WAR CRIMES: LEGAL FRAMEWORK
AND POLITICAL BACKDROP
- WHY WAR CRIMINALS MUST BE BROUGHT TO JUSTICE

LL.M. RESEARCH PAPER

MASTERS LEGAL WRITING (LAWS582)

LAW FACULTY
VICTORIA UNIVERSITY OF WELLINGTON

2002
TABLE OF CONTENTS

ABSTRACT 2

I INTRODUCTION 3

II WAR CRIMES DEFINED 5
   A War Crimes 6
   B Crimes against Humanity 8
   C Genocide 9
   D Aggression 10

III LEGAL FRAMEWORK 10
   A Jurisdiction 11
   B Personal Responsibility 12
   C The Principle of Legality 16

IV WAR CRIMES TRIBUNALS 19
   A The History of War Crimes Tribunals 19
   B From Nuremberg to The Hague and Arusha 21
   C The Intl. Criminal Tribunal for the former Yugoslavia 21
   D The International Criminal Tribunal for Rwanda 25
   E The International Criminal Court 26
   F The Legal Basis for Ad Hoc Tribunals 27

V UPSHOT 30

VI THE CASE OF SLOBODAN MILOSEVIC 31

VII AND ALL THE OTHERS? 38
   A Law Without Enforcement 38
   B A Question of Authority 40
   C Fatal Reluctance 43
      1 Authorisation 43
      2 The Risk of Casualties 44
      3 The Lack of Political Will 46

VIII CONCLUSION 49

BIBLIOGRAPHY 51
ABSTRACT

After the horrific wars in former Yugoslavia and Rwanda, the United Nations established two ad hoc tribunals to bring to justice the worst perpetrators of atrocities during these conflicts. Even so, despite the tribunals having issued numerous indictments, especially in Yugoslavia, the actual apprehension of indictees remains extremely unsatisfactory. The blame lies largely with the lack of commitment and political will of the countries involved. This paper first gives an overview of different categories of so called ‘war crimes’ and the legal framework surrounding the concept of personal criminal liability for these offences. It goes on to discuss the means of prosecution of war criminals, with an emphasis on ad hoc war crimes tribunals. In the last part the paper examines the political considerations obstructing the indictment and apprehension of key war criminals with a focus on the conflict in former Yugoslavia. The paper argues that most of these considerations are not justified, because sparing these offenders sets a bad precedent and thwarts the purpose of deterrence as well as national reconciliation in the respective countries.

This paper comprises 12,894 words, excluding footnotes and bibliography.
I INTRODUCTION

"A person stands a better chance of being tried and judged for killing one human being than for killing 100,000."

- José Ayala Lasso, former United Nations High Commissioner for Human Rights

The history of mankind — sadly — is a history of war. And the history of war — probably even more sadly — is one of war crimes. It is said that “war is a dirty business" and the conduct of war itself is horrific enough. There are however some acts that cross a line, that are so hideous and evil that one is not willing to accept them even in a context of war. The concept of a war being ‘humane’ might seem odd at the first glance, as the whole purpose of warfare is essentially to exterminate the enemy, which is hardly a humane idea. However, even in an extreme situation like a war there have to be some basic rules of conduct. While those rules tend to vary in scope and definition they still maintain certain core elements of what is considered ‘human behaviour’.

Reports of the recent wars in former Yugoslavia (Bosnia-Herzegovina and Kosovo) and Rwanda leave one shocked by the extent of unthinkable horror that humans seem to be able to inflict on each other. And it also immediately creates a distinct feeling that these acts are not acceptable and cannot go unpunished. Each new atrocity brings a new call for war crimes prosecution, which is routinely met with reluctance and caution from those with the power to set such a trial in motion. Justice and diplomacy constantly quarrel about whether to prosecute or to rehabilitate. It is usually only an unexpected confluence of events that leads to the establishment of war crimes tribunals.¹

The term ‘war crimes’ is almost as much a part of worldwide popular usage as murder. However, unlike murder, ‘war crimes’ is still far from having the benefit of international and national legislation, which provides it with the necessary legal specificity that exists in common crimes. Even worse yet, the

enforcement of those acts has been significantly lacking. Most war criminals, even the worst offenders, still go untried.

The trial of former President of the Federal Republic of Yugoslavia, Slobodan Milosevic seems to be an exception. Milosevic's trial before the International Criminal Tribunal for the Former Yugoslavia (ICTY) is the most important war crimes prosecution since the Nazi leaders were tried at Nuremberg. Milosevic himself is the first head of state ever tried for war crimes. His trial is a major benchmark for international justice, but it also spotlights the failure to arrest other architects of the Balkan wars of the 1990s. Richard Dicker, director of Human Rights Watch's International Justice Program points out that:

[The trial is a great step forward for justice, but equally notable are those indicted war criminals missing from the dock. Too many of the most senior Serb indictees remain at large. The blame lies with Balkan governments that have failed to cooperate with the tribunal, and with NATO, which has for six years operated in Bosnia without rounding up Milosevic's co-conspirators.]

Most of the key figures of the war in Yugoslavia are still at large including former president of the Serb Democratic Party for Bosnia-Herzegovina, Radovan Karadzic and former Commander of Serb Troops in Bosnia-Herzegovina, General Ratko Mladic. Both have been indicted, but no serious efforts have been made to actually arrest them. The same is true for many war criminals in various countries. This is partly because the state where the crimes have been committed is not willing to prosecute or extradite the offender, and

---

partly because the international community too often betrays the idea of global justice for blurred political considerations.

With the International Court of Justice (ICC) being established and the ongoing process of codification and definition for some of the most hideous war crimes, today the legal framework for the prosecution of these violations of international law is becoming more and more comprehensive. However, as long as war criminals can usually expect to remain unpunished because indictments are withheld for political reasons, international justice cannot be achieved.\(^7\)

In searching for excuses not to prosecute alleged perpetrators of wartime atrocities it is often argued that criminal responsibility for these offences constitute a ‘grey area’ in international law or would essentially have to be considered to fall under the jurisdiction of the respective country where the crimes have been committed. However, this is not true. After the international war crimes tribunals of Nuremberg and Tokyo, after the establishment of the ad hoc tribunals of The Hague and Arusha and after the conclusion of the process of creating an International Criminal Court, today the legal framework of war crimes prosecution is in fact quite comprehensive.

Examining the example of the successful extradition of former Yugoslav president Slobodan Milosevic, this paper argues the other than a lack of political will there are few obstacles in bringing to justice the worst offenders of international law.

### II  WAR CRIMES DEFINED

The perpetrators of atrocities in war contexts are commonly referred to as ‘war criminals’. Yet, although most people would say that war crimes are very serious crimes, it is not widely known what exactly the catalogue of those crimes incorporates. Different from popular belief and apart from what is implied by the wording, a war criminal is not necessarily only a person that

---

commits a ‘war crime’. In fact, there are four categories of criminal offences in international law that are imprecisely referred to as ‘war crimes’: ⑧

A War Crimes

The first category comprises the actual, technical ‘war crimes’ committed during the conduct of war. The concept of war crimes can be defined as violations of the laws and customs of war or international humanitarian law ⑨. The term ‘war crimes’ has no precise meaning since the scope and definition of these crimes is dependent on the development of the laws and customs of war. Therefore, as the laws of war have a rather dynamic character and the international view on these rules and customs changes with time, an exhaustive and binding catalogue of war crimes cannot be provided. ⑩

The concept of war crime was given the first precise definition in Article 6(b) of the Charter of the International Military Tribunal for the Prosecution of the Major War Criminals of the European Theater (Nuremberg Charter). ⑪ The article defines war crimes as:

Violations of the laws or customs of war which include, but are not limited to, murder, ill-treatment or deportation to slave-labor or for any other purpose of civilian population of or in occupied territory. Murder, or ill-treatment of prisoners of war, of persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity. ⑫

⑧ For reasons of readability, the term ‘war crime’ will be used in this paper, too, referring to all types of violations enumerated in this chapter.
⑩ Alemelesh Gheberhiwot War Crimes Committed by the Eritrean Regime <http://home.swipnet.se/~w-26522/Home/What_s_New/War_Criminal/War_Crimes/war_crimes.htm> (last accessed 1 November 2002).
⑪ However, the concept of war crimes was established before that. The Hague conference of 1899, provided rules of warfare and rules regarding the treatment of prisoners of war as well as conventions on maritime warfare. Offences against these laws and customs of war were declared as war crimes. Furthermore, article 27 of the Treaty of Versailles of 1919 granted the right to the Allied and Associated Powers to Punish the persons who had violated the laws and customs of war, and also provided for the arraignment of the German Emperor Kaiser, for offence against international morality and sanctity of treaties.
⑫ Article 6(c) of the Nuremberg Charter, available at <http://www.yale.edu/lawweb/avalon/imt/proc/imtconst.htm> (last accessed 1 November 2002).
Additionally, the four Geneva Conventions of 1949 have listed a number of "grave breaches" which include wilful killing, torture or inhuman treatments, and the causing of great suffering or serious injury to body or health.\textsuperscript{13} The first protocol of 1977 enlarged the list of grave breaches adding various matters.

Wartime atrocities not prohibited under the Geneva Conventions can be war crimes under the customary law rubric of "violations of the laws and customs of war". For interstate conflicts states agree that such war crimes include for example certain violations of the 1907 Hague Convention and Regulations.\textsuperscript{14} The Statute of the ICC in its article 8(2)(b)\textsuperscript{15} lists as war crimes for international conflicts not only the grave breaches of the Geneva Conventions, but also 26 serious violations of the laws and customs of war, most of which have been considered by States as crimes since at least World War II.\textsuperscript{16}

As for civil wars international law has fewer rules regulating the conduct of conflicts. This area is considered by most States to be part of domestic jurisdiction. Consequently, the catalogue of war crimes for civil conflicts is considerably shorter than for international conflicts. Additional Protocol II to the Geneva Conventions of 1977, containing basic rules for the conduct of internal conflicts, has no criminal liability provisions. The relevance of customary law war crimes is not as clear with respect to such wars as it is for international wars.

The Statute of the ICTY includes "serious violations of Common Article 3 of the Geneva Conventions" (addressing civil wars)\textsuperscript{17}, as well as other basic rules on methods of warfare. The tribunal has defined a serious violation as one that "[c]onstitutes a breach of a rule protecting important values, and involves grave


\textsuperscript{14} IV Convention Respecting the Laws and Customs of War on Land (Hague IV) of 18 October 1907 (entry into force 26 January 1910), available at <http://www.yale.edu/lawweb/avalon/lawofwar/hague04.htm> (last accessed 1 November 2002).

