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ESSAYS

AN INTERNATIONAL CRIMINAL TRIBUNAL FOR FORMER YUGOSLAVIA?

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Early drafts of what became the Statute of the International Tribunal for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991, contained many problems of concept and of detail. There are many scholars whose intellectual model of the international legal order leads them to consider atrocities committed in armed conflict as offenses under conventional international humanitarian law, a body of law which they consider beyond any doubt to be part of international customary law. They also believe that there is a recognized principle of international law which provides that certain offenses may be punished by any state even where none of the common bases of jurisdiction exists. In my opinion, this “monist” model of the international legal order is inconsistent with 350 years of experience under the unwritten Westphalian Constitution,¹ violates Occam’s Razor, and is unworkable today. Fortunately, in my view, the Report of the Secretary-General of the United Nations and its annexed Statute take a “dualist” stance by which municipal legal orders are considered distinct from the international legal

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¹ An outline of this model of the overall international order is given in Alfred P. Rubin, *Enforcement Rules of International Law*, 34 HARV. INT’L L.J. 149, 159-160 (1993).

order.² The Report and its annexed Statute try to be careful in their language, avoiding unnecessary jurisprudential generalities. They have not been wholly successful. Nonetheless, the Statute was adopted by the Security Council in its Resolution 827 on 25 May 1993.³ In its Resolution, the Security Council purports to be acting under the authority of Chapter VII of the United Nations Charter, taking enforcement action to restore international peace and security.⁴ This source of authority solves some legal problems and creates others. Let us turn first to some overwhelming issues of fundamental principle in the Report and in the Statute, then look at the implications of the many traces of the original monist approach and its inconsistencies. Next, let us look at signs of undue haste in the drafting of the Report and the Statute which will inevitably serve as a primary source for questions of interpretation. Finally, let us examine some of the problems that can be expected to arise as a result of that haste.

Let us turn first to the deeper conceptual problems: What is the extent of the authority of the Security Council, even under Chapter VII of the Charter, to erect an institution whose operation threatens the internal organization of a "belligerent" or the actual operating government of a state? *I.e.*, did states, when adhering to the U.N. Charter, envisage themselves re-creating the Holy Alliance, with the victors of World War II as the modern equivalent of Platonic Guardians, and the humanitarian laws of war as the set of substantive rules, adherence to which determines who should rule the units that comprise the international legal order?

The inconsistencies between the international legal order as it appears to be under the Westphalian Constitution, and the order as monist proponents of an International Tribunal would like it to be by their special construction of the U.N. Charter and the authority of the Security Council, appear most vividly in two places.

² U.N. SCOR, U.N. Doc. S/25704, *reprinted in* 32 I.L.M. 1163 sq. (Secretary General's Report) and 1192 sq. (Statute of the International Tribunal) (1993) (hereinafter "Report" and "Statute" respectively).

³ S.C. Res. 827, U.N. SCOR, 3217th mtg., *reprinted in* 32 I.L.M. 1203 (1993).

⁴ *Id.*

The first major problem is the authority given the "Prosecutor." Article 18 of the Statute establishes that it is the Prosecutor who prepares indictments,⁵ and under Article 19 a judge⁶ of a Trial Chamber of the Tribunal reviews the indictment and must confirm it if he/she is satisfied that a *prima facie* case exists. Apparently, there is no authority in any of these people to exercise political discretion. Even high officials in the belligerent forces or government of a party to the conflict do not have authority to relieve any accused of criminal responsibility under Article 7(2) of the Statute.⁷ Therefore, the Prosecutor, with the approval of a non-political judge, not only has the authority, but he/she has the responsibility to "decapitate" an army, a negotiating team or a civil authority even before the offense is proved.

I cannot believe that any of the parties to the conflict in former Yugoslavia will cooperate with this arrangement as it might apply in the one case in which their cooperation would be effective: To transfer to the International Tribunal persons within their own power structure who are accused of offenses within the purview of the Tribunal. The only effect that this arrangement seems likely to have would involve captives or the leaders of a defeated enemy. This should not be surprising, given that the Nuremberg model was in fact a victors' tribunal.

