

OBSERVATIONS ON THE FORTHCOMING MILOSEVIC TRIAL

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Slobodan Milosevic's forthcoming trial at The Hague is far from an easy win for the prosecution. For one thing, it is generally easier to convict middle-level personnel for war crimes than a commander or a former head of state like Milosevic.² Middle-level officers such as captains, camp guards, and squadron leaders, have either participated in the actual crimes themselves (an easy case), given the orders to others to commit the crimes (a fairly easy case), or "looked the other way" when the crimes were committed (a case that is still reasonably provable). However as one goes higher in the chain of command to the level of generals or prime ministers or heads of state, they increasingly distance themselves, as by vague delegation to their field commanders, from specific events in the field. In World War II, some of the higher officers and political leaders of the Axis powers were negligent in isolating themselves from the commission of war crimes, either because they had no thought of losing the war or because they were not warned by a history that in fact had no precedent for high-level post-war tribunals. But now post-Nuremberg, the pendulum has swung in the opposite direction. Show me a general or commander who has risked his life in battle and is ready and able to do so again, and I'll show you a person who would not take a fraction of that risk if it involved personal legal accountability. Military officials I've talked with refer to war-crimes prosecutions as the law stabbing them in the back. Indeed, a factor in the Clinton administration's decision not to send American ground troops into Kosovo (instead there

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² Contrary to media statements, Milosevic is not the first head of state to be prosecuted for war crimes. That dubious honor goes to Admiral Karl Doenitz who was head of state for nine days. He succeeded Hitler as the Chancellor of the Third Reich on May 1, 1945 when Hitler committed suicide, and lost office upon Germany's surrender to the Allies on May 9th. Although he did nothing of note during those nine days, I believe that the main reason he was chosen to be tried at Nuremberg was because of his formal ascension to the Chancellorship. The prosecutors probably felt—as prosecutors today would feel about Milosevic—that the public would rapidly become cynical about war-crimes trials if the highest officials got a pass. Yet, as the Nuremberg tribunal got into the Doenitz facts, they found that they could not pin any war crime on him. So they sentenced him to ten years for playing an important role in the commission of aggressive warfare. But there was no evidence that he participated in the decision to go to war or the planning of the war. Hence it seems that Doenitz' 'crime' was simply doing a good job for the losing side. The few scholars and historians who have studied the Doenitz case have mostly agreed that his conviction at Nuremberg was unjust. But there was scant public interest at the time in the judgments at Nuremberg; people wanted to forget the war. Only in the past ten years has there been a resurgence of interest in war crimes, due in part to news of the rapes and atrocities in former Yugoslavia and the arrest of General August Pinochet for human-rights violations in Chile, but also because old matters are coming to light such as the abuse of Korean "comfort women" in World War Two, the rape of Nanking, and stories of American war crimes in the Korean and Vietnam war. The few judgments so far handed down by the Hague tribunals for Yugoslavia and Rwanda have been subject to detailed media scrutiny. Judges are outdoing themselves in making sure that sufficient evidence of guilt is articulated in the actual judgments the courts hand down. A shoddy judgment like the Doenitz opinion would get nowhere in the glare of present-day scrutiny, and probably no judge would be willing to sign it.

was an inaccurate aerial bombardment strategy) could have been the opposition of army officers who did not want to go into a ground battle where war crimes might be committed. They were aware that Kosovo came under the territorial jurisdiction for war crimes of the ICTY—the International Criminal Tribunal for Former Yugoslavia in The Hague. The shadow of potential liability must have darkened Milosevic’s presidency of former Yugoslavia.

Milosevic has been indicted for murder, deportation, and persecution. Whether or not he eventually seeks legal representation, the critical factor in the tribunal’s eventual decision in his case will depend upon the judges being able to write a persuasive opinion finding him guilty. The opinion has to persuade outside international lawyers first of all, and then through them the world media. It has to make a moral case against Milosevic, demonstrating that the undoubted commission of war crimes and crimes against humanity that took place in former Yugoslavia in the decade of the 1990s was, in some significant part, Milosevic’s moral responsibility.

