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Breaking the Wall of Immunity:
Questions raised by Eichmann,
Filartiga, Pinochet and Milosevic
Trials

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Summary

As the wars on the Balkans emerged in the early 1990's and continued to colour the European reality over almost a decade, a fierce debate regarding questions of guilt, necessary actions, and roads to peace was initiated. In Sweden it was not as broad and competent as in other European countries, but it did allow certain odd features in the everyday life, such as a party, 'the Sarajevo-list', which was mainly occupied with the issue of breaking the siege around Sarajevo. The large groups of refugees that fled the countries, or were rescued out of them, were sheltered in several European countries, but also in other parts of the world, ranging from the USA to Indonesia. Currently, the re-construction of the region is underway, and countries are offering aid in exchange for stability and order – the Balkans are indeed still far from over with intolerance and conflicts. Since the region has in one way or another occupied the interest and efforts of so many, it is of common interest that justice be shed over the conflict. The international community initiated the idea of an international tribunal to hold the responsible individuals accountable for their actions. It has now been working for several years, and reached its peak with the indictment and trial against the former president of the Federal Republic of Yugoslavia, Slobodan Milosevic in 2001. With point of departure in this indictment, the thesis wishes to scrutinise and penetrate the effects of individual accountability for international crimes that have been orchestrated by an entity far greater than to include only one man, or even merely the top executives. Arguments in favour of the possibility to hold the state as such responsible for acts of for instance genocide have been a valuable and important contribution to the dialogue. Regardless of the interesting implications of such an aspect, the main issue is constantly voiced: can states be prosecuted? This study will give no answer to that question, but will try to illuminate the complex web of responsible actors, and of course the danger of holding one person accountable for the acts of a political and legal entity, such as the state.

Preface

I wish to thank my supervisor Katarina Tomasevski for her constant support, inspiration and involvement in the creation of this thesis. I also send a thank you to my father, who through various discussions supported me and provided me with new and important angles to the problem.

Abbreviations

ATCA	Alien Tort Claims Act
FSIA	The Foreign Sovereign Immunity Act
FRY	Federal republic of Yugoslavia
ICC	Permanent International Criminal Court
ICJ	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
ILA	International Law Association
ILC	International Law Commission
IMTFE	International Military Tribunal for the Far East
JNA	National Army of Yugoslavia
KLA	Kosovo Liberation Army
MUP	Ministry of Interior of FRY
OTP	Office of the Prosecutor at the ICTY
SDF	Supreme Defense Council of FRY
VJ	Yugoslav Army

1 Introduction

1.1 THE SUBJECT MATTER OF THE THESIS

When individuals are tried for having violated international law, questions of justice, truth, fairness and purpose are being raised. These issues are even more emphasized when it comes to the prosecution of heads-of-state and the commission of the crimes that actually were state policy at the time of the conduct. If the presumption is that individuals cannot cast the blame of their guilt on their state, then the logical consequence has to be that states too cannot hide their guilt and responsibility behind the punishment of individuals. In order to receive a fair and efficient legal frame-work for the prosecution of international crimes, especially when they consist of crimes such as genocide, aggression, war crimes, and crimes against humanity, holding the factually and legally correct entity or subject responsible for the commission is essential. The indictment and trial against the former, or at the time of the filing of the indictment, the sitting head-of-state of Yugoslavia, Slobodan Milosevic, have evoked some concern regarding the effect and purpose of holding heads-of-state individually responsible of the crimes committed. Are processes such as the one against Milosevic, or those against General Noriega at the beginning of the 1990's or General Pinochet at the end of that decade stemming from domestic jurisdictions, pursuing a good and just cause? Not targeting the good will of all these efforts, doubt is linked to the very nature of the system of the prosecution of individuals substituting the place of the state. As will be shown, the notion of prosecuting a state for its actions because of its sponsorship and approval is not imbedded in positive law. Through innovative drafting and the inherent potential of certain legislation such as the 1949 Genocide Convention, the International Law Commission's Draft Articles on State Responsibility, and the establishment of the Permanent International Criminal Court (ICC) in The Hague, a sphere for, at least the discussion of state liability for certain international crimes is being created. Thus far, a rather extensive case law from domestic jurisdictions on the prosecution of various government

officials, including of heads-of-state has displayed a rather dubious record. Recently the International Court of Justice judged against a too extensive extraterritorial approach by national states to try foreign holders of official positions within a government, and narrowed the scope of municipal legislations with universal appetite. Focusing on the pressing charges against states through civil suits by individual plaintiffs, these have showed to be virtually impotent as the collection on the compensatory and punitive damages in many instances have not been possible. This scenario is the same in cases against individual perpetrators of foreign governments. The future of universal jurisdiction on the national level against individual government officials seems as fruitless as impotent. On the international level, jurisprudence and recent developments show a high degree of activity on both the criminal as well as the civil front. Concurrently with the proceedings against the perpetrators from the former Yugoslavia at the International Criminal Tribunal for the Former Yugoslavia (ICTY), the International Court of Justice (ICJ) is trying a civil suit brought forward by Bosnia and Herzegovina against Yugoslavia on the interpretation of the Genocide Convention. Should the case develop further and not be dropped, it could become a significant step in the evolution of state accountability, although merely in a civil sense.

1.2 METHODOLOGY AND AIM OF THE STUDY

The main issues I will explore, are connected to the questioning of the validity and purpose of prosecuting individual perpetrators, and indeed even heads-of-state for the crimes of their governments. What is it that the principle of superior command responsibility loses, when it implies an embodiment in the sole perpetrator for a state policy, sponsored and directed by the complex entity of a state as in the case of Milosevic at the ICTY? With point of departure in the case against Milosevic case in particular, what dangers could evolve or do already exist when the world community acknowledges such a personalization of the guilt of a state mechanism? What fractions of the responsible community are left out, and how does one deal with such a scenario, especially having in mind the prime goals of law

enforcement relating to a war crime scene, such as truth, peace and justice, for the benefit of the people victimized by the crimes. Finally, focus will be mainly tuned in on a legal framework introduced to take on the task of examining state responsibility for crimes, even of the kind committed in the former Yugoslavia. Is it possible, and at all wise to target state entities for crimes sponsored by them, instead of the individual in the position of a superior commander?

In focusing on both the national and international jurisdictional spheres, this thesis is set to examine the difference between state and individual accountability for criminal conduct, especially regarding violations of human rights and humanitarian law. The situation of prosecuting individuals for international crimes today suffers from blurred boundaries between international human rights, humanitarian law and criminal law. The thesis will sweep over some domestic jurisdictions and jurisprudence, in particular the U.S., and also dwell upon the difference between the civil and criminal approaches of holding subjects of law liable for their crimes and the rather bad experience they have provided in cases relating to abuses in foreign countries. On a parallel basis with the domestic trials, there has been a constant international urge to move back to the Nuremberg model with international tribunals and prosecutions, most recently realized through the establishment of the ICC in The Hague. In this regard the problem of defining the international crimes has once again opened a battleground and provoked some inconsistent solutions as to the existence of the *act of state*. The cases of Pinochet and Milosevic, are the two cases that most clearly witness about both these trends - the domestic and the international approach. In addition, almost an outsider in the company, the case of *Bosnia and Herzegovina v. Yugoslavia* before the ICJ, will prove the purpose of an upcoming trend and the possibility of state accountability for international crimes on an international level.

2 National Courts, National Jurisdictions

2.1 PRINCIPLES OF JURISDICTION

International criminal law has traditionally limited the scope of the enforcement of jurisdiction to a state's own territory, or to the application of its criminal law on offenders for crimes committed abroad, should the offender eventually later on enter its territory. "The spatial scope" of each state's criminal code is more or less fit to react on criminalized commissions abroad, whereby its domestic courts are equipped with the competence to prosecute the offenders. International criminal law in this sense is not really international, but municipal, criminalizing acts as if committed within the territory of the state. States cannot, however, regulate the prosecution and punishment of these persons alone, but will have to rely on multilateral conventions and bilateral agreements in order to expand their extraterritorial competence and jurisdiction. A universally applicable convention regulating the jurisdiction of states does not exist. Hence, states have traditionally had to rely on intra-territorial jurisdiction, based on the principles of territoriality and citizenship. The main principles of international criminal jurisdiction may be described in four variables: the place of the commission, the character of the offender, the character of the victim, the character of the offence committed.¹ The main jurisdictional claims are based on the principles of *territory*, *protection*, nationality of the offender (*active personality principle*), nationality of the victim (*passive personality principle*) and *universality*. Among these, the territoriality jurisdiction is the most common, where the state will actually be able to prosecute through its domestic courts. The personality and protection jurisdictions are not as frequently used, but do exist.² The ICJ in the Lotus case recognized the

¹ Iain Cameron, *The Protective Principle of International Criminal Jurisdiction*, Aldershot. Brookfield, USA. Hong Kong. Singapore. Sydney; Dartmouth, 1999, pp. 10-12

² William A. Schabas, *Genocide in International Law – The Crimes of Crime*, Cambridge, University Press, 2000, p. 353

former.³ Universal jurisdiction, despite its broad scope of potential states willing to prosecute, is limited as to the number of crimes for which a state may charge an alleged offender with. In customary law only crimes of piracy, slave trade, and traffic in children and women are derived, but through multilateral treaties jurisdiction has been admitted over more crimes. These include hijacking, piracy, and attacks against diplomats, nuclear safety, terrorism, apartheid and torture. Prosecutions against genocide, which are based on the territoriality jurisdiction, are as a rule undermined by the usual reluctance of the state where the crimes were committed to prosecute. This may be conditioned by a situation where the perpetrator being a governmental official is sheltered by the fact that he is still in office, or of a state's more general dislike or fear of exposing a controversial past with the effect of provoking and stirring up too many suppressed feelings of guilt and shame. The Genocide Convention does not provide for an application of universal jurisdiction on the crime of genocide. In its Article VI it states that either courts of the forum state should try the war criminals, or international tribunals with such jurisdiction.⁴ And yet, as we shall see later on, Article IX does provide for a resort to the ICJ in cases of disagreement regarding the interpretation of the Genocide Convention.

2.2 STATE IMMUNITY AND HUMAN RIGHTS

The law of state immunity has undergone considerable changes and is today as most features of international law able to show up an ambiguous face, depending on where and by whom dealt with. Evolving from an absolute sphere of untouchables, states have descended to a more concrete level, absorbing the notions of the perhaps most strong force of the last 50 years – the development of the human rights. In the early 20th century, state immunity carried the dignity of absolute immunity. Although the attempt of making the individual a subject of international law, efforts of creating this space for individuals and the remedies for violations of their human rights have been mostly frequent on the national level. During this period, the law

³ *Lotus Case, France v. Turkey*, The P.C.I.J., Series A, No.10 (1927)

⁴ Schabas, pp. 353-355

of the state has also developed from the times when absolute immunity was the predominant concept of it. Focusing on the nature of state activity, rather than the purposes, will provide for opportunities to properly qualify acts as *acts of state* or not.⁵ Common to the tendency of extensive drafting of national statutes on state immunity that continued in especially the U.S. and U.K. was also accompanied by the drafting of conventions on state immunity by the ILC and the International Law Association (ILA). All these efforts had the purpose of reducing the activities protected by immunity in common, and instead allowing jurisdiction over situations where a foreign state had caused death, personal injury or damages to property. The novelty here was the disregard of the private or governmental character of the conduct. Despite this attempt, domestic courts have been cautious to admit human rights cases, and have been more likely to admit the violating states immunity protection on the basis that the conduct was a governmental act, or rejecting the case because of a lack of territorial link to the forum state.⁶

Sovereign immunity is by one definition “the right of a State and its organs not to be held responsible for their acts by the judicial organs of other States”.⁷ While the state remains responsible for actions, it is free from the examination of other states’ courts and authorities. Counter-measures provided for in international law are still applicable and may be utilized against such a state. What the immunity defense legally exercises for the acting state is thus that it protects it from legal scrutiny by the forum state. The most recent development of state immunity is that of further limitation of the sovereignty of it, and more recognition for the human rights approach, and the individual as a “partial subject of international law”.⁸

Evolving from the past of national states and sovereigns, the concept of state immunity was previously more narrowly intended and expressed as “that of the dignity of sovereigns”, also pointing at the personalizing connection of it

⁵ Jurgen Bröhmer, *State Immunity and the Violations of Human Rights*, Martinus Nijhoff Publishers, The Hague/Boston, 1997, p. 1

⁶ Bröhmer, p. 2

⁷ Bröhmer, p. 3

⁸ Bröhmer, pp. 3, 8

towards the sovereign ruler. Another expression less anachronistic and more close to the current situation than the above mentioned, is the Latin maxim *par in parem non habet imperium*, advocating an egalitarian view on sovereign states, and thus giving no sovereign the privilege to exercise jurisdiction over another sovereign.⁹ As a derivative of the concept of sovereignty, or disguised in the shape of non-interference, state immunity is in a way a challenge to a prosperous climate of highlighting, prosecuting and suing human rights violations. The concept of sovereignty impresses the non-hierarchical relationship between states and emphasizes their positions as the primary subjects in international law - *par in parem non habet imperium*. Another aspect of sovereignty is attached to the notion of “state” – the “organisational entity “state”” built up as an individual structure, operating and existing but not as a purpose in itself, but rather inherently controlling the concept of “state”, i.e. performing duties with the character of guarantees for external and internal peace, and social security for its citizens.¹⁰ With time the concept altered and with the turn of the First World War it was confronted with the relativity approach. Jurisdictional immunity was the pendant to sovereignty, protecting the state from interfering legal submissions from other states, and defending its external frontiers. The absolute immunity doctrine was the prevailing and exclusive theory on statehood for a long time.¹¹ Again, at the turn of the 20th century, the restrictive theory of immunity was introduced, limiting the scope and rules of the traditional aspects and tasks of states.¹² Not only states as such enjoy the immunity privilege, their representatives, the heads-of-state, also take advantage of immunity protection when made party to a suit. Even though the head-of-state immunity is related to state immunity seen in a historical context, the personification of the state through the sovereign ruler is no longer adamant. There must be made a distinction between the acts and in what capacity the head-of-state commits them. Head-of-state immunity is linked to diplomatic immunity in situations when a head-of-state is acting

⁹ Bröhmer, pp. 10-11

¹⁰ Bröhmer, p. 17

¹¹ See *The Schooner Exchange v. M'Faddon*, 11 U.S. (7 Cranch) 116 (1812)

¹² Bröhmer, p. 17

outside his official capacity in a foreign country. At least this would be the instance where the head-of-state in the capacity of an individual person commits crimes during a state visit abroad. Should a crime evolve from an act – private or official – where the perpetrator stands as an official representative of the state, the rules of state immunity would be applicable. If it is a case of a joint enterprise, his immunity as head-of-state cannot be stretched further than that of the state.¹³ Further, sovereign immunity was activated whenever a state, its property or a governmental official were brought charges against abroad.¹⁴

2.2.1 IMMUNITY *RATIONE PERSONAE* AND *RATIONE MATERIAE*

Other related concepts to the sovereign immunity are jurisdiction and acts of state. Regarding the theory of jurisdiction, the links to the doctrine of sovereign immunity are very strong. Through the power of jurisdiction, states are capacitated to, by legislative, executive or judicial means control relations and conducts within the territory and boundaries of a state.¹⁵ For the country to assume its jurisdiction, the requirement is that the territorial link is completed, or in other cases that the principle of active personality or nationality is applicable, asserting the state jurisdiction when its nationals are engaged in actions in a foreign country. To assume jurisdiction over foreign nationals having committed acts against a national outside his country of nationality, by the forum state through the passive personality principle is yet to receive recognition. Such recognition would make a difference and affect the possibility of providing jurisdiction for a state over human rights violations committed abroad against its nationals in a positive manner. On top of all this as has been indicated, universal jurisdiction as a specific form of monitor of international crimes, is a novelty in the cluster of different jurisdictions. The main task in a courtroom after the jurisdiction link is set is to ascertain whether the immunity aspect is applicable to the defendant and his status, and thus refraining the court from investigating the

¹³ Bröhmer, pp. 29-31

¹⁴ See *Republic of the Philippines v. Marcos*, 665 F.Supp. 793 at 797 (N.D.Cal. 1987)

¹⁵ Bröhmer, p. 34

state. This is referred to as immunity *ratione personae* and is derived from the principle *par in parem non habet imperium*. Immunity *ratione materiae* on the other hand involves a situation where the subject matter is obstructing a court from adjudicating, because the case is for instance involving administrative law of a foreign state and its official, and the forum state happens to merely be the state where the service has been performed.¹⁶

2.3 EXTRADITION

With point of departure in the four 1949 Geneva Conventions, states have committed themselves to criminalize the actions of war criminals and prosecute them. Article 49 of the First Geneva Convention states the following:

The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article. Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned provided such High Contracting Party has made out a *prima facie* case. (...)

