

# TRYING TYRANTS FOR MASS ATROCITY

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An extraordinary focus on the criminal responsibility of leaders for mass atrocity has developed since the tentative revival of international criminal law in the early 1990s. Ironically, it was images of emaciated concentration camp detainees in Bosnia reminiscent of Auschwitz — and in Europe's backyard — that prompted the creation of the first international criminal tribunal since Nuremberg and Tokyo.

The creation of the International Criminal Tribunal for the former Yugoslavia (ICTY), let alone the creation a year later of its sister Tribunal in Rwanda, had been an improbable idea only years earlier. Indeed, while the idea of a permanent international criminal court had been on the agenda of the United Nations since the end of the Second World War, any serious work had been frozen by Cold War politics and the impossibility of getting any agreement on how to treat mass atrocity, much less determine what was mass atrocity: indeed, a great deal depended on who was committing the atrocity and where and, at any rate, there was an unhealthy tradition of allowing tyrannous leaders to wreak havoc as long as they kept it in their own backyards.

This gentlemen's agreement amongst nation States to turn a blind eye had been a long-established custom in international law. It was not until the genocide of the Armenian Christians by the Ottoman Turkish government in the early twentieth century that a group of nations threatened action for mass atrocity committed by a government against its own peoples.<sup>1</sup> This new idea of international justice inspired abortive efforts following Allied victory in the First World War, but it was Nuremberg that finally delivered on the dream of international criminal justice.<sup>2</sup> As maligned as the Nuremberg trial and its progeny have been, the reality is that Nuremberg was a stroke of political and legal genius: truly victor's justice but justice nonetheless. The grim alternative was that favoured initially by Churchill, Stalin and some senior United States officials: to summarily execute the Nazi leaders.<sup>3</sup>

The rebirth of international criminal justice, which came in the form of the ICTY over 50 years later, was not expected to be long lived. Set up to try former Yugoslav war criminals and, somewhat hopefully, to help restore peace and security, and to assist in reconciliation,<sup>4</sup> it appeared early on there would be little to do. Yet, the accused arrived and — to the surprise of all — trials and appeals were held and modern war crimes trials started to take shape as a criminal justice system with some foundation and

credibility. It was the arrival of the senior political leaders that created a sense of promise and belief in international war crimes trials as a means by which tyrannical leaders might be dealt with. With the recent arrest and transfer to the ICTY of Radovan Karadžić, all of the key players in the Bosnian Serb political leadership during the war will have been dealt with. So too, generals and political leaders from the Bosnian Croat and Muslim, Croatian and Kosovo Albanian sides have been tried, as have a couple of Macedonians.

The trial and conviction for genocide of many before the Rwanda tribunal — including the Prime Minister, Jean Kambanda, as early as 1998 — should also not be forgotten.<sup>5</sup> However, it was the arrest and trial of Slobodan Milošević that became the flagship of the ICTY and of international criminal law and the fight against impunity for leaders who commit mass atrocity.<sup>6</sup>

Soon after Milošević was indicted, other leaders, who until recently were considered largely untouchable, began to receive more than a little attention from the machine of international criminal justice. Augusto Pinochet, upon a medical visit to London, found himself the subject of a very nearly successful extradition to Spain to answer for his reign of terror in Chile from the early 1970s.<sup>7</sup> The former President of Liberia, Charles Taylor, was arrested following a change of political heart in Nigeria and transferred to the Special Court for Sierra Leone to await trial.<sup>8</sup> Saddam Hussein, his country having been invaded and occupied, was also dug out of a hole in the ground, cowering, and was promptly tried, convicted and executed by a court only tangentially related to international criminal justice and wholly removed from normal standards of a fair trial.

The whirlwind of international judicial activity in relation to former leaders had been a mark of great hope and development in international criminal justice, but had also left the international community with a genuinely difficult question: was this expensive, politically tumultuous and intractable process the best way to deal with mass atrocity committed by tyrants? By 2007, it seemed the international community may have exhausted its interest and political and financial commitment to this process.