\textsuperscript{15} The statute of the ICC is available at <http://www.un.org/law/icc/statute/romefra.htm> (last accessed 1 November 2002).

\textsuperscript{16} Ratner, above.

\textsuperscript{17} See article 2 ICTY statute.
consequences for the victim." The catalogue of war crimes embraced in the ICTY statute, while shorter than the list of interstate war crimes, covers most of the atrocities committed during recent conflicts.

B Crimes against Humanity

The second legal category is labelled ‘crimes against humanity’. Article 6(c) of the Nuremberg Charter was the first legal instrument to define crimes against humanity in positive international law. The Charter established a generic category of international crimes to the war crimes addressed in article 6(b) because it deemed it to go beyond the scope of war crimes. Since then, crimes against humanity have acquired their own distinct identity as international crimes.

Unlike other international crimes, there has been no specialized international convention since then on crimes against humanity. Still, that category of crimes has been included in the statutes of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), the statute of the International Criminal Court (ICC) as well as several other international texts. All of them differ slightly as to their definition of that crime and its legal elements.

Crimes against humanity are distinguished from domestic crimes by virtue of their scope, or their so-called "mass nature." Mass nature is defined by two criteria: First, they involve or target a large number of victims and secondly they are conducted executing a systematic state policy of "widespread or

---

18 ICTY Appeals Chamber Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction of 2 October 1995 in the Tadic Case (IT-94-1-AR72) (Tadic Jurisdiction Decision"), para 94.
19 Ratner, above.
22 Ibid.
systematic" violations.\textsuperscript{24} In addition to having the character of a mass nature, in order to qualify under international law as a crime against humanity, it must be shown that the groups concerned were targeted for mass murder because of their status as a distinct group.\textsuperscript{25}

To some extent, crimes against humanity overlap with genocide and war crimes. However, crimes against humanity are distinguishable from genocide in that they do not require a special intent. Crimes against humanity are also distinguishable from war crimes in that they not only apply in the context of war (when the law of war comes into action, the violation of which constitutes a war crime) but also in times of peace.\textsuperscript{26}

\textbf{C Genocide}

The last category of crimes imprecisely combined to the term ‘war crimes’ is genocide. Sometimes deemed to be a mere sub-category of the crimes against humanity described above, genocide has to be considered a different class of crime, as it involves a very dissimilar mental element. Scholars and practitioners of international law often regard genocide as the most heinous international crime.\textsuperscript{27} It is considered a crime on a different scale and both the gravest and the greatest of the crimes against humanity.\textsuperscript{28}

War crimes had been defined before, but the crime of genocide required a separate definition as this was believed to be ‘not only a crime against the rules of war, but a crime against humanity itself’ affecting not just the individual or nation in question, but humanity as a whole.\textsuperscript{29}

\begin{footnotesize}
\begin{itemize}
\item[24] The Cambodian Genocide Program at Yale University \textit{Crimes Against Humanity} (Definition) \url{http://www.yale.edu/cgp/dccam/hcrimes.htm} (last accessed 1 November 2002).
\item[26] Ibid.
\item[27] Steven R. Ratner and Jason S. Abrams \textit{Accountability for Human Rights Atrocities in International Law – Beyond the Nuremberg Legacy} (Clarendon Press, Oxford, 1997), 24.
\item[29] Daniels, above, 1-2.
\end{itemize}
\end{footnotesize}
Unlike other crimes against humanity, genocide has been authoritatively coded in a single, widely accepted legal instrument. The international legal definition of the crime of genocide is found in the 1948 Convention on the Prevention and Punishment of Genocide. After stating in article I that genocide is a crime under international law, the Convention lays down a definition of the crime. Article II of the convention describes two elements of the crime of genocide: First, a mental element (intent requirement), meaning the "intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such", and secondly a physical element which includes five acts described in sections a, b, c, d and e. A crime must include both elements to be called "genocide." Article II goes on to enumerate five punishable forms of the crime of genocide: genocide, conspiracy, incitement, attempt and complicity.

D Aggression

The 2002 Rome Statute of the International Criminal Court in its article 5(d) also features the crime of aggression. However, while war crimes, crimes against humanity and genocide are extensively defined in the subsequent articles, aggression lacks a clear definition.

III LEGAL FRAMEWORK

The legal framework for trying international war criminals has been put into place with various human rights treaties: namely, the Universal Declaration of Human Rights, the Genocide Convention and the Geneva Conventions. In addition, several principles of war crimes prosecution are considered to be part of the jus cogens. The notion of a jus cogens is derived from the Natural Law concept that certain norms exist from which no state may ever deviate. Hence,
while some of the rules given below are not laid down in acts or treaties, they are still believed to have universal validity.

A Jurisdiction

The legislative authority to proscribe certain acts by law is not necessarily coupled with the judicial authority to punish violators of the law. The question of the criminality of wartime atrocities is distinguishable from the question of which courts have jurisdiction to try those accused of these offences.36

Since the rules of war are part of international law, no nation can unilaterally change them. No legislature can declare that something which is considered to constitute a war crime is permitted to own nationals or forces.37 The right to try an enemy war crime suspect has been uncontested throughout the centuries. In fact, since the rules of war are international law, such suspects may be tried and punished even by a nation that has not passed any legislation for such procedures at all. The Nuremberg charter and the judgment of the Nuremberg tribunal furthermore established that war crimes have no particular geographic location. Thus, any state has jurisdiction to put offenders of war crimes on trial, even though they are nationals of another state, for committing crimes in the territory of another state.38

The crimes in question here are considered to be part of jus cogens. They constitute a non-derogable rule of international law.39 As a result, these rules are subject to universal jurisdiction - a principle that has been recognized under international law since the establishment of the International Military Tribunal of Nuremberg. Any state has the ability to exercise universal jurisdiction over

36 Theodor Meron International Criminalization of Internal Atrocities 89 Am. J. Int’l. L. 554, 561.
crimes against humanity and other crimes under international law. All states can exercise their jurisdiction in prosecuting a perpetrator irrespective of where the crime was committed. Furthermore, all states are under obligation to prosecute and punish war crimes and to cooperate in the detection, arrest and punishment as well as the extradition of persons implicated.

The statutes of the international war crimes tribunals explicitly lay down the respective tribunals scope of jurisdiction. The same is true for the International Criminal Court.

**B Personal Responsibility**

Ever since the Nuremberg trials, a common defence for alleged war criminal has been the excuse of ‘just obeying orders’. This defence has always been dismissed as all tribunals assume personal responsibility for acts committed, whether they were based on orders or not. A claim of superior orders cannot serve as a defence against an allegation of grave breaches or other serious violations of international law. However, while it is generally easy to find the actual perpetrators guilty, the people pulling the strings are a lot harder to bring to justice. It is generally easier to convict middle-level personnel for war crimes than a commander or a former head of state. Middle-level personnel have either participated in the actual crimes themselves, given the orders to commit the crimes, or looked the other way when the crimes were committed. In contrast, people in the higher ranks of the command chain increasingly distance themselves from specific events in the field by vague delegation to their field commanders.

---

41 Amnesty International, above.
44 Sophia Piliouras *International Tribunal for the Former Yugoslavia and Milosevic’s Trial* 18 NYLS J. Hum. R. 515, 518.
45 Piliouras, above, 518-519.
However, even those giving orders without ever personally participating in their execution can be punished for war crimes. The culpability of superiors for atrocities that their subordinates commit is known as command responsibility. It is the legal and logical concomitant of the defence of ‘obedience to superior orders’. Although the concept was originally adapted from military law, it now also includes the responsibility of political leaders and other civil authorities for violations of international law committed by persons under their direct authority. There are two forms of command responsibility. The first is direct responsibility for unlawful orders. Any official authorizing acts that can be considered as war crimes is individually responsible for these acts, whether or not the superior personally participates in the atrocity or has subordinates perform it.

The other form of command responsibility is an imputed responsibility for crimes of subordinates where those crimes are not based on direct orders. In this case responsibility depends on whether the superior had notice of the subordinates' atrocities. This can be either direct notice during or immediately after the perpetration of the crimes, or even constructive notice, where the offences were so numerous or notorious that a reasonable person could come to no other conclusion than that the superior must have known of their commission, but displayed such serious personal dereliction as to constitute wilful and wanton disregard of the possible consequences. The failure of the superior to take appropriate measures to control the subordinates under his command and prevent atrocities and the failure to punish offenders are further elements of command responsibility.

Command responsibility is a part of customary international law. The origins of the concept can be traced back to at least 500 B.C., when Sun Tzu referred to

---

47 Bassiouni, above, 419.
49 Bassiouni, above, 422.
it in his *The Art of War.* The doctrine has become such an accepted feature of international and national criminal law, through usage and inclusion in treaties, that it is now a universally recognized precept. It is also an explicit feature of many treaties. Article 86 of Additional Protocol I to the 1949 Geneva Conventions states:

> The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal disciplinary responsibility as the case may be if they knew, or had information which would have enabled them to conclude in the circumstances at the time that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach.

The principle of command responsibility is also a feature of all statutes of modern war crimes tribunals. According to article 7 of the ICTY statute, the direct perpetrator of a crime as well as the military or political leaders who ordered that crime, can be prosecuted. Paragraph 3 adds:

> The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

This phrase is mirrored the 1998 ICC statute. Under its article 28 (Responsibility of Commanders and other Superiors), a military commander is liable for crimes that he "knew or should have known" about under circumstances at the time, and only for those crimes committed by forces under his "effective command and control." He is liable if he "failed to take all necessary and reasonable measures" to prevent and repress such crimes that

---

53 Article 7(3) ICTY statute.
subordinates "were committing or about to commit" or for failing to report such crimes to proper authorities. 54

Given that the appropriate evidence can be presented, the principle of command responsibility is valid for every single person involved at any level in planning, ordering and committing war crimes, including (former) heads of states. There is a long established fundamental rule of international law that heads of state do not enjoy immunity for crimes against humanity. Under international law heads of state and government officials are not immune from criminal prosecution. 55

The fact that military or political superiors are deemed responsible for the crimes of their subordinates does not in turn absolve those inferiors of their individual responsibility. The doctrine of superior orders is not a defence to personal criminal liability. However, it may be used to mitigate the sentence of a subordinate who acted pursuant to the order. Article 7(4) of the ICTY statute states:

The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal determines that justice so requires.

