Special File: Yugoslavia

TRADING THE YUGOSLAVIA WAR CRIMES TRIBUNAL FOR PEACE?

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On 25 May 1993 the United Nations Security Council decided in Resolution 827 to establish an International Tribunal "for the sole purpose of prosecuting persons responsible for serious violation of international humanitarian law committed in the territory of the former Yugoslavia"[1]. It reacted thereby to public pressure outraged by the widespread atrocities committed in this conflict ensuing the secession of former Yugoslavian republics, such as mass killings, large scale organised detention and rape of women, ethnic cleaning, etc. At the same time, Resolution 827 is the logical culmination point of a series of resolutions re-affirming the individual responsibility and accountability of those violating humanitarian law[2].

I. REASONS OF THE ESTABLISHMENT OF THE TRIBUNAL

This paper is not the place to deal with the question of the compe-

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[1] S/RES/827 (1993), 25 May 1993, par. 1

[2] Cf. S/RES/764 (1992), 13 July 1992, S/RES/771 (1992), 13 August 1992, S/RES/780 (1992), 6 October 1992, S/RES/808 (1993), 22 February 1993.

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tence of the Security Council to create a criminal tribunal under the UN Charter provisions, the problem of securing effective cooperation of individual states with the tribunal, or the issue of procedural guarantees for accused before the tribunal. It will rather focus on a particular aspect of a more political kind, an issue concerning the practical wisdom and moral justification of having such a tribunal established and its potential role in facilitating or impeding a peaceful settlement of the - unfortunately still - ongoing conflict.

The establishment of the Tribunal was originally widely hailed as a major achievement in bringing human rights abusers and war criminals to justice, but meanwhile support has waned to a certain degree. In particular the notion that it might prevent aggressors and perpetrators of human rights and humanitarian law violations to agree on peaceful settlement has led to the perception that the tribunal might rather be a costly road-block on the way to peace than a useful signpost. In order to justly appraise the value of the tribunal, we would first have to look at the rationales for establishing such a tribunal.

A. Deterrence

1. Protection of the population

The idea that personal accountability might be a deterrent against the commission of criminal acts ranks high in the official list of reasons for establishing the Tribunal. In preambular paragraph 7 of Resolution 827[3], the resolution establishing the Tribunal, the Security Council formulated it as follows:

> "*Believing* that the establishment of an international tribunal and the prosecution of persons responsible for the above-mentioned violations of international humanitarian law will contribute to ensuring that such violations are halted and effectively redressed".

Even if nobody had actually thought that the mere creation of a tribunal might restore peace, it was clearly one's hope that it might indirectly protect the civilians from continuing to be victims of the most abhorrent war crimes. This notion of deterrence is clearly expressed by the Security Council resolutions leading to the establishment of the tribunal and admonishing the parties to the conflict to respect international humanitarian law and stressing the individual responsibility of those who violate it[4]. In this respect one could view the Yugoslavia resolutions as a logical continuation of the Security Council's growing tendency to adopt decisions for mainly humanitarian purposes as, for

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[3] S/RES/827 (1993), 25 May 1993.

[4] See only S/RES/764 (1992), 13 July 1992, as reaffirmed by later resolutions.

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instance, the request for protective measures for Kurds in Iraq[5], the authorisation to use all necessary means to establish a secure environment for humanitarian relief operations in Somalia[6], or the authorisation of the forming of a multinational force to facilitate the departure from Haiti of the military leadership[7], etc.[8].

2. Prevention of future atrocities

Criminal law theory tends to differentiate between two aspects of deterrence, general and special prevention. While special prevention rests on the idea that a person who committed a crime should be punished in order to prevent him or her from repeating such behaviour, general prevention reasons that the potential of facing accountability should deter potential criminals in general from committing similar acts in the future.

The original idea - and moral impetus - for the Yugoslavia Tribunal lay probably upon the first aspect: special prevention. However, one should not underestimate the importance of general preventive ideas. The tribunal is certainly also seen as a warning sign for the future. Its relatively swift adoption might have also reinforced and accelerated the concurrent work of the International Law Commission on an international criminal court of general competence and on a code of crimes[9].

B. A moral duty to punish - retribution

Even if deterrence proves to be ineffective, it has been consistently argued that "moral considerations" require the action entrusted to the Tribunal.[10] The scale, deliberation and brutality of the violations of human rights and humanitarian law in the former Yugoslavia make the punishment of those responsible for them a moral imperative.

In Resolution 827 (1993) the Security Council clearly expressed the

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[5] See S/RES/688 (1991), 5 April 1991.

[6] See S/RES/794 (1992), 3 December 1992.

[7] See S/RES/940 (1994), 31 July 1994.