I emphasize morality here because legal technicality will not be enough in a huge case of this kind. The tribunal certainly cannot say that Milosevic is guilty just because war crimes were committed on his watch, for that would discourage anyone from ever serving as a head of state. However, the nearest precedent to Milosevic’s case comes fairly close to saying as much, at least on a conventional reading. The Yamashita case, decided by the International Military Tribunal for the Far East and affirmed, via a petition for habeas corpus, by the United States Supreme Court, is the leading case of ‘command authority.’ General Tomoyuki Yamashita arrived in the Philippines on 5 October 1944, when it was in chaos. Yamashita ordered Real Admiral Sanji Iwabuchi to evacuate from Manila, a city which in Yamashita’s judgment had no military value. Instead Iwabuchi dug in, and shortly thereafter his troops were cut off by Allied forces and Filipino guerrillas. The Japanese naval forces trapped in Manila went into an orgy of rape, pillage, torture, and murder of the civilian population.

At Yamashita’s trial, his court-appointed attorneys took the position that he did not know that war crimes were being committed in Manila during the time of his overall command. There was indeed no evidence that Yamashita knew of the crimes, and certainly no evidence that he ordered or condoned any of them. To make up for the lack of a paper trail, the prosecution brought witness after witness testifying as to atrocities over wide areas. The judges as fact-finders in a military tribunal, may have believed that Yamashita’s denial of knowledge was not credible. But rather than base their verdict on their personal opinion that Yamashita was lying, their opinion puts Yamashita’s knowledge in the form of a legally conclusive presumption: that as commander of the Japanese forces in the Philippines, he should have known about the war crimes. Since he should have known about them, it follows that, as commander, he permitted them to occur. The military judges sentenced him to death.

The “should have known” standard, of course, would obliterate the due-process requirement of criminal intent. This point is not analytically difficult, yet it seems to have consumed most of the subsequent academic discussion of the Yamashita case. To get

around it, some observers have taken the position that, irrespective of the language the tribunal used, they must have found that Yamashita in fact knew about the war crimes.³

Yamashita's attorneys should have conceded at the outset that their client knew about the crimes. Then that huge, distracting, and time-consuming factual issue would have been taken out of the case. The focal question would then have become: why didn't Yamashita do anything to stop the war crimes? His attorneys, as we might expect, did address this question, albeit indirectly, by arguing that even if Yamashita knew about the war crimes, he was powerless to prevent them due to the chaotic situation in Manila. But the plea of powerlessness is hard to sustain in any military context no matter how chaotic the conditions. At the very least a commander could issue and reissue orders to his subordinates to prevent the war crimes from occurring. He could repeatedly threaten court-martial to any officer who does not do everything in his physical and military power to stop the criminal acts. Perhaps because Yamashita's attorneys found no such orders among the documents seized the Allies had seized, their possible embarrassment that their client had failed to issue such orders led them to take refuge in the defense that their client was simply unaware of the war crimes in the first place.

In my view there was a defense strategy, consistent with all the facts in the case, that might have saved Yamashita. His attorneys could have argued, as an affirmative defense, that General Yamashita's mission upon being sent to the Philippines in 1944 was to restore order to Japanese army and naval forces that were running amok. Yamashita was facing insubordination from the naval officers and staff officers he had inherited upon coming to the Philippines. Indeed, the restoration of military discipline turned out to be General Yamashita's 24-hour-a-day job. Without military discipline, any orders that he most certainly would have issued regarding particular matters like war crimes would have been premature under the circumstances, perhaps even counterproductive.

³ The courts were quick to rectify the legally inappropriate standard of the Yamashita case. In the "High Command" case (General Field Marshal Wilhelm von Leeb), 1948 (the "should have known" standard in Yamashita "was unacceptable and not sufficient proof of actual knowledge. Crime must be evident"). 37 The second counter to the Yamashita precedent was provided by the United States itself. Murphy J. and Rutledge J. were justified by the notorious My Lai affair in their charge that United States military justice was not even handed. Captain Ernest Medina, commander of Charlie Company, First Division, Second Infantry, was placed on trial by court martial in 1971, on charges relating to inadequate control of his company in Vietnam in 1968. Lieutenant William Calley's platoon, in a raid on the hamlet of My Lai in Vietnam, slaughtered hundreds of civilians. Old women and children in a temple were murdered and eighty civilians were pulled from their homes to be executed.³⁸ As Calley's company commander Medina was charged with responsibility in that he owed a "continuing duty to control the activities of his subordinates". Medina argued that he was unaware of the atrocities until it was too late to intervene. Colonel Kenneth Howard, the military judge, gave instructions to the court that were pertinent. He required actual knowledge plus a wrongful failure to act, if the case was to be proved: Mere presence at the scene without knowledge will not suffice. That is, the commander-subordinate relationship alone will not allow an inference of knowledge. While it is not necessary that a commander actually see an atrocity being committed, it is essential that he know that his subordinates are in the process of committing atrocities or about to commit atrocities.³⁹ The new ICC statute: Under Article 28 (Responsibility of commanders and other superiors) commanding officers "shall be criminally responsible for crimes committed by forces under his or her effective command and control". Knowledge of actual crime, or of intent, must be proved, and a responsibility to "take all necessary and reasonable measures to prevent or repress or to submit the matter to the competent authorities for investigation and prosecution" is basic to the determination of guilt.

