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THE JURISDICTION OF AN INTERNATIONAL CRIMINAL TRIBUNAL IN KOSOVO

Kerry R. Wortzel

I. INTRODUCTION

The International Criminal Tribunal for the Former Yugoslavia (ICTY) was established by the United Nations Security Council in 1993. International support for the Tribunal arose in response to public outrage at the reports of atrocities committed against men, women and children in the course of the conflict between Serbs, Bosnian Muslims and Croats.¹ Until recently, the Tribunal had focused almost exclusively on the crimes committed in what is now Bosnia-Herzegovina and Croatia.² This article will address the unique complications of enforcing the Tribunal's jurisdiction in Kosovo, which has been acknowledged by the international community, at least until very recently, as being within the sovereign territory of the new Yugoslavia (the Federal Republic of Yugoslavia, which includes the Republic of Serbia). The focus of this article is legal, rather than political, although the enforcement of war crimes prosecutions admittedly can be a very political process. Part II of this paper addresses the factual history of the conflict in Kosovo. Part III discusses the validity of the International Tribunal's jurisdiction in Kosovo. Part IV analyzes the Tribunal's jurisdiction with respect to individual crimes. Part V summarizes this discussion. An analysis of the Tribunal's jurisdiction must be divided between the period leading up to NATO's bombing campaign in March, 1999, and the period following its commencement, when the conflict arguably became an international conflict. As this article will discuss, the classification of the con-

¹ See Catherine Cisse, *The International Tribunals for the Former Yugoslavia and Rwanda: Some Elements of Comparison*, 7 *TRANSNAT'L L. & CONTEMP. PROBS.* 103, 104 (1997).

² See *id.* at 105.

flict as either internal or international ultimately determines the jurisdiction of the Tribunal to prosecute particular crimes.

II. FACTUAL HISTORY

A. *The Pre-NATO Conflict in Kosovo*

Kosovo itself is a province of Serbia, the dominant republic of Yugoslavia.³ As of late 1998, ninety percent of Kosovo's estimated two million population was made up of ethnic Albanians, most of whom are Muslims.⁴ Serbia is a republic contained within Yugoslavia, as were Bosnia-Herzegovina, Croatia, Macedonia and Montenegro prior to the collapse of the former Yugoslavia in the late 1980's.⁵ Prior to *Socialist* Yugoslavia's collapse (the former Yugoslavia known as the Socialist Federal Republic of Yugoslavia), the country was divided into six republics and two provinces, one of which was Kosovo.⁶ Under Josip Broz Tito in the 1970's, the province of Kosovo achieved some degree of political autonomy within socialist Yugoslavia and Serbia.⁷ Kosovo had its own representation - in the political framework permitted in Yugoslavia at the time - in federal and state bodies equal to that of the six Republics.⁸ The collapse of the former Yugoslavia occurred following the death of Tito during the 1980's. The exact date of its collapse is still subject to debate.⁹

Kosovo remained an autonomous province until 1989, when Slobodan Milosevic rose to power as president of Serbia. It was then that the Serbian parliament stripped Kosovo of its autonomous status.¹⁰ As part of an overall appeal to Serbian national-

³ See Charles Trueheart, *War Crimes Charge to be Announced Against Milosevic*, WASH. POST, May 27, 1999, at A1.

⁴ See John M. Goshko, *U.N. War Crimes Court to Probe Kosovo Deaths*, WASH. POST, Oct. 15, 1998, at A32; Guy Dinmore, *Some Serbs Quit Kosovo as NATO Issues Warnings*, WASH. POST, Oct. 2, 1998, at A29.

⁵ See Aleksa Djilas, *Imagining Kosovo: A Biased New Account Fans Western Confusion*, 77 FOREIGN AFFAIRS 5, Sept. 1, 1998, at 124.

⁶ See Julie Mertus, *Prospects for National Minorities under the Dayton Accords- Lessons from History: The Inter-War Minorities Schemes and the "Yugoslav Nations,"* 23 BROOK. J. INT'L L. 793, n. 35 (1998).

⁷ See *id.*

⁸ See *id.* at n. 169. See generally Djilas, *supra* note 5.

⁹ See Mertus, *supra* note 6, n. 25.

¹⁰ See Justin Brown, *Uncomfortable Peace in Kosovo Serb Leader says he'll comply with international demands and avoid NATO strikes*, CHRISTIAN SCIENCE

ist elements in Kosovo and Yugoslavia, Milosevic purged many Albanians from their jobs and turned over control of the police force to the Serbs.¹¹ From that point on, all police officers in Kosovo were Serbian.¹² Continued repression by Serbian authorities led ethnic Albanians in the region to form underground governments and schools, and eventually to the formation of the Kosovo Liberation Army (KLA) in the rural villages.¹³ The traditional hatred between Albanians and Serbs stems in part from their cultural and religious identities: most Albanians are traditionally Muslims, and most Serbs are traditionally Eastern Orthodox (as are many Russians).¹⁴

In the summer of 1997, Slobodan Milosevic was elected the president of the Federal Republic of Yugoslavia, rising from his previous position as the president of the Republic of Serbia, the dominant republic of Yugoslavia.¹⁵ On February 28, 1998, Milosevic launched an attack on the Kosovo Liberation Army guerrilla separatist movement.¹⁶ On the first day of the offensive, ten men from the same family were singled out in the town of Liksane.¹⁷ They were beaten and eventually executed. Their mutilated bodies were later returned to their families.¹⁸

As president of Serbia and then Yugoslavia, Milosevic is generally considered an instigator of the collapse of the former Yugoslavia and the resulting conflict in Bosnia-Herzegovina.¹⁹ When the United States decided to implement an agreement which eventually resulted in the Dayton accords, Richard Hol-

MONITOR, Oct. 14, 1998 at 1, 1998 WL 2371289; Mertus, *supra* note 6, at n. 25. See generally Djilas, *supra* note 5.

¹¹ See generally Brown, *supra* note 10.

¹² See R. Jeffrey Smith, *Kosovo Accord Eases Crisis; Foreign Inspectors, Overflights to Gauge Yugoslav Compliance*, WASH. POST, Oct. 14, 1998, at A1.

¹³ See generally Brown, *supra* note 10.

¹⁴ *Id.*; see also *Russian Volunteers Said to Aid Serbs*, RICHMOND TIMES DISPATCH, June 24, 1999, at A6.

¹⁵ See Justin Brown, *Yugoslav President Keeps Fading Political Options Open As World Powers Meet June 8 for Likely Cease-Fire Call*, CHRISTIAN SCIENCE MONITOR, at 6.

¹⁶ See *id.*

¹⁷ See Guy Dinmore, *Serbians Leave Sites of Civilians Slayings; Initial Probe Reveals Patterns of Atrocities*, WASH. POST, Oct. 1, 1998, at A32.

¹⁸ See *id.* at 6.