Thus, no perpetrator can claim the "defence of obedience to superior orders" and that no statute of limitation contained in the laws of any state can apply. No one is immune from prosecution for such crimes, even a head of State. 56 The doctrine of command responsibility imposes criminal liability for wartime atrocities upon the actual perpetrators (whether or not obeying orders) and the

ones that did give these orders or deliberately ignored the perpetration of these acts.

**C The Principle of Legality**

Event though on an international level the standards and legal definitions of crimes under international law are becoming more and more comprehensive – especially with the adoption of the ICC statute – they still lack the preciseness and universal validity of common domestic crimes. This absence of clear standards or precedents is the reason why war crimes prosecutions are often considered to at least have the potential to offend the principles of *nullum crimen sine lege* (no crime without law) and *nullum poena sine lege* (no punishment without law).\(^5\) This concept is often referred to as the ‘principle of legality’.\(^6\)

The prohibition on assigning guilt for acts not considered as crimes when committed is a fundamental precept in international and domestic law. Its notion finds different forms in various legal contexts. The principle of *nullum crimen* includes - in addition to the prohibition of legislation having retrospective effect - also the principle of certainty, that is, for example, the requirement of a distinct definition of the facts constituting an offence.

As applied in the field of international law, the principle *nullum crimen sine lege* received its first interpretation in the opinion of the International Military Tribunal in Nuremberg in 1946, where the defendants asserted that the charges against them were not crimes when (allegedly) committed. Evading a distinction between violations of international law and individual responsibility the tribunal stated:

> In the first place, it is to be observed that the maxim *nullum crimen sine lege* is not a limitation of sovereignty, but is in general a principle of justice. To assert that it is unjust to punish those who in defiance of treaties and assurances have attacked neighbouring states without warning is obviously untrue, for in such circumstances the attacker must


\(^6\) Ibid.
know that he is doing wrong, and so far from it being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished.\(^59\)

However, today most scholars agree that the principle of nulla crimen sine lege, which exists in most national legal systems, is not applicable in the same strict sense in international criminal law because of the particularities of the discipline.\(^60\) Unlike the domestic criminal law, much of the international criminal law is not codified in treaties or in any other code. As a result, the law required for criminality under the *nullum crimen sine lege* maxim at the international level includes not merely conventional law but also customary law.\(^61\)

Two human rights treaties - the International Covenant on Civil and Political Rights (ICCPR)\(^62\) and the European Convention on Human Rights (ECHR)\(^63\) - allow exceptions to the *nullum crimen sine lege* in relation to war crimes trials. This has led many to think that the principle differs from its national corollaries when crimes such as genocide, crimes against humanity and war crimes are involved. Judgments, laws and charters relating to war crimes trials conducted after the Second World War demonstrate that there is a more liberal understanding and application of the *nullum crimen sine lege* principle at international level.\(^64\)

The two modern war crimes tribunals, the ICTY and the ICTR, do not encapsulate the *nullum crimen sine lege* in a statutory provision, but consider it a "general principle of law". The ICTY applies the principle *nullum crimen sine lege*...
as customary international law. Upon creating the tribunal, the Secretary-General believed application of the principle required the ICTY to apply rules of international humanitarian law, which were beyond any doubt part of customary law. This way the problem of adherence of some but not all States to specific conventions would not arise. As the Report of the Secretary-General stated in paragraph 29, the Security Council would not be creating or purporting to legislate. Instead, the ICTY would simply have the task of applying existing international humanitarian law. In the Tadic Case the Trial Chamber said the following:

The Trial Chamber finds that common Article 3 [of the Geneva Conventions] imposes obligations that are within the subject-matter jurisdiction of [the ICTY] because those obligations are a part of customary international law. (...) Imposing criminal responsibility upon individuals for these violations does not violate the principle of nullum crimen sine lege.

However, this has met strong criticism. In fact, the practice of the ad hoc tribunals to determine and apply customary international law, a concept that is not clearly defined in international law, seems to contravene the requirements of specificity and certainty in the law. The problem may be solved with the establishment of the International Criminal Court. Unlike the ICTY, the ICC is completely bound to its statute. Interpretation of customary international law is of secondary importance. The ICC Statute also comprises the requirement of strict construction that prohibits any extension of definitions by analogy. Not only must the description of conduct be interpreted in a strict sense, the principle also requires the Court to strictly construe the elements that make an offence a war crime. Given the ICC’s comprehensive statute, most international

---

67 Johnson, above.
69 Machteld Boot Nullum Crimen Cine Lege and the Subject Matter Jurisdiction of the International Criminal Court: Genocide, Crimes Against Humanity, War Crimes (Ph.D. Dissertation at Tilburg University, NL, 6 March 2002).
70 See article 21(b) of the ICC Statute.
crimes committed after its into-force-coming will fall under the jurisdiction of the tribunal. The assertion that specific behaviour did not constitute a criminal offence at the time it was committed will not be valid anymore. After the Nuremberg Tribunals and after the establishment of the ICC, perpetrators of war crimes can hardly claim anymore that they were not aware of the fact that committing atrocities is a crime under international law, which engages individual responsibility.  

IV WAR CRIMES TRIBUNALS

Just like conventional criminal offences, war crimes are supposed to be judged by the regular criminal courts in the country where the crime has been committed. However, it seems to be a common characteristic of war crime scenarios that the state concerned is not capable, or – more likely – not willing to prosecute the offenders because of their political or military power, their popularity amongst the people or their extensive personal relationships with those in office. This is where international tribunals come into play. As war crimes constitute crimes against the whole humanity, war criminals can be put on trial virtually anywhere.

A The History of War Crimes Tribunals

The modern precedents for international criminal liability for gross violations of international law were established by the Nuremberg and Tokyo trials after the Second World War. Here, the prosecution for the first time imposed international criminal liability for genocide, war crimes, crimes against humanity, and aggressive war.

The Nuremberg trial of leading personalities of the Third Reich before the International Military Tribunal was the largest ad hoc war crimes tribunal the world had seen to date. Following the Nazi atrocities of World War II, the

74 The tribunal held trials from 20 November 1945 to 1 October 1946.
tribunal was established and functioned pursuant to an agreement by representatives of the Allied Powers (United States, Britain, France and the USSR) and formally adhered to also by 19 other nations. Of the 24 former leading Nazis indicted, 22 were tried, one of the defendants committed suicide before judgment and the other was not tried for medical reasons. Death sentences were imposed on 12 defendants, three were given life imprisonment and four lesser prison sentences, and three were acquitted. After the main trial was completed, 185 other leading German personalities were indicted before 12 tribunals, composed exclusively of United States judges, at Nuremberg under a law issued by the Allied Control Council for Germany. The unique circumstances of the collapse of Nazi Germany in 1945 resulted in tremendous success for the prosecutors of the International Military Tribunal at Nuremberg and broad international support for the verdicts.76

The Tokyo international tribunal was established on 19 January 1946 by U.S. General of the Army Douglas MacArthur, as Supreme Commander of the Allied Powers.77 The law applied by it was very similar to that applied by the Nuremberg tribunal. The trial lasted from May 1946 to November 1948. Of the 25 defendants brought to trial, 7 were given the death sentence, 16 were sentenced to life imprisonment and 2 to other prison terms.78

The Tokyo Tribunal does not enjoy the prestige and respect of the Nuremberg Tribunal. It demonstrates how political realities influence or even dictate the effectiveness of the enforcement of international criminal law.79 The Tokyo Tribunal, in retrospect, does not seem as just, and therefore is seldom cited as a landmark in international criminal law.80 The tribunal’s credibility

75 OLG Nuremberg (Higher Superior Court of Nuremberg) International Military Tribunal: The Nuremberg War-Crimes Trial (1945/46) <http://www.justiz.bayern.de/olgn/imte.htm> (last accessed 1 November 2002).
77 Bassiouni, above, 525.
80 Ibid.
was seriously undermined by the selective enforcement of its provisions and by the failure to employ the same standards to those Allied personnel who had committed the same atrocities. The same is true (to a lesser extent) for the Nuremberg tribunal.

B From Nuremberg to The Hague and Arusha

After the tribunals dealing with World War II atrocities no international criminal court sat for more than forty years. Despite a growing body of international human rights law building on the precedents set at Nuremberg and Tokyo and ongoing crimes against humanity in many places all over the world such as Cambodia and Iraq, the United Nations did not establish another international criminal court until atrocities in the Balkans occurred. Eventually, after some 100,000 people had been killed, the United Nations Security Council created the ICTY in May 1993. Less than a year later, Rwanda erupted in genocidal violence after President Habyarimana was assassinated, resulting in the deaths of about 800,000 people. In reaction to the atrocities committed in Rwanda, the Security Council created the ICTR at the end of 1994.

C The International Criminal Tribunal for the Former Yugoslavia

The International Criminal Tribunal for the former Yugoslavia is the first international war crimes tribunal since the immediate aftermath of World War II (Nuremberg and Tokyo tribunals). Located in The Hague, The Netherlands, the actual tribunal is composed of 832 staff from 68 countries.

82 The Nuremberg and Tokyo tribunals were the main trials but not the only ones: War crimes tribunals, involving several thousand suspects, were held in Germany until 1963. In 1961, Israel tried and subsequently executed Adolf Eichmann, who had been abducted from Argentina.
At present, there are 76 published indictments and an unknown number of sealed indictments. 55 persons are currently in proceedings before the tribunal. 44 of the accused are in custody at the ICTY’s detention unit in The Netherlands. Eleven detainees have been provisionally released, 21 are still at large, including the two main figures of the war (next to Slobodan Milosevic), former president of the Serb Democratic Party for Bosnia-Herzegovina, Radovan Karadzic and former Commander of Serb Troops in Bosnia-Herzegovina, General Ratko Mladic.89

The ICTY’s website states the tribunal’s self-conception, declaring that “in harmony with the purpose of its founding resolution, the ICTY’s mission is fourfold:

• to bring to justice persons allegedly responsible for violations of international humanitarian law
• to render justice to the victims
• to deter further crimes
• to contribute to the restoration of peace by promoting reconciliation in the former Yugoslavia.”90

The process of implementing a tribunal began with the adoption of 13 Security Council resolutions and six statements within two months in 1993. These declared the situation in the former Yugoslavia was a breach of international peace and security, expressed concern over violations of international law in the region and affirmed individual responsibility for such violations.