For every commander knows that soldiers must be disciplined in small details (the ‘spit-and-polish’ syndrome) before they can be relied upon to carry out broader commands like respecting the civilian population. With the chaos in the Philippines and the war swinging sharply in the Allied direction, Yamashita was factually unable, despite his best efforts, to get his troops under control in the eleven-month period of his tenure in the Philippines prior to his formal surrender to the Allies on September 3, 1945. At his trial, Yamashita took the stand and said, “I believe that I did the best possible job I could have done. However ... my plans and my strength were not sufficient to the situation... I absolutely did not order nor did I receive the order to do this [commit atrocities] from any superior authority, nor did I ever permit such a thing and I will swear to heaven and earth concerning these points.”⁴

We can be fairly confident today that of all the thoughts crowding General Yamashita’s mind during the Philippines campaign, one of them was probably not the threat of being prosecuted for war crimes. We can be just as confident that people like Slobodan Milosevic and Radovan Karadzic (who is still at large at the time of this writing) thought long and hard, when they were in power, about war-crimes prosecutions. They could not help but know about those crimes through reports in the foreign newspapers that, like all heads of state, they read on a daily basis.

Hence it is unlikely that Milosevic (or Karadzic if he is apprehended) will deny knowledge of the occurrence of war crimes. And they must realize that they would be risking a Yamashita outcome if they contend they were powerless to prevent those crimes. It seems to me that whether Milosevic represents himself (as he has indicated), or has lawyers working for him offstage—or changes his mind and appoints a legal team—he will have to present an affirmative defense to the tribunal. He will have to show, by the evidence he introduces, that he worked diligently during his term in office to reduce the occurrences of war crimes or their severity. He can explain that his statements while in office denouncing the ICTY—a stance he continues to take publicly—is not the same thing as condoning war crimes. Throughout his presidency he said that war criminals should be tried exclusively in Yugoslavian courts (Senator Jesse Helms takes the same position regarding Americans). Indeed, in contrast to the United States, Yugoslavia had incorporated directly into its constitutional law the entire body of international humanitarian laws and the laws of war.

The actual prosecutions for war crimes during Milosevic’s reign were few and far between—but so were the prosecutions in the United States during the Vietnam war. For an affirmative defense, it is more likely that Milosevic will produce a long list of orders, commands, directives, signed documents, and minutes of meetings at which he presided, all to the effect that war crimes will not be tolerated and anyone who commits them will be prosecuted to the full extent of Yugoslavian law. Surely his legal advisers would have prepared many documents for him to sign during his Presidency. (They would be scandalously guilty of malpractice if they had not at least learned this lesson from the Yamashita case.) I am not suggesting here that these orders, commands, and directives were or were not trumped up at the time to provide future cover for Milosevic. Whether

⁴ Quoted in I. Ward, *The Killer They Called a God* 131 (1992).

or not the orders were sincere, if he signed them they had the force of law. There are at least 31 orders, commands, and directives that Karadzic promulgated while he was President of Bosnia.⁵ On paper they are impressive: anyone committing, or aiding or abetting the commission of, war crimes will be arrested and court-martialed. Karadzic also signed implementation orders: that the conventional laws of war be promulgated and made known to every member of the armed forces. I would be surprised if Milosevic does not have an even larger set of such documents that he signed while he was President of Yugoslavia.