A second major inconsistency between the Statute and the Westphalian legal order lies in the roles states are to play in the enforcement system envisaged by the Statute. It rests on the obligations of states members of the U.N. to "accept and carry out decisions of the Security Council in accordance with" Article 25 of the U.N. Charter and the categorization of Resolution 827 as authorized by Chapter VII of the Charter. Presumably the reasons for acting under Chapter VII include not only the desire to avoid questions about the reach of Article 25 to the *jus in bello* instead of the normal *jus ad bellum* interpretation. There also must or should have been an apprehension that the struggle in former Yugoslavia, as an internal armed conflict, might be beyond the reach of United Nations regulation. The struggle in former Yugoslavia has, or at least had, been categorized by

⁵ Statute, art. 18, reprinted in 32 I.L.M. at 1197 (1993).

⁶ The text says "the judge," but since there are three judges in each trial chamber it is hard to say what was intended here.

⁷ Statute, art. 7(2), reprinted in 32 I.L.M. 1194 (1993).

all the parties involved as an internal armed conflict. Under Article 2(7) of the Charter of the United Nations, *except* for the application of enforcement measures under Chapter VII nothing in the Charter authorizes any organ of the United Nations to "intervene in matters which are essentially within the domestic jurisdiction of any state."⁸ Clearly, unless action by the Security Council were categorized as "enforcement measures" under Chapter VII, the organs of the U.N. would have exceeded their authority under the Charter by exercising any purview over the conflict except, perhaps, their power to "discuss" and to pass non-binding resolutions by analogy to action taken with regard to apartheid in South Africa.

But application of Security Council decisions under Article 25 does not solve the problem. First, there are theoretical problems under Article 29 of the Statute.⁹ Only "States" are bound to cooperate in such arrests and handings over. The Bosnian Serbs are not subject to the orders of the Tribunal. They are not even subject to the "decision" of the Security Council in this regard, since they are not a state (yet?). Thus the Bosnian Serbs can be held bound to an Article 25 decision¹⁰ of the Security Council only by a logic that would hold all national liberation movements equally bound or would insert *jus ad bellum* criteria into the *jus in bello* against a hundred and thirty years of experience. Holding the Bosnian Serbs bound by an Article 25 decision of the Security Council also seems to violate fundamental democratic governmental theory based on our own notion of "no taxation without representation." The Bosnian Serbs are not represented in the United Nations by the authorities of Bosnia-Herzegovina against whom they are rebelling or, judging from their refusal to accept the "advice" of the leaders of Serbia-Montenegro, by any other authority that is represented in the U.N.

Second, there are practical realities that get in the way. If the authorities representing Bosnia-Herzegovina could arrest those Serbians or Croatians they believe to have been guilty of the offenses listed in the Statute, they surely would. It is unlikely that they can carry out an arrest order aimed at Serbians

⁸ U.N. CHARTER art. 2, para. 7.

⁹ Statute, art. 29, *reprinted in* 32 I.L.M. at 1200 (1993).

¹⁰ U.N. CHARTER, art. 25.

or Croatians issued by the Prosecutor. Is it expected that the authorities of Bosnia-Herzegovina would hand over people in their own command structure who have been accused by the Prosecutor of triable offenses to the Tribunal? Similarly, would the authorities of Croatia or the armies of the Bosnian Serbs hand over their own people for such trials to the Tribunal? Ironically, the largest foreseeable scope of operation of that provision is likely to be to get accused Serbian or Croatian war criminals out of the hands of Bosnian-Herzegovinian officials who would plan to punish them anyhow, probably with harsher penalties than the International Tribunal.

This raises a lesser question that also indicates some confusion as to the legal model that lies behind the Statute of the Tribunal: the location of the Tribunal. The Statute provides for its seat to be at The Hague (Article 31),¹¹ although the Secretary-General's Report also suggests the possibility of Geneva or elsewhere. The firmest guidance is that it be located outside former Yugoslavia. There seems to be a presumption that the tribunal is "the world" bringing former Yugoslavia back to the larger community. But that was not the perception at Nuremberg or Tokyo (or Manila - as in the Yamashita and Homma trials), where the site of the trials was the place where the offenses occurred. As far as I know, there were no offenses committed in The Hague or Geneva by any persons who are potential defendants before this Tribunal. It is very hard for me to understand how trials in places beyond the reach of local media in former Yugoslavia are supposed to help bring a desire for order to that benighted area or sense of shame for atrocities committed in the name of ethnic interest. Therefore, trials as proposed now cannot accomplish the "civilizing mission" that was an essential reason for Nuremberg and Tokyo. As to impressing the Balkan populace with the notion that it is "the world" or "the civilized world" that is running things, I doubt very strongly that any former Yugoslavians will be convinced of that if the tribunal's authority is restricted to events in former Yugoslavia; if American leaders accused of ordering war crimes or "grave breaches" during the Gulf War (Captain Rogers of the Vincennes; General Schwarzkopf in connection with the bombing of what turned out to be a bomb shelter in Baghdad?) are