If it is not possible for one contracting party to bring the war criminals before its own courts, it should make sure that the persons are handed over to the forum state when also a contracting party for trial. This extradition principle is based on the *aut dedere aut judicare* maxim, which implies that when states are unable to put war criminals on trial themselves, they are required to extradite them. However, the realization of the principle has proved to be difficult to implement, mainly due to a lack of political susceptibility. The application of the principle especially failed proof in the aftermath of the Second World War when countries in Eastern Europe showed evidence of endemic reluctance to prosecute or extradite offenders.¹⁷ State practice tells us that extremely few cases exist where states have indeed extradited offenders. There is only one case of precedent

¹⁶ Bröhmer, pp. 37-39

regarding genocide, that of Froduald Karamira, who was extradited from India to Rwanda for having committed atrocities in Rwanda.¹⁸

2.4 THE EICHMANN CASE

The first really important case of international war crimes and genocide after the Nuremberg and Tokyo Trials was the *Eichmann case*¹⁹ from 1961, from the domestic sphere. Not only did Eichmann, who was the mastermind behind the “final solution” which led to the extermination of millions of Jews in Europe, complain against his physical abduction from Argentina to Israel. He also pointed to the UN Sixth Committee Debates on the drafting of the Genocide Convention where no consensus was reached regarding universal jurisdiction, but rather the territorial jurisdiction was reaffirmed as the ruling principle. The Jerusalem District Court challenged this claim by referring to the same debate and interpreted the outcome as one where there was not ruled out for other countries besides the territorial state to prosecute. Territorial jurisdiction was nothing more than a “compulsory minimum” upgraded by the Genocide Convention provisions to compulsory universal jurisdiction.²⁰ Apart from relying on this interpretation, the District Court also advocated the protective jurisdiction principle on the basis of the rights of the state of Israel as the victim to protect its existence.²¹ The notion of a universal jurisdiction – in the case of genocide – that the Israeli Court initiated through the *Eihmann case* has also been affirmed in academic literature.²² In the final report of the Commission of Experts for the former Yugoslavia established by the Security Council, it was confirmed that universal jurisdiction exists for the crimes of genocide, as well as for the crimes against humanity. Guided by these statements, the *Tadic Appeals Judgment*²³ of the ICTY stated that universal jurisdiction is nowadays an established fact in customary international law. A customary international

¹⁷ Christine Van Den Wyngaert, *War Crimes, Genocide and Crimes against Humanity – Are States Taking National Prosecution Seriously?*, in *International Criminal Law – Enforcement, III*, edited by Cherif Bassiouni, 2nd ed, Transnational Publishers, Inc., Dobbs Ferry, New York, 1999, p. 229-230

¹⁸ Schabas, pp. 411-2

¹⁹ *A-G Israel v. Eichmann*, (1968) 36 ILR 5 (District Court, Jerusalem)

²⁰ *A-G Israel v. Eichmann*, (1968) 36 ILR 5 (District Court, Jerusalem), paras. 24-5

²¹ Schabas, pp. 360-1

²² Schabas, p. 362

norm of this kind is still to reconcile given the contradicting message from the Sixth Committee Debate. This is true in regard to the debate from 1948, but also in connection to 1998 when discussions were held on the ICC at the Rome Diplomatic Conference. The discussions did not result in an affirmation of the universal jurisdiction, but rather of the territorial and active personal jurisdiction, leaving still no consensus on the matter of universal jurisdiction, especially regarding genocide and crimes against humanity. In the *Case Concerning Application of the Genocide Convention*²⁴ before the ICJ, which shall be examined further below, the ad-hoc judges presented the same disagreement on the issue of universal jurisdiction. The International Law Commission (ILC) has held in its Draft Code of Crimes that there exists a universal jurisdiction for the crime of genocide. In a confusing line of thinking the ILC expressed that although universal jurisdiction cannot be extended from the intention of the language of the Genocide Convention, it exists in customary law, and that in conclusion, “universal jurisdiction exists for states that are not party to the Genocide Convention, but not for those that are, a bizarre conclusion”.²⁵

2.5 U.S. LEGISLATION - ALIEN TORT CLAIMS ACT

A unique resort was provided for foreigner for well over 200 years in the U.S. Alien Tort Claims Act (ATCA) for “any civil action by an alien for a tort, committed in violation of the law of nations or a treaty of the United States” in its section 1350, i.e. including international law.²⁶ It became famous when it dismissed the *act of state* doctrine in the *Filartiga case*²⁷ in 1980, where U.S. courts found themselves to sit in judgment of a torture case from Paraguay. In 1976 General Pena-Irala, the head of police in Asuncion, had tortured and killed the 17-year-old Filartiga because of his father’s political opposition to the Paraguayan government. The boy’s father and sister traced the perpetrator to Brooklyn and brought damage

²³ *Prosecutor v. Tadic*, Appeals Judgment, IT-94-1-A, 15 July 1999

²⁴ *Case Concerning Application of the Genocide Convention* (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro)) (Preliminary Objections) I.C.J. Rep. 1993

²⁵ Schabas, p. 365

²⁶ Bröhmer, p. 46

²⁷ *Filartiga v. Pena-Irala* (1980) 630 F. 2d. 876; 1980 (19) I.L.M. 966 U.S. Cir. Court of Appeals, 2nd Cir.

proceedings in 1978 in a U.S. federal district court that ruled that it did not have jurisdiction to hear the case. The U.S. Court of Appeals however stated that “official torture” is part of the international prohibition and “the international consensus surrounding torture”,²⁸ thus not making any difference between aliens and citizens, and sentenced Pena-Irala to restitution. Prior to the filing of the Court of Appeal’s judgment, the accused had been allowed to return back to Paraguay, and thus the damages were never paid. Despite the importance and innovative approach of the case in reaching a public condemnation of the human rights violations that were committed, it points at several shortcomings that will later on be further examined in a number of follow up cases. In short, the *Filartiga case* would not have been realized had the defendant not been within U.S. jurisdiction, and even so, the case still lacked assets against which the judgment could have been enforced. Because of the protection that states enjoy through state immunity, a case such as this would not have been able to be brought against a state, as the actual human rights violator, for which the accused was only an agent and “publicly pronounced” personalized actor.²⁹ The *Amerada Hess case*³⁰ put an end to a flow of cases that were inspired by the *Filartiga* decision.³¹ During the Las Malvinas/Falkland War, Argentine military aircraft outside the war zone attacked an oil tanker. The owners United Carriers, Inc. and Amerada Hess Shipping Corp. did not file a suit in Argentina because of the political climate at the time. The Supreme Court held that the Foreign Sovereign Immunity Act (FSIA) was legislated with the inclination to include jurisdiction over violations of international law as seen in section 1605(a)(3) FSIA, and that the Act well could substitute existing law against foreign states. The decision brought forward the still ruling principle that the ATCA is only a *lex specialis* to the FSIA, and that

²⁸ *Filartiga v. Pena-Irala*, 1980 (19) I.L.M. 966 U.S. Cir. Court of Appeals, 2nd Cir.

²⁹ D. J. Harris, *Cases and Materials on International Law*, 5th edition, London, Sweet & Maxwell, 1998, pp. 733-4

³⁰ *Amerada Hess Shipping Corp. v. Argentine Republic*, 638 F.Supp. 73 (S.D.N.Y 1986), reversed, 830 F.2d 421 (2d Cir. 1987), cert. Granted, 108 S.Ct. 1466 (1988), *Argentine Republic v. Amerada Hess Shipping Corp.*, 109 S. Ct. 683 (1989) = 81 ILR (1990), p. 658

³¹ *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C.Cir. 1984) cert denied, 470 U.S. 1003 (1985) = 77 ILR (1988) 193 et seq. (District Court decision at 196 et seq.; Court of Appeals at 204 et seq.); *Siderman v. Republic of Argentina*, No. CV 82-1772-RMT (Mex) (C.D. Cal. Sept. 28, 1984); 965 F.2d 699 (9th Cir. 1992); *Sanchez-Espinoza v. Reagan*, 770 F.2d 202 (D.D.Cir. 1985)

the jurisdictional question for suits brought by aliens in the U.S. is to be determined only under the auspices of the FSIA.³² Since the FSIA did not provide for a general immunity exception the litigants did still continue to lean on the ATCA after the *Amerada Hess judgment*, but decided to focus on individuals in governmental positions, rather than states. These suits will not be affected by the principle of state immunity or sovereignty principle since the defendants are individuals. Cases against former officials having held positions in governmental bodies increased, and U.S. courts found themselves to sit in judgment over individuals such as Philippine president Marcos' wife, Haitian ex-President Lieutenant General Prosper Avril, the former Guatemalan defense minister, army general Hector Alejandro Gramajo Morales, Indonesian general Panjaitan, former official of the Ethiopian government Negowo, and political Bosnian Serb leader Radovan Karadzic.³³

2.5.1 THE FOREIGN SOVEREIGN IMMUNITY ACT

When in 1976 the U.S. Congress passed the legislation on state immunity, the FSIA, it did so in order to solve some special concerns, such as the realization of a restrictive approach to state immunity. Exceptions from the principle rule of state immunity, in section 1605, were made for e.g. commercial activities. From the language of the FSIA and previous case law, it is obvious that sovereign immunity in litigations is only applicable to state entities or their "instrumentalities", and not to individual acts.³⁴

Section 1605 (a)(5) FSIA contains immunity exceptions for certain cases of tortuous conduct irrespective of whether they are governmental or private acts. It does so only on a strict basis of the territoriality principle, which always entails a state with the right to pursue jurisdiction over acts committed within the state territory.³⁵ Through the gradual abandonment of the *acta jure gestionis/imperii* distinction - the distinction between acts that

³² Bröhmer, p. 49

³³ Bröhmer, p. 50

³⁴ Bröhmer, p. 54

³⁵ Bröhmer, p. 58

are by their nature considered as public acts, *jure imperii*, and those that are private, for instance commercial acts, *jure gestionis* - the FSIA amplifies another obstacle, by requiring a strong territorial nexus or contact to the state where the tortious conduct was committed. The damage suffered by the plaintiff and caused by the foreign state must occur in the U.S. The U.S. reluctance to fully apply to this rule is exemplified by the cases of *Frolova v. USSR*³⁶, the *Persinger*³⁷ and *McKeel*³⁸ cases (the *Iran cases*), and *Nelson v. Saudi Arabia*³⁹.

In 1985 von Dardel brought a compensation case against the USSR before an American court, arising from the unlawful arrest, detention and possible killing of his brother, the Swedish diplomat Raoul Wallenberg. The court reasoned that the USSR could not be able to keep its immunity in this case since the Soviet government had explicitly violated international law, and concluded that the international agreements exception in section 1604 FSIA accordingly was applicable. When a state involves in an action in breach of international law principles and norms that constructs *jus cogens* and reaches the level of *erga omnes*, such as the infliction on Wallenberg's diplomatic immunity status, the court argued, the state immunity must be denied. However, the court's expansive and inclusive approach of reading the waiver exceptions was not followed out. The *Amerada Hess case* ruled that the FSIA was the basis for cases regarding jurisdiction in the U.S. The judgment came to prevail over the notion that there could be some general clause for immunity exceptions regarding cases of human rights violations and thereby barred further development of the protective domestic approach to human rights.

