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War Crimes in the Former Yugoslavia: Comments on the International War Crimes Tribunal

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INTRODUCTION

I want to present three potential problems of the Yugoslav War Crimes Tribunal which may limit the Tribunal’s effectiveness. The three issues are (1) the unwillingness of the United Nations to proceed with war crimes trials *in absentia*, or to effect international arrest; (2) the sources of applicable law for the war crimes trials; and (3) the failure of the United Nations to address the delicate relation between politics and criminal law in the aftermath of a civil war, specifically the absence of any pardoning power or amnesty power in the political organs of the United Nations.

I. TRIALS *IN ABSENTIA AND INTERNATIONAL ARREST*

The actors guilty of ethnic cleansing in the former Yugoslavia should not escape conviction because they refuse to come to court. When U.N. Secretary-General Boutros Boutros-Ghali solicited suggestions for an ad hoc tribunal, the French proposed *in absentia* jurisdiction. In the French scheme, if a defendant was indicted by the war crimes prosecutor and the indictment was approved by a chamber of the tribunal, the trial could go forward even if a defendant refused to appear.1 The Secretary-General recom-

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1. See Letter Dated 10 February 1993 from the Permanent Representative of France to the United Nations Addressed to the Secretary-General, ¶ 108, U.N. Doc. S/25266 (report of the Committee of French Jurists). If the defendant voluntarily appeared or was later arrested, he would have the privilege of reopening the proceedings.
mended against the French proposal, and the Security Council followed suit.

The Secretary-General argued that *in absentia* jurisdiction would strain article 14 of the International Covenant on Civil and Political Rights, which guarantees a defendant the right "[t]o be tried in his presence, and to defend himself in person or through legal assistance of his own choosing." The Secretary-General may have chosen the less controversial route by not allowing trials *in absentia*. Perhaps it was not the right one.

The ban on trials *in absentia* is not universal in domestic legal systems. The French allow *in absentia* trials within their legal system even for felony cases. In the United States, trials do not go forward unless the defendant is arrested and brought to the court for the initial swearing of the jury. Nonetheless, if he chooses to absent himself in the middle of trial—violating bail in flight from the jurisdiction—the trial goes on without him. Similarly, if the defendant disrupts the trial by shouting or threatening witnesses, he can be removed from the courtroom. A good judge will try to make it possible to follow the proceedings by television or telephone, but in the United States there is no constitutional right to have every moment of the trial conducted in the defendant's presence under these circumstances.

For a national legal system, there may be good reasons for not allowing trials *in absentia*. Legal norms can usually be enforced to an adequate degree within this rule. A national government is capable of bringing most defendants to the bar by coercive means, and in a national system, we accept that not all crimes will be prosecuted.

National legal systems are different in other respects, too. The limitation excluding *in absentia* trials from the criminal adjudicative jurisdiction of domestic courts is a nice proxy for circumscribing the reach of lawmakers' prescriptive jurisdiction. An American

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3. See Richard Frase, Introduction, The French Code of Criminal Procedure 23 (1988); see also Code de Procédure Pénale, arts. 627-32 (Fr.). The default conviction is reopened if the defendant is later found. Recorded evidence can be used if witnesses no longer are available. Id. art. 640.


criminal court cannot ordinarily try a foreigner who has remained outside the United States, but in such cases the United States is more likely to lack appropriate prescriptive jurisdiction over the offense. The *in absentia* rule thus serves as a proxy for appropriate division of legislative jurisdiction among national legal systems. So, too, we worry that the substantive law of a particular nation may be unjust; this is one reason why international law respects the right to provide asylum to ordinary defendants. A ban on *in absentia* trials also inhibits the application of unjust law. This is, one trusts, not apropos of the war crimes trials proposed for the former Yugoslavia.

My own view is that the Secretary-General indulged in an over-reading in his claim that the International Covenant on Civil and Political Rights forbade the trial of alleged Yugoslav war criminals not physically present in the Hague. Clearly they have a right to be present if they wish to be, and to have full notice of the proceedings. No one should be able to exclude a defendant and have the trial in secret. But if the defendant voluntarily chooses to absent himself, I question whether the United Nations is wise—certainly it is not required—to prevent the proof of the offense.

As every working prosecutor knows, trial proof suffers with the passage of time. The statute of limitations is in part a recognition of practical limits on the ability to conduct a probative trial. When I served as a federal prosecutor, I was once told that a long-time fugitive from the United States might be returning. I was not entirely delighted, for there is nothing worse than trying a fifteen-year-old case. It cannot be done well. The witnesses have died, and memories faded. If you value *viva voce* proof, the freshness and immediacy of eyewitness testimony—and these are an important element of fairness—the trial must take place reasonably soon after the commission of a crime.