By its Resolution 780 (1992) of 6 October 1992, the Security Council created a commission of experts to examine these violations of international law.91 The

90 ICTY The ICTY at a Glance (General Information) <http://www.un.org/icty/glance/index.htm> (last accessed 1 November 2002).
commission concluded in two interim reports\(^{92}\) that serious violations of international humanitarian law were indeed taking place and recommended the creation of an ad hoc international tribunal. In the aftermath of the commission's first report, on 11 February 1993, the Council declared that the violations of international humanitarian law in the former Yugoslavia indeed constituted a threat to international peace and security, and decided to establish an international tribunal to address them.\(^{93}\)

On 3 May 1993, the Secretary-General's report set forth a draft statute for an ad hoc international tribunal and took the view that the Security Council should establish the tribunal by resolution.

On 25 May 1993, the United Nations Security Council unanimously passed Resolution 827 (1993)\(^{94}\), creating the tribunal under Chapter VII of the United Nations Charter and adopting the draft statute in the Secretary-General's report\(^{95}\). The tribunal was established:

> [b]elieving that the establishment of an international tribunal and the prosecution of persons responsible for the above-mentioned violations of international humanitarian law will contribute to ensuring that such violations are halted and effectively redressed.\(^{96}\)

The ICTY was created in the aftermath of evidence of horrendous war and humanitarian crimes in that conflict, in particular, genocide, numerous atrocities and ethnic cleansing perpetrated mainly by Bosnian Serbs (regular army as well as several paramilitary groups) against Muslims in Bosnia-Herzegovina.

---


\(^{95}\) Report of the Secretary-General (S/25704 and Add.1).

The jurisdiction of the tribunal is contained in article 1 of the statute. This article states that the ICTY shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 in accordance with the provisions of the present Statute.

The statute also establishes individual criminal responsibility for four clusters of offences. These offences are: grave breaches of the 1949 Geneva Conventions (article 2), violations of the laws or customs of war (article 3), genocide (article 4), and crimes against humanity (article 5).

It is interesting to note, however, that the Geneva Conventions traditionally do only apply to international conflicts, but not to internal conflicts. In the ICTY decision of The Prosecutor v Dusko Tadic, the majority of the Appeal Chamber held that although the Geneva Conventions only impose mandatory universal jurisdiction for grave breaches committed in an international conflict, they acknowledge that the status of current international humanitarian law on the applicability of grave breaches may very well be in a state of flux and is perhaps in the process of changing from the traditional view.

This dichotomy between international and internal conflict is further strengthened when the court in the Tadic Case noted the view of the United States. The U.S. stated that grave breaches apply to armed conflicts of a non-international character as well as those of an international character; however, there is little discussion as to the reason why. The reason for this seems to be a new interpretation of the Geneva Conventions, which emphasise a personal criminal responsibility for acts which constitute grave breaches of the conventions even when committed in the course of an internal armed conflict.

---

99 ICTY, Prosecutor v. Dusko Tadic a.k.a "Dute", Case No. IT-94-1-AR72. 100 Strangely enough, when accused of maltreating alleged prisoners of war from the Afghanistan conflict at Camp X-Ray, Guantanamo Bay, Cuba, U.S. Secretary of State Donald
This is supported by the fact that Tadic was sentenced to 20 years imprisonment for his individual criminal responsibility on six counts of grave breaches of the 1949 Geneva Conventions, without taking into account the question whether the war in the former Yugoslavia was considered to be an internal or an international conflict.

Because the ICTY was created by the Security Council, all member states are bound by that decision. Its statute imposes a duty on all members of the United Nations to cooperate with its investigations and arrests. Furthermore, as the ICTY was created under Chapter VII, the Security Council can use sanctions to enforce the decisions of the tribunal.

The International Criminal Tribunal for Rwanda

The history of the Rwanda Tribunal mirrors that of the Yugoslavia Tribunal in many respects, as the United Nations' member states took action after a tragedy had already unfolded. Like the ICTY, the Arusha tribunal took years to begin its first trial, and despite setting some impressive precedents, only a handful of the defendants have been prosecuted. Those convicted include Jean Kambanda, the Prime Minister of the Rwandan Government during the genocide, who was the first head of Government to be convicted for genocide.

The statute of the ICTR resembles the ICTY-statute considerably. Article 2 (Genocide), article 3 (Crimes against Humanity) and article 4 (Violations of Article 3 common to the Geneva Conventions and of Additional Protocol II) establish the ICTR's power to those certain types of crimes (only). The

Rumsfeld refused to acknowledge the applicability of the Geneva Conventions to conflicts of not-international scale.

101 Jelena Pejic Conceptualizing Violence: Present and Future Developments in International Law 60 Alb. L. Rev. 841, 843-44.
104 ICTR General Information / Achievements of the ICTR <http://www.ictr.org> (last accessed 1 November 2002).
definition of genocide in article 2 is identical to article 4 of the ICTY statute. So is the wording of article 3 of the ICTR statute and article 5 of the CTY statute. The only major difference between the two statutes is article 4 of the ICTR Statute, which discusses Violations of article 3 to the Geneva Conventions and of Additional Protocol II. The ICTR Statute does differ in this regard reflecting the conflict's particular circumstances.

E The International Criminal Court

The ICTY and ICTR, despite their flaws, provided the impetus for the creation of a permanent international criminal court.106 Ever since the Nuremberg trials of Nazi war criminals, the UN has envisaged the creation of an International Criminal Court to try the gravest crimes. The need for international criminal justice has been highlighted recently by cases such as that of Chile’s General Augusto Pinochet, Sierra Leone’s Foday Sankoh and the military generals in Indonesia.

On 1 July 2002, the Rome Statute of the International Criminal Court entered into force, triggering the jurisdiction of the first permanent international court capable of trying persons who commit serious violations of international law, namely war crimes, crimes against humanity, genocide and the newly created but yet to be defined107 crime of aggression.108 Unlike the International Court of Justice (ICJ), whose jurisdiction is restricted to States, the ICC has the capacity to indict individuals.109

The statute of the ICC was adopted and opened for signature and ratification at the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (Rome Conference) 17 July 1998.110 During a historic ceremony on 11 April 2002, 10 states simultaneously deposited their instruments of ratification, crossing the threshold of the 60

107 The lack of a definition for ‘aggression’ was one of the main arguments brought forward by the United States in justifying the U.S. refusal to ratify the Rome Statute.
ratifications necessary for entry into force of the Rome Statute, which subsequently occurred on 1 July 2002.\textsuperscript{111}

The statute, having its own text as governing law, avoids the \textit{ex post facto} and \textit{nulla crimen sine lege} questions of the Nuremberg and Tokyo tribunals. However, the courts jurisdiction is limited to those crimes committed after the entry into force of its statute on 1 July 2002. Crimes committed before that threshold date can not be prosecuted by the ICC.

To date, 139 states have become signatory to the Rome Statute. Of those, 81 have already ratified it, including New Zealand which ratified the statute on 7 September 2000.\textsuperscript{112} However, with the defiant refusal of the United States to support the ICC and to become signatory to its statute and its attempts to undermine the courts jurisdiction by urging states to sign impunity agreements\textsuperscript{113} before the court has actually taken up its work, it is not clear whether the court will be able to live up to the great expectations for a permanent criminal court that the international community has been thinking about for so long.

\section*{F The Legal Basis for Ad Hoc Tribunals}

One of the major advantages of the permanent ICC will be the fact that it can hardly be perceived to represent “victors’ justice”, a suspicion often raised in regard to ad hoc tribunals. These tribunals are UN institutions, created by the Security Council pursuant to Chapter VII of the UN Charter. In the case of the ICTY, the UN obviously first considered to base the tribunal on a treaty, but this approach was then abandoned as being too long and arduous given the urgency expressed in the respective UN resolutions.\textsuperscript{114}

\begin{flushright}
\textsuperscript{110} The ICC statute was adopted by a vote of 120 to 7, with 21 abstentions.
\textsuperscript{113} To date the USA has signed 13 impunity agreements, in most cases with foreign ministers of states that are vulnerable to US pressure. Reportedly, many of those that signed were threatened with withdrawal of US military and other assistance. However, apparently not a single one of these agreements has been ratified by parliament.
\end{flushright}
Thus, the authority to create the tribunal was predicated on Chapter VII of the UN Charter. Following the wording of the Charter, the ICTY was labelled as a measure to maintain or restore international peace and security, following the requisite determination of the existence of a threat to peace, breach of the peace or act of aggression.¹¹⁵

However, the jurisdiction of these tribunals has not been undisputed. In one of his few pertinent comments, during the early stages of the trial, Milosevic flatly refuses to accept the jurisdiction of the ICTY, branding it as a political tool designed to impose "victor's justice." This objection cannot be dismissed as the mere ranting of a madman - Milosevic’s arguments have been taken up by a number of well-known lawyers, including former U.S. attorney general Ramsay Clark, who acted as legal council for Milosevic at the time.

Some scholars seem to agree with Milosevic to a certain extent on this point. The ICTY sometimes is deemed to have a somewhat questionable derivation, as it was created by the UN Security Council, rather than the General Assembly, especially since the same Security Council had imposed sanctions on Serbia before, and three of the Council’s permanent members had led the earlier bombing campaign. Thus, the ICTY has been burdened with a suspicion of "victor’s justice". It is pointed out that, while the General Assembly endorsed the establishment of the ICTY by nominating the judges, by approving the budget and by passing resolutions in support of the tribunal, such consent does not permit states to voice their objections relating to the structure of the tribunal, the scope of its jurisdiction, the language of the statute, its procedure and evidence rules or the sanction powers.¹¹⁶ Joshua M. Koran thus reasons that

[a]ccordingly, the manner in which the Tribunal was established greatly diminishes the precedential value of this Tribunal as a representative consensus on the necessity and

¹¹⁵ Report of the Secretary General, above, paras 19 and 23.
In fact, article 22 of the UN Charter states that it is the General Assembly’s authority to “establish such subsidiary organs as it deems necessary for the performance of its functions”. However, it is doubtful if a war crimes tribunal really could be seen as a subsidiary organ to the General Assembly.

In contrast, articles 41 and 42 of the UN Charter (the provisions the establishment of the tribunal was ultimately based on) seem much more relevant in the context of the persecution of war crimes. Article 41 provides:

The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures...