Another case that strongly affects the human rights field was the *Princz case*.⁴⁰ Hugo Princz, later on an American citizen, was arrested by German

³⁶ *Frolova v. USSR*, 761 F.2d 370 (7th Cir. 1985) = 85 ILR (1991) p. 236 *et seq.*

³⁷ *Persinger v. Islamic Republic of Iran*, 729 F.2d 835 (D.C. Cir. 1984) = 90 ILR (1992), p. 586

³⁸ *McKeel v. Islamic Republic of Iran*, 722 F.2d 682 (9th Cir. 1983) = 81 ILR (1990), p. 543

³⁹ *Nelson v. Saudi Arabia*, 923 F.2d 1528 (11th Cir. 1991)

⁴⁰ Decision of 1 July 1994 of the United States Court of Appeals for the District of Columbia Circuit, *Hugo Princz v. Federal Republic of Germany*, 26 F.3d 1166 (D.C. Cir. 1994) (Appeal from the US District Court for the District of Columbia (92cv00644), 813 F.Supp. 22 (D.D.C 1992)); 33 ILM

officers in 1941 and sent together with his family to concentration camps. He was forced to commit forced labor for German corporations, and persisted under inhuman life conditions. Princz later turned to individual court action in the U.S. and sued Germany. During the proceedings the U.S. court denied Germany immunity. It was stated that the FSIA was not the base for this decision because of the degree of “barbarism” of the acts committed by this “out-law nation” contradicting everything that was held as human and sacred.⁴¹ As regards the international agreements exception, the court once again followed the *Amerada Hess* precedent stating that such agreements must be in obvious contrast to the FSIA, which was stipulated to argue the inadequacy of a treaty provision simply stipulating a must for the wrongdoing party to compensate the victim, as in article 3 of the Hague Convention which Princz referred to.⁴² As the basis for the waiver exception of section 1605(a)(1) FSIA, it was held that, since Germany had violated the fundamental *jus cogens* norms of international law, it had implicitly waived its sovereign immunity. The sole violation, the court however argued,⁴³ can not imply waiver, but will have to be accompanied by a requirement of a willing clear intention by the state of its compliance to take part of the trial as a party to it. The Court of Appeals eventually dismissed the case.⁴⁴

2.6 NATIONAL JURISDICTIONS IN GENERAL

Even though the former Yugoslav states have resisted the application of the prosecution and punishment at national courts, the political, and in certain occasions military pressure has been so overwhelming, that in fact the ICTY

(1994), p. 1483. Plaintiff’s petition to the United States Supreme Court for a writ of certiorari was denied on 17 January 1995 (*Hugo Princz v. Federal Republic of Germany*, No. 94-909), 115 S.Ct. 923 (1995)

⁴¹ Bröhmer, p. 79

⁴² Bröhmer, p. 79

⁴³ Bröhmer, p. 80

⁴⁴ In her dissenting opinion, Judge Patricia Wald, argued in favor of the viewpoint of a German waiver of immunity due to the breach of fundamental international law norms. She also contended a new view of universal jurisdiction. Contending that violations of international law no longer is only a subject of relevance to the national state, but is part of a wider global interest, Judge Wald took recourse to the examples of the statutes as well as the case law of the Nuremberg and Yugoslavia Tribunals, and the *Eichmann case* from the national sphere. When it comes to the intention requirement, Judge Wald made a parallel to a “foreseeability test” – meaning that the violating state should know that such a behavior could only end in responsibility for the conduct at one point. Apparently though, the dissent is not keeping to the strict legal basis in this argument, thus confusing the principle of state responsibility that is part of international law, with the possibility of prosecuting foreign states in national courts under international law.

now holds a decent number of indictees and defendants in detention. Additionally, the Genocide Convention does not provide for universal jurisdiction for trying perpetrators of acts of genocide. Criminal procedures have anyway been held in a number of civil law countries in Europe against war criminals from the former Yugoslavia, while common law countries have showed reluctance in prosecuting Balkan offenders.⁴⁵ A case in point is the *Tadic v. Karadzic case*⁴⁶ which concerned charges of “genocide, rape, forced prostitution and impregnation, torture and other cruel, inhuman and degrading treatment, assault and batter, sex and ethnic inequality, summary execution and wrongful death” against Radovan Karadzic as the political leader of the “Bosnian-Serb entity” in Bosnia. Before referring the case back to the District Court, the court ruled that acts of torture or summary executions in a private capacity were not to be regarded as violations of the laws of nations. Only if committed with the distinct “pursuit of genocide and war crimes” were they to be seen as in breach with law.⁴⁷ Canada’s Criminal Code though, does entitle for universal jurisdiction in cases of genocide. In particular during the 1980’s, common law countries, such as the U.S., U.K. and Australia, did also try war criminals from the Second World War and other seats of war such as Cambodia. The prosecution of these persons was not based on some notion of universal jurisdiction from the countries’ perspective, but was rather an extension of the extraterritorial jurisdiction. The extension, however, showed to be limited and only dealt with these annotated conflicts. In recent years there has been an upswing in U.S. domestic courts for cases dealing with international war criminals, although not on the basis of universal jurisdiction. In accordance with the rules set forth in the Geneva Conventions, states are required to adopt national legislation for the facilitation of prosecuting war criminals. Austria, Germany, Denmark, France, Belgium and Switzerland all made efforts to prosecute alleged perpetrators from Rwanda and the former Yugoslavia.⁴⁸ As regards universal jurisdiction among civil law states, Germany and

⁴⁵ Schabas, p. 366-7

⁴⁶ *Tadic v. Karadzic*, 70 F.2d 232 (2d Cir. 1995)

⁴⁷ D. J. Harris, *Cases and Materials on International Law*, 5th Edition, London, Sweet & Maxwell, 1998, p. 733

⁴⁸ Schabas, p. 367

Belgium have adopted the jurisdiction for war crimes, crimes against humanity and/or genocide. France still lacks the provision in its *Nouveau Code Pénal*, which nonetheless prescribes for prosecution of the most serious offence in its code, the crimes against humanity. Belgium on the other hand stands out as the most progressive among the European countries in the broadness of its ability to prosecute international war criminals under Belgian law. The Belgian statute not only implements what is stated under the Geneva Conventions in that it considers all the grave breaches as war criminals in both international and non-international conflicts, creates imprescriptibility for these crimes, and also universal jurisdiction. The Belgian War Crimes Statute from 1993 is therefore one of the few statutes said to be “over-inclusive” rather than “under-inclusive” as the case is in the majority of statutes around the world.⁴⁹ This approach is not unproblematic though, as the recent decision by the ICJ indicates in the case of *DRC v. Belgium*.

2.6.1 EUROPEAN CONVENTIONS AND STATUTES

Leaving the sphere of national statutes, out of which the U.S. FSIA is still the most progressive and significant, and case law on state immunity from national courts, the 1972 European Convention on State Immunity is currently the most thorough multilateral instrument on state immunity. As it was codified in the early 1970's, the Convention reflects a compromise typical of the time, a period of division between the old absolute immunity doctrine, and the more progressive, but still controversial restrictive immunity doctrine. This way the principles of “restrictive adjudicatory immunity”, of “strict territorial nexus requirements” and of “opting-out” provisions with extensive immunity exceptions were combined in the statute.⁵⁰ The European Convention and national instruments such as the FSIA, however represent a rare portion of actual enacted legislation, in a field that is predominantly found in customary international law. Examining the international law sphere for state immunity, the conclusion is inevitably

⁴⁹ Van Den Wyngaert p. 232

⁵⁰ Bröhmer, p. 119

that there is no explicit requirement of states granting foreign states immunity from adjudicatory proceedings before their domestic courts. Indeed, states can be sued and tried in foreign courts, but under certain circumstances and not always. The negative rule provides exceptions of immunity from commercial activities - *acta jure gestionis*. If consensus seems to be strong on this point, there is some confusion when distinguishing between private and governmental acts.⁵¹ Domestic immunity statutes and most international instruments have stipulated clauses that do not imply any differences between the private and official character of the tortuous act. Even if they admit jurisdiction, they all call for strict forum contact, prescribing a connection requirement linking the conduct to the foreign state. The FSIA states an immunity exception in cases of non-commercial torts only if the damage occurred in the U.S., extended though by case law which requires both damage and act located to the U.S. In Germany for instance, a different view is taken, leading to another conclusion. Immunity would here be denied (on the basis of the *gestionis/imperii* distinction) but only in commercial tort cases, with no regard to where the tortuous conduct was committed. This way the approach is cutting off jurisdiction over governmental acts traced to foreign states. Under the opposite approach of the territorial nexus requirement in the U.S., non-commercial torts are observed as well, but with the necessary relationship to the forum state. In relation to this approach no denial of jurisdiction over foreign governmental acts as a principle is to be found. This means that a domestic court could investigate human rights violations that normally are organized through governmental involvement. And even so, none of the two principles can be seen as comprehensive and prevailing in practice, and the solution offered is to further try to combine them in search for a way to find a balance between the two parties, the state and the individual.⁵²

⁵¹ Bröhmer, p. 139

⁵² Bröhmer, p. 141

2.7 THE PINOCHET CASES

*Pinochet No. 1*⁵³ and *Pinochet No. 3* one after the other, dealt with the issue of immunity protection for a former head-of-state in relation to the extradition charges, including acts of torture, hostage-taking, conspiracy to commit these offences and murder, in accordance with the formal Request for Extradition of the former dictator to Spain.⁵⁴ After the “judicial review” of the two warrants from 16 and 22 October 1998 had first been held in the Divisional Court of the High Court, leave was granted for the lodging of an appeal with the House of Lords. The law Lords in *Pinochet No. 1* ruled in a majority decision (by a vote of three to two) that acts of torture and hostage taking were conducts that by their nature was exceptions to any immunity protection, even for a former head-of-state. By an unprecedented intervention, the House of Lords was asked to reverse the first decision because of an unforeseen “intervener” in the case by Lord Hoffman’s affiliation to Amnesty (actually a fund raising project for charity), which was considered to be a party to the case.⁵⁵ Thus disqualifying the first judgment, a board of this time seven new law Lords was constituted in January 1999. The reasoning of the new decision that also held that Pinochet did not have immunity is a complex pattern covering U.K. legislation, common law and international law, and identifying seven diverse lines of interpreting the applicable law. Lord Goff was the only law Lord to entail the former head-of-state Pinochet, as any other public official, immunity *ratione materiae*. Only in an instance where the acts would have been carried out in a private capacity, for unofficial ends would he have been considered to lose his immunity.⁵⁶ Moreover, in Lord Goff’s opinion, the priority to sovereign immunity as a norm well established in international law, was higher than that to the stipulated principle of “repression” of crimes stipulated in for instance, the Torture Convention.⁵⁷ The majority

⁵³ R. v. Bow Street Magistrate, Ex Parte Pinochet, [1998] 3 W.L.R. 1456; 37 I.L.M. 1302 (1998) (hereinafter *Pinochet No. 1*)

⁵⁴ Initially the warrants for extradition were issued in Spain, and later on the 16 October 1998 they were re-issued by a London magistrate.

⁵⁵ In re Pinochet, [1999] 2 W.L.R. 272; 38 I.L.M. 432 (1999) (hereinafter *Pinochet No. 2*)

⁵⁶ Jan Klabbers, 'The General, the Lords, and the Possible End of State Immunity', Nordic Journal of Law, 68, 1999, p. 88

⁵⁷ *Pinochet No. 3*, 38 I.L.M. 606-607 (1999)

rather focused on the inherent incompatibility of immunity “co-existing” with offences, committed under its protection, and considered conducts in breach of international law not by any definition to be part of a head-of-state’s official functions.⁵⁸ Lord Millett ascribed personal immunity to heads-of-state, as they symbolized state embodiment and could not be put on trial since such an action would have been an insult to his country, in accordance to the *par in parem non habet imperium* doctrine. Subject matter immunity on the other hand was seen as available to both heads-of-state and diplomats, and without regard being taken to the “rank of the office holder”. In regard to the Convention against Torture, immunity of this kind could not be reconciled with the purpose of the Convention.⁵⁹

The advocacy of the obligation *erga omnes* and *jus cogens* norms under international law reflect the advancement into creating a normative system where certain rights have been endorsed with higher content invoking moral considerations and creating legal barriers. However desirable, the controversial effect of emphasizing certain elements of customary international law as *opinio juris*, creates a normative, “legislative” backbone.⁶⁰ Taking the example of the prohibition against torture, it is easy to discern the clash between normative recognition of the hierarchical supremacy of such a norm and state practice. This breach from the positivist way of describing international customary law has also been developed by academics. Deciding upon certain values, the international society sets itself in the next step to promote and protect these “interests” by transforming them to rules. This “social process” of customs, in the international context is therefore described as a constant “interactive” play, absorbing the wills and contributions of states and transforming them to rules for the benefit of all. Adhering to the autonomously created set of customs, states maintain to divide their own private and political interests and relationships from established “normative independence” and “legal system”. The key for

⁵⁸ *Pinochet No. 3*, 38 *I.L.M.* 651

⁵⁹ *Pinochet No. 3*, 38 *I.L.M.* 644

⁶⁰ Rachel Swain, ‘A discussion of the Pinochet Case (House of Lords Decision of 24 March 1999) Noting the Juxtaposition of International Relations and International Law Perspectives’, *Nordic Journal of Law*, 69, 2000, p. 250

solving this evolutionary imbalance is the interest states nevertheless have put into the future existence and maintenance of the customary approach of international law.⁶¹

The removal of Pinochet's immunity was not construed to eliminate the state immunity of the sitting heads-of-state. Nevertheless, as a non-intended effect of the Lordships decision, the state of Chile may now be brought proceedings against in other countries, and thus, have its state immunity in part removed or weakened.⁶² As for Pinochet personally, had he still been the head-of-state in Chile, he would have enjoyed the immunity protection as would he in the position of a former head-of-state if the acts had constituted functions of his office. There would not have been any obstacles to threaten his position, and the immunity *ratione materiae* would have prevented him of being arrested, judged or condemned in his official capacity as a head-of-state under civil as well as criminal law for conducts in breach of international criminal law. Once he has stepped down from power, the issue seems to be another, and the immunity protection seems to cover at least acts that were not committed under his official functions, but rather as private acts, thereby not being covered by international and national law.⁶³ All in all, it is important to make sure that the word immunity does not become a synonym for impunity when dealing with crimes of this sort and at this level.⁶⁴

2.7.1 CONCLUDING REMARKS

Taking the case from the concrete sphere to the abstract, where it is suggested it should have been held from the start, one may wonder why, more practically, immunity law still exists with such a strong emphasis. The parallel to the diplomat working abroad, in need of some extra-territorial defense, is not valid, since the state normally functions within its own

⁶¹ Swain, p. 251

⁶² Nina H. B. Jorgensen, *The Responsibility of States for International Crimes*, Oxford University press, 2000, p. 226-7

⁶³ *Crimes Against Humanity – Pinochet Faces Justice*, International Commission of Jurists, July 1999, p. 73

⁶⁴ International Commission of Jurists, p. 97

borders. The immunity protection makes more sense from the political viewpoint and it is perhaps no surprise that the British Home Secretary under the Extradition Act at the end refused the extradition of Pinochet based on his medical state, in a manner perhaps flavored with a bit of ‘realpolitik’. Be that as it is, the conclusion that could legally be drawn from the Pinochet decision, is not that heads-of-state violating human rights have more to fear in the future, but rather that immunity law is in need of reformation, because as derived from the Pinochet cases, it has lost some of its momentum.⁶⁵

2.7.2 AFTER PINOCHET – THE DRC-BELGIUM CASE

The judgment by the ICJ in The Hague on 14 February 2002, ruled that the arrest warrant that a Belgian court had issued *in absentia* against Mr. Abdulaye Yerodia Ndobasi, the former foreign minister of the Democratic Republic of Congo (DRC), in accordance with its domestic law, was in violation with international law. Failing to respect the immunity that the minister enjoyed from for instance foreign criminal jurisdictions by customary international law, Belgium was forced to cancel the arrest warrant. The issue was not whether the warrant was unlawful and in breach with international principles regarding jurisdiction, thus rendering the Belgian law itself illegal, but rather, whether the circulation of such an arrest warrant did violate the ministerial immunity of the foreign minister and thereby put the lawfulness of the warrant at stake. Belgium’s legal obligations towards DRC had been violated because of the disrespect of his immunity, immaterial of the fact of whether the acts charged with were committed in a private or official capacity, and whether the minister, at the time of the arrest, is abroad due to private or official matters. In its judgment, the ICJ did not rule on the issue regarding the legislation itself, or its universal and “long-arm” character. Having in mind the special criteria of the ICJ decision, that is, that it only applies to Belgium and not third states, that it addresses merely foreign ministers’ immunity concerns in criminal proceedings, it may still send signals abroad affecting for instance the U.S.

