

# COMMENTS IN THE INTERNATIONAL LAW ASSOCIATION PANEL ON THE YUGOSLAV TRIBUNAL: NOVEMBER 13, 1998

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I have been asked to assess briefly the track record of the Yugoslav tribunal. I would like to mention three aspects: the tribunal as an institution; the tribunal as a court of law; and, finally, the contribution of the tribunal to deterrence of crimes and to reconciliation between the peoples of the region. I will also want to make some comments on the role of the tribunal in the Kosovo situation.

Institutional aspects, first. The tribunal is a well-functioning and well-managed institution. Its output is good. Its technical, investigative and prosecutorial quality impressive. What is particularly important, is that the tribunal is no longer in danger of running out of defendants. Under strong international pressure, some defendants have surrendered or been surrendered to the tribunal; some have been captured *manu militari*, including by United States troops under the umbrella of the Stabilization Force and North American Treaty Organization (hereinafter NATO). Based on public indictments, twenty-seven persons are now in custody, while twenty-nine remain at large. Those at large include twenty-seven ethnic Serbs and two ethnic Croats. Altogether seventeen persons have been acquitted or had their charges dismissed.

Thus, most of those still at large are ethnic Serbs. The regimes of Milosevic and that of Pale have continued to resist cooperating with the Tribunal. Milosevic has consistently refused to recognize the competence of the tribunal.

Although some of the persons in custody are mid-level officials responsible for major offenses, the principal leaders responsible for atrocities are still free, including Mladic and Karadic, but they are forced to hide and their arrest remains a distinct possibility.

Although the tribunal has continued to enjoy major United States political, logistical, financial, logistical and intelligence support, the Security Council has not been consistently helpful. Verbal admonitions, even when made under Chapter VII, not accompanied by credible sanctions or threats of use of force have not proved adequate to force compliance. The need to back up international criminal tribunals with power, power of enforcement, has been demonstrated once again.

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I turn to the tribunal as a court of law. The tribunal has given a number of important decisions that clarify and give a judicial imprimatur to some rules of international humanitarian law. It elucidated some general principles of criminal law, such as duress and superior orders. It has given a significant impetus to development of customary law.

Its rulings, that the principles of the Hague law are applicable to non-international armed conflict and that apart from the limitations in its Statute, crimes against humanity are, under customary law, independent of any nexus with armed conflict, that crimes against humanity can be committed not only by states, but also by other organizations, are of historic importance and have already provided the foundation for the Rome Statute. The tribunal has thus had a considerable success in strengthening international law.

Given the newness of the tribunal, its achievements are praiseworthy and nitpicking is inappropriate. Nevertheless, some criticism might not be out of place, especially if it can contribute to course correction.

I believe that the appeals chamber in the 1995 Tadić interlocutory appeal on jurisdiction erred in leaving trial chambers to decide whether a particular accused was involved in an international or non-international armed conflict. This could have resulted in a crazy quilt of norms that would be applicable in the same conflict, depending on whether it is characterized as international or non-international. A potential was thus created for inconsistent and unequal treatment of the accused.

For cases considered non-international, the tribunal deprived itself of bringing in the grave breaches of the Geneva Conventions as treaty law. Moreover, it refused to bring in the grave breaches as customary law whose content parallels the pertinent provisions of the Geneva Conventions. The grave breaches of the Geneva Conventions, the core of international criminal law, was thus left out of the normative arsenal for cases deemed non-international.

I believe that the Court should have accepted the view of the prosecution and of the United States that the conflicts in Bosnia were international armed conflicts and that, therefore, the entirety of international humanitarian law was applicable.

Secondly, I believe that the Tadić 1997 trial chamber erred in applying the International Court of Justice's *Nicaragua* imputability test to whether conflicts in Bosnia were international or non-international. That resort was inappropriate because *Nicaragua* dealt with quite a different legal question, for example, whether the contras either constituted an organ of the United States government or were acting on its behalf for purposes of attribution and state responsibility. The question whether a conflict is an international armed conflict depends, as I explained in an *American Journal of International Law* editorial, on other considerations.

Finally, the Tribunal departed from the Nuremberg jurisprudence and customary law by holding that all crimes against humanity, not only

persecution, require discriminatory intent. The Statute of Rome follows a more correct position.

Let me now turn to the broader role of the tribunal. The great hope of the Tribunal's advocates was that decollectivization of guilt, placing responsibility on the leaders and the perpetrators of atrocities, rather than on whole communities, would help bring about peace and reconciliation. However, perhaps because of the inability or reluctance of the international community, to enforce the tribunal's orders, the tribunal has had no major impact on reconciliation.

Secondly, one of the tribunal's objectives was deterrence of violations of the law. Again, as Srebrenica and Kosovo amply demonstrate, the tribunal did not have any clear deterrent effect.

I am wondering whether Kosovo is not a case where a higher profile for the tribunal, especially a louder talk of indictments, would not have been in order. But, the real problem has been the inability of the Security Council, despite strong United States support, to force Milosevic to cooperate with the tribunal, especially with regard to visas for investigators. The most recent Security Council resolution on Kosovo, Resolution 1203, adopted under Chapter VII, calls for full cooperation with the tribunal, in regard to all atrocities against civilians, including compliance with orders, requests for information, and investigation.

Again, I am wondering whether visas and freedom of movement for the tribunal's investigators should not have been the special focus of Chapter VII resolutions, resolutions that should have been backed up by credible threats of sanctions. The fact that the Kosovo conflict is a non-international armed conflict, in addition to political considerations, may explain, but does not justify, the Security Council's timidity.

There are lessons to be learned here, for the future International Criminal Court as well. International justice and international criminal law are not just ethical statements. To be truly effective, and to serve as a real deterrent, they must be backed up by real power.