¹⁹ See Jonathan S. Landay, *Helping Kosovo's Refugees Before Winter is Only One Goal, U.S. Officials Say Privately*, CHRISTIAN SCIENCE MONITOR, Oct. 15, 1998, at 1. See generally Brown, *supra* note 15.

brooke directly bypassed the Bosnian Serb leaders and negotiated principally with Milosevic.²⁰ Milosevic himself dictated the Serbs' position and forced Bosnian Serb leaders into agreement.²¹ Milosevic is named by human rights groups as a war criminal with command authority over documented war crimes, and was indicted for crimes against humanity by the ICTY (International Criminal Tribunal for the Former Yugoslavia) in May 1999.²²

In August 1998, other reports of atrocities by Serbian forces against ethnic Albanians emerged from Kosovo.²³ These reports included the burning and destruction of homes and towns, and the killing of civilians.²⁴ Some reports indicated that in the southwestern Kosovo town of Orahovac, Serb forces killed a leader of the town's Halveti Shia Muslim sect and scores of his followers in the basement of their religious building.²⁵ Other reports told of Serbian paramilitary forces removing twelve truckloads of bodies from Orahovac on July 21, 1998 before western observers and reporters got there.²⁶

In September, 1998, an ethnic Albanian refugee who escaped to Germany reported that in May, Serbian policemen and soldiers "smashed down the door" of their Ljuberic house where he and his family were hiding.²⁷ All of the men in the family, a total of nine, were shot and killed on site. The refugee survived a gunshot wound to the stomach with help from a neighbor, and retold the story two months later when he made it to Germany.²⁸ According to reports by Amnesty International, the refugee's family was not targeted for anti-government activities, but merely as "an act of revenge for the shootings of several Serb policemen or civilians by members of the Kosovo Libera-

²⁰ See Mertus, *supra* note 6, at n. 148. See, e.g., Warren Bass, *The Triage of Dayton*, 77 FOREIGN AFFAIRS, Sept. 1, 1998, at 95, 1998 WL 14795989.

²¹ See Bass, *supra* note 20, at 95; Mertus, *supra* note 6, at n. 148.

²² See *id.*; Charles Trueheart, *Charges Against Milosevic Detailed*, WASH. POST, May 28, 1999, at A1.

²³ See Laura Rozen, *What Does the U.S. Know About Atrocities in Kosovo*, CHRISTIAN SCIENCE MONITOR, Aug. 26, 1998, at 11, WL 2370206.

²⁴ See *id.*

²⁵ See *id.*

²⁶ See *id.*

²⁷ See R. Jeffery Smith, "We Will Kill You All": A Kosovo Survivor's Tale; *Ethnic Albanian Tells of Massacre by Serbs*, WASH. POST, Sept. 26, 1998, at A1.

²⁸ See *id.*

tion Army.”²⁹ Some of the wounds at the scene were confirmed by a video of the site taken after the massacre and smuggled to Albania.³⁰

As of the middle of October 1998, an estimated 700 to 750 ethnic Albanians had been killed. Some estimates put the death toll as high as 1,532.³¹ Another 250,000 to 400,000 ethnic Albanians had been forced from their homes.³² Many of those have found shelter in towns across Yugoslavia’s border in Albania, Macedonia, and Montenegro.³³ However, as of September, 1998, 50,000 of those refugees were without shelter.³⁴ Two hundred villages had been completely destroyed as of that date.³⁵

One of the most clearly documented cases of atrocities to date occurred in late September 1998, in the town of Gornje Obrinje, Yugoslavia.³⁶ There, nineteen ethnic Albanian civilians were executed by Serbian police units following the killing of seven policemen by KLA guerrillas.³⁷ Other reports put the number as high as twenty-eight.³⁸ Most of those killed were women, children and the elderly.³⁹ All were killed either by having their throats cut or by a bullet in the back of the head.⁴⁰ The youngest killed was eighteen months old. Her throat had

²⁹ *Id.*

³⁰ *See id.*

³¹ *See* Justin Brown, *Airstrikes in Kosovo May Just Fuel More Fighting in Kosovo, Analysts Say*, CHRISTIAN SCIENCE MONITOR, Oct. 5, 1998, at 5; *see also* Smith, *supra* note 27, at A1.

³² *See id.*; *see* Thomas W. Lippman, *U.S., NATO Preparing to Strike Yugoslavia; Serb Atrocities Raise Urgency on Kosovo*, WASH. POST, Oct. 1, 1998, at A1; Guy Dinmore, *Some Serbs Quit Kosovo as NATO Issues Warnings*, WASH. POST, Oct. 2, 1998, at A29. *See generally* Landay, *supra* note 19.

³³ *See generally* Dinmore, *supra* note 32.

³⁴ *See* Guy Dinmore, *New Kosovo Massacre May Spur NATO to Act*, WASH. POST, Sept. 30, 1998, at A1.

³⁵ *See id.*

³⁶ *See id.*

³⁷ *See id.*

³⁸ *See* Jonathan S. Landay, *After Kosovo Killings, What? Evidence of New Atrocities Tempts NATO to Strike Hard. But Hints of a Serb Withdrawal, However Brutal, Forces Delay*, CHRISTIAN SCIENCE MONITOR, Oct. 1, 1998, at 1.

³⁹ *See id.*

⁴⁰ *See id.*

been slit.⁴¹ One twenty-eight-year-old woman who was eight months pregnant had her belly cut open.⁴² Diplomats and journalists had the opportunity to observe the results of the massacre.⁴³

Within days of the massacre in Gornje Obrinje, fourteen men were executed by Serbian police in a nearby farm compound.⁴⁴ Many farms in the region were torched and cattle killed as police withdrew from the region before the declaration of a unilateral cease-fire by the Serbian government.⁴⁵ Other allegations of rape and torture continued to surface.⁴⁶ These included allegations by diplomats in the region that there were special units of Serbian police created to carry out atrocities in order to terrorize civilians into breaking their links with KLA rebels.⁴⁷ These allegations have also been made by the United Nations Security Council itself.⁴⁸ Representatives for the international criminal tribunal in the Hague were already interviewing survivors of the massacres in late 1998.⁴⁹

On October 1, 1998, Zivadin Joyanovic, the foreign minister of Yugoslavia, did not deny that atrocities had occurred, but told Washington Post editors and reporters that "there is no indiscriminate killing of civilians. There is only a struggle against terrorism. Sometimes this leads to the abuse of civilians."⁵⁰ Yugoslavian government spokesman Radovan Urosevac also denied that Serbian forces have committed atrocities, but confirmed that Serbian troops completely ignored an "Interior Ministry order" not to torch the homes of ethnic Albanians.⁵¹

⁴¹ See *id.*; see also Peter Finn, *Massacre Haunts Child Survivors; Kosovo Refugees Await Aid as NATO Grants Serbs 10-Day Reprieve*, WASH. POST, Oct. 17, 1998, at A1.

⁴² See generally Finn, *supra* note 41.

⁴³ See *id.*

⁴⁴ See generally Dinmore, *supra* note 17.

⁴⁵ See *id.*

⁴⁶ See *id.*; Finn, *supra* note 41.

⁴⁷ See generally Dinmore, *supra* note 17.

⁴⁸ See R. Jeffrey Smith, *Yugoslavia Trims Kosovo Presence; Tanks Ordered Out; Troops Start Leave*, WASH. POST, Oct. 4, 1998, at A29.

⁴⁹ See generally Dinmore, *supra* note 17.

⁵⁰ See generally Lippman, *supra* note 32.

⁵¹ See generally Smith, *supra* note 12.