[8] *Cf.* in general Richard B. Lillich, Humanitarian Intervention Through the United Nations: Towards the Development of Criteria, 53 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 557 (1993).

[9] *Cf.* Draft Code of Crimes against the Peace and Security of Mankind, ILC Report 1991, *YBILC* 1991-II2, 94, and Draft Statute of an International Criminal Court, ILC Report of the Working Group on A Draft Statute for an International Criminal Court, July 16, 1993, UN Doc. A/48/10, Annex; reproduced in 33 *ILM* 253 (1994).

[10] Theodor Meron, The Case for War Crimes Trials in Yugoslavia, 72 *Foreign Affairs* 122 (No 3, 1993), at 127.

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equal weight of this purpose by stating its determination "to put an end to such violation and to take effective measures to bring to justice the persons who are responsible for them"[11].

The retribution rationale for punishing offenders is a modern version of the ancient *lex talionis* principle which in its original conception demanded "an eye for an eye, a tooth for a tooth". Contemporary practice has adapted this demand to a call for proportionality in inflicting punishment to the gravity of the offence, instead of mirror-like retribution. It further transfers the act of punishing from the victims acting in a form of self-help to state organs. However, it still receives its moral justification from its retaliatory purpose of punishing past acts regardless of its future-oriented deterrence value.

C. Conflict resolution

The idea that the Tribunal might serve as a tool for conflict resolution and national reconciliation is probably the most critical aspect of all rationales for the court and the one we would focus on.

1. Restoration of peace

In Resolution 827 (1993) the Security Council expressed its "conviction" ... "that in the particular circumstances of the former Yugoslavia the establishment as an *ad hoc* measure by the Council of an international tribunal and the prosecution of persons responsible for serious violations of international humanitarian law would enable this aim [i.e. to put an end to the crimes and to put the responsible persons to justice] to be achieved and would contribute to the restoration and maintenance of peace"[12]. After all, one had to find a justification to have the Tribunal being "imposed" by Security Council resolution upon all member States and not voluntarily accepted by them in the form of a multilateral convention[13].

The Council is competent to pass binding resolutions under Chapter

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[11] Preambular paragraph 5 of S/RES/827 (1993), 25 May 1993.

[12] Preambular paragraph 6 of S/RES/827 (1993), 25 May 1993.

[13] This alternative method of establishing the tribunal was advocated for instance by the CSCE: Corell / Türk / Thune (rapporteurs): *Proposal for an International War Crimes Tribunal for the former Yugoslavia*, under the SCCE Moscow Human Dimension Mechanism to Bosnia-Herzegovina and Croatia, 9 February 1993 (reprinted in Virgina Morris / Michael P. Scharf, *An insider's guide to the International Criminal Tribunal for the former Yugoslavia: A documentary history and analysis* (vol. 2, 1995) 11). It was not pursued mainly for reasons of expedience and in order to secure compliance by all affected states which are clearly bound by a Security Council resolution even without their consent. See *Report of the Secretary General pursuant to paragraph 2 of Security Council Resolution 808 (1993)*, S/25704, 3 May 1993, para. 23.

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VII of the Charter of the United Nations only for specific purposes. Article 39 enables the Security Council to decide on binding measures "to maintain or restore international peace and security". Chapter VII measures, as originally contemplated, primarily envisaged economic and military sanction against aggressors[14]. While it is generally accepted that the measures contained in articles 41 and 42 of the UN Charter are listed in a non-exhaustive, purely demonstrative manner and would thus encompass, arguably, all possible non-military and military options, one would still have to show that they are apt to fulfil the purpose required by article 39, i.e. to maintain or restore peace.

One might have doubts as to whether the establishment of a tribunal that will prosecute violations of humanitarian law is an appropriate measure of restoring international peace and security. As we will see later it has actually been argued that it might rather be an impediment. The competence of the Council to establish the Tribunal has thus been questioned[15]. Nevertheless, Resolution 827 (1993) was adopted unanimously.

If we look at the list of crimes that could form the subject matter of the Tribunal's competence[16] one might be surprised to ascertain the omission of any mention to acts of aggression. In the context of the Security Council's jurisdiction this is even more perplexing considering that its competence to issue binding decisions is triggered by a determination that "a threat to the peace, breach of the peace, or act of aggression" exists[17].

2. National reconciliation

While the notion of the establishment of the Tribunal as a measure to restore peace as well as the deterrence and retribution rationales have been constantly reaffirmed by the Security Council, both in its resolutions and the discussions surrounding their adoption[18], national reconciliation, on the other hand, did not receive this explicit en-

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[14] As evidenced in the demonstrative list of measures contained in articles 41 and 42 of the United Nations Charter respectively.