The Yugoslav Army's awareness of Presidential directives and orders led the army personnel to take considerable care regarding war crimes. I have not seen any evidence that soldiers in the regular Yugoslav Army engaged directly in the commission of war crimes (although rape may turn out to be a major evidentiary exception—though one especially hard to trace up the chain of command). The soldiers gladly left the beatings, torture, and killings to the paramilitaries. The latter, basically thugs and opportunists, would precede the army into a town and shoot, intimidate, and shake down Muslims and Croats. These civilians were then chased out of town, allowing the army—now at no personal risk—to march in.⁶ Moreover, at the detention camps, army personnel apparently left the interrogations, beatings, tortures, and killings to the civilian paramilitaries. I say 'apparently' because soldiers in the Yugoslav Army typically wore no uniforms or insignia, and therefore it might be hard for the prosecution to find eyewitness evidence that army officers engaged in war crimes.⁷

The prosecution will probably have to take the position that the atrocities committed by the paramilitaries are morally attributable to the Yugoslav Army under the command of President Milosevic. Because of many unique features of the Yugoslavian civil war, it is hard to come up with a legal precedent for dealing with paramilitaries. But, morally, the case the prosecution will have to make is fairly clear. The prosecution will have to prove that the Army deliberately made use of the paramilitaries to do the 'dirty work,' and that the Milosevic government through its army had a policy either of condoning the activities of the paramilitaries or looking the other way. Perhaps in an early anticipation of this prosecutorial strategy, Karadzic in 1992, when he was President

⁵ 31 of these orders, commands, and memoranda can be found informally posted at <http://www.srpska-mreza.com/library/hague/hague-vs-justice.html>. Caution: this site should not be used as a primary reference.

⁶ The Croatian and Muslim armies did much the same thing to Serbs who were in a minority in various Bosnian towns.

⁷ The lack of identification conveniently helped army officers to deny complicity in the commission of war crimes, but it was not established for that purpose. Rather, it stems from the partisan resistance during World War II, where each member of a resistance unit knew only the faces of the persons in his unit, and each unit leader only knew the faces of one or two of his direct superiors. Clearly the carrying-over of that resistance tradition to the Yugoslav civil wars of the 1990s will create additional difficulties for the prosecution at the ICTY.

of Bosnia, officially disowned all paramilitary groups that were not ready to be under his political control and called for their arrest.⁸ However, since some rebel groups did in fact submit to his political control, an important factual question in Karadic's case becomes whether the groups that were under his control engaged in war crimes. We will undoubtedly get an advance look at Karadzic's dilemma at the forthcoming Milosevic trial. Did Milosevic take reasonable steps to stop the deprivations of the paramilitaries? Here the legal strategy I suggested earlier for Yamashita would apply to Milosevic: to mount an affirmative defense to the effect that he took all available and reasonable steps to bring order to a chaotic situation. He cannot deny that the Yugoslav paramilitaries engaged in brutal and repeated acts that violated the laws of war. He will have to show that he took active steps against the paramilitaries. Did Milosevic try to reduce the chaos, or did he thrive upon it?

Apart from war crimes, one might ask whether Milosevic is guilty of 'ethnic cleansing.' The answer is: 'yes, but it's not a crime.'⁹ There are many benign examples of ethnic cleansing, most notably the successful population transfers after the first World War supervised by the League of Nations and primarily affecting areas of the former Ottoman Empire. Perhaps one of the most unfortunate episodes in the sorry epic of former Yugoslavia after 1990 was the attempt by the planners at Dayton to create a multiethnic Bosnian federation presiding over a patchwork of Muslim, Croatian and Serbian communities. Once the tripartite civil war broke out in 1990, the Dayton solution would have been only possible by the reinstatement of a massively powerful police state. Since the Western powers were not interested in that approach, they should have let population transfers—'ethnic cleansing'—take place. Thus I do not believe that Karadzic and Milosevic did anything wrong in saying publicly that the three groups should live apart from each other. Their statements may have contravened the 'spirit of Dayton,' but that was an issue of policy and not of international criminal law.

Nevertheless, what is loosely called 'ethnic cleansing' could involve the actual crimes of genocide, persecution, or deportation. Milosevic is not presently charged with genocide, although that charge might be added later on as an amendment to his indictment. But he is charged with persecution and deportation, crimes that are relatively new to international humanitarian law. Adolf Eichmann had also been charged with and convicted of persecution and deportation by the Israel tribunal, but these were hardly distinguishable aspects of his conviction for genocide. Nor is the Statute of the ICTY much help: it simply mentions deportation and qualifies persecutions "on political, racial

⁸ See Document #4, n.4, *supra*.