⁶⁵ Klabbers, pp. 91-5

ATCA statute and whatever future processes against government officials in extraterritorial jurisdictions.⁶⁶

⁶⁶ ASIL Insights, February 2002, by Pieter H.F. Bekker, World Court Orders Belgium to Cancel an Arrest Warrant Issued Against Congolese Foreign Minister, <http://www.asil.org/insights/insigh82.htm>

3 International Crimes and International Prosecution

3.1 INTERNATIONAL CRIMINAL LAW

Before one goes into the legal statutes and record of international criminal law, it would be helpful to somewhat go through the scope and conduct of international criminal law, although some positivist scholars might call it a supposition, a set of rules and principles that in fact do not exist. A positivist approach merely recognizes torts that are classified as “international crimes” as crimes under municipal law. The international aspect is the one that judges the legal setting of the status and extent of a municipal criminal law that is used in prosecuting a national of a foreign state for crimes committed outside the territory of the forum state. Opposed to this, a naturalist approach sees international crimes as by definition international, only seeking a forum for prosecution under international criminal law among the domestic courts. With the coming into existence of the ad-hoc tribunals for the former Yugoslavia and Rwanda, the dichotomy is not that interesting, since the tribunals exist through a mandate from the Security Council, and operate by an international statute defining the crimes. The same is true for the ICC statute, which receives its jurisdiction and the crime definitions from international law. Crimes that are not within the realm of the international tribunals and their jurisdictions may be prosecuted in national courts, depending on whether the state has ratified co-operation treaties and conventions where the definition of the crimes and jurisdiction is prescribed. In doing so, the creation of a system of universal jurisdiction is realized, by which punishment of perpetrators is globally secured by the states parties.⁶⁷ If a possibility to act as a prosecuting state does not exist, most treaties offer the alternative of extradition or submission of the suspect to another jurisdiction. As to the definition of “international crime”, it is required that it fulfills both requisites, it has to be a “crime”, and identified by

“international law”. Customary international law, which covers a field larger than only the legislated when it e.g. looks at the effect of a convention on for instance states that have not ratified a convention, shows no “definite list” of international crimes.⁶⁸

Some of the crimes have also achieved a status of *jus cogens*, such as aggression, genocide, crimes against humanity, war crimes, piracy, slavery and torture. This would mean that any instigation of such conduct by states would immediately outlaw such conduct. Apart from the *jus cogens* regulations, there exists a set of “core crimes” as well, included in the Rome Statute of the ICC, endowing only the crimes of genocide, crimes against humanity, war crimes and aggression with a deeper, more profound

⁶⁷ John F. Murphy, *Civil Liability for the Commission of International Crimes as an Alternative to Criminal Prosecution*, Harvard Human Rights Journal, Vol. 12, Spring 1999, p. 3

⁶⁸ A recent table of offences under international law by Jordan Paust et al. in the International Criminal Law Review 11 (1996) presents the following “protected areas”:

- A. Protection of Peace
 1. Aggression
- B. Humanitarian Protection During Armed Conflicts, the Regulation of Armed Conflicts, and the Control of Weapons
 2. War Crimes
 3. Unlawful Use of Weapons; Unlawful Emplacement of Weapons
 4. Mercenarism
- C. Protection of Fundamental Human Rights
 5. Genocide
 6. Crimes Against Humanity
 7. Apartheid
 8. Slavery and Related Crimes
 9. Torture
 10. Unlawful Human Experimentation
- D. Protection Against Terror-Violence
 11. Piracy
 12. Aircraft Hijacking and Sabotage of Aircrafts
 13. Threat and Use of Force Against Internationally Protected Persons
 14. Taking of Civilian Hostages
 15. Attacks upon Commercial Vessels and Hostage-Taking on Board such Vessels
- E. Protection of Social Interests
 16. Drug Offences
 17. International Traffic in Obscene Publications
- F. Protection of Cultural Interests
 18. Destruction and/or Theft of National Treasures
- G. Protection of the Environment
 19. Environmental Protection
 20. Theft of Nuclear Materials
- H. Protection of Communication Means
 21. Unlawful Use of Mails
 22. Interference with Submarine Cables
- I. Protection of Economic Interests
 23. Falsification and Counterfeiting
 24. Bribery of Foreign Public Officials

significance and willingness to prosecute.⁶⁹ As regards prosecution and extradition regulations in conventions, the 1949 Geneva Conventions hold certain “grave breaches” as universal and universally extraditable. Every state is requested to enact legislation accordingly, prosecute offenders in domestic courts under fair trials or to extradite them.⁷⁰ Looking back it is easy to notice the reluctance and hesitant manner in which states have approached the prosecution of core crimes. The Yugoslavia and Rwanda Tribunals are the first international criminal law systems to deal with these crimes in a serious manner since the Nuremberg and Tokyo Trials. However, the effectiveness of the newly implemented international permanent tribunal is at stake regarding the prosecution of these crimes.⁷¹ There exists a whole set of barriers and obstacles with a possibility for states to “opt out” of the Court’s jurisdiction, and a “consent regime” indicating that, in order for the tribunal to be able to exercise its jurisdiction, it is necessary that the state where the atrocity has been committed as well as the state of nationality of the alleged offender, give its consent to the tribunal. In a concrete situation that would imply a possibility of prosecution only against a person who has committed any of the core crimes in a foreign state, contrary to practice in general, where most of these crimes are committed by states within their own territories against their own people/s.

3.2 CRIMINAL RESPONSIBILITY OF STATES – ILC DRAFT ARTICLES

The concept of international criminal responsibility for individuals was first endorsed under international law in the Nuremberg Trials. Previously states have always been regarded as the sole subjects of international law. As a prevailing political concept, the liability of individuals took over as may be seen in international instruments such as the 1954 Draft Code of Crimes against the Peace and Security of Mankind by the ILC, the Genocide and Apartheid Conventions, as well as the ICC Statute. With the drafting of the

⁶⁹ Art. 5(1) of the Rome Statute of the International Criminal Court, July 17, 1998, U.N. Doc. A/CONF.183.9, reprinted in 37 I.L.M. 999 (1998).

⁷⁰ Murphy, p. 6-7

⁷¹ Murphy, p. 20

Draft Articles on State Responsibility, the approach towards state liability was addressed in Article 19. Since there is a link between state criminal responsibility and individual criminal responsibility, the two notions are in some cases inter-exchangeable or even complementing.⁷² While subparagraphs a) and b) deal with state responsibility, c) and d) will be implying a punishment of an individual instead of the state.⁷³ Subparagraph c) targets both states and individuals with liability consequences and includes war crimes, and d) relates to individuals acting on their own or on behalf of the state.⁷⁴ Tomuschat confirmed in an ILC report on the Draft Code of Crimes against the Peace and Security of Mankind that apart from states being held liable as “juridical entities” for crimes committed by them, individuals in head-of-state positions in addition may be responsible for the breaches “in their individual capacity”.⁷⁵

The ILC had long been preparing reports on individuals as subjects of international criminal law. This position brought on criticism by Doudou Thiam, the ILC Special Rapporteur, who defended the idea of harmonizing the positions. These thoughts were elaborated in an analytical paper on the Draft Code where the country representatives talked in favor of an advance of the two responsibilities.⁷⁶ Germany even articulated its position by stating that “holding individuals responsible should not replace the responsibility

⁷² Jorgensen, p. 139

⁷³ Jorgensen, p. 156

⁷⁴ The issue of concern here is, whether such prosecution and punishment of an individual wrongdoer is a substantially sufficient, adequate and perhaps also fair remedy. Individual heads-of-state are no longer assisted by the doctrines of *act of state* or superior orders, as are states not by individual criminal responsibility. The fact that these two liabilities may be invoked inter-changeably on both subjects is tailored to cover the claim of command, and make sure that all levels of the hierarchy are punished according to their involvement. A key case in this regard is the *case Bosnia-Herzegovina v. Yugoslavia* where so far no reference has been made to any of the ICTY judgments or conclusions – only to the Security Council’s decision on the creation and mandate of the Tribunal. On the other hand, it is prognosticated that the judgments will have an effect on the ICJ’s assessment on the state responsibility, maybe even to such a high degree that the case will be left dismissed. Despite the work with Article 19 of the Draft Articles and the Draft Code, ILC has yet not created a coherent instrument to deal with all forms of criminal responsibility, covering all the instances on the scale of criminal responsibility. Additionally, it is necessary to uphold the difference between the two liability modes, since state responsibility is more exclusive than individual responsibility. – Jorgensen, pp. 155-158

⁷⁵ Report of the ILC on the Work of its Forty-Eighth Session, Draft Code of Crimes against the Peace and Security of Mankind, ‘Crimes against the Environment’, ILC(XLVIII)/DC/CRD.3, 27 March 1996

⁷⁶ Report of the ILC on the Work of its Thirty-Fifth Session, Draft Code of Offences against the Peace and Security of Mankind, Analytical paper prepared pursuant to the request contained in

under international law of a state which organized, committed or supported such crimes”, and definitely not “preclude” the state responsibility.⁷⁷ The U.K. on the other hand was reluctant to see any link between state responsibility and individual criminal responsibility. For instance, a crime such as that of aggression was more correct to sue as state responsibility than as individual responsibility.⁷⁸ Arguing against the U.K. comment, it is said that if the ILC has failed to create a distinction between state and individual responsibility, it is only so because the “distinction is artificial”.⁷⁹ Examining the case of genocide, it is clear that both subjects can be held liable. And indeed, reviewing case-law from the Tokyo and Nuremberg Tribunals, and now lately, the UN ad-hoc Tribunals, individuals have both been indicted on a vast scale for the acts of genocide and been found guilty for the same as well. States, however, have not been even tried for their involvement in genocide around the world. In the 12th ILC report on the Draft Code in 1995 Belgium argued that state responsibility needed its place in the Draft Code. Advantages of this inclusion would appear for instance in cases of civil compensation suits to individual plaintiffs/victims. Furthermore, by conferring liability on a state, there is less space for the nation to restrict the blame to the government or state officials thereby distancing themselves from the responsibility they carry as the electorate.

In 1954 the ILC concluded the work on its Draft Code listing 11 crimes out of which the first seven were recognition of the precedent of the “crimes against peace” in the Nuremberg Statute, which had transformed into customary law as the worst crimes of international criminal law rendering the hardest punishments. The Code was moreover an attempt to differentiate between acts incurring state responsibility – all the crimes except one – and individual responsibility. In 1991 the new Draft Code took on an expansive approach, including pretty much any possible crime, regardless of whether or not it was endorsed in international law. This approach proved not to be

paragraph 256 of the report of the Commission on the Work of its Thirty-Fourth Session, A/CN.4/365, 25 March 1983

⁷⁷ A/C.6/36/SR.60, para. 26, and A/37/325, 9, paras. 13, 15

⁷⁸ Jorgensen, p. 142

⁷⁹ Jorgensen, p. 143

very successful from a viewpoint of identifying the correct liability modes. The mixture of crimes was not consequently composed and did not take into consideration which subject of international law was targeted for liability – states, government officials or individuals.⁸⁰ The 1995 Draft Code therefore presented a slimmer Nuremberg Statute version, basing the listed crimes on two criteria: “extreme seriousness and international community recognition”.⁸¹ It was thereby distancing itself from crimes that were not to be found as established in the codex of international law. The legal input came from the recently adopted Statute for the ICTY and the Secretary General, implicitly creating an invitation for the international humanitarian law to be included, and affirmed as customary law.⁸² This standpoint, accompanied by the *nullum crimen sine lege* principle, was making sure that a consensus on the field of international humanitarian law would prevail, not leaving any space for countries to deny adherence on the ground of different conventions.⁸³ The criteria for the 1994 Draft Statute of the ICC were set up to distance it from the Draft Code, by the inclusion of “treaty crimes” directly in the text, whereby a clear recognition of treaties as *de facto* law was intended, and also an atmosphere of “international concern” as well as a thorough juridical framework of extradition requirements, universal jurisdiction and prosecution. By reaching out for a larger and more cohesive sphere of crimes than only the crimes against peace and security known from the Draft Codes, the Statute evidently tried to foresee the operative level of the ICC on a larger scale.⁸⁴ The 1996 Draft Code presents different modes of liability depending on the nature of the annotated crimes. The ICC has found that it is more efficient to target individual representatives of governments than the state itself. Both the Nuremberg

⁸⁰ Compared to what the 1996 Draft Code turned out to be, the 1991 version is more controversial and less selective, while the 1996 Code found a more exclusive feature, although still dealing with the crimes of aggression, genocide, and crimes against humanity. The 1998 Rome Statute of the ICC on the other hand settled with the core crimes under general international law, not reaching out for the proposed extension of crimes by the Preparatory Committee.

⁸¹ Jorgensen, p. 148

⁸² Includes conventions and laws of for instance the 1949 Geneva Conventions for the Protection of War Victims, the 1907 Hague Convention (No. IV) Respecting the Laws and Customs of War on Land and Annexed Regulations, the 1948 Genocide Convention, and the Charter of the Nuremberg Tribunal.

⁸³ Jorgensen, p. 148-9

⁸⁴ Jorgensen, p. 149-150

Statute and the Draft Code admit individuals being prosecuted for acts of state, that is, when holding the capacity of a governmental official, a head-of-state, or military leader. Since the individual responsibility is derived from the state's conduct, some suggest, it would be "logical" to state that the two responsibilities correspond and are identical. The punishment of these two subjects will have to differ though, since it is not possible to, for instance, punish a state to imprisonment for a criminal act. It will need to be held liable in a "civil sense" for the criminal offense, as exemplified in the case *Bosnia-Herzegovina v. Yugoslavia* before the ICJ. Another question is why such double liability exists, and what possible purpose it would make to punish an individual instead of the state entity. Oppenheim's *International Law* acknowledges that in the case of war crimes, entailing responsibility to individual agents is a way of punishing the state. Should a state agent commit international crimes, the responsibility will be held by the state, if the conduct was performed under the control of the government. Hence, should a head-of-state individually face charges against his conduct, and be held liable for the offences, it will be viewed as an indirect punishment of the state.⁸⁵ The Milosevic indictment is the first of its kind against a head-of-state still in power at the time of the drafting and filing of the indictment. In arguing this connection between the individual and the state, caution needs to be observed. State responsibility is bound to exist even if the individual agent is not put on trial. An act that is causing individuals criminal responsibility could by a presumption also engender state responsibility, if the setting is adequate for such legal liability.⁸⁶ It is not reasonable to create a situation where the guilt of a state is hidden behind the liability of an individual. From the point of view of the victim state, it is also uncertain whether the prosecution of an individual can actually amount to a satisfactory reparative action for the guilt of a state sponsored campaign of violations of human rights and humanitarian law.⁸⁷

⁸⁵ R. Jennings and A. Watts (eds.), Oppenheim's *International Law*, i: *Peace*, 9th edn. (1992), p. 536; Jorgensen, p. 154

⁸⁶ Jorgensen, p. 157

⁸⁷ Jorgensen, pp. 155, 157

3.3 PUNISHING A STATE – IMMUNITY FOR HEADS-OF-STATE

The reparative actions available to a state against which it has been committed a wrongful act, are declaratory judgments, satisfaction, restitutions, and compensation.⁸⁸ The “collective guilt” of the breaching state that the remedies in a way presuppose, especially if one is inclined to see the remedy as a punishment, still has to be carefully examined in order not to expose it to a different layer of retaliatory actions such as sanctions, countermeasures and other measures.⁸⁹ It is necessary to assess whether the whole population should be treated as an accessory to the government or the regime, even if it is, in a worst case scenario, dictated by an autocratic regime which is maybe also oppressing its own population.⁹⁰ It is self-evident that such remedies should contain elements of punishment, but also of prevention and correction. If the punishment should target an innocent group, the whole purpose of it is left out, and components of personal justice and social prevention are not fulfilled.⁹¹