B. *Events Following the Commencement of NATO's Bombing Campaign*

On March 24, 1999, following a series of failed agreements with the Yugoslav government, NATO began a seventy-six-day bombing campaign designed to end the campaign of ethnic violence in Kosovo. Instead of ending the atrocities, the violence intensified. The Serb's response took many in NATO by surprise.⁵² Serbian military, paramilitary and security forces, as well as Serb civilians, reacted directly against ethnic Albanian civilians in an attempt to either kill them off or drive them out of Kosovo.⁵³ Albanians were indiscriminately executed, and their homes were burned and destroyed.⁵⁴ As of May 27, 1999, approximately 800,000 ethnic Albanians had been forcefully driven from their homes by Serb forces in an attempt to deport most of the Albanian population of Kosovo from the province's borders.⁵⁵ Thousands more were executed.⁵⁶ Reports indicated a pattern whereby Serbs would pin residents indoors by shelling or sniper fire, and then go door to door to kill or remove Albanian residents from their homes.⁵⁷ Men would be separated from their families, entire villages would be burned, and survivors would be forced to move on.⁵⁸ The ICTY's May 27, 1999 indictment against Slobodan Milosevic identified seven sites of large-scale executions and at least 340 victims.⁵⁹

In June, 1999, after Serb forces agreed to withdraw from Kosovo, NATO forces discovered evidence of the atrocities as they took control of the province. On June 14, 1999, NATO troops discovered an apparent mass grave site containing as many as one hundred bodies in the town of Kacanik.⁶⁰ Ethnic Albanian survivors described a scene in early April, 1999, when Serbian troops went from house to house killing Albanians in

⁵² See Thomas W. Lippman & Dana Priest, *NATO Agrees to Target Belgrade*, WASH. POST, March 31, 1999, at A1.

⁵³ See *id.*

⁵⁴ See *id.*

⁵⁵ See *supra* note 3; see Trueheart, *supra* note 22.

⁵⁶ See *id.*

⁵⁷ See *id.*

⁵⁸ See *id.*

⁵⁹ See *id.*; Charles Trueheart, *War Crimes Court Set to Start Kosovo Probe*, WASH. POST, June 10, 1999, at A22.

⁶⁰ See R. Jeffrey Smith, *In a Village, Signs of a Massacre*, WASH. POST, June 15, 1999, at A1.

response to the killing of seventeen Serbian soldiers in a firefight the previous day.⁶¹ In the town of Vlastica, reporters recorded the story of thirteen-year-old Vjore Shabani, who described the day when her family and two others were lined up in a house and shot in the head one at a time. Thirteen people were killed, including her mother, father, and two-year-old brother.⁶² Vjore was wounded, but survived.⁶³ In the town of Cikatova, eighty ethnic Albanian men were reportedly executed by Serbian troops on May 1, 1999, buried in a mass grave, then later removed by Serbian troops and placed in individual graves.⁶⁴ NATO and Tribunal personnel continue to discover and collect physical and testimonial evidence of the violence that took place.⁶⁵

As noted earlier, the Tribunal indicted Slobodan Milosevic and four other high-level officials for planning, instigating, and aiding and abetting "a campaign of terror and violence directed at Kosovo Albanian citizens."⁶⁶ Milosevic, along with the others, was placed in the chain of command responsible for the campaign by U.S. and other classified data.⁶⁷ Milosevic and the others were indicted for crimes against humanity and violations of the laws or customs of war, but not for genocide.⁶⁸ One former CIA analyst noted that western intelligence information indicated that the entire campaign of "ethnic cleansing" was planned at least six months before it took place, with Milosevic at the top of the chain of command.⁶⁹

III. VALIDITY OF THE EXISTENCE OF THE ICTY AND ITS REACH INTO KOSOVO

In 1993, The United Nations Security Council passed a formal resolution to establish an international tribunal to prose-

⁶¹ See *id.*

⁶² See Peter Finn, David Dinkel, R. Jeffrey Smith & Michael Dobbs, *A Landscape of Ruin, Across Kosovo, Death at Every Turn, Brutal Campaign Litters Countryside with Bodies, Bones*, WASH. POST, June 16, 1999, at A1.

⁶³ See *id.*

⁶⁴ See *id.*

⁶⁵ See *id.*

⁶⁶ See Trueheart, *supra* note 22.

⁶⁷ See *id.*

⁶⁸ See *id.*

⁶⁹ See *id.*

cute persons for violations of “war crimes” in the former Yugoslavia.⁷⁰ As a result of the resolution, the International Criminal Tribunal for the Former Yugoslavia (ICTY) was established. The ICTY is considered a subsidiary organ of the United Nations.⁷¹ The legal basis for the Security Council’s power to establish the Tribunal is set out in Chapter VII of the Charter of the United Nations.⁷² Chapter VII of the U.N. Charter empowers the Security Council to take actions to maintain and restore international peace and security.⁷³ Article 39 of the U.N. Charter opens Chapter VII, and states that

The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain and restore international peace and security.⁷⁴

Article 41 lists a range of possible enforcement measures:

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. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.⁷⁵

While other articles empower the Security Council to use force,⁷⁶ Article 39 is the legal basis for the creation of the international criminal tribunals in the former Yugoslavia and

⁷⁰ See *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808* (1993), U.N. SCOR, U.N. Doc. S/25704 (1993), at para. 18 [hereinafter Secretary-General’s Rep.].

⁷¹ See Cisse, *supra* note 1, at 106; see also *Prosecutor v. Tadic*, Case No. IT-94-1-T, para. 37-38 (Oct. 2, 1995) (Appeals Chamber, International Criminal Tribunal for the former Yugoslavia) (visited Oct. 15, 1999) reprinted in <<http://www.un.org/icty/tadic/appeal/decision-e/ace1-1.htm>> [hereinafter Tadic].

⁷² See Secretary-General’s Rep., *supra* note 70, at para. 24; see also Tadic, *supra* note 73, at para. 28. Monroe Leigh, *Report on the International Tribunal to Adjudicate War Crimes Committed in the Former Yugoslavia*, 1993 A.B.A. SEC. INT’L. L. & P. 10 [hereinafter ABA Rep.].

⁷³ See U.N. CHARTER ART. 7. See ABA Rep., *supra* note 72, at 10.

⁷⁴ U.N. CHARTER, art. 39.

⁷⁵ U.N. CHARTER, art. 41.

⁷⁶ See Henry H. Perritt, *Kosovo: Internal Conflict, International Law*, 144 CHI. DAILY L. BULL. 5, July 24, 1998; see, e.g., U.N. CHARTER, art. 43.

Rwanda.⁷⁷ The examples of enforcement measures in Article 41 are merely “illustrative,” and do not exclude other enforcement measures.⁷⁸ The only restriction under Article 41 is that the measures do not involve the “the use of force.” An *ad hoc* international criminal tribunal has been determined to be an appropriate enforcement measure which does not involve the “use of force.”⁷⁹ The actual capture of fugitives may indeed involve the use of force, but this in itself may be justified under Article 43 of the U.N. Charter.