An alternative, of course, is for the Security Council to be more aggressive about procuring the defendants. The Yugoslav 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 with the Security Council. But in practice, a state may move slowly, allowing a defendant to flee, or may claim it cannot locate the defendant. It is unrealistic to wait for the moment when a war crimes defendant needs triple bypass heart surgery and happens to travel to a prosecutorially-minded state. People who are facing international charges are not likely to leave their lair.
The intimation of the *Lockerbie* case is that the Security Council has power under chapter VII of the United Nations Charter to force the production of a criminal defendant for crimes of universal jurisdiction by economic sanctions or even force of arms. In *Lockerbie*, Libya was called upon to surrender the defendants even though ordinarily there is no customary duty to do so. So, too, the United Nations declared its intention to proceed against members of General Aidid's forces in Somalia who ambushed U.N. peacekeeping forces, even where the leader of those belligerent forces would not turn them over.

Article 42 of the Charter empowers the Council to maintain and restore international peace and security. If that power extends to creating an international tribunal, surely it extends to making that tribunal effective. Many of us have scruples about the *Alvarez-Machain* case and the unilateral use of extraterritorial arrest to seize criminal defendants because of the potential for abuse and the lack of transparency in the decision process. But where it is a multilateral institution acting with the concurrence of its members, and the United States can regulate the decision through its veto, it may be a different state of affairs. Practically speaking, one must recognize that after five to ten years, cases are not triable. If they are mounted, it is only at the cost of another ideal, that of fresh, reliable testimony. If one is serious about the international prosecution of grave breaches of the law of war, the enforcement of international process under chapter VII must be considered.

II. **The Applicable Law for War Crimes**

A second problem concerns the sources of applicable law for offenses that have been committed in the fighting in Bosnia-Herzegovina and elsewhere. Possible sources of law to penalize the humanitarian outrages in the former Yugoslavia include crimes against humanity, genocide, and breaches or grave breaches of the law of war.

The statute of the Court proposed by Secretary-General Boutros Boutros-Ghali and approved by the Security Council draws upon

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these categories: crimes against humanity, genocide, violations of the customary law of war, and grave breaches of the Geneva Conventions. The difficulty is that these sources of law involve complicated jurisdictional prerequisites and elements of proof.

What trial prosecutors know is that every time you add an element of proof to the criminal case, even if it is a jurisdictional element, you are lessening the odds of a conviction. To be sure, in the Yugoslav case the fact-finding will be performed by trial judges, rather than jurors, and will require only a majority, rather than a unanimous verdict. But new prosecutors sometimes find to their surprise that judges can be even more demanding than jurors about factual proof, perhaps because they feel more trepidation deciding as a small chamber where the jury has the comfort of larger numbers. Any new element of a crime diminishes the probability of a successful prosecution.

The charge of crimes against humanity was invoked at Nuremberg for the punishment of the Nazis' grotesque killings involving systematic planning and grossly invidious motivation. At Nuremberg the prosecution was limited to crimes against humanity committed "in execution of or in connection with" crimes against peace and conventional war crimes. These conditions would undoubtedly complicate the case in the former Yugoslavia, and the Tribunal would be well advised to discard these unduly cautious limitations.

Proving genocide can also be difficult. Genocide requires the "intent to destroy, in whole or in part" a religious, ethnic, national, or racial group. The definition adds a very difficult element of specific intent to the prosecution. Most crimes of domestic jurisdiction require only general intent. The prosecution does not have to show anything about the person's state of mind except that he was doing the action voluntarily and knew the nature of his action. It will be a trying task to prove the specific intent of a brigade commander whose men ran amok—to show that he was allowing the killing of civilians in order to exterminate Muslims rather than (horrible as it is) to force civilians from the area. There will likely be no record of the commander's contemporaneous statements; soldiers in an internecine war rarely record the reason they are kill-

Requiring proof of specific intent in the melee of civil war assures a formidable obstacle to any prosecution.

The United Nations statute for the Yugoslav Tribunal allows certain charges under the customary law of war, *jus in bello*, and these will fit some of the disturbing activities of the conflict. The statute allows prosecution of the wanton destruction of cities and towns and the bombardment of undefended towns, devastation not justified by military necessity. The bombardment of Sarajevo and the sniper fire that felled civilians on the street would be within range. But the case can be hard to prove in the particular. A town under siege may host a militia that operates at night, and perhaps even provokes the enemy. How will we prove beyond doubt that there was no military necessity for a bombardment and that the town was truly undefended?

The categories of customary law recited in the Tribunal’s statute do not specifically note some of the practices that disturb us most profoundly, including the slaughter of civilians, the rape of female noncombatants, and the detention of villagers under inhuman conditions. These signal types of violence are not among the examples given by the Tribunal’s statute as violations of the customary law of war, though the statute includes the full scope of “the laws or customs of war.” It would have been useful didactically, as an assurance to the prosecutors, and to avoid any question of the scope of the law of war in an internecine conflict, to name these offenses against noncombatants specifically in the statute.

An alternate source of law is the Geneva Convention for the Protection of Civilians (Geneva IV) as supplemented by the 1977 Protocols I and II. Geneva IV has a clear application to some of the atrocities that have taken place. The Geneva Conventions’ “universal” article 3 forbids, even in conflicts not of an interna-


tional character, any violence to life and person, the taking of hostages, and outrages against personal dignity, which could easily include systematic rape. The problem with the delicate drafting of Geneva IV is in the definition of grave breaches. Grave breaches allow universal jurisdiction—the right of any member country to prosecute the offense regardless of the nationality of the victim or offender or the place of the crime. Sadly, grave breaches are defined to exclude domestic conflict; grave breaches are offenses committed against people “protected by” the Convention, and this protection is defined to include only the non-nationals of the contracting party. When you slaughter your fellow countrymen, it is not a grave breach.