The establishment of the ICC was first initiated firmly when in 1991 the General Assembly in its Resolution 46/54 brought forward the idea of such a court and investigated whether there existed a will or even consensus for such a creation. Consequently, the ILC followed up with Reports by its Special Rapporteur⁹² and workgroups that resulted in the Draft Statute for an International Criminal Court (1994). The Draft Statute made no mention of “state responsibility” though, a sort of legacy derived from the ad hoc tribunals’ statutes. In contrast to this, a Committee of Experts on the Establishment of a Permanent Criminal Court met and coordinated their findings in the second “Updated Siracusa Draft” from 1996.⁹³ It amended Article 33 of the ILC Draft, which stated under paragraph 4 that state responsibility for criminal acts should not be prejudiced by individual

⁸⁸ Jorgensen, p. 167

⁸⁹ Jorgensen, p. 167-8

⁹⁰ Jorgensen, p. 172

⁹¹ Jorgensen, p. 170

⁹² Report of the ILC on the Work of its Forty-Fourth Session, A/CN.4/442

⁹³ 15 March 1996

responsibility. The same approach was later adopted in Article 25(4) of the Rome Statute. In theory, the possibility of an expansion of the ICC jurisdiction to include states is also conceivable and would be the ideal solution to combine the “substantive issues” of state criminality and the more procedural aspects of it. Until the ICC is running properly, the ICJ and other ad hoc tribunals would be able to award punitive damages to states when called for.⁹⁴ As previously noted, sovereign immunity is activated when a crime is committed against a foreign domestic law, or even human rights violations and breaches against international law in general. Even though the restrictive theory on sovereign immunity is prevalent today,⁹⁵ states are as a presumption immune from criminal suits abroad.⁹⁶

3.4 STATE RESPONSIBILITY, THE GENOCIDE CONVENTION AND THE ICJ

The Genocide Convention mainly contemplates the individual liability for crimes of genocide. States, however, are not addressed as such, even though they often stand as the main perpetrators and initiators of genocide as well as of other crimes against the laws of war. It is the nature of the act that somehow requires for a state to be involved. The Convention does mention States and imposes obligations on them, but does not provide for any possibility of holding them directly guilty for acts of genocide.⁹⁷ There was considerable activity among the states of the UN Sixth Committee in 1948 during the drafting and amending of the Genocide Convention and these

⁹⁴ Suggested by the NGO *Avocats sans frontières* on the jurisdiction of the Rwanda Tribunal in their Open Letter Regarding the Need to Expand the Jurisdiction of the International Tribunal for Rwanda, 18 May 1995, <http://www.asf.be/asf/letter/letterlong.html>, 2

⁹⁵ Jorgensen, p. 224

⁹⁶ Two cases have recently been related to trials against former heads-of-state and the question of immunity, one against Chile's former dictator, Augusto Pinochet (Reg. v. Bow Street Magistrate, Ex parte Pinochet, [1999] 2 W.L.R. 827; 38 I.L.M. 581 (1999) (hereinafter *Pinochet No. 3*)), and the other against the former dictator of Chad, Hissene Habre in Senegal. Even though the *Pinochet case* is a milestone in the history of criminal proceedings against state officials, one should not forget that individual perpetrators, although in a limited number, have been found liable for crimes against international law since the Nuremberg and Tokyo Trials, for example, ex-dictator of Equatorial Guinea, Marcias Nguema; the Colonels of the Greek Junta; the Argentine Generals; the former head-of-state of the Central African Republic, Jean Bedel Bokassa. It is against this background that the *Pinochet case* has to be seen – against an evolutionary process from the Nuremberg Statute and onwards to a universal jurisdiction for cases of individual acts in breach of human rights, as stipulated in the Rome Statute. - Nigel S. Rodley, *Breaking the cycle of Impunity for gross Violations of Human Rights: The Pinochet Case in Perspective*, Nordic Journal of International Law, 69, 2000, p. 16

⁹⁷ Schabas, p. 418

distinct views on the Convention emerge in the numerous debates and the *travaux préparatoires*.⁹⁸ France strongly emphasized the need for an international court, but held that the Genocide Convention was only supposed to target individuals, and not states. The UK had a totally reversed opinion, searching for a way to prosecute states through the Convention rather than individuals. UK made its first suggestion to incorporate criminal responsibility for states and governments in the amendment to Article V⁹⁹ and VII¹⁰⁰ of the Genocide Convention. The amendments were rejected, but once again proposed when debating Article IX. The UK amendment sought for a connection between the deterrent to states for involvement in genocide and the “maintenance of peace”.¹⁰¹ Including states and governments was “imperative” to make the Convention optimal.¹⁰² UK’s approach was supported by other countries such as Belgium, which suggested a link and recourse to the ICJ for cases of state responsibility in the Genocide Convention. The crux then and now, is that states are not subjects to criminal law and do not obey to the same principles of criminal responsibility as individuals. Under civil law states are obliged to provide material reparations as the only punishment.¹⁰³ During the debate on the drafting of Article IX, France supported the new joint UK/Belgium approach for a submission to the ICJ of any “disputes relating to the responsibility of a State for any of the acts enumerated in articles [I] and [III]” as long as it was a question of civil responsibility.¹⁰⁴ The UK/Belgium amendment was adopted, again after some confusion regarding whether it was involving any criminal responsibility of states under the Convention, but after the UK assurance and clarification that it was indeed a suggestion for international civil responsibility of states violating the Convention, the amendment was adopted.¹⁰⁵

⁹⁸ Official Records of the Third Session of the General Assembly, Part 1, Sixth Committee, Legal Questions, Summary Records of Meetings, 21 Sept.-10 Dec. 1948; Jorgensen, p. 35

⁹⁹ A/C.6/236, 16 Oct. 1948; Jorgensen, p. 36

¹⁰⁰ A/C.6/236/Corr.1; see 99th and 100th Meetings, Summary, 392-4

¹⁰¹ 92nd Meeting, Summary Records, 302.

¹⁰² (1948-9) YrbkUN, 955-6.

¹⁰³ Schabas, pp. 419-420

¹⁰⁴ UN Doc. A/C.6/258

¹⁰⁵ UN Doc. A/C.6/SR.105 (eighteen in favor, two against, fifteen abstentions)

3.5 BOSNIA AND HERZEGOVINA V. YUGOSLAVIA

The litigation between Bosnia-Herzegovina and FRY before the ICJ, is a case which has been pending before the Court for almost a decade now. Bosnia-Herzegovina filed its application to the ICJ on 20 March 1993 charging FRY with violations against the 1948 Genocide Convention. The charges were based on Article IX of the Convention as the jurisdictional basis of the Court and invoked Articles I to V of the Convention that FRY had allegedly violated. Bosnia-Herzegovina also sought several provisional measures under Article 41 Statute of the ICJ to be activated against FRY in order to make it cease all acts of genocide against Bosnia-Herzegovina. The Court argued that Article IX provided it with the jurisdictional basis, however, refusing authority on the other grounds opined by Bosnia-Herzegovina.¹⁰⁶ On 27 July 1993, Bosnia-Herzegovina filed a new request, this time for provisional measures to the effect that it would prevent the commission of acts of genocide under the Convention, by admitting Bosnia-Herzegovina a recourse to military weapons, equipment and supplies.¹⁰⁷

In the Memorial¹⁰⁸ filed by Bosnia the argument was based on Article IX and involved state responsibility on three different levels. First, state responsibility was invoked for acts of genocide as described under Article II and Article III. Second, responsibility for a state could be triggered by breaches of obligations set out in Articles I, IV, V and VI, when the state failed to prevent acts of genocide through the organs and instruments of the domestic legal system. Third, Articles I and IV also invoked state responsibility when the state failed or refused to bring individual perpetrators to trial. Article IX was seen as the proper basis for states to along with a whole range of individuals be determined liable or not for the failure of preventing and punishing the perpetrators of the acts of genocide.¹⁰⁹ Bosnia stated that inferring the question of whether the state

¹⁰⁶ Schabas, p. 428

¹⁰⁷ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro)), Further Requests for the Indication of Provisional Measures*, 13 September 1993 [1993] *ICJ reports* 325, pp. 332-3

¹⁰⁸ *Memorial of the Government of the Republic of Bosnia and Herzegovina*, 15 April 1994 (hereinafter Memorial)

¹⁰⁹ Memorial, pp. 200-201

actually had committed an act of genocide, and thus criminalizing such a state, was an entirely separate one, i.e. part of the issue of accountability for criminal acts that does not exist under the Genocide Convention. FRY agreed in its preliminary objections to the jurisdiction of the Court, that a state is responsible when failing to punish or prevent acts of genocide.¹¹⁰ Additionally, FRY contended that, since the conflict was being waged in certain parts of Bosnia where FRY did not have any jurisdiction, it constituted a domestic problem of Bosnia with no connection to FRY. It asserted that the Bosnian Memorial was based upon an erroneous construction of the Genocide Convention, supported by “submissions” that were not within the scope of the Convention. Consequently, FRY stated that there could be no international dispute under Article IX, and hence no jurisdiction for the Court over the case.¹¹¹

The ICJ however concluded that Article IX did in fact provide the Court with jurisdiction in this case, and briefly indicated its reasons and the rejection of the of the 5th Preliminary Objection of FRY by eleven votes to four. It is not a hindrance for state responsibility when Article IX refers to “the responsibility of a state for genocide or for any other acts enumerated in Article III”. Nor is Article IV, which deals with individual responsibility of “rulers” or “public officials”, meant to exclude the responsibility of states.¹¹² The Court continued to indicate the extra-territorial applicability of the Genocide Convention without any limitation to a state’s obligation to prevent and punish acts of genocide outside its territory under Article VI. The Court never went as far as to affirm any state responsibility for the commission of genocide or responsibility “for acts of its organs”, but merely implied that the Convention did not exclude such a form of liability.¹¹³ After all, it was not necessary for the Court to make a closer assessment of this issue at that time, but its conclusion that, since there exists a disagreement between the parties on the direct state responsibility over acts enumerated in

¹¹⁰ Jorgensen, pp. 266-7

¹¹¹ (1996) ICJ Reports, para. 14; Jorgensen, p. 268

¹¹² (1996) ICJ Reports, para. 32; Jorgensen, p. 269

¹¹³ Schabas, p. 435

Articles I and III automatically makes Article IX to cover the litigation, is “sufficiently equivocal”.¹¹⁴ What did the Convention actually have in mind? As previously indicated, the drafters of the Genocide Convention more than half a century ago, debated rather vividly the scope and interpretation of Article IX, and may have left the issue of state responsibility to be solved through the evolutionary process. Such a regard to the concept of inter-temporal law would encourage to a more flexible and balanced approach by the ICJ to address the implementation of Article IX.¹¹⁵ It is suggested in the literature that when a court has to apply a rule or an article, it should refrain from only making an assessment from a static perspective, and rather attempt to reach a conclusion from “within the framework of the entire legal system prevailing at the time of the interpretation”.¹¹⁶ This question is particularly interesting and important in cases involving human rights and has been raised in a couple of cases before the ICJ. Bosnia did invoke other grounds for jurisdictions as well, based on international law on war and international humanitarian law by means of the 1949 Geneva Conventions, Protocol 1 of the Geneva Conventions, the 1907 Hague Regulations on Land and Warfare, and the Nuremberg Charter, the Judgments and Principles. Even though the Court dismissed these additional grounds, because it was not *prima facie* established, all the Conventions address state responsibility (although all do not admit recourse being taken to the ICJ). Moreover, obligations *erga omnes* advocate a compliance with the Conventions, and thus also with the Articles addressing state responsibility. As for the Genocide Convention, the ICJ ruled that the rights and obligations stipulated are also obligations *erga omnes*. When interpreting the Court’s rejection, it seems though, that only alleging the existence of an obligation *erga omnes*¹¹⁷ to comply with the Genocide Convention, or any of the other Conventions dealing with state responsibility for war crimes, would not have presented a sufficient ground¹¹⁸ for jurisdiction.¹¹⁹

¹¹⁴ Schabas, p. 435

¹¹⁵ Jorgensen, p. 269

¹¹⁶ Oppenheim’s *International Law*, p. 1282; Jorgensen, p. 270

¹¹⁷ (1996) ICJ Reports, para. 31; Jorgensen, p. 276

¹¹⁸ See case of *East Timor* (Portugal v. Australia), I.C.J. 1995, p. 90

¹¹⁹ Jorgensen, pp. 274-6

Through the *Bosnia v. Yugoslavia case* the ICJ is inevitably approaching the domain of an emerging principle of state accountability for international crimes such as genocide. By avoiding the criminal responsibility of a state for genocide, it is admitted to award punitive damages, which would include a criminal consideration, and still not force itself into a “quasi-legislative”¹²⁰ field. The ICJ can not ignore the re-emergence of state responsibility in relation to the Bosnia case, and should interpret it as a “crystallization” of the first stage in the development towards a final concept and principle of state liability for certain commissions, among which the acts of genocide present the most severe.¹²¹

¹²⁰ (1996) ICJ Reports, para. 103

¹²¹ Jorgensen, p. 278

4 ICTY and Slobodan Milosevic

4.1 THE KOSOVO INDICTMENT

What does it mean when scholars and Balkan analysts, discuss Serb or Yugoslav politics, and instead of using the name of the state, almost exclusively formulate the points in the manner of “Milosevic started a counter-attack...”,¹²² “... the Albanians had started fighting with Milosevic...”,¹²³ “... the world community condemned Milosevic’s counter-offensive...”¹²⁴ (my emphasis added). Surely president Milosevic did not himself personally wage a war in Kosovo, shooting, raping or expelling any ethnic Albanians from the country. Talking about the aggressions and violations committed, as a one man’s work hopefully does not provoke any such insinuations. Apart from being a stylistic way of expressing oneself, the formulations motivate in more ways for an explanation. After all, it is Milosevic who stands trial in The Hague, charged in the Kosovo Indictment, the first indictment of three filed by the Office of the Prosecutor (OTP), with crimes against humanity and violations of the law and customs of war, individually or in concert with the President of Serbia, Milan Milutinovic; the Deputy Prime Minister of the FRY, Nikola Sainovic; Chief of the General Staff of VJ, Colonel Dragoljub Ojdanic; and the Minister of Internal Affairs of Serbia, Vljajko Stojiljkovic,¹²⁵ all accused by virtue of their positions in FRY during the relevant period of time.