However, recent events suggest something of a resurgent commitment to international criminal justice in the form of war crimes trials and the prospect that they might be a means of addressing some of our more profound moral and legal dilemmas surrounding tyrants and their persecution of innocent peoples. Consider

## REFERENCES

1. United Nations War Crimes Commission, *History of the United Nations War Crimes Commission and the Developments of the Laws of War* (1948), 35.
2. See *Trial of the Major War Criminals Before the International Military Tribunal, Nuremberg, 14 November 1945–1 October 1946* (1947).
3. For a discussion of the Nuremberg Trial in its judicial and political context, see Geoffrey Robertson, *Crimes Against Humanity* (1999) 200–204.
4. See, Security Council Resolution 827, S/Res/827 (1993).
5. *Prosecutor v. Kambanda*, Case No ICTR-97-23-S, Judgment and Sentence, 4 September 1998.
6. For a detailed discussion of the Milošević trial, see Gideon Boas, *The Milosevic Trial: Lessons for the Conduct of Complex International Criminal Proceedings* (2007).
7. See, *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte* (No. 3) [2000] 1 AC 147.
8. See *Prosecutor Against Charles Taylor*, Case No. SCSL-03-01-PT, Second Amended Indictment, 29 May 2007.

the recent application for an arrest warrant by the ICC Prosecutor of the Sudanese President, Al Bashir,<sup>9</sup> its investigation of events in Georgia<sup>10</sup> and the arrest of Karadžić and his transfer to the ICTY.

Just consider how now, when a crisis such as Sudan or Ossetia arises, there is a heightened discussion over the commission of war crimes, crimes against humanity and even genocide, and who might be accountable. United Nations Reports, Non-Governmental Reports, fact finding commissions, and political rhetoric abound. Indeed, it took the Russian Prime Minister, Vladimir Putin, moments to announce in August 2008 that his forces were in South Ossetia because Georgia was engaged in 'ethnic cleansing' and 'genocide'.<sup>11</sup> The indictment of the Sudanese President arises out of a detailed UN Report and, of course, with Security Council support. Quite unlike the mood following Milošević's demise and the overdriven efforts to shut down the *ad hoc* international criminal tribunals for the former Yugoslavia and Rwanda,<sup>12</sup> there seems to be a sense of the place of international war crimes trials in the international political landscape.

If there really is a long-term prospect for international criminal justice, some scores need to be settled and some deep-seated issues need to be discussed in an informed way. There are at least two such issues that stand out: (1) the sustainability of international criminal trials; and (2) the politics of who gets prosecuted for what. There is only scope in this article to consider these issues briefly.

### The sustainability of international criminal trials

The Milošević trial at once embodies all that international criminal law aspires to and much that it seeks to avoid. This first trial of a (former) head of State by an international criminal tribunal signalled the possibility that even the powerful (or at least some of the powerful) might be called to account.

On the other hand, the Milošević trial revealed some of the weaknesses of the international criminal justice system. One of the clear messages from the trial was that international prosecutors must resist the temptation to 'throw the book' at a senior accused who may be linked at differing levels of responsibility to a massive scope of criminality. Milošević was charged with over 7000 criminal allegations across three wars, spanning eight years.<sup>13</sup> Commitment to represent all victims of the conflicts led to an understandable, but weak, refusal to take responsibility for that which a prosecution must: the scope, nature and viability of the case it will plead. Now that the Karadžić trial looms, it appears most uncertain what the ICTY Prosecutor will do to reduce the considerable scope of that indictment.

War crimes cases against senior politicians are complicated. It is not that it is difficult to prove that such crimes were committed; the difficulty lies in tying these crimes through layers of military, paramilitary, secret service and government structures to such accused and establishing their criminal responsibility

for all of these crimes. Doing this takes evidence, and it takes time. The new ICTY Prosecutor, Serge Brammertz, cannot afford to indulge in an overflowing charge sheet against Karadžić. While Brammertz expresses a desire to conduct a prosecution that is efficient, and to learn from the Milošević trial, his statements about the charges so far suggest he is stuck in that old war crimes prosecutor's dilemma of trying to balance a sense of obligation to all the victims of atrocity with an obligation to conduct a reasonable and focused case.<sup>14</sup> This dilemma will be shared time and again in the prosecution of senior politicians and others by war crimes tribunals. Prosecutorial focus and restraint must be broadly achieved, lest the international community lose faith in the capacity of these institutions to deliver fair and expeditious justice.