In the context of Kosovo, considered to be within the sovereign territory of the Federal Republic of Yugoslavia (the new Yugoslavia), the question arises as to what constitutes a “threat to *international* peace and security.” The massive refugee flows from Kosovo into the neighboring countries of Albania and Macedonia arguably pose such a threat, and did so long before NATO’s bombing campaign.⁸⁰ Long before the NATO campaign, there was real concern on the part of the United States and others in the international community that the mass of Albanian refugees would destabilize the relatively new and fragile democracy in Macedonia.⁸¹ The massive refugee movements in Rwanda in 1994 supplied one of the principal justifications for the Security Council’s decision to act during the Rwandan massacres.⁸² In addition, even clearly internal armed conflicts and civil wars can constitute “threats to international peace and security” according to the settled practice of the United Nations.⁸³ The Appeals Chamber in *Prosecutor v. Tadic* cited the United

⁷⁷ See ABA Rep., *supra* note 72, at 10; see also *Prosecutor v. Kanyabashi*, Case No. ICTR-96-15-T, June 18, 1997 (reported in Virginia Morris, *Prosecutor v. Kanyabashi*, 92 AM. J. INT’L L. 66 (1998)).

⁷⁸ See ABA Rep., *supra* note 72, at 10; *Tadic*, *supra* note 71, at para. 35.

⁷⁹ See *id.*

⁸⁰ See Ferritt, *supra* note 76, at 2; see generally Dinmore, *supra* note 32.

⁸¹ See Jonathan S. Landay, *Helping Kosovo’s Refugees Before Winter is Only One Goal, US Officials Say Privately*, CHRISTIAN SCIENCE MONITOR, Oct. 15, 1998, at 1.

⁸² See Virginia Morris, *International Criminal Tribunal For Rwanda . . .*, 92 AM. J. INT’L L. 66, 67-68, n.6 (1998)(quoting from *Prosecutor v. Kanyabashi*, Case No. ICTR-96-15-T, June 18, 1997).

⁸³ See *Prosecutor v. Tadic*, Case No. IT-94-1-T, at para. 37-38 (Oct. 2, 1995) (Appeals Chamber, International Criminal Tribunal for the Former Yugoslavia) (visited Oct. 15, 1999) reprinted in <<http://www.un.org/icty/tadic/appeal/decision-e/ace-1.htm>>.

Nations' treatment of the recent crises in Liberia and Somalia as examples of such threats.⁸⁴

Finally, the Statute for the ICTY ("the Statute") is itself very clear and unqualified as to the Tribunal's geographic and temporal jurisdiction. Article 1 of the Statute states: "The International Tribunal 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."⁸⁵ The Federal Republic of Yugoslavia, and Serbia and Kosovo contained within it, fall within the territory of the former Yugoslavia (as do Bosnia-Herzegovina and Croatia), and thus well within the Tribunal's geographic jurisdiction.⁸⁶ A new tribunal specifically created for the province of Kosovo is not necessary. This is important because the creation of a new tribunal is subject to a veto by the permanent members of the U.N. Security Council. If the creation of a new tribunal were legally required, it is likely that its creation would be subject to vetoes by Russia and (probably) The Peoples Republic of China.

IV. THE ISSUE OF CONCURRENT JURISDICTION AND THE PRIMACY OF THE INTERNATIONAL CRIMINAL TRIBUNAL

The Statute of the ICTY provides that while the Tribunal and national courts have concurrent jurisdiction over "serious violations of international humanitarian law," the international tribunal "shall" have primacy over national courts.⁸⁷ In the Report of the Secretary General of the United Nations pursuant to Security Council Resolution 808, the Secretary General noted that while national courts are encouraged to exercise jurisdiction with respect to such crimes, the ICTY may at any time request the national courts to defer to its competence.⁸⁸

⁸⁴ See *id.* at para. 30.

⁸⁵ *Statute on the International Tribunal for Kosovo, Annex to Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, U.N. SCOR, U.N. Doc. S/25704 (1993)[hereinafter ICTY Statute]; see also Goshko, *supra* note 4, at 32.

⁸⁶ See VIRGINIA MORRIS & MICHAEL SCHARF, AN INSIDER'S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 117-18 (1995)[hereinafter MORRIS & SCHARF].

⁸⁷ ICTY Statute, *supra* note 85, art. 9(1),(2).

⁸⁸ See Secretary-General's Rep., *supra* note 70, at para. 64, 65.

Exercising criminal jurisdiction is considered an "essential element" of state sovereignty, and the U.N. Security Council's power to assert its primacy is limited to situations where the Security Council has in some way exercised its power under Chapter VII of the U.N. Charter.⁸⁹ As the trial chamber noted in *Prosecutor v. Kanyabashi* (a case under the Rwandan tribunal), Chapter VII of the U.N. Charter empowers a tribunal to exercise primacy without the consent of the State in question.⁹⁰ In making its holding, the Chamber applied principles spelled out by the Appeals Chamber in *Prosecutor v. Tadic*, Decision on Jurisdiction, Case No. IT-94-1-AR72.⁹¹ The Appeals Chamber serves as the appellate body for both the tribunals in the former Yugoslavia and Rwanda.⁹²

In *Tadic*, one of the Appeals Chamber's justifications for exercising primacy in Bosnia-Herzegovina was that the relevant territory, the Republic of Bosnia and Herzegovina, had *approved* the jurisdiction of the ICTY.⁹³ This was also the case in Rwanda, which originally requested the creation of the ICTR, although it did vote against the actual resolution creating it.⁹⁴ This was not the case, however, with the Federal Republic of Yugoslavia (the new Yugoslavia containing Serbia and Kosovo).

While *consent* is one justification given for the exercise of primacy, another important justification for the exercise of the Tribunal's primacy over the sovereignty of a nation-state is the principle of *Universal Jurisdiction*.⁹⁵ The underlying principle of universal jurisdiction is that some crimes are so egregious as to give *all* states jurisdiction over the accused to ensure that

⁸⁹ See MORRIS & SCHARF, *supra* note 86, at 126; U.N. CHARTER at 51, para.1.

⁹⁰ See *Kanyabashi*, *supra* note 77, at 69; see also MORRIS & SCHARF, *supra* note 86, at 126-27 ("States are not precluded from exercising jurisdiction over the crimes covered by the Statute by virtue of the establishment of the International Tribunal. However, the International Tribunal may *preempt* a national court by asserting primacy of jurisdiction in a particular case under Article 9(2) of the Statute . . . [I]t is for the International Tribunal to decide whether to assert its primacy of jurisdiction and thereby *supercede* the criminal jurisdiction of a national court in a particular case.") *Id.*

⁹¹ See generally *Tadic*, *supra* note 71.

⁹² See Cisse, *supra* note 1, at 111.

⁹³ See *Tadic*, *supra* note 71, at para. 56.

⁹⁴ See Cisse, *supra* note 1, at 107.