[15] See the voting statements of the Chinese and Brazilian representatives in the Security Council who would have both preferred a treaty-created tribunal, Provisional Verbatim Record, S/PV. 3217, 25 May 1993.

[16] According to articles 2 to 5 of the Statute of the Yugoslavia Tribunal (Annex to the *Report of the Secretary General pursuant to paragraph 2 of Security Council Resolution 808 (1993),* hereinafter: Statute), the Tribunal is competent to prosecute "Grave breaches of the Geneva Convention of 1949", "Violations of the laws or customs of war", "Genocide", and "Crimes against Humanity".

[17] Article 39 United Nations Charter.

[18] *Cf.* the voting statements of state representatives in the Security Council Provisional Verbatim Record, S/PV.3217, 25 May 1993.

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dorsement as an official reason for the creation of the Tribunal. It still seems to have been an important aspect, albeit in a rather implicit manner. As far as the goal of national reconciliation is concerned the Tribunal as a tool to reach this aim will remain most controversial and it seems legitimate and in fact very important to ask whether the prosecution of war criminals and perpetrators of human rights violations is a necessary and useful aspect of "clearing up" the past.

Proponents of the Tribunal will maintain that the Tribunal's work will have a cathartic effect on the population as a whole. It is to be hoped that the establishment of the truth about the past will create an environment where former enemies will be able to live together or least next to each other peacefully.

The Tribunal might contribute to this goal by its task of prosecuting individual criminals. By singling out individuals, instead of demonising collectives might help to defuse tensions in the region[19]. It has been observed that the propagandistic use of "collectivising guilt" facilitates and serves to legitimise attacks against individual non-combatants solely on the basis of their ethnic or religious affiliation[20]. A tribunal might help to reverse this trend.

Also to be considered is the value of an impartial institution in the process of establishing facts. If successful, its credibility could serve as a valuable alternative to the propagandistic recounts of atrocities in the press of the warring factions.

II. The Tribunal - an obstacle to a peaceful settlement?

One of the major and probably the only real serious counter-argument against upholding the Tribunal and going through with prosecuting persons suspected of having committed war crimes and other atrocities in former Yugoslavia is that it might ultimately prevent a peaceful settlement.

A. A general obstacle - estranging the population

As we have seen the issue of what is really required in order to achieve a reconciliation between warring states or factions is hard to answer. While many would insist that individual responsibility and consequently punishment of all guilty parties is the only method to acquire a settlement, it can also be argued that national reconciliation

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[19] Meron stressed this proposition and argued that "[b]lame should not rest on an entire nation but should be assigned to individual perpetrators of crimes and responsible leaders"; *supra* note 10, 134.

[20] Jeri Laber/Ivana Nizich, The War Crimes Tribunal for the Former Yugoslavia: Problems and Prospects, 18 *The Fletcher Forum of World Affairs* 7 (no. 2, 1994), at 15.

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demands a certain degree of pardoning those responsible for criminal acts. Pardoning and clemency, however, does not necessarily mean that the truth about large-scale crimes and individual responsibility for them should not be clarified. In fact, an alternative to judicial proceedings in clearing up the past can be found in the *Truth Commissions* of many Latin American states established after their (re-)turn to democracy. Their mandate is usually limited to establish facts without any sanctioning power[21].

But some would go further and deny even the value of establishing the truth about the past, arguing that lengthy judicial inquiries into the details of atrocities committed would just prolong the suffering of victims and refresh the memories of both sides, thereby effectively preventing the healing of collective emotional and psychic wounds.

B. A technical obstacle - the leaders

The necessity of dealing with potential war criminals in the Geneva talks might have implied a certain moral dilemma for some negotiators on a personal level. The threat of criminal responsibility, however, might have posed an even more disquieting practical problem. Anthony D'Amato has pointedly asked in an editorial comment in the *American Journal of International Law* whether it is realistic to expect political ad military leaders, who are potential targets of the Tribunal, to agree to a peace settlement "if, directly following the agreements, they may find themselves in the dock"[22]. Also Cherif Bassiouni, a chief advocate for an international criminal court and institutionalised prosecution of international crimes, spoke of the interaction or, at least, incongruence "between pursuing an international criminal justice goal and political settlements of international disputes" and he considers this incongruence the main reason why so many conflicts in he past have resulted in *de facto* immunity for the leaders[23].

The Statute of the Tribunal leaves no doubt that they should not enjoy any head-of-state or other personal immunity and would thus, if convicted, face the maximum punishment of life imprisonment[24]. In line with general human rights developments[25] there is no death pen-

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[21] See the impressive account of the work of one of these commissions by a former commission member, Thomas Buergenthal, The United Nations Truth Commission for El Salvador, 27 *Vanderbilt J. of Transn'l L.* 497 (1994).