There are strategies nonetheless that could make Geneva IV a source of norms. The reasons we should try to do this are several. The Geneva Conventions’ protections of civilians are important and germane in the context of civil conflicts; the low-tech fighting of an internecine war often sees the worst war crimes violations. Civil war combatants include militia and pick-up armies unschooled in the classical sense of what it means to be a soldier. Civil wars are of great brutality, with atavistic hatreds. Like international conflicts, these wars require the deterrence of stringent humanitarian law.

Three separate strategies would allow us to apply Geneva IV to a non-international case. The first is to say that Geneva IV is a source of norms, though not jurisdiction. We can rely upon Geneva for a clean articulation of the governing norms for all forms of warfare, while allowing jurisdiction here to flow from the U.N. Charter, through chapter VII’s own (albeit limited) law-creating power.

Second, and I think Ted Meron may raise an eyebrow here, one can gloss the language of Geneva IV on jurisdiction. While Geneva IV excludes nationals from the protection of the Convention, it is contemplating the case where the military party considers the excluded civilians to be its own nationals. Where a rump belligerent engages in ethnic cleansing of a region and declares itself to be a separate state banishing residents of another heritage, the

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14. See id. art. 4, 6 U.S.T. at 3520, 75 U.N.T.S. at 290 (“Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.”).
belligerent can be estopped from claiming "co-nationality" so far as Geneva is concerned.

The third strategy builds upon the general duties of each party under Geneva IV. Though universal jurisdiction is restricted to grave breaches, each contracting party is bound to take measures for the "suppression of all acts contrary to provisions of the present Convention."15 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 could say that where Serbia or the rump Serb state ("Republica Srpska") of Bosnia-Herzegovina should have taken action to suppress war crimes, the Security Council can act as a substitute by vesting jurisdiction in the ad hoc Tribunal.

III. THE POWER TO PARDON AND TO DECLINE PROSECUTION

Let me take a different direction for a moment—and look at a circumstance that by necessity may limit the range of the War Crimes Tribunal. The design of the Yugoslav Tribunal has not confronted the problem of prosecutorial discretion and the pardon power. Common lawyers are familiar with prosecutorial discretion—selecting which cases will go forward. Prosecutorial discretion must exclude partisan politics, but it does not always exclude a more statesmanlike politics, weighing a criminal prosecution against other values that may be harmed by the prosecution. This balancing occurs in many contexts. In a federal prosecution, for example, one must sometimes weigh foreign policy and intelligence interests against the importance of enforcing federal law. In the United States, some have criticized the practice of allowing a special prosecutor to operate independently from the president, because he cannot balance those profound interests with the same authority as the president.

So here the U.N. has divorced the Yugoslav prosecution from the necessities of state. It may not be possible to bring about a peace settlement in the former Yugoslavia if the 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. It will be difficult to conduct diplomacy with someone who is the subject of an unexecuted arrest warrant,

15. Id. art. 146, 6 U.S.T. at 3616, 75 U.N.T.S. at 386 (emphasis added).
and a main object of our efforts in the former Yugoslavia must be to quell the fighting. As many liberal Argentineans argued in their own civil war, you may need to accept a *punto final*, and sacrifice the prosecutorial interest in general deterrence for the sake of future peace. This problem is especially acute in prosecuting leaders of a belligerent state.

For the followers, the lack of prosecutorial discretion is also a problem. There may be many hundreds of culpable soldiers, militia, and politicians in the Yugoslav situation. You cannot prosecute them all. In post-war Germany the problem was handled *sotto voce* by failure to act. But taking seriously the civil law principle of full prosecution would keep the Yugoslav Tribunal in business for years and years.

A pardon power resides in the political organs of every domestic constitution because there are times when stabilizing a situation to allow civic rebuilding may be more important than extended general deterrence or vindication of the past. In post-war Germany it was important to have war crimes trials as historical lesson and deterrent, and indeed some of us may believe that the prosecutions were unduly curtailed with the onset of the Cold War. But one cannot assume that full prosecution of all actors is possible in a civil conflict.

The statute of the Yugoslav Tribunal has not adequately provided for this reality. It only says in article 28 that if a defendant has been sentenced to a term and the domestic law of the country in which he was convicted provides for a pardon or commutation, then the president of the Tribunal can exercise similar power.\(^{16}\) There is no provision for conscientious choice of cases at the initiation level, or recognition that there might come a time when a broader amnesty or pardon is necessary. These are difficult decisions, and Ambassador Madeleine Albright has properly expressed the U.S. commitment to advance the war crimes prosecutions as far as humanly possible. But one might also surmise that the slow start of the Tribunal reflects a fear that the Tribunal’s work could impede the peace process. Most civil wars end with amnesty. This is a fact of history and political life. It does not serve the interests of candor to fail to address the matter.

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