¹¹ Statute, art. 31, reprinted in 32 I.L.M. at 1201 (1993).

not subjected to the same procedures and same laws as accused former Yugoslavs. It may seem obvious to us that "genocide" is more evil than shooting down civilian airliners, but that perception is not universally shared. Indeed, in light of our anguish over the supposed role of Libyan officials in the Lockerbie incident, there is a certain amount of hypocrisy that will be apparent to everybody but us in this matter.

Finally in this discussion of conflicting principles in the Statute of the new Tribunal as adopted by the Security Council, I would mention one of a series of what seem confusions about the international legal order in relatively minor specifics. Article 10, "Non-bis-in-idem," identifies the "crimes" at municipal law with the crimes under the "monist" law-of-war conceptions currently popular with international lawyers, and concludes that a trial under a municipal legal order and a trial by the International Tribunal are really the submission of a single situation under a single legal order to two tribunals: double jeopardy.¹² That notion is abandoned (in my opinion, properly) if the person who has been tried by a national court for acts constituting serious violations of international humanitarian law was tried for acts "characterized as an ordinary crime".¹³ But this dualist conclusion retains its monist bias in its elision: "Characterized" by whom as an "ordinary crime"? Should the judges in an international tribunal have the authority to determine definitively, as if "objectively," the legal category of a municipal process? Does trial by a military court martial for violation of military law self-evidently exclude categorization as an "ordinary crime"? Lieutenant Calley? An off duty soldier robbing a taxi driver, but tried by a military court? Should the International Tribunal be able to characterize the proceedings of a municipal legal order while purporting to interpret its own authority under a "Statute" drafted by international civil servants and adopted by the Security Council of the United Nations by states who do not expect their decisions to be applied to themselves? We have had some experience with this sort of thing, principally the United States extradition to Israel of Abu Eain, a Palestinian who planted a bomb at a rock festival in Galilee. The United States insisted that Israel try him under

¹² Statute, art. 10, reprinted in 32 I.L.M. at 1195 (1993).

¹³ Statute, art. 10(2)(a), reprinted in 32 I.L.M. at 1195 (1993).

“ordinary” criminal law instead of the laws of war; an insistence with which Israel was delighted to concur, but which seriously misread the actual situation of the time in Israel. But I have written about that elsewhere and do not propose to repeat the argument here.¹⁴

There are other problems with the Statute of the Tribunal that might assume some significance. For example, why is the date of 1 January 1991 asserted by the Secretary-General to be a “neutral” date?¹⁵ I would want to know what was happening in former Yugoslavia in 1989 and 1990 before I could agree to that; not that “reprisal” will excuse violations of those parts of the laws of war in place to protect persons *hors de combat*, but that political or propaganda advantages might be given to one side or the other by choosing a date that appears significant to them for reasons not considered by us outsiders. Were there any violations of the laws of war by either side before that date which were then rectified afterwards? Are we depriving some accused individuals of a *locus poenitentiae* that the date allows to some on the other side?

There are many other traces of confusion in the Statute. Perhaps some reflect disagreements as to the pertinent model of the international legal order; I suspect most reflect advocates’ haste to move the world in their favorite direction before anybody has a chance to think too hard about it. But since the Statute is to be the basis for defining and enforcing criminal law, every elision or inconsistency risks major injustice to real people. Let me list some of them.

Under Article 1 the International Tribunal has the power to “prosecute persons responsible” for the listed atrocities.¹⁶ How does the Prosecutor or anybody else know who is “responsible” for an atrocity *before* the prosecution? Surely more careful drafting would have used the phrase “prosecute persons alleged to be [or ‘believed to be’] responsible.” The same problem exists in Article 4.1.¹⁷

¹⁴ See, *Extradition of Terrorists, Case Note on Eain-v. Wilkes*, 15 INT’L PRAC. NOTEBOOK 10 (1981).