4.1.1 ARTICLE 7(1)

As the President of FRY at all times relevant to the Kosovo Indictment, Milosevic is regarded as the main perpetrator and responsible for the military campaign and strategic co-ordination of the commissions in Kosovo

¹²² Michael Ignatieff, *Det virtuella kriget – Kosovo och därefter* (transl. *Virtual War – Kosovo and Beyond*), Daidalos, Göteborg, 2000, p. 15

¹²³ Ignatieff, p. 30

¹²⁴ Ignatieff, p. 15

¹²⁵ Stojiljkovic however committed suicide on 13 April 2002 in front of the Serbian Parliament in a protest against the Indictment.

from 1 January 1999 until 20 June 1999.¹²⁶ According to Articles 3, 5 and 7(1) of the Statute of the Tribunal, the indictees “planned, instigated, ordered, committed, or otherwise aided and abetted in the planning, preparation, or execution” of the crimes charged with.¹²⁷ Each and one of them is, apart from being individually responsible for the commission of these crimes, also responsible in the position of a “co-perpetrator” in the participation of the “joint criminal enterprise”, a plan construed with the purpose to expel “a substantial portion of the Kosovo Albanian population from the territory of the province of Kosovo”, also known as “ethnic cleansing”. This “criminal purpose” was fulfilled by the use of “the *de jure* and *de facto* powers available” to the accused in their positions. Additionally, the accused “shared the intent and state of mind” for the commission of all the crimes enumerated in the five counts of the Kosovo Indictment. The crimes were “within the object of the joint criminal enterprise” alternatively that the consequences of the commission were “natural and foreseeable”.¹²⁸

4.1.2 ARTICLE 7(3)

Article 7(3) is also available to ascertain someone individual criminal responsibility for the acts of their subordinates, if he had reason to know or suspect that the subordinates were violating international humanitarian law, and “failed to take necessary and reasonable measures to prevent such acts or to punish the perpetrators”.¹²⁹ Milosevic’s command responsibility set out in §§20-28, takes the point of departure in the fact that Milosevic was, apart from President of FRY from 15 July 1997, also holder of a number of *de jure* positions, such as President of the Supreme Defense Council of FRY (SDF). The SDF, consisting of the President of FRY and the Presidents of Serbia and Montenegro, is responsible for the questions of national security and defense, and decides over the Yugoslav Army (VJ). The power to command and order the implementation of the National Defense Plan and

¹²⁶ Second Amended Indictment, The Prosecutor v. Slobodan Milosevic *et al.*, Kosovo, Case No. IT-99-37-PT, (hereinafter Kosovo Indictment), §17

¹²⁷ See footnote 138

¹²⁸ Kosovo Indictment, §18

¹²⁹ Kosovo Indictment, §19

the responsibility over the VJ was in Milosevic's hand, as the Supreme Commander of the VJ.¹³⁰ This title derived from the FRY Law on Defense also granted Milosevic power over "republican police units subordinated to the VJ" during a state of emergency or war, which occurred on 23/24 March 1999 in FRY.¹³¹ Through these positions, Milosevic had apart from the control over the VJ and the Ministry of Interior (MUP) units, authority over "military-territorial units, civil defense units and other armed groups", i.e. paramilitary units, and is hence criminally responsible for all the commissions of his subordinates under Article 7(3).¹³² Milosevic's *de facto* control over the whole stratum of institutions in federal, republican and provincial life acquired between 1986 and the beginning of the 1990's is the second set of positions examined. Federal institutions and organs, normally under the control of the Assembly of the Government of the FRY were controlled by Milosevic, as well as functions and institutions such as the police force and the military force of the Ministry of the Interior (MUP), otherwise to be found under the competence of "Serbia and its autonomous provinces". The media is in particular pointed out as a medium in FRY's political and economic life controlled by Milosevic.¹³³ Milosevic acquired these control positions through his official positions as the leader of the two leading political parties that succeeded each other in power. From 1986 until 1990 he was the Chairman of the Central Committee of the League of Communists in Serbia, and from 1990 until 2000 he was the President of the Socialist Party of Serbia.¹³⁴ Stemming from his control over institutions and organs covering the entire political environment of the FRY, Milosevic's *de facto* control includes the influence over Kosovo, Vojvodina and Montenegro, as well as their institutions.¹³⁵ Each and one of the persons of the joint criminal enterprise is responsible through their direction, encouragement or support, for the systematic, deliberate and widespread expulsion campaign against the Kosovo Albanian population, in order to

¹³⁰ Kosovo Indictment, §21

¹³¹ Kosovo Indictment, §22

¹³² Kosovo Indictment, §28

¹³³ Kosovo Indictment, §23

¹³⁴ Kosovo Indictment, §24

¹³⁵ Kosovo Indictment, §25

create a continuance of Serb dominion over the province, the OTP alleges. The climate and “atmosphere of fear and oppression”¹³⁶ that the VJ and other forces and units created in Kosovo, encompasses a variety of breaches and violations of international law, principles and norms: the shelling of towns, burning down and destruction of public and personal properties, looting, destruction of cultural and religious sites, beatings, unlawful arrests, harassment, sexual assault and killings. All these acts were committed with the purpose to expel the ethnic Albanians from their homes and out of the province, and was sealed with the forces of the FRY and Serbia robbing refugees of their money, valuables and identity documents en route and at the borders, intended to “erase any record of the deported Kosovo Albanians’ presence in Kosovo and to deny them the right to return to their homes”.¹³⁷ Some of the most heinous crimes are brought to the fore in the five counts in the Kosovo Indictment, not genocide though.¹³⁸

4.2 THE PRE-TRIAL BRIEF, ADDITIONAL FACTS AND BACKGROUND

65ter(E)(i) of the Rules of Procedure and Evidence requests for the prosecution to submit a pre-trial brief, elaborating on the charges and the facts held against the accused. The core allegation is the criminal liability of Milosevic for the expulsion and internal displacement of between 600.000 and 800.000 Kosovo Albanians in the FRY province of Kosovo.¹³⁹ Kosovo and the tragic development there during the few months in 1999 is seen as the “book-ends” of a criminal campaign that lasted for over a decade, and harvested over 200.000 killed in the wars in Croatia, Bosnia-Herzegovina and finally Kosovo. Gazing back at 24 April 1987, the prosecution creates a

¹³⁶ Kosovo Indictment, §55

¹³⁷ Kosovo Indictment, §61

¹³⁸ The allegations are epitomized and structured in the following 5 counts:

Count 1: deportation – crime against humanity, Article 5(d)

Count 2: other inhuman acts (forcible transfer) – crime against humanity, Article 5(i)

Count 3: murder – crime against humanity, Article 5(a)

Count 4: murder – violation of the laws or customs of war, Article 3 and Article 3(1)(a) of the Geneva Conventions

Count 5: persecutions on political, racial and religious grounds – crime against humanity, Article 5(h)

¹³⁹ Prosecution’s Pre-trial Brief pursuant to rule 65ter(E)(i), *The Prosecutor v. Slobodan Milosevic et al.*, Case No. IT-99-37-PT, 26 November 2001, (hereinafter Pre-Trial Brief), §§1-3

scenario featuring Milosevic as the arch-criminal, successively but constantly accumulating power and control, extending it to all “segments of society”¹⁴⁰ with the sole plan of creating his very own mono-ethnic Greater Serbia, ethnically homogenous state, concentrated to not only Serbia, but also including Bosnia and Croatia.¹⁴¹

In 1989 when Milosevic was the President of Serbia, the Serb Assembly amended the constitution of Serbia, which had rested intact since 1974 when Tito created the 1974 SFRY Constitution, decentralizing power to the six constituent republics, and providing for substantial autonomy for the two Serb provinces, Kosovo and Vojvodina, which then became autonomous provinces. From 1974 until 1989 ethnic Albanians controlled Kosovo. The Serb population kept decreasing from 40% to 10% of the total population of the province.¹⁴² A new Serb constitution made sure Kosovo was incorporated with Serbia again, revoking its previous autonomous powers.¹⁴³ As a result of this amendment, Milosevic allegedly expanded his sphere of influence to the SFRY Presidency where he controlled eight votes through the votes of the representatives of Serbia, Montenegro, Kosovo and Vojvodina. This “Serbian bloc” later constituting the “Rump Presidency” when the Croatian, Bosnian, Slovenian and Macedonian representatives had left the presidency on 1 October 1991, continued to enjoy the constitutional powers such as the one of collective “Commander-in-Chief” of the Yugoslav National Army (JNA).¹⁴⁴ During the new repressive Serb reign over Kosovo and its institutions, a project of altering the ethnical composition was shaped, and soon stripped the ethnic Albanians of all their previous rights and equal treatment as citizens of FRY. The Kosovo Albanian population was forced into a shadow, parallel life, with own institutions, schools and hospitals. Life got even more unbearable when the expelled Croatian Serbs were re-placed into Kosovo. It is in this environment that the Kosovo Liberation Army (KLA) saw its rise,

¹⁴⁰ Pre-Trial Brief, §18

¹⁴¹ Pre-Trial Brief, §15

¹⁴² Pre-Trial Brief, §17

¹⁴³ Pre-Trial Brief, §21

¹⁴⁴ Pre-Trial Brief, §22

especially after the collapse of Ibrahim Rugova's peaceful resistance policy, undermined by Milosevic's refusal to discuss the future of Kosovo at the Dayton negotiations in 1995.¹⁴⁵ When the Rambouillet negotiations in February and the Paris negotiations in March 1999 on a peace agreement for Kosovo collapsed too, due to Milosevic's obstruction again, and as a result the OSCE Kosovo Verification Mission left the country on 20 March 1999, civil war broke out in the province between the KLA and the FRY armies.¹⁴⁶

Further amendments of the FRY Constitution in 1992 and the Republic of Serbia Constitution in 1990 carved out new platforms for Milosevic to exercise authority. The FRY Constitution mandated the President of FRY with *de jure* authority over military and police forces, and with "primary responsibility for the defense of the country" together with the Supreme Defense Council and the President of the VJ, that is, the President of FRY.¹⁴⁷ All three functions remain inter-linked, constituting almost one body. The control Milosevic thereby exercised by legal means over the VJ and MUP was expanded through certain extra-legal features. Ignoring higher *de jure* authorities, Milosevic exercised *de facto* control through the Commander of the 3rd Army, General Nebosa Pavkovic, the Head of MUP forces in Kosovo, General Sreten Lukic, or directly through the Federal Deputy Prime Minister, and co-accused, Nikola Sainovic.¹⁴⁸ This creates two main military bodies in the FRY – the VJ and the MUP forces over which Milosevic exercised total control. In 1998, during the prelude to the war in 1999, MUP had the primacy and was responsible for neutralizing the KLA. When Milosevic put General Ojdanic in command of the VJ and other loyalists in top positions, the VJ was granted the leading role in Kosovo. Apart from these two units, police, para-militaries, and other irregular forces coordinated themselves under Milosevic's command and fought against the KLA, and later the NATO.¹⁴⁹ The State Security Service had monitored

¹⁴⁵ Pre-Trial Brief, §27

¹⁴⁶ Pre-Trial Brief, §35

¹⁴⁷ Pre-Trial Brief, §36

¹⁴⁸ Pre-Trial Brief, §9

¹⁴⁹ Pre-Trial Brief, §40

Albanian activities in Kosovo throughout the 1990's and had also a special force unit, that was responsible for the armament of the paramilitary groups, including, the now late Arkan and his Tigers. Their indirect connection to Milosevic however remains unclear.¹⁵⁰

The chain of command for the VJ can easily be drawn, but the MUP structure remains still somewhat unclear. MUP's connection to Milosevic is transparent, but the multitude of units and sub-groups makes the chain-of-command blurred, as well as the cooperation with the VJ.¹⁵¹ As to command responsibility, the amount and size of the atrocities in the Kosovo war makes it implausible for the government and Milosevic to disclaim responsibility and knowledge. The ICTY Statute derived the concept of command responsibility from military law, and it is now part of international customary law and effects civil authorities as well, either through their direct orders of illegal acts, or through the commission of their subordinates.

4.3 INDIVIDUAL CRIMINAL RESPONSIBILITY IN THE CASE OF SLOBODAN MILOSEVIC

Milosevic is the most famous head-of-state to stand trial, prosecuted as the top of the political and military brass of the FRY and pivotal mastermind of the Yugoslav wars and civil wars – the master of chaos. At least the OTP attributed him the supreme responsibility for tailoring the crimes against humanity, war crimes and even genocide in the separate Bosnia Indictment¹⁵². In the Kosovo Indictment, the OTP has set itself to prove Milosevic's *de jure* and *de facto* authority, and as shown above, the *de jure* control follows the constitutional patterns and legal eligibility in accordance with the FRY and Serbian law. Milosevic did not violate any rules in attributing himself the command over the military and police forces. Proving his *de facto* authority on the other hand, critics, and former legal advisors from the ICTY, predict will be a much harder task and process. It is

¹⁵⁰ Pre-Trial Brief, §45

¹⁵¹ Pre-Trial Brief, §48

¹⁵² The Prosecutor v. Slobodan Milosevic *et al.*, Case no. IT-01-51-I, 22 November 2001

one thing to show that he ordered certain things, but to show that he actually misused his capacity that he knew about the monstrous killings, and in addition did nothing to prevent and punish the perpetrators is a “painstaking” project.¹⁵³

4.3.1 INDICTING MILOSEVIC

The Kosovo Indictment was filed on the 27 May 1999 and the first time a head-of-state still in power was indicted. As the peace talks on the war in Kosovo were collapsing in France, the Kosovo Indictment definitely “pulled out the rug from under the negotiating process”.¹⁵⁴ Prior to that, NATO bombers had been involved in the bombardment of strategic objects, and as it later was proved, not very strategic objects as well, such as refugee convoys, TV-stations and other purely civilian targets.¹⁵⁵ Before becoming an “international pariah”, Milosevic was seen as the stabilizing factor during the negotiations for the Dayton Agreement, and was seen as the key actor in ending the wars in the former Yugoslavia. Western statesmen praised him as the key figure to peace, and no one was even suggesting the thought of indicting him for the wars in Croatia and Bosnia. After the breakdown of the “sign or else we will bomb” negotiations in Rambouillet and Paris and the escalation of the actual events on the ground in Kosovo by Serb troops, almost everyone gave the appearance of agreeing that the Kosovo Indictment was a terrific idea. This was however, contrary to vibrations given by “anonymous informants” in western capitals, and particularly Washington. The U.S. State Department saw this as clearly counter-productive for a negotiation solution, but soon found itself in a position together with everybody else, where praise had to be shed over the indictment.¹⁵⁶ The probable conclusion is then that Milosevic would not have been indicted,¹⁵⁷ had he signed the Rambouillet Treaty.¹⁵⁸ Louise

¹⁵³ Marlise Simmons, New York Times, 2 July 2001, New York Times, www.globalpolicy.org/intljustice/tribunals/2001/0702mil1.htm.

¹⁵⁴ Noam Chomsky, *The New Military Humanism – Lessons From Kosovo*, Pluto Press, London, 1999, p. 104

¹⁵⁵ Chomsky, p. 113

¹⁵⁶ Ignatieff, p. 94

¹⁵⁷ Steven Erlanger, 29 June 2001, New York Times – www.globalpolicy.org/intljustice/tribunals/2001/0702mil1.htm.