Article 42 adds that, in the case that measures provided for in article 41 prove to be inadequate, the Security Council may use necessary force to maintain or restore international peace and security. It can be argued that, if the use of force is allowed as a ‘measure’ under article 42, a fortiori the creation of an international tribunal to judge atrocities in a war context should also be permitted.

Additionally, the authority to create a tribunal can be based on the general duties of each party under the Geneva Conventions. Though universal jurisdiction is restricted to grave breaches of the conventions, each contracting party is bound to take measures for the “suppression of all acts contrary to provisions of the present Convention.” Under general principles of law, where a party has failed to act, equity allows a substitution. Where an act ought to have been done, equity will deem it done. On this ground the United Nations can say that where the country concerned should have taken action to suppress

---

117 Koran, above, 49.
199.
119 See: article 41 UN Charter.
120 McCormack and Simpson, above, 199.
war crimes, the Security Council can act as a substitute by vesting jurisdiction in the ad hoc tribunal.\textsuperscript{122}

Ad Hoc tribunals will always have to bear the suspicion of “victors’ justice.” The same was said about the Nuremberg Trials as well. It is the nature of all these tribunals that they are created in the aftermath of wars, and thus, of course, by the victorious parties. In the absence of a uniform and global approach, the trials of war criminals have generally occurred only where defeat and criminality coincide. Yet, this does not have to mean, that their judgements have to be biased or that their jurisdiction is questionable. The war crimes tribunals are designed to try war criminals rather than only defeated war criminals.\textsuperscript{123} The ICTY has jurisdiction over all adversaries in the Balkan conflict. Indeed, even if one does regard the tribunal essentially directed against Serbs (as all but very few ICTY indictments were issued against non-Serbs), it is impossible to conceive them as the vanquished in this conflict.\textsuperscript{124} The ICC is designed to be operative during peace times when distinctions between victor and defeated becomes entirely meaningless.\textsuperscript{125}

The war crimes tribunals in The Hague and Arusha were established by lawful proceedings of the United Nations and based on the UN Charter. They are not creations of the victors but of the entire international community and all nations member to the United Nations. They do not exercise ‘victors’ justice’ but international justice.

\textit{V }\textbf{UPSHOT}

The legal framework for the prosecution of war criminals does exist. So do the adequate courts or tribunals the perpetrators could be tried before. Neither the tribunals nor the underlying law may be as comprehensive as national

\begin{flushleft}\textsuperscript{121} This phrase is common to article 49 First Geneva Convention, article 50 Second Geneva Convention, article 146 Third Geneva Convention and article 129 Fourth Geneva Convention. \textsuperscript{122} Ruth Wedgwood \textit{War Crimes in the Former Yugoslavia: Comments on the International War Crimes Tribunal}\textsuperscript{34} Va. J. Int’l. L. 267, 274. \textsuperscript{123} Timothy L.H. McCormack and Gerry Simpson (eds) \textit{The Law of War Crimes – National and International Approaches} (Kluver Law International, The Hague/London/Boston, 1997), 7. \textsuperscript{124} Christopher D. Hox “Tribunal to Cite Serb Chief as War Criminal” (24 April 1995) \textit{The New York Times}, A1. \textsuperscript{125} McCormack and Simpson, above, 7.\end{flushleft}
systems of criminal jurisdiction that took centuries to be developed and agreed on. However, they still serve as potent instruments that comprise mere universal acceptance. The indictment and prosecution of war criminals thus is far from being a ‘grey area’ of international law. Other than a lack of political will there are few obstacles in bringing to justice the worst offenders of international law.

VI THE CASE OF SLOBODAN MILOSEVIC

With the case of Slobodan Milosevic, the international community has an excellent chance to exercise a prime example of its commitment to not let war crimes go unpunished any longer.

On May 27, 1999, the ICTY issued an indictment for the former President of Yugoslavia, Slobodan Milosevic and four other former Serbian or Yugoslav officials, charging them with crimes against humanity and violations of international law. The other four indictees remain at large as of today: former Serbian President Milan Milutinovic, former Yugoslav Deputy Prime Minister Nikola Sainovic, former Serbian Minister of Internal Affairs Vlajko Stoijiljovic, and former Yugoslav Army Chief of Staff General Dragoljub Ojdanic. Specifically, Milosevic, who had already been removed from power in October 2000, was charged with personal responsibility for ordering, planning, instigating, executing, and aiding and abetting the persecution, deportation, and murder of Kosovo Albanians in 1999. This campaign was allegedly undertaken with the aim of removing a substantial portion of the Kosovo Albanian population from Kosovo in an effort to ensure continued Serbian dominance over the area.

The ICTY indicted Milosevic a second time on 29 October 2001, for crimes allegedly committed in Croatia (‘Croatia indictment’). The indictment charges Milosevic with 32 counts of murder, torture, deportation, detention and

---

126 ICTY, Prosecutor v. Milosevic et al. No. IT-02-54 (first Indictment: ‘Kosovo’).
129 ICTY, Prosecutor v. Milosevic et al. No. IT-02-54, pages 90-100.
130 ICTY, Prosecutor v. Milosevic No. IT-01-50-1 (second indictment: ‘Croatia’).
other atrocities committed during the attempted ethnic cleansing of Croatia from 1991 to 1992. Specifically, the Indictment alleges that Milosevic, acting alone or in concert with others, participated in a joint criminal enterprise with the objective to attack civilian populations in Croatia.

On 11 December 2001, the ICTY issued a third indictment against Milosevic for crimes in Bosnia and Herzegovina (‘Bosnia and Herzegovina indictment’). The indictment includes one count of genocide, one count of complicity with genocide and an additional twenty-seven counts of war crimes and crimes against humanity arising from the conflict in Bosnia-Herzegovina between 1992 and 1995. These charges cover the shelling of Sarajevo, the murder of thousands of Muslim men at Srebrenica, and the Omarska detention camp. The Bosnia and Herzegovina indictment is the only one to comprise a charge of genocide, based on the allegations that Bosnian Serbs killed thousands of Bosnian Muslims and Bosnian Croats, and further caused serious bodily and mental harm to thousands of others by various inhumane acts. Milosevic is alleged to incur responsibility for the genocide by his acts and omissions in regards to the crimes which were said to have been committed with an intent to destroy the groups in whole or in part.

All three indictments allege that the former head of state was a leader of a joint criminal enterprise with an objective of making Serbs the dominant group in Yugoslavia by exterminating, confining, deporting, sexually assaulting, subjugating, and otherwise terrorizing and persecuting non-Serbs in the territories. Milosevic is charged both with "individual responsibility" through his participation in a joint criminal enterprise as well as "superior responsibility," meaning that he knew or should have known that the crimes were being committed by subordinates and failed to take necessary measures to prevent these crimes from being committed by his subordinates. The charges of individual and superior responsibility are spelled out under Articles 7(1) and 7(3) of the ICTY statute respectively. However, in two prior cases before the

\[\text{\footnotesize 131 ICTY, Prosecutor v. Milosevic No. IT-01-51-I (third indictment: ‘Bosnia and Herzegovina’).}\]
\[\text{\footnotesize 133 Ibid.}\]
ICTY\(^\text{134}\) the court found that in the context of a joint criminal enterprise, once individual responsibility is determined, superior responsibility need not be decided because it is subsumed within individual responsibility. Thus, if Milosevic is found to have participated in a joint criminal enterprise, he apparently cannot also be found guilty of superior responsibility for the same crimes.\(^\text{135}\)

However, while in publicly indicting Milosevic, the first step towards a war crimes trial against him was taken, he still remained safe from the ICTY’s authority in Belgrade. Despite ongoing work on a new law that would remove the ban on the extradition of Yugoslav citizens, thus allowing extradition of Milosevic and indictees to the ICTY, Yugoslav President Vojislav Kostunica publicly indicated that he remained opposed to Milosevic’s extradition.\(^\text{136}\) In a February 2001 speech to the Yugoslav parliament, Kostunica maintained that the first priority was to try Milosevic at home, rather than risk angering nationalists by extraditing Milosevic to an international tribunal.\(^\text{137}\)

The western countries - officially supporting the ICTY’s efforts - did little to put pressure on Yugoslavia to hand over Milosevic. In fact, senior American officials initially even opposed his indictment, assuming that this would undermine Yugoslavia’s commitment to implement the peace agreement. Milosevic seemed to have been granted de facto immunity as the ICTY initially accepted the Clinton Administration’s argument that Milosevic represented the keystone to any lasting peace in Bosnia. To justify this inaction, U.S. authorities contended that although Milosevic could reasonably be perceived as aiding and abetting war crimes and acting complicit in the commission of genocide, there was no “smoking gun” direct order bearing his signature.\(^\text{138}\)

\(^{134}\) The Krstic Judgement and the Kvocka et al. Judgement, available at the ICTY website, above.


\(^{137}\) Ibid.

However, despite the reluctance to extradite the former head of state, Yugoslav leaders began purging the legal system of Milosevic loyalists in early 2001. The most notable arrest was that of Rade Markovic, the former chief of the secret police under the Milosevic regime. Prosecutors hoped that information gained from Markovic would lead to the arrest of Milosevic himself.

Although the Yugoslav government made positive efforts to commence criminal actions against Milosevic and other protagonists of the war, the ICTY publicly opposed Kostunica, emphasizing the importance of extraditing Milosevic rather than trying him at home. The Chief Prosecutor of the tribunal, Carla Del Ponte, insisted that Milosevic was no different from any other person indicted by the ICTY and that Yugoslavia was obligated by international law to transfer him into custody in the Hague. The ICTY was primarily concerned that any trial in Yugoslavia would neglect the more serious alleged war crimes and focus on domestic charges, such as corruption, thus spoiling any effects of deterrence expected from a war crimes trial for Milosevic.

When peace in Bosnia appeared to last after all, Milosevic began to lose any shield of political utility. The United States finally decided to support the ICTY more actively in this case, restating concerns that the Yugoslav judicial system was not pursuing Milosevic vigorously enough. Under a measure adopted by the United States Congress in 2000, Yugoslavia was called to demonstrate its cooperation with the ICTY by the end of March 2001, or risk loosing USD 100 million in U.S. aid and consideration for the International Monetary Fund and World Bank.

141 Di Giovanni, above, 1.
Still, Belgrade officials insisted that Milosevic face trial at home prior to any extradition. This insistence apparently was the result Yugoslav domestic policy, as Kostunica's feared of being labelled a puppet of the west.