⁹⁵ See *Tadic*, *supra* note 71, at para. 57.

those who commit such crimes answer for them.⁹⁶ This prosecution is theoretically permitted to take place regardless of whether there is any connection between the prosecuting state and the offender.⁹⁷ The rationale is that “there exist certain offenses, which to their very nature, affect the interests of all states, even when committed in another state or against another state, victim or interest. . . . Thus, the principle of universal jurisdiction assumes that each state has an interest in exercising jurisdiction to combat offenses which all nations have condemned.”⁹⁸ The same principle was noted by the United States Sixth Circuit Court of Appeals in *Demjanjuk v. Petrovsky*:⁹⁹ “This ‘universality principle’ is based on the assumption that some crimes are so universally condemned that the perpetrators are enemies of all people. Therefore, any nation which has custody of the perpetrators may punish them according to law applicable to such offenses.”¹⁰⁰

The Appeals Chamber in *Tadic* clearly utilized this principle in support of the tribunal’s primacy in the former Yugoslavia:

It would be a travesty of law and a betrayal of the universal need for justice, should the concept of State sovereignty be allowed to be raised successfully against human rights. Borders should not be considered as a shield against the reach of the law and as a protection for those who trample underfoot the most elementary rights of humanity Indeed, when an international tribunal such as the present one is created, it *must* be endowed with primacy over national courts. Otherwise, human nature being what it is, there would be a perennial danger of international crimes being characterized as “ordinary crimes” . . . or proceedings being

⁹⁶ See M. CHERIF BASSIOUNI, *CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW* 512-513 (1992) [hereinafter BASSIOUNI].

⁹⁷ See *id.*; see also MORRIS & SCHARF, *supra* note 86, at 122 n. 370.

⁹⁸ BASSIOUNI, *supra* note 96, at 512-13.

⁹⁹ See *Demjanjuk v. Petrovsky*, 776 F.2d 571, 582 (6th Cir. 1985) (holding that the universality principle justified the State of Israel’s prosecution of Demjanjuk for alleged atrocities during World War II, as well the United States’ extradition of the defendant to Israel), *vacated on other grounds*, *Demjanjuk v. Petrovsky*, 10 F.3d 338 (6th Cir. 1993).

¹⁰⁰ *Id.*

“designed to shield the accused,” or cases not being diligently prosecuted¹⁰¹

The universal jurisdiction principle exists in part to permit prosecution of those defendants who would not normally be pursued criminally in their own territories,¹⁰² even though a state which does not prosecute such an offense can be held internationally responsible.¹⁰³ The universality theory has long been used as a justification for prosecuting the crime of piracy on the high seas where the crimes were not committed in a country's territorial waters.¹⁰⁴

The principle of universal jurisdiction is not universally accepted, but it is recognized by such countries as Israel,¹⁰⁵ Australia and Canada.¹⁰⁶ This principle has also been recognized in the United States.¹⁰⁷ However, as will be discussed in a later section, the universality principle, even when

¹⁰¹ See Tadic, *supra* note 71, at para. 58. But see Tara Sapru, *Into the Heart of Darkness: The Case Against the Faray of the Council Tribunal into the Rwanda Crisis*, 32 TEX. INT'L L. J. 329, 350. Sapru argues that Common Article 3 (of the Geneva Conventions) and Protocol II were designed specifically to address internal “strife,” and that no universal jurisdiction arises automatically - state acquiescence is required. See *id.* at 350. He notes that the preliminary drafts of Article 3 and Protocol II contained provisions with language requiring mandatory compliance, but that these provisions were subsequently removed because of fears of foreign intervention in internal wars. See *id.*

¹⁰² See Tadic, *supra* note 71, at para. 58; MORRIS & SCHARF, *supra* note 88, at 122.

¹⁰³ See RÜDIGER WOLFRUM, THE DECENTRALIZED PROSECUTION OF INTERNATIONAL OFFENCES THROUGH NATIONAL COURTS, IN WAR CRIMES IN INTERNATIONAL LAW 233, 235-36 (Yoram Dinstein & Mala Tabory eds., 1996) [hereinafter WOLFRUM].

¹⁰⁴ See MORRIS & SCHARF, *supra* note 86, at 122, n. 370; BASSIOUNI, *supra* note 96, at 518.

¹⁰⁵ See Attorney General of Israel v. Eichmann, 36 INTERNATIONAL LAW REPORTS 277, 290-93 (Isr. S. Ct. 1962).

¹⁰⁶ See BASSIOUNI, *supra* note 96, at 511.

¹⁰⁷ See Demjanjuk v. Petrovsky, 776 F.2d 571, 581-83 (6th Cir. 1985), *vacated on other grounds*, Demjanjuk v. Petrovsky, 10 F.3d 338 (6th Cir. 1993); United States v. Layton, 509 F. Supp. 212, 221-24 (N.D. Ca. 1981). The biggest concern on the part of the United States with the primacy issue is the potential for U.S. citizens and soldiers to be brought within the jurisdiction of an international criminal court or war crimes tribunal. See also James Podgers, *War Crimes Court Under Fire*, 84 A.B.A. J. 64, 66-68 (1998). Some supporters of an international criminal court say that the U.S.'s concerns with primacy are unwarranted, especially in light of the U.S.'s veto power on the Security Council. See *id.* However, in January 2000, the chief prosecutor of the ICTY announced that she was reviewing the possibility that war crimes were committed by NATO forces during the Kosovo

accepted, clearly does not apply to all crimes described as "war crimes."

In the Federal Republic of Yugoslavia, it appears unlikely that those responsible for various atrocities will be prosecuted by the government. Even if some individuals are prosecuted, the integrity of the proceedings in light of the political environment in Serbia and Yugoslavia comes into question. Not only has Milosevic thus far refused to support the Tribunal's jurisdiction, but any decision otherwise on his part puts his own political position within his country in jeopardy.¹⁰⁸ Furthermore, Milosevic himself has been implicated in crimes in Kosovo and the other territories in the former Yugoslavia.¹⁰⁹ Primacy of the Tribunal in Kosovo would appear to be a necessary prerequisite to seeing any alleged war criminals brought to justice.¹¹⁰

The holding of the Appeals Chamber in *Tadic* indicates that the primacy of the Tribunal in Yugoslavia and Kosovo will not be a concern from a legal standpoint. Whether the Tribunal will be able to carry out its mandate, in Kosovo or in the other territories of the former Yugoslavia, remains to be seen.

campaign. See Charles Trueheart, *Professors Pursue War-Crimes Case Against Nato*, WASH. POST, Jan. 20, 2000, at A15.

¹⁰⁸ See Justin Brown, *'Unsolved' Kosovo Plays to Survival of Milosevic Yugoslav President Keeps Fading Political Options Open as World Powers Meet June 8 for Likely Cease-Fire Call*, CHRISTIAN SCIENCE MONITOR, July 8, 1998, at 6. See generally Goshko, *supra* note 4.

¹⁰⁹ See Mertus, *supra* note 6, at n.148; Trueheart, *supra* note 22.