Arbour, the former main prosecutor at the ICTY, who indicted Milosevic denies that the timing of the Kosovo Indictment, which was the first indictment to be filed against him, should have been suggested or ordered by either NATO or the Security Council, and purports that the choice of time was entirely her own. The only instructions she ever received from the Security Council was to go to the top of the hierarchy, collect the relevant evidence and finally indict the perpetrators. Full stop.¹⁵⁹

At first the KLA was viewed by many, including Serb analysts, as a provocation created by the Serbs themselves, in order to justify a military retaliation against the Albanians. Having previously supported the non-violent resistance in their parallel society under the leadership of Ibrahim Rugova, many ethnic Albanians joined the KLA in the uprising that followed, and struck most with surprise. Tim Judah states that the uprising surprised both Serbs and Albanians. Soon the Kosovar guerilla force was in command of 40% of Kosovo and the region was awaiting the second half of what came to be the tragic expulsion of almost half the population of Kosovo.¹⁶⁰ The first half left FRY and Milosevic in a puzzled state of mind. FRY, no doubt was a war-sick country¹⁶¹ by now, suffering from economic sanctions, the largest number of refugees in Europe, and an international label of being war criminals.¹⁶² Contemplating the international “green lights” for the Serb Srebrenica massacre in 1993 and the Serb exodus from Croatia in 1993, FRY might have anticipated the same passive reaction by

¹⁵⁸ Chomsky notes that what the Agreement actually acquired of FRY and Milosevic was the “complete occupation” and control by NATO troops of a part of FRY. Milosevic refused to retreat on this single point and rejected this part of the Agreement, calling for OSCE monitors to replace the NATO force which he simply saw as a “foreign military troop” occupying a part of his territory. – Chomsky, pp. 104-109

¹⁵⁹ Ignatieff, p. 94

¹⁶⁰ Tim Judah, Wall Street Journal, 7 April 1999; Chomsky, p. 31

¹⁶¹ Ignatieff tells how Serb intellectuals felt “de-nazified” first during the NATO bombings, and thereby stepped in a way onto the side of the victims; Ignatieff, p. 123

¹⁶² As an addendum to this scenario, Serbia was now facing a partial occupation of its southern province Kosovo, the historic, cultural and religious fundament of Serbia. A similar occupation by any part of a western country, e.g. a guerilla in Puerto Rico seeking independence from the US through foreign aides, or the reunification with Mexico by some of the US states in the southwest, would surely provoke at least the same reaction, as the one that successively was created in FRY. – Chomsky p. 31

the international community for yet another of these “population exchanges”.¹⁶³

On 15 January 1999 FRY launched its counter-attack targeting the village of Racak where 45 Albanians were murdered, and resulted in NATO initiating its military campaign against FRY. Coinciding with the NATO bombardment, the Serbian military campaign “Operation Horseshoe” was executed. Whether it was a pre-staged plan, or a reaction and catalyst of the NATO campaign is impossible to assess. That the Serbian leadership had plans for an ethnic cleansing in Kosovo would not be surprising. A statement by the NATO General Wesley Clark however, indicates that he had never been informed of any “Operation Horseshoe”, and that the NATO action “was not designed as a means of blocking Serb ethnic cleansing”,¹⁶⁴ rather leaves a bit of stunning confusion in mind, particularly since western leaders claim that they knew about the Serb military operation in advance. Such a testimony also gives at hand a bit of incriminating evidence regarding the responsibility of the western leadership while doing nothing to prevent or prepare for the effects, e.g. the anticipated refugee floods¹⁶⁵ - should it be true that they knew.¹⁶⁶

4.3.2 COMPETING VIEWS ON THE RESPONSIBILITY OF MILOSEVIC

The Yugoslav break-up in 1991 was taken to the fore by two competing tendencies. The first was a quest for national emancipation and secession by the Yugoslav republics, manifested in different ways. What they had in common was the Communist leadership taking the lead, vested in newly located nationalism. In Slovenia, Croatia, Bosnia-Herzegovina and Macedonia it took a centrifugal approach and resulted in the independence of these republics. Serbia with Milosevic as the President, on the other hand,

¹⁶³ Chomsky, p. 32

¹⁶⁴ BBC, 19 April 1999?, Summary of World Broadcast, SECTION: Part 2 Central Europe, the Balkans; Federal Republic of Yugoslavia; Serbia; EE/D3492/A, citing the Tanjug news agency

¹⁶⁵ Chomsky, p. 36

¹⁶⁶ Adding a statement from a quotation from a State Department official, that “the demonization of Milosevic is necessary”, in order to maintain the air strikes, elicits a somewhat alternative view on Milosevic for the purpose of maintaining an objective approach.- Chomsky, p. 93

reached out for a conservation of the existent borders, because of the intricate geographic composition and division of the Serbs in Yugoslavia in combination with a pointed nationalistic message. The Serbian approach coincides with the second trend, the federalist urge to maintain a certain degree of centralism in the decision-making.¹⁶⁷ The first tendency, the “exploitation of nationalism” produced a horrible scenario consisting of all possible violations of human rights and humanitarian law, including genocide, in order to create as much homogeneity as possible, and to secure “a rule based on political extremism”. All the old Communist leaders, now transformed into national icons, were “masters of the technology of power”, as well as of abusing the political power.¹⁶⁸ As the disintegration and the wars succeeded each other and prolonged the chaos on the Balkans, different political goals can be discerned. During the secessionist period the political goals of the former Communist leaderships were different from the goals of the “national elites and leaders” after the wars were already in progress.¹⁶⁹ It is just to acknowledge that there exists a difference between a political leader in peace navigating its people into war, and the political leaders and soldiers who find themselves at war.¹⁷⁰ Where to place Milosevic in this puzzle of trends and highly contradicting happenings is not an easy task. If one were to critically examine the war scenario in Kosovo exclusively from a political and legal viewpoint, OTP’s assessment appears as factually wrong.¹⁷¹ Not neglecting or minimizing the severity and tragedy of the Serb treatment of the Kosovar Albanians in any way, it is literally true that Milosevic sought to preserve Kosovo in FRY, and hence could be described as having the political target, the *end* of the military campaign set on the maintenance of what was left of the Yugoslav state. Constitutionally and legally he had every right to claim what was rightfully “his” to protect. Whereas the OTP concludes that both the *end* as well as the *means* were

¹⁶⁷ Aleksandar Fatic, *Reconciliation via the War Crimes Tribunal?*, Ashgate, Aldershot • Brookfield USA • Singapore • Sydney, 2000, p. 15

¹⁶⁸ Fatic, p. 17

¹⁶⁹ Fatic, p. 16

¹⁷⁰ Fatic, p. 20

¹⁷¹ Indeed, already during the wars in Bosnia and Croatia, though not under scrutiny here, the first UN Special Rapporteur on the situation of human rights in the former Yugoslavia, Tadeusz Mazowiecki, contended the view that the conflicts were primarily political and not racial or ethnic. - UN Doc. CERD/C/SR. 1071; O’Flaherty, p. 444

criminal, it is important to distinct the two terms and once again reverse the focus on the legal sphere of admissibility that existed in FRY at the point of time of the war. The *means*, no doubt proved their criminal and heinous reality, but should be analyzed in its true arena. It was after all, the law that legalized the gross and systematic violations of the human rights. The legal context should by no means be trivialized.

OTP, however, created its own blueprint of the factual events, and will now have to rely on aerial photos, intercepts and intelligence information collected from the ‘intelligence-society’ – the CIA, FBI, DIA and the NSA as well as wire-taps and apparently decisive radio-messages that the U.S. had collected in May 1999 just before the filing of the Kosovo Indictment.¹⁷² There is no classic paper trail at all to face Milosevic with.¹⁷³ So, was the Kosovo war but merely the final chapter of Milosevic’s expansionist, genocidal tour around the former Yugoslavia, or was it, as he himself claims an outcome of his urge to preserve Yugoslavia, as it had been. Milosevic says he had no national ambitions or plan to create a Greater Serbia, or to create an ethnically pure state. Being a Serb nationalist is not correlative to the reality where Serbs lived dispersed in the majority of the six republics, and therefore the only solution for the Serbs to live in one country was to preserve it as one. That makes him a Yugoslav, not a Serb nationalist.¹⁷⁴ It can be stated in Milosevic’s defense that he is a tactic, not a strategist, that he can only think and play one move ahead. And true enough, the wars in the former Yugoslavia do not appear to have been planned in a pre-mediated manner, or according to a systematic pattern. On the other hand, Milosevic is often described as stubbornly consequent. Wherever Serbs were involved in uprisings against their new independent host-countries, he assisted and supported them.¹⁷⁵ His engineering role, as the President of Serbia, will be harder to prove for the wars in Croatia and Bosnia, but Kosovo, very much at his heart, turned out to be another issue.

¹⁷² Ignatieff, pp. 96-7

¹⁷³ Simmons

¹⁷⁴ BBC documentary

¹⁷⁵ Ignatieff, p. 43

A great part of Milosevic's political success, he owed to his own support to the Serb minority in Kosovo, and he would not let them down in the conflict in 1999.¹⁷⁶ As yet we do not know whether Milosevic alone, abused his official positions by ordering actions in breach with international humanitarian law, which would obviously strengthen OTP's accusation of individual responsibility. The other approach, which has been indicated above, would be to assess whether the crimes committed were or became part of a government/state policy and hence actions of gross and systematic human rights violations depending on a state policy. Indeed, only focusing on Milosevic does not seem to be a historically and politically correct point of departure. Certainly not if one takes into account the actions of the Yugoslav Presidency in 1989 and 1990, that was perhaps the main instigator to the unreasonable reactions against the Slovenian and Croatian decisions to leave the Yugoslav collective, quickly followed by Bosnia and Macedonia. None of the persons, such as Borislav Jovic, that were part of that Presidency have been indicted. None, except Milosevic. In correlation with all characterizations of Milosevic's regime as a form of "sultanism", a "web of extra-institutional political, economic, and coercive powers" a stubborn elite regime refusing to follow the common Eastern European pattern of transformation into social-democracy¹⁷⁷ and rather feeding on "political cannibalism" absorbing all the political programs in the country,¹⁷⁸ the answer to the question of accountability has to be found "within the state structures" (my emphasis added) of the FRY.¹⁷⁹ There is deliberately no reference to governmental action in the ICTY or ICTR.¹⁸⁰

¹⁷⁶ Ignatieff, p. 45

¹⁷⁷ Robert Thomas, *Serbia under Milosevic – Politics under the 1990's*, Hurst & Company, London, 1999, p. 424

¹⁷⁸ Catherine Samary, *Milosevic in the Dock – The Balkans Show-trial*, Le Monde Diplomatique, April 2002, www.mondediplo.com/2002/04/05balkans.

¹⁷⁹ www.BosNet.org/archive/bosnet

¹⁸⁰ Steven R. Ratner and Jason S. Abrams, *Accountability for Human Rights Atrocities in International Law – Beyond the Nuremberg Legacy*, Clarendon Press, Oxford 1997, p. 66

4.3.3 DEMONIZING A HEAD-OF-STATE – THE EASY SOLUTION TO A CONFLICT?

“Guilt must be determined as individual, rather than collective” in the sense that the guilty actors should be detected and exposed, but not for the sake of finding one person to bear the whole responsibility. War crimes are always part of a “policy of war”, where certain pre-conditions have to be fulfilled. Even though the crimes against peace are not to be found among the articles of the ICTY Statute, certain acts should merit if they were put in a pre-war context, taking into consideration the fault and responsibility of the war-mongering national elites and their media in all the constituent republics as well as of the SFRY Presidency.¹⁸¹ The demonization of Milosevic and the unvaried portrayal of him as a “genocidal maniac”¹⁸² leaves too many actors out of the picture: the media, the church,¹⁸³ the paramilitary militias that were more than any other actor responsible for the war-mongering and arousing of fear in the Serbian population in Croatia and Bosnia¹⁸⁴ and finally the state apparatus itself with all its policy makers and silent key actors. Blaming everything on Milosevic is a transparently easy excuse away from a holistic approach and may well fall short of cutting the bounds between Milosevic and the Serb population if taking regard to the high support for Milosevic in studies made in FRY. Before Milosevic was extradited in May 2001, he had a support of 17,1% of the Serbs as the person who had “done the most in the defense of the Serb nation in the wars in the last decade of the 20th century”.¹⁸⁵ After his extradition and after the trial in The Hague started, support for him was sky-high again. The accompanying feeling of alienation that is currently underhand in Serbia is also a factor that must not be neglected.

¹⁸¹ Fatic, pp. 73-5

¹⁸² Chomsky, somewhere p. 93

¹⁸³ See www.wcc-coe.org, web site of the World Council of Churches, on the expulsion of the Serbian Orthodox Church; David Wilson, *Serbian in Body, Serbian in Soul*, The United Church Observer, June 1999, www.ucobserver.org; Norman Cigar, *Genocide in Bosnia – The Policy of “Ethnic Cleansing”*, Texas A&M University Press, STAD; ÅR, pp. 23, 31, 89, 91, 192

¹⁸⁴ Catherine Samary

¹⁸⁵ Human Rights in Yugoslavia 2001 – Legal provisions, practice and legal consciousness in the federal republic of Yugoslavia compared to international human rights standards, Belgrade Center for Human Rights, Belgrade 2002, p. 448

4.4 ANALYSIS OF STATE/INDIVIDUAL RESPONSIBILITY

Individual responsibility at the Nuremberg and Tokyo Tribunals for crimes can be divided into two poles or extremes. The first would be a principle of “collective guilt” subsuming the individual responsibility, for instance by the conception of “guilt by association”. Supreme Court Justice Robert Jackson, the American prosecutor at the Nuremberg Tribunal used this approach when he created his strategy for proving the Nazi state as a criminal “corporate entity” consisting of “criminal organizations” and the membership of individuals in them. The other end presents a contrasting “individualization of responsibility”, where the complete negligence and denial of the importance of a top political, military, administrative, bureaucratic collective, treating it as a corporation consistent of a few individuals. Also ignoring the policy of mass murder derived from the brass collective, it would see it as a “series of individual murders”, and would treat each individual as responsible for his own acts as in any other crime case in time of peace.¹⁸⁶ The tension that arose at the Nuremberg Tribunal was caused by the clash between Justice Jackson’s strategy to prove the guilt and conspiracy of the Nazi state as a collective entity, and the actual prosecutions of the individuals, charged as individually liable for the actions of the State. Invoking the *act of state*, as defense did not help the accused, as the Nuremberg Tribunal promptly held that accountability for the conception of collective responsibility, derived from U.S. law and advocated by Justice Jackson, was not applicable.¹⁸⁷

At the International Military Tribunal for the Far East (IMTFE), “the other Nuremberg”, the conspiracy theory was made the focal point of the judgments, where the collective instead of the individual actions were examined. Even though the IMTFE did not succeed in creating any systematic “general criteria of responsibility”, and totally failed to refer to

¹⁸⁶ David Cohen, *Beyond Nuremberg: Individual Responsibility for War Crimes*, in *Human Rights in Political Transitions: Gettysburg to Bosnia*, Edited by Clark Hesse & Robert Post, Zone Books, New York, 1999, pp. 54-5

¹⁸⁷ Cohen, pp. 56-7

any “particular findings” in the verdicts against the individuals accused,¹⁸⁸ the concept of a conspiracy doctrine can generally be stated as useful when dealing with cases lacking any culpable evidence, as at the IMTFE.¹⁸⁹ In general this view has to be emphasized also because of the “very complexity of modern governmental activity”.¹⁹⁰