Without prior warning, on 1 April 2001, just before the end of the U.S. deadline for revoking financial aid, Yugoslav police forces conducted a raid to arrest Milosevic at his home in Belgrade.\textsuperscript{143} After an exchange of gunfire with Milosevic's heavily armed bodyguards and lengthy negotiations, Milosevic surrendered.\textsuperscript{144} Following the arrest, Yugoslav officials reiterated their intent to try Milosevic in Belgrade on various charges relating to abuse of power and corruption.\textsuperscript{145}

International pressure continued to grow, however, and Kostunica was pressured to transfer Milosevic to the tribunal to face war crime charges.\textsuperscript{146} Accepting the necessity to cooperate and the lesser of two evils, the Yugoslav cabinet adopted a decree to transfer Milosevic to the ICTY in June 2001. After an unsuccessful attempt to challenge the constitutionality of the extradition decree in Yugoslav courts, Milosevic was finally transferred to ICTY’s the Hague detention facility on 29 June 2001.\textsuperscript{147} During his first appearance before the tribunal on 3 July 2001, Milosevic refused to enter a plea maintaining that he considered it a “false” and “illegal” tribunal.\textsuperscript{148}

\begin{footnotes}
\item[143] Steven Erlanger “Serb Authorities Arrest Milosevic to End Standoff” (1 April 2001), The New York Times, A1.
\item[144] Ibid.
\item[146] Erlanger, above, A1
\end{footnotes}
On 8 November 2001, the Trial Chamber of the tribunal decided an initial motion to dismiss brought forward by Milosevic and *amici curiae*. In the motion it was argued that:

1) the tribunal was an illegal entity because the UN Security Council lacked the power to establish it;
2) the prosecutor had not maintained prosecutorial independence, and was therefore in violation of article 16, paragraph 2 of the ICTY’s statute;
3) the tribunal was impermissibly tainted with bias against Milosevic;
4) the tribunal lacked judicial competence to prosecute Milosevic due to his status as the former President of Yugoslavia;
5) the tribunal lacked judicial competence to prosecute Milosevic due to his unlawful surrender and extradition to the Hague; and
6) the tribunal lacked general jurisdiction.

The ICTY Trial Chamber rejected each of these arguments, relying on Article 7, paragraph 2 of the tribunal’s statute. The tribunal rejected Milosevic’s claims of immunity due to his status as the former President of Yugoslavia, stating that article 7(2), which rejected head of state immunity, reflected an accepted principle of customary international law. Additionally, the Trial Chamber relied on the Pinochet case and the Rome Statute of the International Criminal Court.

All three indictments (‘Kosovo’, ‘Croatia’ and ‘Bosnia and Herzegovina’) have been confirmed by the Trial Chamber. The initial appearance for Milosevic to enter pleas to the counts in the Croatia indictment took place on 29 October 2001. As Milosevic decided to maintain his strategy of refusing to acknowledge the ICTY’s jurisdiction and refusing to enter a plea, the Trial
Chamber consequently entered a plea of "not guilty" on his behalf on every count of the indictment.\textsuperscript{155} The same happened for the Bosnia and Herzegovina indictment on 11 December 2001.\textsuperscript{156}

On 1 February 2002, the Appeals Chamber ordered that the three indictments be tried together in one single trial, following the prosecution's argument that all three indictments were part of Milosevic's master plan to create an ethnically pure 'Greater Serbia'.\textsuperscript{157}

The trial commenced on 12 February with evidence relevant only to the charges relating to Kosovo. Milosevic continued to refuse to recognize the court, disdainfully glancing at his watch during the proceedings as if he were bored, and dismissively addressing the presiding judge, Justice Richard May, as "Mr. May."\textsuperscript{158} Refusing to argue the allegations brought forward against him, Milosevic initially just went on to discredit the court, dismissing it as a political body prejudiced to rule against him. He also claimed that putting him on trial was equal to trying the Serbian people at a whole. This allegation was promptly rejected by Chief Prosecutor Carla del Ponte emphasizing that the trial of Milosevic in no way was intended to impose collective guilt on the Serbian people.\textsuperscript{159}

Eventually, when the prosecution presented the first witnesses in order to prove and establish Milosevic's central role in the atrocities committed during the Balkan wars, the accused began to challenge these allegations, skilfully cross-examining the witnesses. Central to his defence strategy has been the repeat of the assertion that it was not Serbian forces who drove Albanians out of Yugoslavia, but rather NATO's 1999 bombing campaign that killed hundreds of innocent civilians and destroyed a large number of non-military properties.\textsuperscript{160}

\textsuperscript{155} ICTY The ICTY at a Glance (Case Information Sheets/ Milosevic) <http://www.un.org/icty/glance/index.htm> (last accessed 1 November 2002).

\textsuperscript{156} Ibid.

\textsuperscript{157} ICTY, Prosecutor v. Milosevic et al. No. IT-02-54 (combined indictment 'Kosovo, Croatia, Bosnia and Herzegovina').


\textsuperscript{159} Askin, above.

\textsuperscript{160} Askin, above
On 25 July 2002, the Trial Chamber gave the prosecution until 16 May 2003 to present further evidence for all three indictments.  

VII AND ALL THE OTHERS?

The trial of Slobodan Milosevic is a major benchmark for international justice, but it also spotlights the failure to arrest other architects of the Balkan wars. “This trial is a great step forward for justice, but equally notable are those indicted war criminals missing from the dock,” says Richard Dicker, director of Human Rights Watch’s International Justice Program. “Too many of the most senior Serb indictees remain at large.”

Even today the arrest policy by NATO troops remains sporadic and inconsistent. The Chief Prosecutor of the tribunal, Carla Del Ponte, noted in her address to the Security Council on 21 November 2000, that the rate of arrests of the indicted persons by the international military forces has dropped dramatically. Many of the fugitives from the tribunal, such as Radovan Karadzic, former president of the Serb Democratic Party for Bosnia-Herzegovina and General Ratko Mladic, former commander of the Bosnian Serb Army, are at large and reportedly in territory controlled by NATO forces. This is not only frustrating for those trying to bring to justice the perpetrators of the worst crimes, but also poses a severe threat to the concept of universal justice and serves as a bad precedent, compromising the international community’s aim of deterrence.

A Law Without Enforcement

By far the biggest problem to be faced is the ability to compel those accused of war crimes to actually appear before a tribunal. The tribunals in The Hague...
and Arusha have constantly been criticized for their inherent weaknesses as they have no enforcement power and thus must rely on national governments and NATO forces to seize and transport suspects.\textsuperscript{165} The lack of state cooperation in this regard has become a major obstacle to the effectiveness, as well as the international esteem of the tribunals. Politically inspired delays in the arrest of indicted war criminals pose the most serious threat to the credibility and the very essence of the tribunals.

This problem has been particularly evident in Yugoslavia, where it has been difficult to compel all sides accused in the conflict to appear before the ICTY. Only about half of those indicted have come into the custody of the tribunal and only a minority of them through arrests secured by NATO forces on the ground.\textsuperscript{166} The slow way in which suspects have been detained seriously risks rendering ineffective and futile the enormous efforts of the tribunal to investigate crimes under international law and has considerably hampered the prosecution of those who have been detained.\textsuperscript{167}

The international force will only arrest suspects whom it encounters in the normal course of its duties.\textsuperscript{168} It has failed to arrest some suspects who were indicted by the ICTY whose whereabouts are clearly known and who could be easily apprehended, such as Karadzic and Mladic, believed to have been involved in some of the worst atrocities of the entire Yugoslav conflict.\textsuperscript{169} The case of Karadzic is the most unfortunate. When he was indicted on charges of genocide and crimes against humanity in July 1995, UN troops in Bosnia could

\textsuperscript{165} Issues and Controversies on File War Crimes Tribunals: An In-Depth Analysis \texttt{<http://www.facts.com/icof/warintro.htm> (last accessed 1 November 2002)}.

\textsuperscript{166} Amnesty International Milosevic’s Indictment -- Amnesty International Welcomes Decision That Head of State May Be Held Responsible for Crimes Against Humanity and War Crimes (AI News Service, 27 May 1999), \texttt{<http://www.web.amnesty.org/ai.nsf/index/EUR700811999> (last accessed 1 November 2002)}.

\textsuperscript{167} ibid.


have undoubtedly arrested him as he moved freely within the area. The same is probably true for Mladic, who was indicted for the same charges.\footnote{Richard J. Goldstone \textit{The Role of the United Nations in the Prosecution of International War Criminals} (WUSTL UN Conference Papers), available at <http://law.wustl.edu/igls/Unconfpapers/p119_Goldstone.pdf> (last accessed 1 November 2002), 119ff.}

The tribunal’s first trial \textit{Prosecutor v. Dusko Tadic}\footnote{ICTY, \textit{Prosecutor v. Dusko Tadic a.k.a. “Dule”}, Case No. IT-94-1-AR72.} resulted in a conviction, but it illustrates some problems inherent in the ICTY.\footnote{Jonathan A. Bush \textit{Nuremberg: The Modern Law of War and Its Limitations}, 93 Colum. L. Rev. 2022, 2083.} The most obvious problem for the ICTY is that those most responsible for the policy of ethnic cleansing are safe from prosecution in Belgrade or in Bosnian Serb territory.\footnote{Jelena Pejic \textit{Conceptualizing Violence: Present and Future Developments in International Law} 60 Alb. L. Rev. 841, 850.} As important as the Tadic trial is as a precedent, Tadic himself was only a very minor player in the conflict. On the other hand, some of the most notorious suspects for Bosnian war crimes are still at large. Neither Bosnian Serb authorities nor the Federal Republic of Yugoslavia will cooperate in arresting them.\footnote{CNN World>Europe Bosnian Envoy Calls for Karadzic Arrest (20 November 2000), <http://www.cnn.com/2000/WORLD/europe/11/20/bosnia.envoy> (last accessed 1 November 2002).


\textbf{B \hspace{1em} A Question of Authority}

The Military Annex to the Dayton agreement authorized the Implementation Force (IFOR) “\textit{[t]o take such actions as required, including the use of necessary force, to ensure compliance with this Annex, and to ensure its own protection.}”\footnote{This phrase is found in the Dayton Peace Agreement – Proximity Peace Talks (Wright Patterson Air force Base, Ohio, November 1995) as well as the Military Technical Agreement between the International Security Force (“KFOR”) and the Governments of the Federal Republic of Yugoslavia and the Republic of Serbia of 9 June 1999 and United Nations Resolution 1031 (1995).} But the agreement did not technically oblige IFOR to apprehend or transfer to the custody of the ICTY suspected war criminals, or otherwise facilitate the work of the tribunal.\footnote{Jim Hopper (Balkan Institute) \textit{Dayton’s Mandate for Apprehending War Criminal} <http://www.pbs.org/wgbh/pages/frontline/shows/karadzic/trial/hooper.html> (last accessed 1 November 2002).} This absence of a direct enforcement mechanism in the ICTY statute left the tribunal dependent on state cooperation. Sadly, neither the countries of the former Yugoslavia nor the NATO member
states have been particularly enthusiastic to actively enforce the orders of the ICTY.