[22] Anthony D' Amato, Peace vs. Accountability in Bosnia, 88 *AJIL* 500 (1994).

[23] Cherif M. Bassiouni, Former Yugoslavia: investigating violations of international humanitarian law and establishing an international criminal tribunal, 18 *Fordham Int'l L.J.*, 1191 (1995), at 1209.

[24] Article 7 para. 2 of the Statute.

[25] Christoph Schreuer, Capital Punishment and Human Rights, *Recht zwischen*

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alty provided for[26]. This criticism has led some observers to discuss a model of general amnesty for all crimes committed in the territory of the former Yugoslavia at the critical time. As a consequence, one would have to abolish the Tribunal[27]. D'Amato discusses such a theoretical solution based on a "law-and-economics" approach which he presents as worth considering - although he himself finds it "distasteful". The United Nations could use the Tribunal as a "bargaining chip", willing to abandon it if the Muslims, Croats and Serbs agreed *inter se* in their peace negotiations to ask the United Nations to dissolve it[28]. The undisputed assumption is that an assurance of their personal impunity would induce the leaders to agree on a peace plan.

C. Legal support in dismantling the Tribunal

As we have seen already, the Security Council's competence to create the Tribunal was not without controversy from the outset. The claim that the Security Council exceeded its powers by this "enforcement action" might in fact facilitate the argument for abandoning the Tribunal for the price of a peace accord.

The main legal justification for the Security Council's competence was that the widespread violation of humanitarian law constitute a "threat to international peace and security" and that the establishment of a criminal tribunal as a non-military enforcement measure would help to restore and maintain peace. If peace and security were restored by an agreement or *de facto* one could - by a strict interpretation of Chapter VII - arrive at the conclusion that the Security Council's competence to take enforcement action and thus the Tribunal's legal basis has ceased to exist as well. This indeterminacy concerning

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Umbruch und Bewahrung, Festschrift für Rudolf Bernhardt (1995) 563.

[26] According to article 24 para. 1 of the Statute penalties are limited to imprisonment.

[27] Given the lack of support the Tribunal enjoys by a majority of states this would probably be easy to accomplish from a political point of view. The lack of support is clearly evidenced by withholding the necessary funding from the Tribunal through the General Assembly. There is a widespread sentiment, however, that the opposition to the Tribunal is not in first line directed against its task, but is rather due to the "undemocratic way" of establishing it by Security Council resolution without proper regard to the opinions of the member states in the General Assembly. At the preparatory stage for the Tribunal the alternative way of drafting a convention was discussed. This method was not further pursued mainly because of its "voluntary" character. Since no state and in particular none of the states on the territory of the former Yugoslavia would have been obligated to ratify such a treaty (and would have probably resisted it), the not quite uncontroversial solution of subjecting all states to cooperation by way of a binding Security Council resolution was followed.

[28] D'Amato, supra note 22, 503.

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the Tribunal's existence is also reflected in the Secretary-General's Report on its Statute: "[A]s an enforcement measure under Chapter VII, however, the life span of the International Tribunal would be linked to the restoration and maintenance of international peace and security in the territory of the former Yugoslavia, and Security Council decisions related thereto"[29].

Experience has shown that it might take years, if not decades, for war crimes tribunals to perform their tasks when confronted with such large scale violations as in the instant case. To cancel their activity upon restoration of peace would render their establishment into a farce. Even without recurring to this *argumentum ad absurdum*, however, one might find good reasons in the text of the UN Charter and the Security Council's prior practice to argue for a temporal extension of the Council's "enforcement" measures.

Article 39 empowers the Council not only to "restore international peace and security", but also to "maintain" it. As a reaction not to an actual "breach of the peace, or act of aggression", but to "any threat to the peace" peace-maintaining actions are *per definitionem* legitimate in time of peace. While such actions have been probably contemplated primarily as preventive actions, anticipating a potential breach of the peace, there is nothing in the texts that would preclude peace-maintenance actions being undertaken by the Security Council after a successful restoration of the peace and as useful means to guarantee such peace-making efforts. The prevailing practice of the Security Council also shows that enforcement measures have been maintained even after the reasons for their imposition had lapsed.

The assumption that the Tribunal will continue to function after a peace accord has been reached seems to be also implicitly contained in the Resolution establishing the Tribunal. Operative paragraph 1 of Security Council Resolution 827 delimits the Tribunal's jurisdiction *ratione temporis* as extending to a period "between 1 January 1991 and a date to be determined by the Security Council upon the restoration of peace". It would seem inconceivable that a Tribunal's adjudicative functions cease at the same time that its jurisdictional scope ends, since this would make it practically impossible for it to sit in judgment over the most recent acts.