Tuning in on recent cases of individual accountability for transnational crimes, where the cases in whole would have merited by an approach that would have focused on the policy-related actions of the state apparatus rather than subsuming the collective guilt under one person some light has to be shed on the *Noriega case*.¹⁹¹ General Manuel Noriega, a former CIA confidant, surrendered himself to U.S. troops and was arrested and brought to the U.S. in 1990 after “Operation Just Cause”, the U.S. military campaign and invasion of Panama, was ended. The operation itself was a violation of Articles 2(4) and 51 of the UN Charter, as well as an incursion on Noriega’s head-of-state immunity. He was indicted in February 1988, charged with the engaging in a “criminal enterprise”, violating the U.S. domestic racketeering and drug laws.¹⁹² Although not performing any illegal acts within the territory of the U.S., the court adopted the “direct or substantial effect test” from a previous judgment and concluded the effects of Noriega’s activity too direct and substantial to be ignored, thus refusing to further contemplate

¹⁸⁸ Cohen, pp. 60-61

¹⁸⁹ The Yamashita, Shigemitsu and Hirota cases made a clear precedent in favor of “absolute collective responsibility” ignoring every kind of inclination towards individual absence of knowledge. A corollary to the Milosevic indictment, (not however insinuating any innocence as such from Milosevic’s side) the Japanese cases neglected the individual factor of innocence in an attempt to prove the system of criminality that the Japanese regime and military as a “joint criminal enterprise” produced. There was no incentive to have one person to individualize the state sanctioned terror the way it is in the ICTY, but regardless of this, the IMTFE did create martyrs in a way as it refused to make an assessment of the personal acts of the accused. The Kosovo Indictment is composed as targeting a joint criminal enterprise, but leaves little conviction that it is purported as a collective case. Rather the focus is set on Milosevic and his position as the President of the FRY. The creation of a joint criminal enterprise in this regard feels more like a, for the purpose, construed and artificial concept in order to get to Milosevic. On contending such a “collective” strategy, the need for individual innocence naturally has to be provided for and not neglected as in some of the IMTFE trials. Although falling short of presenting the *act of state* doctrine in a convincing manner, at least the tribunals pointed in the right direction, in that they made attempts of circling the events into a larger pattern of state policy. - Cohen, pp. 76-8, 86

¹⁹⁰ Cohen, p. 64

¹⁹¹ *US v. Noriega*, 746 F.Supp. 1506, 1510 (S.D.Fla. 1990) (Noriega I); *US v. Noriega*, 117 F. 3d 1206, 1210 (11th Cir. 1997) (Noriega II)

¹⁹² Adam Isaac Hasson, *Extraterritorial Jurisdiction and Sovereign Immunity on Trial: Noriega, Pinochet, and Milosevic – Trends in Political Accountability and Transnational Criminal Law*, http://www.bc.edu/bc_org/avp/law/lwsch/journals/bciclcr/25_1/05_TXT.htm, p. 3

the official status of Noriega as a head-of-state.¹⁹³ The FSIA does not mention exclusively head-of-state immunity in a criminal context and so the court ignored the Act and turned to customary international law for guidance.¹⁹⁴ It took inspiration from customary international law providing for head-of-state immunity related to official acts only, as well as the dismantling of the *act of state* doctrine. In holding that Noriega's actions were not taken on behalf of the state of Panama and therefore could not be seen as public actions, the Miami court made a similar differentiation between *jure imperii* and *jure gestionis* acts as the Pinochet court, and waived the head-of-state immunity.¹⁹⁵ Accordingly, on 9 April 1992 General Noriega was sentenced to 40 years of imprisonment.¹⁹⁶

A case such as the *Noriega case*, shows what political means strong states have at their disposal when using law against persons that have fallen either into disgrace, or just do not suit a political map any longer. It cannot be desirable to base any rejection of the *act of state* on these premises. What cases such as the *Noriega* and *Pinochet* decisions additionally fail in addressing is the complexity of state sponsored crimes and the effect of other factors that are not brought attention to. For instance, in the case of the wars in the former Yugoslavia, institutions and elements such as the media, the church, the intellectuals, as well as the tabooed collective responsibility of the populations have failed to be examined. Such a profound analysis and examination of whole societies is not possible to perform in a tribunal, and has invited support for a truth and reconciliation commission. In an attempt to avoid the individualization of guilt that is the effect of a criminal trial, human rights activists have sought alternative ways to deal with the problem.¹⁹⁷ "Truth telling" as an "obligation" to all the victims is in a way more important than bringing justice.¹⁹⁸ It is impossible to prosecute the

¹⁹³ Hasson, p. 5-6

¹⁹⁴ Hasson, p. 7

¹⁹⁵ Hasson, p. 8

¹⁹⁶ Hasson, p. 4

¹⁹⁷ Aryeh Neier, *Rethinking Truth, Justice, and Guilt after Bosnia and Rwanda*, in *Human Rights in Political Transitions: Gettysburg to Bosnia*, Edited by Carla Hesse & Robert Post, Zone Books, New York, 1999, p. 43

¹⁹⁸ Neier, p. 39

majority of those who were actually part of the “conspiracy” of crimes against humanity.¹⁹⁹ If using a tribunal, evidently the political leadership has to be targeted. This is however not an unproblematic choice of making justice as indicated. Important questions rise in connection to this. Will it suffice to prosecute political leaders, military commanders and so on for the committed crimes? How can in fact a few trials establish individual responsibility and abolish or revoke the collective guilt? It is clear that the guilt is not equally attributed to all involved, hence, it is just that those who sponsored the crimes receive the lion’s share of the blame as well.²⁰⁰ A truth commission for Bosnia or Rwanda it is stated, would not be a “meaningful gesture”, since the crimes committed are not in dispute, but on the contrary were blatant and well announced. Nothing stands as simple as that. Acknowledged as they were by the perpetrators, the acts still prove to confuse whole nations.²⁰¹

Turning the recourse to the state level is not a novelty in the Yugoslav context. Assessing the degree of individual responsibility is a hard, if not impossible task as can be seen throughout history. The Japanese Generals and politicians were sentenced to death without almost any culpable evidence, and at the ICTY uncertainty rules regarding the evidence against Milosevic. No victory should be taken out in advance, as the *de facto* control accusations against him are reportedly weak, and few people are actually ready to testify against him. State responsibility and the concept of state criminality have grown stronger and emerged recently as a general principle of international law and customary international law. It has gained relevance mainly through the drafting of the 1948 Genocide Convention and the *Bosnia-Herzegovina v. Yugoslavia case*.²⁰² Ascribing the words “responsibility of a State” to an action – sponsored, committed as a state policy – has not been detected to any other treaty after 1949. It is as if the legislative community still is trying to grasp the vastness and importance of

¹⁹⁹ Neier, p. 39

²⁰⁰ Neier, p. 48

²⁰¹ Neier, p. 42-3

²⁰² Jorgensen, p. 279

that single phrase, that even a state can be a villain,²⁰³ a pirate in the words of the English Admiralty Judge, Dr. Lushington.²⁰⁴ State responsibility is a presumptive concept of law, “juridically feasible” as a conception of a “criminal organization model” or a “corporate crime model”, a sort of joint criminal enterprise in the language of the ICTY, but in the shape of the state.

It is possible to punish a state, or at least apply measures that provide the same effect. Under the current international legal system the two legal responses to state crimes are: a) “a declaratory judgment and/or an award of punitive damages” by the ICJ, and b) trials of individual political and military leaders before the International Tribunal. As for the future, a set of important and significant alternative frameworks have emerged: a) a possibility to include states under the ICC or establishing a “criminal division” under the ICJ; b) a reformation of the ILC’s Draft Articles on State Responsibility to include state criminal responsibility. In addition, further development of state responsibility may be provided for through: a) a ‘common law’ approach by courts and judges on both national and international levels; b) “maturation of the concept of obligations *erga omnes*”.²⁰⁵ Ascribing a state accountability for international crimes raises almost metaphysical questions of whether morality can be attributed as well to the state or/and international community. Hans Kelsen stands for the view that if conducts can be imputed to a state, then so can morality, or “psychic acts”, especially when the acts conducted are acknowledged as a “original responsibility”.²⁰⁶ “Therefore, not only those persons exercising authority in a state but the state as a legal person in its own right must be shown to be the subject of a moral code.”²⁰⁷ If such a concept would be assumed to exist, then would international morality as well, created when different states’ domestic morality codes overlap.²⁰⁸ When states trespass these borders, it is

²⁰³ Schabas, p. 437

²⁰⁴ Jorgensen, p. 279

²⁰⁵ Jorgensen, pp. 280-1

²⁰⁶ H. Kelsen, “Collective and Individual Responsibility in International Law with Particular Regard to the Punishment of War Criminals”, (1942-3) 31 *California Law Review*, pp. 530, 533; Jorgensen, p. 281

²⁰⁷ Jorgensen, p. 281

²⁰⁸ Jorgensen, p. 281

only natural that they should be held accountable for the conducts as well. Not holding the proper entity responsible for the acts will only complicate things for the future and make the prevention of such conduct impossible.

5 Conclusion

What happens when a war ends, a war where atrocities have been replacing each other for almost a decade, in the worst manner that Europe has experienced since the Second World War. How then, when war has come to an end, does one create justice, promote lasting peace, make people tell and acknowledge truth? These are difficult questions and issues, which take a lot of courage, optimism and forgiveness to come to terms with. The international community reacted at the atrocities in Yugoslavia after the massacre in Srebrenica under the poignant leadership of General Mladic. It has been argued that the ICTY reacted on the persons behind the acts more than the deeds that would be the wrong way of approaching the problem. This was made the elementary point even more when Milosevic was indicted in 1999 after having refused to sign the Rambouillet and Paris treaties. Internationally this was seen as a major achievement. When Milosevic was extradited to The Hague in June 2001, critics were euphoric, since there were really few who had ever thought this would be possible. Moreover, the tribunal badly needed a big fish to raise its own prestige and credibility with. They got the biggest fish of them all. All the time since the filing of the indictment the backbiting and defamation of Milosevic had been taking place; he became the incarnation of all the evils and horrors that haunted the region when, like Pandora's box, the war started one day in 1990. Voices acknowledge now that it would be a terrific thing to get hold of Mladic and Karadzic as well, but basically, the ICTY is ready to close business, sooner rather than later. The recently established ICC is a major incentive here too. It is possible, but not desirable to have two tribunals that could have the jurisdiction over the same field (in case new wars should break out on the Balkans - ICC however, does not have any retroactive jurisdiction).

It is not easy to argue against the prosecution of Milosevic, because, doubtlessly, he is one of the main responsible politicians in the former

Yugoslavia for the wars in the 1990's. However, the pattern of responsibility that the prosecution has created of his guilt does not provide for an entirely convincing scrutiny of the historical, political and personal motives or occurrences. It is certainly a dangerous endeavor to build a whole case on one person the way the OTP has set its mind to do. Scapegoats should not have a place in international law. While trials against heads-of-state are made possible in international venues, they have become restricted in a double sense in domestic forums. The U.S. has been the state with the most generous legislation regarding civil suits and prosecution of governmental officials, including heads-of-state, and states. Numerous cases have been processed along this line, but with rather fruitless ends in the vast majority of the cases since most of the judgments anyway cannot be collected against the defendant. The bad experience with domestic courts involving in trials regarding abuses committed abroad is a warning for the future. Courts struggling with procedural and substantive issues such as the Pinochet Courts put the problems of overcoming the obstacles with state immunity in an even starker spotlight. In addition to this inherent obstacle of success, the recent ICJ judgment in the *DRC v. Belgium case*, the Court ruled out the legitimacy of the Belgian arrest warrant since it was based on disrespect of the principle of immunity for foreign ministers, contrary to international customary law. International law, as it stands firm today, does not provide for issuing arrest warrants against governmental officials (it is quite probable that one is correct in making the extension to heads-of-state from the foreign minister in the Belgian case). Prior to the ICJ decision, the two cases of Pinochet and Milosevic were steeling all attention. The Pinochet ruling tried to distinct the difference between the official and private sphere of a head-of-state, refusing to immunize him for actions not naturally being part of his official capacity, such as torture, illegal arrests and murder. Milosevic on the other hand, being indicted and tried by a UN established body, found his immunity to be explicitly waived by the UN Security Council, in order for the Tribunal to examine his individual and superior command responsibility and guilt for the wars in Croatia, Bosnia-Herzegovina and Kosovo.

Alternative ways of seeking justice in the Balkans have been to combine or substitute the ICTY with a Truth Commission. The approach of acknowledging the complexity and intricacy of the conflicts is far more important than hunting down one person, stigmatized for the sake of others. After all, Slobodan Milosevic would not have reached this position had it not been for the state apparatus, the structure of the legislation and the government that left the field open for the *means* that were employed in the wars. The *target, goal* of the military campaigns, especially with regard to Kosovo, constructs a focal point in the defense of Milosevic as a head-of-state, of his position more than his person. Milosevic's objection that the incentive with the operation was to preserve Kosovo as a Yugoslav entity seems reasonable and credible. It is not obvious whether the OTP has made clear the distinction, as it seems that it is more focusing on Milosevic and the character and (negative) personality he produced. As the trial against Milosevic is continuing, the *Bosnia and Herzegovina v. Yugoslavia case* is also working at the international level by examining the charges of genocide in the Balkans. The difference from the ICTY trials is that it is approaching the issue of guilt from the state perspective, the only possible when dealing with such grave allegations. Respecting the legislative, constitutional powers Milosevic was rightfully in position of through his presidency, the regime of violence in Kosovo must be viewed with the pre-text of a state policy and not a single man's work. Examining the state will bring international law and criminal law much closer to the truth, and since there can be no justice without the truth it is imperative to present the preferences clearly from the start. It is evident that personalizing guilt can offer good results. The legacy of the Nuremberg Tribunal pre-trial theory constructions and the jurisprudence, shows how the assumption of "collective responsibility" can be transferred to the actual perpetrators, star villains, the group of criminals that represent the crimes and not the German people or any other people, the former ICTY Prosecutor Richard Goldstone says.²⁰⁹

²⁰⁹ Richard J. Goldstone, *Fifty Years after Nuremberg: A New International Criminal Tribunal for Human Rights Crimes*, in *Contemporary Genocides: Causes, Cases, Consequences*, Edited by Albert J. Jongman, 1996; Akhavan, p. 766

Positive law has not favored state responsibility in criminal proceedings, although the *act of state* is clearly defined in international customary law. The Genocide Convention is the iconoclastic tool here, providing for a resort to the ICJ, should states find themselves involved in a dispute regarding the interpretation of the Convention. During the drafting of the Convention, it was not explicitly stated that Article IX did not imply any criminal responsibility. Using this unique resort to the Court, an extension of its competencies for the development of a criminal section is one solution. Alternatively the newly established ICC could be provided with a mandate to extend its jurisdiction to cover states in its field of work as well. Either way will be a proper response to an issue that is becoming more and more important and up-to-date with the development and current dilemmas of international criminal law.

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