The non-cooperation of the states exposed the weak enforcement mechanism of the tribunal. Though endowed on paper with authority to order arrests and impose all manner of sanctions, the tribunal lacks any true power to assert that authority. It relies entirely upon the cooperation of states, yet it has no ability to coerce such cooperation. The tribunal noted in 1994 that it "must rely upon the domestic legal system and the enforcement machinery of each State."\(^{177}\) The tribunal has thus sometimes been seen as "the epitome of a paper tiger.\(^{178}\)

Even the former president of the ICTY, Antonio Cassese, observed in 1996 that the ICTY was

\[\text{[like an armless and legless giant which needs artificial limbs to act and move. These limbs are the State authorities (...) the national prosecutors, judges and police officers. If state authorities fail to carry out their responsibilities, the giant is paralysed, no matter how determined its efforts.}\] \(^{179}\)

In theory, all states are obligated to cooperate with the ICTY and to execute arrest warrants, extradite the accused, and provide all necessary information requested by the tribunal.\(^{180}\) The tribunal has the power to call upon any national state to produce defendants who are hiding in its territory. Under articles 25, 48, and 103 of the United Nations Charter, member states are obliged to cooperate.\(^{181}\) If states fail to do so the tribunal can report the failure to the Security Council.\(^{182}\) However, this method proved to be essentially


\(^{178}\) Lucas W. Andrews Sailing Around the Flat Earth: The International Tribunal for the Former Yugoslavia as a Failure of Jurisprudential Theory 11 Emory Int'l. L. Rev. 841, 853.

\(^{179}\) Jelena Pejic Conceptualizing Violence: Present and Future Developments in International Law 60 Alb. L. Rev. 841, 853.


\(^{182}\) See: Rule 59(b) of the ICTY Rules of Procedure and Evidence, above.
ineffective. Though the Security Council passed a number of resolutions calling for state compliance with ICTY orders, those resolutions were regularly ignored by the Federal Republic of Yugoslavia.

Because of the lack of state cooperation, the tribunal has had to develop other means of enforcing its authority. It has employed different enforcement methods, which are based both on the provisions of the ICTY Statute. The statutory mechanisms utilized by the tribunal included proceedings under rule 61 of the ICTY Rules of Evidence and Procedure, which provide the tribunal with an opportunity to hear the case against the accused in absentia and issue an international arrest warrants afterwards, freezing of indictees’ financial assets in order to limit their possibility to evade international justice, political pressure through condemnation by U.N. organs as well as the use of specific economic sanctions. The success of these efforts proved to be very limited because they have been used inconsistently or directed at countries already isolated by the international community. A more controversial enforcement method has been the use of individual financial rewards for the apprehension of indicted war criminals. However, the legality of captures performed for cash rewards has not been examined by the tribunal. Scholars point out that this practice could result in legal liability of the Western governments for the consequences of bounty hunters’ actions. Furthermore it appears to be rather doubtful whether encouraging abductions for profit is an acceptable method of achieving the paramount goal of international justice.

Despite the use of the enforcement methods outlined above, the majority of accused war criminals remained at large. The use of military force to arrest indicted persons – potentially the most effective method of enforcement – has only been made use of extremely rarely so far.

---

184 Scharf, above, 946.
185 Scharf, above, 927.
186 The tribunal has not offered rewards for the capture of accused persons, but the United States instituted a war crimes reward program, promising cash rewards for information leading to the arrest of persons wanted by the ICTY.
187 Scharf, above, 949-51.
**C Fatal Reluctance**

NATO forces have been incredibly reluctant to arrest alleged or indicted war criminals. They have however done so on a number of occasions. A successful precedent for the use of military force was established in June 1997 with the successful arrest of Slavko Dokmanovic, one of the secretly indicted war criminals. NATO troops do not suffer from a lack of capabilities, but rather from a lack of political will to enforce ICTY indictments. If ordered, many of those publicly and secretly indicted could be arrested and brought before the tribunal in a short period of time. Yet, even after this successful precedent, forceful arrests remained sporadic to date.

NATO troops are even reported to systematically avoid confrontations with indicted war criminals. Statements report of NATO allowing indicted war criminals to pass through checkpoints and allowing indictees to move openly in patrolled areas. At times, IFOR troops even left areas that they had been patrolling to avoid encounters with indictees. NATO was also initially reluctant to distribute lists and descriptions of indicted war criminals to IFOR troops that would enable them to identify indictees.

To explain their apparent unwillingness to do so, political leaders of NATO countries bring forward a number of arguments. However, none of these arguments is convincing:

1 **Authorization**

Sometimes it is argued that the NATO forces simply did not have the legal authority to carry out arrests on behalf of the ICTY. This in not true. NATO troops have legal authority under international law to use force in arresting indicted war criminals. The mandate of IFOR and of the Stabilization Force (SFOR) included authorization to use military force in arresting indictees.

---

190 Ibid.
191 SFOR replaced IFOR on 20 December 1996.
The Security Council authorized IFOR to take such actions as required, including the use of necessary force, to ensure parties' compliance with their obligations to implement the terms of the Dayton Accords.

The authority to enforce peace in Bosnia in general, and to enforce the arrest warrants of the ICTY in particular, is derived from the Security Council mandate. The Security Council decided to replace UNPROFOR troops on the ground in Bosnia with NATO troops in 1995 and subsequently passed Resolution 1031 (1995), delegating military enforcement powers to the member states and obligating them to act "through or in cooperation with" NATO to implement the Dayton Accords. Resolution 1031 (1995) stated that the international military force could "take such actions as required, including the use of necessary force, to ensure compliance with Annex I-A of the Peace Agreement." Thus, NATO-led troops were authorized by the Security Council to use military power to enforce compliance of the parties with the Dayton Accords. This includes the search and arrest of persons indicted by the ICTY. NATO's authority to use force in arresting the indictees is based on a mandate of the Security Council, as expressed in its resolutions, as well as consent of the states of the former Yugoslavia to the presence of NATO troops in Bosnia.

2 The Risk of Casualties

In trying to explain why NATO troops did not arrest indicted war criminals, many scholars point out the evident risk for the personnel involved. Obviously, military leaders were not prepared to risk the lives of their soldiers. The Pentagon feared that involvement of IFOR troops in operations to arrest indicted war criminals would expose U.S. soldiers to retaliation. Pentagon officials argued that American casualties would undermine public and congressional support for Dayton.

---

Conceptualizing Violence: Present and Future Developments in International Law 60 Alb. L. Rev. 841, 851.
The Western political and military leadership feared that possible casualties might result from enforcement attempts and assumed that arrests would threaten implementation of military provisions of the Dayton Accords and thus undermine peace in Bosnia. NATO troops, consistent with their political leaders' official position, did not feel any obligation to arrest indicted war criminals. The Commander of IFOR forces in Bosnia, Admiral Leighton Smith, interpreted the mandate in the most limiting manner, claiming that "it was not the mission of his forces to go after indicted war criminals." Indeed, NATO military commanders perceived active pursuit of the accused war criminals as a threat to both security of the troops and peace in Bosnia. Therefore, in the first years of Dayton Accords the NATO policy was to arrest the indictees only if they surrendered or were found by accident.

The fear for the soldier's lives is probably well founded as some of the indictees such as Karadzic and Mladic obviously still enjoy massive public support in their former areas of influence and are also reported to maintain bands of heavily armed bodyguards. During the raids that led to the arrests of some indictees, a number of NATO personnel were injured, but no fatalities occurred so far. However, the precedents mentioned above illustrate that NATO forces boast the necessary ability to apprehend indictees without taking unjustifiable risks. Finally, although it is understandable that putting the risks of their own people on the line for the abstract concept of justice is something that politicians and military leaders refrain from wherever possible, it has to be said that the risk involved in this type of military operation is something inherent to NATO's mandate in the area of former Yugoslavia. This is exactly

---

197 Scharf, above, 955.
198 Bass, above, 246-50.
199 Bass, above, 248.
201 See e.g.: Thomas B. Hunter Special Forces Arrest War Crimes Suspects <http://www.specialoperations.com/Focus/warcrimes.html> (last accessed 1 November 2002.)
what NATO forces have been deployed for. As former Chief Prosecutor of the ICTY, Richard Goldstone remarks:

> What are American troops, armed and in uniform, doing in Bosnia if they are not prepared to take risks in the performance of their duties?²⁰²

### 3 The Lack of Political Will

In the end, the only reason why NATO forces do not actively participate in the enforcement of ICTY indictments is a lack of sufficient political commitment from the West to use military force in apprehending indicted war criminals.²⁰³ In fact, the tribunal faces enormous difficulty in generating the political will of the international community in enforcing its orders. There is the inherent difficulty of operating in an environment where the main goal of the international community and Security Council is to establish peace rather than justice. Any pursuit of justice, and especially the arrest of suspected war criminals, will likely be preceded by the alleged need to accomplish some sort of peace on the ground.