III. AN ATTEMPT TO UPHOLD THE TRIBUNAL

While the idea of abandoning the Tribunal in order to facilitate a peace settlement might seem appealing to those desperately seeking a

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[29] *Report of the Secretary General pursuant to paragraph 2 of Security Council Resolution 808 (1993), supra*, para. 28.

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solution for the Yugoslavian tragedy, one should be careful in accepting it too readily. It might well be that - to stay within a law and economics approach - in the long run the costs of trading the Tribunal for peace are too high.

And - in order to revert to the less mundane world of jurisprudence and speak of legal ethics - it might also be that such a solution would be squarely contrary to notions of human rights and justice the United Nations tries to promote on a universal basis.

A. Deterrence

To speak of "costs" that might prove "excessive" we have to go back to the idea of deterrence. As we have seen there is not only an immediate interest in threatening punishment in order to prevent the commission of criminal acts in former Yugoslavia, but also a larger societal interest of the international community in deterrence for future cases.

It might well be that at the present point the Tribunal will not prevent any further atrocities, but rather prolong a situation under which the commission of such acts will be likely, if its existence can indeed be viewed as an obstacle for political and military leaders to end hostilities and to agree on a peaceful settlement. And it is quite evident that the horrible atrocities of the past four years cannot be undone.

However, it is even more probable that at the present point with the establishment of the Tribunal and its far-reaching progress in actually performing its task, its sudden abandoning will send a wrong message to other conflicts elsewhere[30].

Because of the United Nations' necessary role in abandoning the Tribunal it could even be seen as the international community's licence for future scenarios that "aggression pays" and that the commission of atrocities will go unpunished - to remain within lawyers' parlance - that both violations of the no longer existing *ius ad bellum* (right to war) and the *ius in bello* (law of warfare) will not receive the appropriate sanctions.

D'Amato has argued that this cost might be off-set by a peace deal, because it internalised the external factor of the international community's interest to punish war criminals into a bargaining chip for the victims. To arrive at an acceptable deal the party having committed those crimes would have to trade something in return - possibly "have to make land concessions" to the other sides[31]. They would thus

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[30] Bassiouni argues that *de jure* or *de facto* immunity reduces deterrence and ultimately leads to "increased violence in international relations"; *supra* note 23, 1210.

[31] D'Amato, *supra*, 505.

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be forced to "trade in" any advantages they had unlawfully gained.

It appears questionable, however, whether this "off-setting" justification can be properly maintained. The argument itself seems to rest on a illegitimate collectivisation. In the same way as it is not an ethnic collective at large that is responsible for the atrocities committed in the former Yugoslavia, but rather individuals, it is not primarily Croats, Serbs, or Muslims as a group who have been victimised, but rather individual members of these ethnicities. Given this fact, could it really be anyone else than only these direct victims and their relatives who might "bargain away" their grief and suffering?

It seems open to doubt, moreover, whether in the minds of those willing to terrorise civil populations in order to gain military and political advantages a potential bargaining position in subsequent peace negotiations is usually anticipated[32]. As far as military personnel is concerned one could only hope that the average reasonable soldier would not even consider the commission of war crimes in terms of cost and benefit analysis. This conception of war crimes as being "out of bounds" clearly underlies the idea of the law of war. The whole body of the current international law on the subject, the Hague Conventions as well as the Geneva Conventions, can be seen as an attempt to regulate the use of military force. By necessity, those rules cannot outlaw all violent acts but they attempt to limit them. Those acts that are "outlawed", i.e. war crimes, should be clearly regarded "non-negotiable". As their commission or non-commission cannot legitimately form the basis for a (peace) deal, their prosecution should not be at the disposition for any "negotiation".

B. Individual righting of wrongs

While in terms of peace-restoring and deterrence value one might at least argue about the usefulness of the Tribunal, it seems that the idea of criminals being brought to justice cannot be bargained away. Thus, the Tribunal would, in any event, serve a purpose - whose value might be tested and questioned on other grounds - namely, the satisfaction of victims to have criminals put on trial and punished. You might call this a revival of the old retaliatory concept of criminal law[33]. But it seems that - despite all criticism - it is still perceived as

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[32] Current theory of economics seems to teach that the prudent market participant used in standard economic choice situations is hard to find in reality. In exceptional situations such as times of war it is unlikely that people will act in a more rational way.

[33] Although, of course, the administration of criminal justice is precisely aimed at preventing a simple retaliatory symmetry by limiting punishment to imprisonment and forestalling further retaliatory atrocities.

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an important task of criminal law.

This vindication of "rights" of individual victims follows political demands by activist groups for criminal prosecution and punishment of individual human rights violators "out of respect for the victims of abuse [..] by sending a message that one cannot victimise others without suffering severe consequences oneself"[34].