¹¹⁰ See MORRIS & SCHARF, *supra* note 86, at 133; ICTY Statute, *supra* note 85, at art. 10. (It should be noted that the principle of *non bis in idem* does restrict the Tribunal's exercise of primacy over national courts. *Non bis in idem* is the fundamental principle of criminal law that provides that a person may not be tried and/or punished twice for the same crime. This principle is clearly reflected in Article 10 of the ICTY Statute. However, Article 10 sets out two exceptions which would nevertheless permit an assertion of primacy. First, if a person was tried for an act constituting an ordinary crime, that person may be tried again for the same act constituting a different crime under the Statute. An example is an act which constitutes the crime of murder or rape under national law, and also constitutes the crime of genocide under international law. Second, if the national court proceedings "were not impartial or independent, were designed to shield the accused from international criminal responsibility," or were not "diligently prosecuted," the accused may be tried again by the Tribunal). See *id.*

V. SUBJECT MATTER JURISDICTION OVER THE CRIMES ALLEGED

The Statute for the International Criminal Tribunal in the former Yugoslavia divides punishable crimes into four general categories: Grave breaches of the Geneva Conventions of 1949 (Article 2), Violation of the laws or customs of war (Article 3), Genocide (Article 4), and Crimes against humanity (Article 5).¹¹¹ A critical element in the Tribunal's ability to punish violations of *some* of these crimes is whether the conflict can be characterized as internal or international.¹¹² This is particularly critical in the case of Kosovo, which, at least until very recently, was viewed by the international community as within the sovereign territory of the Federal Republic of Yugoslavia:

Kosovo is not Bosnia in one crucial respect: Bosnia was an independent nation and had been recognized as such by major European powers and the United States. Kosovo is not. It is part of Serbia, and thus as a formal matter, the disputes between the Serbian government and the Kosovo rebels are internal matters, within sovereign prerogatives of the Serbian government. One of the clearest principles of international law, now enshrined in Article 2(4) of the United Nations charter, is that other countries must not interfere in the internal affairs of a sovereign nation.¹¹³

When some of the crimes alleged in Croatia and Bosnia-Herzegovina occurred, both territories had not only declared their independence, but also received international recognition of their status.¹¹⁴ That had not occurred with respect to Kosovo prior to the NATO campaign, nor is Kosovo's status as fully independent formally recognized by the international community at this time.¹¹⁵ In addition, there is little, if any allegation that the conflict involved parties outside of the territory of the Federal Republic of Yugoslavia itself prior to the NATO bombardment. While refugees have streamed across its borders, potentially creating a "*threat* to international peace and secur-

¹¹¹ See ICTY Statute, *supra* note 85, at art. 2-5.

¹¹² See MORRIS & SCHARF, *supra* note 86, at 57.

¹¹³ Henry H. Perritt, *Kosovo: Internal Conflict, International Law*, 144 CHI.DAILY L.BULL. 5, July 24, 1998.

¹¹⁴ See MORRIS & SCHARF, *supra* note 86, at 58.

¹¹⁵ See *generally* Perritt, *supra* note 76.

ity,”¹¹⁶ this must be distinguished from a situation in which parties *outside* the sovereign boundaries of Yugoslavia are themselves participating in the armed conflict to a significant extent.¹¹⁷ While a threat to international peace and security establishes the right of the Security Council to act to restore peace, it does not automatically establish the Tribunal’s jurisdiction to punish all of the crimes alleged. This section addresses which of the crimes may or may not be enforced by the tribunal based on the international or internal nature of the conflict. The crimes that allegedly took place must necessarily be divided between those that occurred prior to NATO’s military action, when the conflict could still be characterized as internal, and those that took place once the bombardment had begun, when the conflict arguably became international in nature.

A. *Grave Breaches of the Geneva Conventions of 1949*

Article 2 of the ICTY Statute sets out the Grave Breaches crimes punishable by the Tribunal. As the title indicates, they are taken from the Geneva Conventions of 1949. Grave breaches include:

- (a) wilful killing;
- (b) torture or inhuman treatment, including biological experiments;
- (c) willfully causing great suffering or serious injury to body or health;
- (d) extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
- (e) compelling a prisoner of war or a civilian to serve in the forces of a hostile power;

¹¹⁶ See *id.*

¹¹⁷ See ICTY Statute, *supra* note 85, at art.5. Much of the ICTY Statute requires some form of armed conflict, at least as far as the crime of Crimes Against Humanity is concerned. “Armed conflict” is defined very broadly: “[A]n armed conflict exists whenever there is a resort to armed forces between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.” See also Tadic, *supra* note 71, at para. 70. This definition would apply at least from the time of the commencement of Milosevic’s offensive against the Kosovo Liberation Army in late February, 1998. *Id.*

- (f) wilfully depriving a prisoner of war or a civilian of the rights of fair and regular trial;
- (g) unlawful deportation or transfer or unlawful confinement of a civilian;
- (h) taking civilians as hostages.¹¹⁸

“Grave breaches” is obviously a broad area, and covers many of the crimes alleged against the Federal Yugoslav Army and police force in Kosovo. The critical issue is that the grave breaches provisions of the Geneva Conventions are directed toward *international* wars.¹¹⁹ The Appeals Chamber in *Tadic* outlined the rationale behind the internal/international distinction:

The international armed conflict requirement was a necessary limitation on the grave breaches system in light of the intrusion on State sovereignty that such mandatory universal jurisdiction represents. State parties to the 1949 Geneva Conventions did not want to give other States jurisdiction over serious violations of international humanitarian law committed in their internal armed conflicts - at least not the mandatory universal jurisdiction involved in the grave breaches system.¹²⁰

While the United States has argued that Article 2 also applies to armed conflicts that are internal in character, the Appeals Chamber in *Tadic* held that the argument was unsupported by any authority.¹²¹ The grave breaches provisions appear to be so encompassing that it would seem very difficult to prosecute war criminals if the crimes in question were committed within Kosovo prior to the NATO campaign. If the rules under Article 2 are not applicable, prosecutions under the crimes of Genocide and Crimes Against Humanity may be the sole source of criminal prosecution for the alleged atrocities.¹²² It is not clear whether these crimes will fill the gaps left by the inapplicability of Article 2.

¹¹⁸ ICTY Statute, *supra* note 85, at art. 2.

¹¹⁹ See THEODOR MERON, *The Normative Impact on International Law of the International Tribunal for the Former Yugoslavia, in War Crimes in International Law* 211, 214; see also *Tadic*, *supra* note 71, at para. 84.

¹²⁰ See *id.* at para. 80.

¹²¹ See *id.* at para. 83.

¹²² See MORRIS & SCHARF, *supra* note 86, at 57.

The events of recent months - late March to the present - arguably created a different *legal* environment. NATO's military action in Serbia and Kosovo has expanded what was essentially an internal armed conflict into one that can be characterized as international.¹²³ In addition, the involvement of NATO rather than the U.N. Security Council might be significant. If military action had been pursued under the auspices of the Security Council, there might have been a tenuous argument that an enforcement action by the United Nations against one country did not constitute an "international armed conflict" contemplated by the Geneva Conventions. However, no such argument exists in an action carried out by NATO, which is specifically a European/American military alliance with restricted membership. At the same time, it is important to recognize that the events of recent months have no retroactive application to the crimes that occurred prior to the commencement of NATO's bombing campaign. The national/international distinction remains important with regard to the prosecution of such crimes. Crimes falling solely under the grave breaches provisions of Article 2 that occurred prior to the NATO campaign would likely not be punishable by the ICTY.