In Bosnia, the NATO-lead forces have chosen not to arrest some of the indicted war criminals out of concern that such actions might exacerbate the situation.²⁰⁴ Senior American officials initially assumed that the indictment of Milosevic would undermine his commitment to implement the peace agreement. The Dayton negotiators were also reluctant to order the arrest of Karadzic and Mladic. As in the case of Milosevic, U.S. and allied leaders fear that the apprehension of the two most senior Bosnian Serb indictees would spark
Bosnian Serb retaliation to the peace accords and risk the lives of NATO troops.\textsuperscript{205}

Although it may be desirable to bring to justice those responsible for gross atrocities in the context of every war, of course, ultimately war crimes prosecution will be subject to \textit{realpolitik}. One must weigh foreign policy and intelligence interests against the importance of enforcing the law. It may sometimes not be possible to bring about a peace settlement if a war crimes tribunal is going forward with active prosecutions of the state leaders of the belligerent parties. Even if the political leadership should change, it may be impossible for the new governments to hand over former leaders and remain in power.\textsuperscript{206}

Rightly, the main object of all international efforts in all post-war societies is to quell the fighting.\textsuperscript{207} In that context the achievement of justice is mostly seen as secondary and sometimes even counterproductive to the paramount goal of peace. This perception, however, is not necessarily correct. In fact, justice can be an important step to overcome the traumas of peace and also serves as a deterrent to war-criminals-to-be. The rationale for establishing the Hague tribunal was that it would assist the peace process by punishing at least some of those guilty of atrocities.\textsuperscript{208}

Punishing perpetrators of horrible crimes is an important step toward healing a strife-torn society. In this context, the world community has a moral responsibility to seek out justice when national governments are unable or unwilling to take action. Many proponents of war crimes tribunals also believe that the threat of appearing before a war crimes tribunal can serve as a useful deterrent to those who might otherwise commit atrocities with impunity.\textsuperscript{209}

\textsuperscript{205} Jim Hopper (Balkan Institute) \textit{Dayton’s Mandate for Apprehending War Criminal} <http: //www.pbs.org/wgbh/pages/frontline/shows/karadzic/trial/hooper.html> (last accessed 1 November 2002).


\textsuperscript{207} Wedgwood, above, 275.


\textsuperscript{209} Issues and Controversies on File \textit{War Crimes Tribunals: An In-Depth Analysis} <http://www.facts.com/icof/warintro.htm> (last accessed 1 November 2002).
Without justice, lasting peace cannot be achieved. The individualization and
decollectivisation of guilt, placing responsibility on the leaders and the
perpetrators of atrocities rather than the whole communities help to bring about
peace and reconciliation.\(^\text{210}\) It is a fallacy to believe that the international
community would rely on the consent of persons indicted by war crimes
tribunals. On the contrary, negotiating with the perpetrators of massive
violations of international law effectively discredits any efforts for durable
results. A country that is not willing to dissociate itself from the perpetrators of
war crimes will never be able to cope with its past in the long term.

A peaceful society cannot be built upon repression and ignorance towards
atrocities committed. Those responsible for these types of violations have
demonstrated that they are not willing to recognize the concept of a peaceful
and humane society. They are not acceptable partners for peace negotiations.
These persons have to be brought to justice in order to unmistakably express the
international communities commitment to the punishment of this behaviour.

In Yugoslavia, some of the military leaders, including U.S. General Wesley
Clark, who became SFOR Commander in 1997, endorsed the view that

\[\text{unless the killer were removed from society, the peace agreement could not be}\]
\[\text{successfully implemented and NATO's troops would be bogged down for years in a costly}\]
\[\text{peacekeeping mission.}^\text{211}\]

Not the arrest warrants of international war crimes tribunals, but their
continuous non-enforcement has to be seen as an obstacle to effective
implementation of the political side of peace agreements. An international
criminal tribunal plays an integral role in the reconciliation of war torn societies
but it can only be as effective as the collective political will and military power

187.

\(^{211}\) Gary Jonathan Bass \textit{Stay the Hand of Vengeance – The Politics of War Crimes Tribunals}
support from political leaders in the United States and Great Britain. Madeleine Albright, then
Secretary of the U.S. State Department and Tony Blair, British Prime Minister, pressed for a
more forceful NATO policy in arresting indicted war criminals.
of those who create and support it. Regrettably, this view has taken much too long to receive some reluctant acceptance at international level. Finally, in 1998 the NATO leadership noted that “detentions by SFOR over the past year of war crimes indictees have contributed to the peace process” and that progress in cooperation with the ICTY will "help to create the conditions in which a NATO-led military presence is no longer needed."

**VIII CONCLUSION**

Ultimately, war crimes will be subject to *realpolitik*. This will always leave war crimes law, as practised through the creation of ad hoc tribunals, open to accusations of selectivity, partiality and ‘victors justice’. State interests seldom readily yield to the dictates of legality. Too often, the price of peace is considered to be an abdication of war crimes proceedings. So every war crimes tribunal is also an exercise in partial justice.

The inability to bring accused war criminals to justice has been extremely frustrating for the prosecutors of the ICTY in The Hague. Under the terms of the Dayton Accord, the governments of the Balkan region are all obliged to turn over accused war criminals and NATO forces are authorized to apprehend them. Yet, so far that has largely not occurred. The various governments are reluctant to surrender their nationals and the NATO commanders are wary of trying to forcibly arrest people. In 1996, IFOR commander U.S. Admiral Leighton Smith, contended that trying to arrest war criminals might detract from his basic mission, which is to maintain the peace. That may not be ideal, the admiral admitted.

It certainly is not. A war crimes tribunal can only be as effective as the political will to enforce its orders and judgements. There will be no lasting

---


peace without justice. And there can be no justice without credible mechanisms of enforcement. The international community has much to lose in abandoning this important cause. The credibility of international humanitarian law depends on war crimes tribunals to hold accountable those responsible for gross violations. 216 A frustrated Judge Goldstone argues that arresting the accused war criminals, especially Karadzic and Mladic, "seems to me not only in the interest of justice but in the interests of peace." This is so, Goldstone contends, because "if people in positions of authority cannot be brought to The Hague, the important deterrent value of the tribunal will be destroyed." 217

BIBLIOGRAPHY

A Books

Gary Jonathan Bass

*Stay the Hand of Vengeance – The Politics of War Crimes Tribunals*

M. Cherif Bassiouni

*Crimes Against Humanity in International Criminal Law (2nd Revised Edition)*

Alain Destexhe (Editor)

*Rwanda and Genocide in the Twentieth Century*

Ingrid Detter

*The Law of War (2nd Edition)*

Roy Gutman (Editor)

*Crimes of War: What the Public Should Know*
W.W. Norton & Company, New York, 1999

John R. W. D. Jones

*The Practice of the International Criminal Tribunals for Former Yugoslavia and Rwanda (2nd Edition)*
Transnational Publishers, Ardsley, 2000

Timothy L.H. McCormack and Gerry Simpson (Editors)

*The Law of War Crimes – National and International Approaches*
Theodor Meron

*War Crimes Law Comes of Age - Essays*


Michael A. Meyer and Hilaire McCoubrey (Editors)

*Reflections on Law and Armed Conflict – The Selected Works on the Laws of War by the Late Professor Colonel G.I.A.D. Draper, OBE*


Steven R. Ratner and Jason S. Abrams

*Accountability for Human Rights Atrocities in International Law – Beyond the Nuremberg Legacy*


Geoffrey Robertson

*Crimes Against Humanity – The Struggle for Global Justice*


Michael P. Scharf and William A. Schabas

*Slobodan Milosevic on Trial: A Companion*

Continuum International Publishers, New York, 2002

Christine Van den Wyngaert (Editor)

*International Criminal Law: A Collection of International and European Instruments*

B Journals

Payam Akhavan
*The International Criminal Tribunal for Rwanda: The Politics and Pragmatics of Punishment*
90 Am. J. Int’l L. 501

Jose E. Alvarez
*Crimes of States/Crimes of Hate: Lessons from Rwanda*
24 Yale J. Int’l L. 365

Lucas W. Andrews
*Sailing Around the Flat Earth: The International Tribunal for the Former Yugoslavia as a Failure of Jurisprudential Theory*
11 Emory Int’l. L. R

Garry Jonathan Bass
*International Law: War Crimes and the Limits of Legalism*
97 Mich. L. Rev. 2103

Jonathan A. Bush
*Nuremberg: The Modern Law of War and Its Limitations*
93 Colum. L. Rev. 2022

Vincent M. Creta
*The Search for Justice in the Former Yugoslavia and Beyond: Analyzing the Rights of the Accused Under the Statute and the Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia*
20 Hous. J. Int’l L. 381

Stefan Glaser
*Nullum Crimen Sine Lege*
24 J. Comp. Legis. & Int’l L. 29
Carin Kahgan
*Jus Cogens and the Inherent Right to Self-Defense*
3 ILSA J. Int’l & Comp. L (Vol. 3, No. 3, Spring 1997), 767

Joshua M. Koran
*An Analysis of the Jurisdiction of the International Criminal Tribunal for War Crimes in the Former Yugoslavia*
5 ILSA J. Int’l & Comp. L (Vol. 5, No. 1, Fall 1998), 43

Paul J. Magnarella
*Expanding the Frontiers of Humanitarian Law: The International Criminal Tribunal for Rwanda*

Paul J. Magnarella
*Some Milestones and Achievements at the International Criminal Tribunal for Rwanda: The 1998 Kambanda and Akayesu Cases*
11 Fla. J. Int’l. L. 517

Theodor Meron
*International Criminalization of Internal Atrocities*
89 Am. J. Int’l. L. 554

Sean D. Murphy
*Progress and Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia*
93 Am. J. Int’l. L. 57

William H. Parks
*Command Responsibility for War Crimes*
62 Mil. L. Rev. 1
Jelena Pejic
*Conceptualizing Violence: Present and Future Developments in Intl. Law*
60 Alb. L. Rev., 841

Sophia Piliouras
*International Tribunal for the Former Yugoslavia and Milosevic’s Trial*
18 NYLS J. Hum. R. 515

Michael P. Scharf
*The Tools for Enforcing International Criminal Justice in the New Millennium: Lessons from the Yugoslavia Tribunal*
49 DePaul L. Rev. 925

David J. Scheffer
*Developments in International Criminal Law: The United States and the International Criminal Court*
93 Am. J. Int’l L. 12

Ruth Wedgwood
*War Crimes in the Former Yugoslavia: Comments on the International War Crimes Tribunal*
34 Va. J. Int’l L. 267
C Online Resources

California Institute of Technology: Major War Criminals/Suspects
http://www.cco.caltech.edu/~bosnia/criminal/criminals.html

CNN.com/ In-Depth Specials: Milosevic On Trial

Focus Feature Special Operations Forces and Bosnian War Crimes Suspects
http://www.specialoperations.com/Focus/warcrimes.html

Interpol (Arrest Warrants)
www.interpol.int

The Mazal Library Holocaust Resource (e.g. Nuremberg Military Tribunal Records)
www.mazal.org/imt-home.htm

United Nations International Criminal Court

United Nations International Tribunal for the Former Yugoslavia
www.un.org/icty

United Nations International Tribunal for Rwanda
www.ictr.org

Web Genocide Documentation Centre: War Crimes and Criminals
http://www.ess.uwe.ac.uk/genocide/war_criminals.htm

\[^{218}\text{All online sources last accessed in November 2002.}\]