⁹ There was an unfortunate split in our legal team for the defense of Dr. Milan Kovacevic. I wanted to admit ethnic cleansing and say that it was benign in our client's case, whereas other lawyers on the team felt that they had to deny that there was ethnic cleansing. They believed the term to be too emotional and pejorative, while I felt that it was better strategy to admit ethnic cleansing because it is not itself a crime and because the facts were pretty clear that our client supported or was engaged in it. The actual trial lasted only two weeks; Dr. Kovacevic died in the detention center. The New York Times published a long account of the Kovacevic case before it went to trial; *The World v. Dr. Kovacevic* is available on my web site. Recently I wrote a short essay summarizing some of the legal strategies in the case, which is also available on my web site: *Defending a Person Charged With Genocide*, 1 Chicago J. Int'l L. 459 (2000).

and religious grounds.”¹⁰ (The careless draftsmanship resulting in the use of the word “and” in this qualification may cause grief to the prosecutors—it is, after all, a criminal statute and must be strictly construed.) Perhaps the most authoritative “definition” of these two crimes is in the as-yet unratified Rome Statute for the new International Criminal Court. Article 7 tells us that deportation and persecution are crimes against humanity “when committed as part of a widespread or systematic attack directed against any civilian population.” Then the two crimes are specified:

- (d) Deportation or forcible transfer of population;
- (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in *paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court.

The wording leaves much to be desired. Perhaps the Eternal City has too many distractions to serve as a serious place to draft a major international treaty.

Consider (d). Does this mean that deportation is synonymous with the forcible transfer of population? The drafters probably meant to say that with their use of the word “or,” but what about deportation that isn’t forceful? Suppose the mayor of a town in Yugoslavia, acting under the direct orders of Milosevic, commanded a minority group of residents to pack up their things and move out. If the residents did in fact move out without any use of force, would this constitute ‘deportation’? What if the residents moved out because the use of force was implied, or even threatened? Even so, if they were not *forcibly* transferred out, then the prosecutor would have a serious problem construing (d).

Turning to (h), we find that the drafters ‘solved’ the problem of persecution being subsumed under genocide by making it broader than genocide. The crime of genocide does *not* apply when targeted against a political group, but under (h) of the ICC Statute persecution *would* apply. Yet I think there was a good reason other than Stalin’s intransigent insistence in 1948 for excluding political groups from the new UN definition of genocide, namely, that all armed insurrections (whether or not they amount to a full-fledged civil war) are by their nature political. Hence any lawful government action to suppress an armed rebellion or insurrection would constitute the war crime of persecution! Another problem with the language of (h) is the concluding catch-all phrase, recursively incorporating international-law standards in the definition of the crime. It was a similar recursiveness in the ICTY statute that led the American delegation to the Rome ICC conference to insist upon spelling out, in enormous detail, each and every war crime. If the American team could do it for war crimes, why couldn’t they do it for the crime of persecution? Moreover, the language in the ICC definition includes the phrase “other grounds that are universally recognized as impermissible under international law.” If those other grounds are indeed universally recognized, why

¹⁰ Art. 5, Statute of the International Criminal Tribunal for Former Yugoslavia.

couldn't the ICC drafters recognize them? Perhaps Theodor Meron, the expert drafter for the American delegation, might have the opportunity to tell the world what he had in mind if and when Milosevic is convicted of persecution and the case comes before Judge Meron on appeal.

Despite the legal hurdles, the Office of the Prosecution has momentum on its side. The judges—with an eye to the continued viability of the tribunal—will naturally be reluctant to tell the world that the boss is innocent after they have already convicted a number of underlings. New evidence may also be unearthed, and high-level witnesses may testify as to Milosevic's actual intent when he was President. Also, the prosecutor may decide to up the ante by adding genocide to the indictment. Even with all these problems facing him, Milosevic could be better off having no lawyers at all than having lawyers with poor strategic judgment, as may have been true of Yamashita. Milosevic very much needs what Yamashita did not have: a strong affirmative defense. It is hard to see how he can orchestrate such a defense on his own, much less manage the public-opinion front. His chances of pulling it all off are not zero, but they are not good.