hearings of all matters before it. To that end, it shall:

- (a) Confine the trial to the issues raised by the Indictment;
- (b) Impose appropriate restrictions or punishment on participants in proceedings before the Trial Court for violation of decorum or refusal to comply with the rules and orders of the Trial Court

**IV: RIGHTS OF THE ACCUSED PERSON AFTER PRELIMINARY HEARING****Article 20.**

Accused persons shall be presumed innocent until proved guilty beyond a reasonable doubt in a public trial. From the time of the Trial Court's decision to hold the accused person over for trial under article 17(c), each accused person shall have the rights guaranteed under international law and by this Charter, including the right:

- (a) to be informed promptly and in detail, in a language which the accused person understands, of the nature and cause of the accusation against him or her;

- (b) to be informed of the evidence supporting the accusation against him or her, and to be provided any exculpatory evidence in the possession of the Chief Prosecutor;
- (c) to have adequate time and facilities for the preparation of a defense and communication with defense counsel;
- (d) to be tried without undue delay;
- (e) to be tried in his or her presence, and to defend him or herself in person or through legal assistance of his or her own choosing; to be informed, if he or she does not have legal assistance, of this right; and to have legal assistance assigned to him or her, without payment by him or her in any such case if he or she does not have sufficient means to pay for it;
- (f) to examine or have examined witnesses against the accused person and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her;
- (g) to have the free assistance of an interpreter at all phases of the proceedings against him or her if the accused person cannot understand or speak the language used in court;
- (h) not to be compelled to testify against him or herself or to confess guilt and not to have his or her failure to make any statement or explanation used against him or her;
- (i) to appeal the judgment and sentence of the Trial Court in accordance with article 24 of this Charter.

#### V: JUDGMENT AND SENTENCING

##### Article 21.

The Trial Court shall have the power to sentence convicted persons to imprisonment or other appropriate punishment.

##### Article 22.

Imprisonment shall be in a state chosen by the Trial Court from a list of states that have agreed to imprison persons for this purpose.

**Article 23.**

Complaints about the conditions of imprisonment shall be made to national authorities or to the Tribunal and, after it has ceased operations, to the Security Council.

**VI: APPEALS****Article 24.**

- (a) Upon written notice filed within 30 days of the date of entry of judgment, a convicted person shall have the right to appeal to the Appeals Court a conviction on the grounds that the Trial Court committed an error of law invalidating the decision, or an error of fact that caused a manifest miscarriage of justice.
- (b) An application for reversal of a conviction may also be made to the Appeals Court, or, if the Tribunal has ceased operating, to the Security Council, upon discovery of some fact of such a nature as to be a decisive factor, which fact was, when the judgment was given, unknown to the Court and to the convicted person. The application for reversal of conviction must be made within six months of discovery of the new fact.
- (c) The Rules adopted pursuant to article 6 may also provide for interlocutory appeals by the accused person or Chief Prosecutor of other matters.

**Article 25.**

After the convicted person's appeal is exhausted or if the convicted person elects not to exercise the right to appeal, the convicted person may seek clemency or commutation of his sentence from the Security Council.