Finally, other defenses exist that may further complicate the prosecution of defendants under the grave breaches provisions. A defendant for example might argue that an ethnic Albanian does not have the status of a "victim" under the grave breaches provisions of Article 2. As the Appeals Chamber noted in the Tadic appeal in July, 1999, Geneva Convention IV (upon which the grave breaches provisions are based) "intended to

¹²³ See Prosecutor v. Tadic, Case No. IT-94-1-T, July 15, 1999, at para. 84. (Appeals Chamber, International Tribunal for the former Yugoslavia.) (visited Oct. 15, 1999) <<http://www.un.org/icty/tadic/appeal/judgement/Tadic9julyacc.html>> [hereinafter Tadic Judgment]. The definition of an "international" conflict is a relatively broad one, as was noted by the Appeals Chamber as recently as July, 1999 when Dusko Tadic appealed his conviction:

[A]n armed conflict is international if it takes place between two or more States. In addition, in case of an internal armed conflict breaking out on the territory of a State, it may become international (or, depending upon the circumstances, be international in character alongside an internal armed conflict) if (i) another State intervenes in that conflict through its troops, or alternatively if (ii) some of the participants in the internal armed conflict act on behalf of that other State.

Id.

protect civilians (in enemy territory, occupied territory or the combat zone) who do not have the nationality of the belligerent in whose hands they find themselves, or who are stateless persons.”¹²⁴ A Serb defendant might therefore argue that ethnic Albanians in Kosovo are citizens of Yugoslavia, and therefore not technically “victims” because they do not have the same ethnicity as Serbs. However, the Appeals Chamber also noted that another protected group are people who “are refugees and thus no longer owe allegiance to [the belligerent] and no longer enjoy its diplomatic protection”¹²⁵ In dicta, the Appeals Chamber also noted that in the context of Yugoslavia, ethnicity may ultimately be the deciding factor in determining one’s “allegiance” in connection with establishing one’s status as a victim under Article 2.¹²⁶ Ultimately, this defense may therefore be unsuccessful, but it nevertheless exists as a potential roadblock for the prosecution of crimes under Article 2.

B. *Violations of the Laws or Customs of War*

Article 3 states that such crimes “shall include, but not be limited to:”

- (a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering;
- (b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity;
- (c) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings;
- (d) seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science;
- (e) plunder of public or private property.¹²⁷

This list is not exhaustive.¹²⁸ Its purpose is to cover those crimes not covered by the “grave breaches” provisions.¹²⁹ The mass bombing and burning of homes and villages in Kosovo would fall within this category. The Appeals Chamber in *Tadic*

¹²⁴ See *Tadic Judgment*, *supra* note 123, at para. 164.

¹²⁵ See *id.*

¹²⁶ See *id.* at para. 166.

¹²⁷ ICTY Statute, *supra* note 85, at art. 3.

¹²⁸ See *Tadic*, *supra* note 71, at para. 87.

¹²⁹ *Id.* at para. 89.

held that Article 3 also includes violations of Article 3 of the Geneva Conventions, which governs the rules of internal conflicts.¹³⁰ Violations of Article 3 can include such crimes as murder, torture, mutilation, and the taking of hostages.¹³¹ However, the primary limitation to Article 3 is that it may *not* be used as a method to punish infringements of the grave breaches provisions in Article 2 of the Statute.¹³² Otherwise, Article 2 would become superfluous.¹³³ Thus, while the Tribunal has jurisdiction to prosecute the crimes listed in Article 3 irrespective of the internal nature of the conflict, it is still prevented from exercising jurisdiction over the more serious grave breaches enumerated in Article 2.¹³⁴ Under Articles 2 and 3 of the ICTY Statute, a number of crimes and criminals may “fall through the gaps” in Kosovo (prior to the NATO bombing campaign) absent other enforcement measures. Those occurring after the NATO campaign likely have no such defense.

C. Genocide

Genocide is defined by Article 4 of the ICTY Statute as:

[t]he following acts committed *with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such*:

(a) killing members of the group; (b) causing serious bodily or mental harm to members of the group; (c) deliberately inflicting on the group conditions of life calculated to bring about its physi-

¹³⁰ *Id.* at 85, 89, 94, 103; see also MERON, *supra* note 119, at 214. The Appeals Chamber in *Tadic* lists four requirements for a crime to fall within the Tribunal's jurisdiction under Article 3 of the ICTY Statute (to be distinguished from common Article 3 of the Geneva Conventions, which is merely one set of crimes punishable under Article 3 of the ICTY Statute). All of these requirements must be met:

- a. (1) the alleged violation must be of an infringement of a rule of international humanitarian law
- b. (2) the rule must be *customary* in nature (or if under treaty law, the required conditions of the treaty must be met);
- c. (3) the violations must be “serious”, involving “grave consequences to victim”
- d. (4) the violation must entail individual criminal responsibility.

Id.

¹³¹ See S.C. Res. 955, U.N. Security Council, 3453rd mtg.(1994); Barrett Printz, *The Treaty of Versailles to Rwanda: How the International Community Deals with War Crimes*, 6 TUL. J. INT'L & COMP. L. 553, 563 n. 71 (1998).

¹³² See *Tadic*, *supra* note 71, at 87.

¹³³ See *id.*

¹³⁴ See MERON, *supra* note 119, at 214-15.

cal destruction in whole or in part; (d) imposing measures intended to prevent births within the group; (e) forcibly transferring children of the group to another group. 3. The following acts shall be punishable: (a) genocide; (b) conspiracy to commit genocide; (c) direct and public incitement to commit genocide; (d) attempt to commit genocide; (e) complicity in genocide.¹³⁵

Article 4 reproduces the provisions of the 1948 Convention on the Prevention and Punishment of Genocide, and is today considered part of customary international law.¹³⁶ The crime has two essential elements: (1) a commission of the of the prohibited acts noted in the article; and (2) the *specific intent* to destroy all or part of the members of a national, ethnic, racial or religious group, "as such."¹³⁷ Genocide is punishable regardless of whether it occurs in the international or internal context, and national sovereignty does not prevent an international tribunal from exercising jurisdiction.¹³⁸

The first-ever "genocide" sentences to be handed down by an international court took place in September, 1998, with the convictions of Jean-Paul Akayesu and Jean Kambanda in Rwanda.¹³⁹ The critical challenge in proving genocide is demonstrating the defendant's specific or "special" intent to destroy in whole or in part a particular group.¹⁴⁰ "[T]he victim is chosen not because of his individual identity, but rather on account of his being a member of a national, ethnical, racial or religious group. The victim of the act is therefore a member of a group,

¹³⁵ ICTY Statute, *supra* note 85, at art. 4(2)(a-e) and 4(3)(a-e) (emphasis added).

¹³⁶ See MORRIS & SCHARF, *supra* note 86, at 86; Secretary-General's Rep., *supra* note 70, at para. 45.

¹³⁷ See MORRIS & SCHARF, *supra* note 86, at 86.

¹³⁸ See MERON, *supra* note 119, at 215; MORRIS & SCHARF, *supra* note 86, at 81 n. 216.

¹³⁹ See Prosecutor v. Akayesu, International Criminal Tribunal for Rwanda, Case No. ICTR 96-4-T, Sept. 2, 1998 (visited Oct. 15, 1999) *reprinted at* <http://www.un.org/ictt/english/singledocs/jpa_summary.html> [hereinafter Akayesu]; Prosecutor v. Kambanda, International Criminal Tribunal for Rwanda, Case No. 97-23-S, Sept. 4, 1998 (visited Oct. 15, 1999) *reprinted at* <<http://www.org/ictt/english/judgements/kambanda.html>> [hereinafter Kambanda]; *Ex-Rwandan Mayor Gets Life for Genocide*, RICHMOND TIMES-DISPATCH, Oct. 3, 1998, at A5; *Rwandan Ex-Chief Sentenced; Genocide Judge Rejects Leniency*, RICHMOND TIMES-DISPATCH, Oct. 5, 1998.