¹⁵ Statute, art. 8, reprinted in 32 I.L.M. at 1194 (1993).

¹⁶ Statute, art. 1, reprinted in 32 I.L.M. at 1192 (1993).

¹⁷ Article 4.1 gives the Tribunal power “to prosecute persons committing genocide” as if only those caught in *flagrante delicto*. Statute, art. 4.1, reprinted in 32 I.L.M. at 1193 (1993).

Article 2(d) defines some of the offenses: "extensive destruction . . . carried out unlawfully."¹⁸ But "unlawfully" by what "law"? This language comes verbatim from the 1949 Geneva Civilians Conventions (Convention IV) Article 147,¹⁹ but that does not make it appropriate for this purpose. The Convention gave to states parties the responsibility to put meaning into these general phrases. The states parties have not done so except in their municipal criminal law, which is not binding on anybody outside the jurisdiction of the enacting state. Indeed, I know of no state that has actually referred to this phrase in its municipal criminal or military law, and I know of no "handing over" of persons alleged to have committed a "grave breach," so no diplomatic correspondence or practice puts meaning into "unlawfully."

The same problem exists in Article 2(g): "unlawful deportation or transfer or unlawful confinement"²⁰ by what "law"? And does the use of the word "unlawful" before two nouns and not the third mean that "lawful" transfers of protected persons are criminally punishable?

Article 9 allows the Tribunal to "request" national courts to defer to its competence.²¹ But must the International Tribunal's "request" that a national tribunal defer to its competence be obeyed? Where does the Statute say so?

Article 10.2(b) lifts the ban on double trials if the national court proceedings "were not impartial . . . or the case was not diligently prosecuted."²² But who determines if there is a case "not diligently prosecuted"? How? On what evidence? Does the new Tribunal sit in judgment on the efficacy of municipal criminal process? The Prosecutor plus one judge?

Article 24.3 allows Trial Chambers of the International Tribunal to order the return of "property acquired by criminal conduct."²³ What is property "acquired by criminal conduct"? A taking of property by military requisition without the receipt

¹⁸ Statute, art. 2(d), *reprinted in* 32 I.L.M. at 1192 (1993).

¹⁹ Convention Relative to the Protection of Civilian Persons in Time of War of 12 August 1949, 6 U.S.T. 3516, 75 U.N.T.S. 970-73.

²⁰ Statute, art. 2(g), *reprinted in* 32 I.L.M. at 1192 (1993).

²¹ Statute, art. 9, *reprinted in* 32 I.L.M. at 1194 (1993).

²² Statute, art. 10(2)(b), *reprinted in* 32 I.L.M. at 1195 (1993).

²³ Statute, art. 24(3), *reprinted in* 32 I.L.M. at 1199 (1993).

that the Annex to the 1907 Hague Convention requires?²⁴ A taking by purported civil authority whose "right" to rule is contested? But errors in handing out receipts can occur; are they in the same category as "genocide" or "rape"? And all legal authorities that can, "expropriate" private property from time to time. Does this provision belong here?

Article 29.2(b) requires states to comply with any request for assistance or order issued by a Trial Chamber.²⁵ As noted above, it is not clear that this article applies to a "request" issued by the Tribunal itself under Article 9.²⁶ More seriously, does the requirement for cooperation in the taking of testimony and the production of evidence apply to the defendant, too? If so, any defendant demanding evidence classified by himself must be released, I suppose. Is that what is intended? Suppose the defendant demands that the Chamber request what he or she claims is exculpatory evidence classified by the United States or United Kingdom or the Government of one of the Balkan states other than his or her own? Would we in the United States obey such an order for CIA evidence?

Many of these apparently minor problems seem to me to trace to parts of the Secretary-General's Report.²⁷ For example, in paragraph 42 of that Report the Nuremberg tribunal's adoption of the 1907 Hague rules²⁸ as if general international law is mentioned, but the Tokyo tribunal, which was later in time than Nuremberg, took a softer line that is not mentioned. There is no acknowledgment that the Nuremberg adoption is not supported by consistent practice. Similarly, paragraph 47²⁹ does not mention the fact that the definition of crimes against humanity adopted for Nuremberg in the London Charter³⁰ restricted the definition to the then current war in order to avoid charging the Soviets or the colonial powers (the United Kingdom and France) with the same crimes. But in Article 5 dealing

²⁴ See, Hague Convention on Law and Customs of War on Land, Annex, Oct. 18, 1907, arts. 51 and 52, 36 Stat. 2277, T.S. No. 539.