IV. PUNISHING WAR CRIMINALS AS A HUMAN RIGHTS OBLIGATION?

In this context an interesting argument can be derived from the current human rights discourse in the Americas.

A. The Uruguayan amnesty law under scrutiny of the Inter-American Commission on Human Rights

The Inter-American Commission on Human Rights has recently held laws of general amnesty for human rights violations perpetrated by the military regimes to be in violation of the American Declaration of the Rights and Duties of Man[35] and the American Convention on Human Rights[36].

In Report No. 29/92 the Commission concluded that Uruguay's law immunising military and police personnel against prosecution for politically motivated crimes under the military regime was incompatible with article XVIII (Right to a Fair Trial) of the American Declaration of the Rights and Duties of Man and articles 1, 8 and 25 of the American Convention on Human Rights[37]. In Report No 28/92 the same provisions were held to be violated by legislative measures taken in Argentina to an equally immunising effect[38].

At the centre of both cases was the fair trial guarantee as embodied in article 8 para. 1 of the Convention which closely resembles comparable provisions in the European Convention on Human Rights and the International Covenant on Civil and Political Rights:

> "Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial

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[34] Human Rights Watch, *World Report* 1993 (1994).

[35] Adopted 2 May 1948 at Bogota, Colombia.

[36] 22 November 1969, OASTS No. 36; 9 *ILM* 673 (1970).

[37] Report No. 29/92 (Cases 10.029, 10.036, 10145, 10.305, 10.372, 10.373, 10.374 and 10.375), 2 October 1992, *Annual Report of the Inter-American Commission on Human Rights* 1992-1993, OEA/Ser.L/V/II.83, 154 *et seq*. See also Robert Kogod Goldman, Uruguay: Amnesty Law in Violation of Human Rights Convention, 49 *Review of the International Commission of Jurists* 37 (1992).

[38] Report No. 28/92 (Cases 10.147, 10.181, 10.240, 10.262, 10. 309 and 10.311), 2 October 1992, *Annual Report, supra*, 41 *et seq*.

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> tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labour, fiscal, or any other nature."

The Commission rejected Uruguay's main contention that this provision only referred to rights of an accused in criminal proceedings and not of someone demanding criminal prosecution and that in Uruguay - as in most other countries - the right to pursue a criminal prosecution rested solely with the state. The Commission obviously saw in article 8 para. 1 also a "right to legal redress, to an impartial and exhaustive judicial investigation that clarifies the facts, ascertains those responsible and imposes the corresponding criminal punishment"[39].

One might criticise this crucial part of the decision for its rather weak legal reasoning. It seems that the Commission was almost intentionally begging the question when it repeatedly insisted on the victims' "opportunity to participate in the criminal proceedings, which is the appropriate means to investigate the commission of the crimes denounced, determine criminal liability and impose punishment on those responsible"[40], thus apparently treating this "necessity" as equal to a "right" protected under article 8 para. 1. In this respect, also the Commission's reference to its own previous opinion on "the need to investigate the human rights violations committed prior to the establishment of the democratic government"[41] is legally no conclusive evidence for a corresponding right. The wording of article 8 para. 1 and of the corresponding provisions in the International Covenant on Civil and Political Rights and the European Convention on Human Rights guarantees a "right" to a trial in criminal matters only to an accused, not to victims[42].

The result of holding the amnesty law in violation of human rights norms becomes far more comprehensible when seen in light of article 1 para. 1 of the Convention and in particular through its interpretation by the Inter-American Court of Human Rights. Article 1 para. 1 obliges the states parties to the Convention "to respect the rights and freedoms recognised [t]herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and free-

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[39] Report No. 29/92, para. 39.

[40] Report No. 29/92, para. 40.

[41] *Annual Report* 1985-1986, 205, cited in Report No. 29/92, para. 37.

[42] The European Commission on Human Rights has consistently rejected claims of an individual right based on article 6 of the European Convention on Human Rights to have a penalty imposed on assailants. See *X. v. Federal Republic of Germany*, Application No. 7116/75, 7 *Decisions and Reports* 91 (1977), cited by P. van Dijk, Access to Court, *in* R.St.J. Macdonald, F. Matscher and H. Petzold (eds.), *The European system for the protection of human rights* (1993) 359.

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doms" in a non-discriminatory fashion. In the landmark *Velásquez Rodriguez* case[43] the Court has considered it a "consequence" of the duty to "ensure" those rights that "the States must prevent, investigate and punish any violation of the rights recognised by the Convention".

This interpretation is of particular importance in so far as it contributed to the extension of the classical human rights approach, according to which the responsibility of the state is basically limited to the obligation to suppress human rights violations and, in the event of their occurrence, to compensate the victims. A direct claim against the state to punish individuals, the state agents perpetrating human rights violations, was traditionally not seen as included[44].