¹⁴⁰ See MORRIS & SCHARF, *supra* note 86, at 87; Akayesu, *supra* note 139, at para. 42.

targeted as such; hence, the victim of the crime of genocide is the group itself and not the individual alone.”¹⁴¹ Not only must the rape, torture, killing, forcible transfer, etc. be proved, but the defendant’s overall intent to destroy the group itself must be proved. This intent can be proved circumstantially, such as by proving through evidence of patterns of activity that an “ethnic cleansing” was done as a matter of policy.¹⁴² However, this is still a greater burden than merely showing that the act itself took place.

Once again, reports of atrocities in Kosovo are not as well-documented as they are in Bosnia-Herzegovina, although more may be discovered now that the Tribunal has the ability to conduct its investigations following the Serb withdrawal from Kosovo. However, without proving the requisite intent to destroy a group, a number of crimes committed by Serb forces against the Albanian citizens of Kosovo are not punishable under the crime of genocide. It remains to be seen what the evidence will show. Even the Tribunal itself has refrained as of the date of this article from indicting any defendant in Kosovo (including Milosevic) on the crime of Genocide, instead concentrating on the crimes against humanity provisions of the ICTY Statute (discussed below).¹⁴³

D. *Crimes Against Humanity*

Article 5 of the ICTY Statute clearly indicates that crimes against humanity create criminal liability regardless of whether the conflict is international or internal in character.¹⁴⁴ This principle was affirmed by the Appeals Chamber in *Tadic*.¹⁴⁵ Crimes against humanity are defined as crimes “directed against any civilian population,” consisting of:

- (a) murder;
- (b) extermination;
- (c) enslavement;
- (d) deportation;
- (e) imprisonment;

¹⁴¹ *Id.* at para. 43.

¹⁴² See MORRIS & SCHARF, *supra* note 86, at 87.

¹⁴³ See Charles Trueheart, *supra* note 22.

¹⁴⁴ See ICTY Statute, *supra* note 85, at art. 5.

¹⁴⁵ See *Tadic*, *supra* note 71, at para. 141.

- (f) torture;
- (g) rape;
- (h) persecutions on political, racial and religious grounds;
- (i) other inhumane acts.¹⁴⁶

The crime was first recognized in the trials of war criminals following World War II.¹⁴⁷ The crime is further defined in the U.N. Secretary General's report accompanying the statute:

Crimes against humanity refer to inhumane acts of a very serious nature, such as willful killing, torture and rape, committed *as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds*. In the conflict of the territory of the former Yugoslavia, such inhumane acts have taken the form of so-called "ethnic cleansing" and widespread and systematic rape and other forms of sexual assault, including enforced prostitution.¹⁴⁸

Thus, the crime requires both an inhumane act, and that the act be committed as part of a systematic plan or general policy rather than random acts of violence. By noting that the crime is committed against "any civilian population," Article 5 extends to atrocities committed against civilians which are not covered by other war crimes, specifically "crimes committed by a State against its own nationals."¹⁴⁹ Of particular importance is that the crime does not require the *specific intent* to destroy all or part of a group. It is therefore theoretically easier to prove.¹⁵⁰ It is available where the prosecution of genocide is less tenable because of an inability to establish specific intent, or where prosecutions for grave breaches violations under Article 2 are impossible because of the internal nature of the Kosovo conflict.¹⁵¹

However, the burden exists to show that any prohibited act by a defendant was part of an overall widespread or systematic

¹⁴⁶ See ICTY Statute, *supra* note 85, at art. 5.

¹⁴⁷ See Secretary-General's Rep., *supra* note 70, at para. 47.

¹⁴⁸ *Id.* at para. 48 (emphasis added). Note that Morris believes that only Article 5(h) requires the crimes to be directed toward members of a defined group. She believes that the other acts in Article 5 do not require victims to be members of a defined group, or even to share a common characteristic, such as ethnic, religious or racial background. See MORRIS & SCHARF, *supra* note 86, at 81.

¹⁴⁹ See *id.* at 80.

¹⁵⁰ See *id.* at 80-81.

¹⁵¹ See *id.* at 77-78.

attack against ethnic Albanians. The critical issue will be whether the evidence proves that the atrocities as discussed above were part of a systematic attack, or whether they were somehow isolated atrocities and abuses by renegade members of the Serbian military who were not "properly supervised." The facts available thus far strongly indicate, at least circumstantially, that most were part of a coordinated systematic attack against ethnic Albanians, rather than isolated abuses. The events of late March through the present have provided even stronger evidence of specifically coordinated action by Serb forces against Kosovo civilians. The crime of crimes against humanity may become the most useful tool of the Tribunal because it requires neither a specific intent to destroy a group nor an international conflict.

VI. CONCLUSION

The domestic nature of the Kosovo conflict, as it seems to be recognized by the international community, creates particular problems for the punishment of war crimes in Kosovo. While the mass or forced migration of ethnic Albanians may create a threat to international peace and security sufficient to justify Security Council action in the region, the conflict itself was not international in nature until March of 1999. As a result, the international tribunal may only be permitted to prosecute the crimes of genocide and crimes against humanity, at least with regard to crimes that occurred prior to the commencement of the NATO bombing campaign. Many of the atrocities committed in Kosovo may well fit into these categories, although some may fall through the cracks into categories that are non-prosecutable under the auspices of protecting national sovereignty.

Slobodan Milosevic himself is named by human rights groups as a war criminal with command authority over documented war crimes, and has been indicted by the ICTY.¹⁵² However, the political reality is that it is unlikely under the current power structure in Yugoslavia that he or other Yugoslav leaders will be subject to criminal liability for crimes committed either in Kosovo or in Croatia and Bosnia-Herzegovina.

¹⁵² See Mertus, *supra* note 6, at n. 148; Trueheart, *supra* note 22.

As recent events surrounding former Chilean president Augusto Pinochet have demonstrated, that situation may be someday subject to change.¹⁵³

The authority for the United Nations Security Council to exercise jurisdiction, at least for some crimes in Kosovo and Yugoslavia, already exists. The objective of this article is not to comment on the steps that the West should or should not have taken to carry out its promises to establish peace in the region. However, the International Criminal Tribunal is legally justified in investigating and prosecuting certain human rights violations in the region. The situation in Kosovo is unique in that the Security Council has already provided for the prosecution of war crimes in the entire territory, while the actual use of force within Kosovo was arguably still subject to a vote and potential veto by a member of the Security Council. Without addressing the legality of the use of NATO as an end run around a Security Council resolution, now that the opportunity for enforcement and prosecution exists, the Tribunal should take it. Regardless of whether the Security Council itself has or had the authority to attack Yugoslavia, it does have the authority, under Resolution No. 808, to prosecute war crimes, even if it is NATO and not the United Nations that provided the opportunity.

¹⁵³ See Anthony Faiola, *General's Arrest Divides Chileans; Prospect of Ex-Dictator's Return Polarizes Left and Right*, WASH. POST, Oct. 30, 1998, at A36.