²⁵ Statute, art. 29.2(b), reprinted in 32 I.L.M. at 1200 (1993).

²⁶ See *supra* note 21.

²⁷ See *supra* note 2.

²⁸ See *supra* note 24.

²⁹ Report, art. 4, para. 47, reprinted in 32 I.L.M. at 1173 (1993).

³⁰ Convention on the Prosecution and Punishment of Major War Criminals of European Axis, Charter for an International Military Tribunal, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 280.

with "crimes against humanity" the qualification is dropped.³¹ I can understand why, and it might be good "progressive development," but it is polemical and evasive to do that without explanation or even mention of the revision made in the texts.

Paragraph 48 of the Secretary General's Report says that in the conflict within former Yugoslavia there have been atrocities and "such inhumane acts have taken the form of so-called 'ethnic cleansing'."³² Can this assertion be made in a legal document setting up a tribunal but before any trials have been held? The sentence is unnecessary and it strikes me as prejudging what the document sets up a tribunal to judge.

In paragraph 55 it is asserted that "these suggestions draw upon the precedents following the Second World War"³³ Indeed? Tokyo? What happened to Judge Pal's dissent? Were the "precedents" applied in a system of sovereign equality? To the Soviets? Or was it a "victors'" tribunal applying "victors law" to the vanquished? I suggest that many of the substantive laws applied in Nuremberg and Tokyo are well-grounded in legal tradition, but not the procedures and not all of the substantive "laws."

Paragraph 75 refers to "non-member States maintaining permanent observer missions at United Nations Headquarters."³⁴ Who are they? Only Switzerland? Or is this an invitation to dispute over the status of the PLO and perhaps other National Liberation Movements?

I have some other problems with procedures that are too complex to be related to specific articles of the Statute or paragraphs of the Secretary-General's Report. The basic plan is for the national police to arrest the accused and hand him/her over to some authority at the "seat of the International Tribunal." Which authority? Dutch police? And how can the "rights of the accused" then be "respected"? Suppose he/she tries to subpoena the classified records of a Cabinet meeting at which it is claimed he/she "ordered" a grave breach to be committed. Would any country hand over such records? Would they be trusted by any unbiased tribunal? But that is the sort of high-

³¹ Statute, art. 5, *reprinted in* 32 I.L.M. at 1193-94 (1993).

³² Report, para. 48, *reprinted in* 32 I.L.M. at 1173 (1993).

³³ Report, para. 55, *reprinted in* 32 I.L.M. at 1174-75 (1993).

³⁴ Report, para. 75, *reprinted in* 32 I.L.M. at 1179 (1993).

level situation we are addressing. And how can witnesses be at the same time confronted and their identity protected? Suppose the Defendant's lawyer divulges the identity to news media - is there a provision for "contempt" proceedings? Or would the defendant be deprived of her/his free choice of counsel?

CONCLUSION

The basic problem that I have with the Statute of an International Tribunal applying international criminal law to the perpetrators of atrocities in the Balkan struggle now underway is what seems to me to be a fundamental incompatibility between a model of the legal order under which the laws of war are administered by an "impartial" agent of organized humanity, and a model under which the laws of war are administered by each body corporate of the international legal order within its own competence. In the former case, international tribunals staffed by international civil servants dominate the world order. I doubt that any great powers are willing to live within that model. And if they were, *quis custodet custodians*, who oversees the overseers? In the latter Westphalian model, each "body corporate" in the legal order chooses its own leaders and administers its own law to whomever the legal order places within its jurisdiction. Failures to administer the law to the satisfaction of organized humanity result in various pressures to bring the defaulting "body corporate" back in to the "comity of nations" without affecting its basic authority to choose its own leaders who must administer its own law to its own people.³⁵

At this time in the evolution of world order, I strongly doubt that any other model would be acceptable to anybody but idealistic lawyers and civil servants who would seem to gain control over the public policy of the world, but who are not responsible for the lives and well-being of real constituencies and who are not generally known as a group with deep moral insights.

³⁵ See *supra* note 1.