The *Velásquez Rodriguez* court, however, expressly held that the state has a "legal duty" not only to prevent human rights violations and to ensure adequate compensation, but "to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment"[45]. It further elaborated on the implication of a state's duty to "ensure" the exercise of the Convention's rights and freedoms that "[i]f the State apparatus acts in such a way that the violation goes unpunished [...], the State has failed to comply with its duty to ensure the free and full exercise of those rights to the persons within its jurisdiction"[46].

Against such a broad understanding of the obligations of states parties to the Convention it was easy for the Commission to qualify the Uruguayan amnesty law as a violation of its provisions.

B. Relevancy for the Yugoslavia Tribunal?

1. Legal considerations

If we want to argue for any legal relevancy of these decisions for the

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[43] Inter-American Court of Human Rights, Judgment of 19 July 1988, Ser. C, No. 4.

[44] This leads to a certain enhanced third party effect ("*Drittwirkung*"), *cf.* Andrew Clapham, The 'Drittwirkung' of the Convention, *in* R.ST.J Macdonald, F. Matscher and H. Petzold (eds.), *supra*, 163. Although the right to respect human rights in an entitlement vis-à-vis the state and not vis-à-vis individuals, certain individuals, state agents committing human rights violations, will be indirectly obliged towards private parties to respect their rights in a more effective way. Traditionally the means to secure such compliance was deemed an internal affair not part of international human rights obligations of states. Where disciplinary sanctions, often to be waived by discretion were the only sanctions against state officials the guarantee for compliance seems to be, of course, weaker than under a compulsory criminal proceedings threat.

[45] Inter-American Court of Human Rights, *supra* note 43, para. 174.

[46] *Ibid.*, para. 176.

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Yugoslavia Tribunal, we have, of course, to be aware of the different legal context. This poses primarily issues of a more technical nature such as the question whether the implied duty to prosecute human rights infringements is also valid for humanitarian law violations and whether the United Nations as the entity ultimately responsible for the Tribunal is legally bound by human rights standards. The crucial and primary - also in a logical sense - preceding point, however, is whether the Inter-American standard as expressed in the cases we just discussed can be seen to reflect a universal human rights *acquis*.

At that level as well, it seems to be most promising to found a possible duty to prosecute individual human rights violators on the general obligation to "respect and ensure" human rights as contained in most human rights instruments. For instance, the United Nations Human Rights Committee has interpreted article 2 para. 1 of the International Covenant on Civil and Political Rights in conjunction with the torture prohibition of article 7 so as to require states to set up an effective control machinery and elaborated that this duty included that "[c]omplaints about ill-treatment must be investigated effectively by competent authorities" and that "[t]those found guilty must be held responsible"[47]. In a subsequent comment the Committee "has noted that some States have granted amnesty in respect of acts of torture. Amnesties are generally incompatible with the duty of States to investigate such acts; to guarantee freedom from such acts within their jurisdiction; and to ensure that they do not occur in the future"[48].

Although not legally binding those comments join the line of similar statements which seem to indicate a growing *opinio juris* of states reflecting the necessity to criminally prosecute gross human rights violations. An example of a recent, almost world-wide affirmation of this principle can be found in the Declaration and Programme of Action of the 1993 World Conference on Human Rights in Vienna, which specifically urges that "[s]tates should abrogate legislation leading to impunity for those responsible for grave violations of human rights such as torture and prosecute such violations"[49]. As far as "enforced disappearances" are concerned, the World Conference "reaffirm[ed] that it is the duty of all States, under any circumstances, to make investigation [...] and, if allegations are confirmed, to prosecute its perpetra-

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[47] General Comment No. 7 (16), article 7, adopted by the Human Rights Committee under article 40 para. 4, of the ICCPR, 37 UN GAOR Supp. (No. 40) Annex V, at 94, para. 1 (1982).

[48] General Comment No. 20 (44), article 7, adopted by the Human Rights Committee under article 40 para. 4, of the ICCPR, UN Doc No. CCPR/C/21/Rev. 1/Add. 3, 7 April 1992.

[49] United Nations World Conference on Human Rights: Vienna Declaration and Programme of Action, adopted 25 June 1993, para. 60; reprinted *in* 32 *ILM* 1661 (1993).

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tors"[50]. Viewed together one might thus conclude that the Uruguay case can be seen as an avant-garde expression of a growing awareness that the state obligation to "ensure" the enjoyment of human rights might also contain an enforceable entitlement of victims of grave human rights violations to have their oppressors prosecuted for those acts.

As far as humanitarian law violations are concerned, is seems that the arguments for an obligation to prosecute are even stronger that in the human rights context. After all, the relevant provisions of the Geneva Conventions contain a clear obligation to prosecute violators[51]. Since some states, where the crimes were committed, are apparently not adequately prepared to live up to their primary responsibility to do so and even other states, having gained physical control over suspects, are not too eager to prosecute them, the action by the United Nations might be seen as a kind of "vicarious" prosecution by the world community.

Concerning the relevancy of human rights standards of the United Nations, there seem to be forceful reasons for the proposition that the United Nations can be regarded legally bound to respect international human rights standards. Not only that the Charter lists the "conformity with the principles of justice and international law" among its purposes and principles; the far-reaching approximation of its rights to those of sovereign states - in particular through the jurisprudence of the International Court of Justice in interpreting and confirming the United Nations international legal personality - seems to call for a similar extension of its duties under general international law. This relevancy of human rights standards has been demonstrated in the particular context of the United Nations adoption of rules of procedure for the Yugoslavia Tribunal[52]. In a similar vein a strong case could be made to require the United Nations to follow human rights demands calling for the punishment of war criminals and human rights violators.

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[50] *Ibid.*, para. 62.

[51] E.g. article 146 of the Fourth Geneva Convention (Relative to the Protection of Civilian Persons in Time of War, adopted 12 August 1949, 75 UNTS 287) clearly not only authorises, but also obliges all contracting states to prosecute war criminals "regardless of their nationality" before their own courts - an obligation which is only weakened by the option to extradite them.

[52] August Reinisch, Das Jugoslawien-Tribunal der Vereinten Nationen und die Verfahrensgarantien des II. Menschenrechtspaktes, 47 *Austrian J. of Public and Int'l L.* 173 (1995).

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2. Political reflections

The Inter-American human rights cases are also worth considering in respect of their underlying political arguments.

The Uruguayan Government has stressed the importance of the amnesty law as part of a national reconciliation process which might otherwise be obstructed since "investigating facts that occurred in the past could rekindle the animosity between persons and groups"[53]. Uruguay tried to shield its law - which had been approved by a popular referendum - from larger (international) societal interests by arguing that "the express will of the Uruguayan people to close a painful chapter in their history in order to put an end, as is their sovereign right, to division among Uruguayans, is not subject to international condemnation"[54].

The Commission, on the other hand, by citing its own general position as expressed in a previous report underlines the importance and necessity of facing the truth for the establishment of a democratic government: "Every society has an inalienable right to know the truth about past events, as well as the motive and circumstances in which aberrant crimes came to be committed, in order to prevent a repetition of such acts in the future"[55].

As far as the sovereignty argument is concerned, it appears to be advanced in an inappropriate way, i.e. to disguise a majoritarianist threat of disregarding the wounds of a minority. Cases like this seem to be a proper place for international human rights to intervene. Human rights serve to protect the rights of individuals were they are potentially overridden by the will of a majority even if that will is expressed in a fair and democratic process.

With respect to the Commission's proposition about the necessity of establishing the truth for democracy-building political science and social psychology will hopefully give reliable insight.

V. WHAT IS IT WE MIGHT ULTIMATELY LEARN FOR THE YUGOSLAVIA TRIBUNAL?

Even if one does not accept the Commission's progressive interpretation of human rights demands, the political considerations on the necessity of establishing responsibility for criminal acts in order to get a hold on a country's past and to bring justice to victims and their dependants seem worth to be taken into account in the Yugoslavia con-

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[53] Report No. 29/92, para. 26.

[54] Report No. 29/92, para. 22.

[55] Report No. 29/92, para. 37.

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text.

A final reflection on the perhaps surprising result should be devoted to the discrepancy of the relevant practice of different organs within the United Nations system. While the United Nations Human Rights Committee seems to follow the legal reasoning clearly applied by the American human rights institutions, the Security Council appears to be largely unimpressed by any human rights concerns when trading justice for peace settlements. An example of the United Nations' willingness to let even the worst genocidal regimes go unpunished is its role in the Cambodian peace accord where it apparently put the goal of seeking an agreement above all other concerns.

But precedents are not to be followed blindly, they should be overruled by showing strong reasons. It is to be hoped that the traumatic experience in former Yugoslavia will contribute to make the Security Council, which has publicly stated its determination to "bring to justice" the persons who are responsible for the grave violations of human rights and humanitarian law, to live up to its promises.

Although the Dayton Accord did not "trade in" the Tribunal for peace, recent developments evidence that the core issue raised in this article "Peace v. Justice" remains not yet fully settled. The author, however, would like to stress an aspect that has not received adequate attention in the public debate among international lawyers hitherto, i.e., a potential human rights mandate to uphold the principle of individual accountability as developed hereinafter.

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