Another area of considerable concern in these trials is the decision by senior level accused to represent themselves. Self-representation has become something of a disease in international criminal trials, spreading from the Milošević case in the ICTY to the Rwanda and Sierra Leone tribunals. It is based on a poorly conceived understanding of the right of an accused under international law to act on their own behalf.<sup>15</sup> The result of allowing Milošević to represent himself for too long was — along with the permitted scope of the case — the death of the accused and a premature and fateful end to the trial.

These cases must also be managed very rigorously. One of the great challenges faced by the Court in the Milošević case was how to curtail and control the scope of the case. Understanding that the prosecution was unprepared to constrain the breadth of the case, the Court was required to take steps unprecedented in the world of adversarial justice, including reducing the number of witnesses, refusing to hear repetitive witness testimony, interfering in the questioning of witnesses and, ultimately, imposing strict time limits on the parties. The seed of more radical case management reforms has also been planted in the international criminal justice system, seeing a range of measures, including court-enforced reduction of indictments.<sup>16</sup>

Courts and tribunals applying international criminal law have an obligation to ensure that a trial is fair, and they have an obligation to ensure that it is expeditious. These fundamental criminal process rights are as applicable in international law as they are in Australian domestic law. How to achieve these often competing interests is a question of great complexity. Lord Diplock once said in the Privy Council: 'The fundamental human right is not to a legal system that is infallible, but to one that is fair'.<sup>17</sup> Our own High Court has noted as much, identifying the right to a speedy trial as an integrated, and not independent, part of the fair trial equation.<sup>18</sup> Indeed, while an expeditious trial may not be a distinct right, there will inevitably come a point at which the length of a trial affects its fairness. The achievement of the goals of international criminal justice — to bring to justice those most responsible for mass atrocity — will require work, to ensure that

9. See 'Prosecutor's Application for Warrant of Arrest under Article 58 Against Omar Hassan Ahmad AL BASHIR', <[icc-cpi.int/library/organs/otp/ICC-OTP-Summary-20081704-ENG.pdf](http://icc-cpi.int/library/organs/otp/ICC-OTP-Summary-20081704-ENG.pdf)>, at 12 February 2009.

10. See <[icc-cpi.int/press/pressreleases/413.html](http://icc-cpi.int/press/pressreleases/413.html)>, at 12 February 2009.

11. See 'Georgia "pulls out of S Ossetia"', BBC News, <[news.bbc.co.uk/2/hi/europe/7552012.stm](http://news.bbc.co.uk/2/hi/europe/7552012.stm)>, at 12 February 2009.

12. See Security Council Resolutions, S/RES/1503 (2003) and S/RES/1534 (2004); Daryl A. Mundis, 'The Judicial Effects of the "Completion Strategies" on the Ad Hoc International Criminal Tribunals' (2005) 99 *American Journal of International Law* 142.

13. For a detailed discussion of the trial, see Boas, above n 6.

14. 'Prosecutor Serge Brammertz Statement on the transfer of Radovan Karadžić', The Hague, 30 July 2008, SB/OTP/1278e, <[www.un.org/icty/lateste/pressindex.htm](http://www.un.org/icty/lateste/pressindex.htm)> accessed 12 February 2009.

15. See Boas, above n 6, ch four; Nina H.B. Jørgensen, 'The Problem of Self-Representation at International Criminal Tribunals, Striking a Balance Between Fairness and Effectiveness' (2006) 4 *Journal of International Criminal Justice* 64.

16. *Prosecutor v. Milutinović*, 'Decision on Application of Rule 73bis', IT-05-87-T, 11 July 2006.

17. *Maharaj v Attorney-General of Trinidad and Tobago* (1978) 2 WLR 902 (Privy Council).

18. See *Jago v District Court (NSW)* 168 CLR 23.

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the goals of fairness and, to a lesser but crucial extent, expedition are met.

### The politics of prosecution

While we have recently been blessed with a raft of indictments, investigations and prosecutions in the pursuit of international criminal justice, there does appear to be a nagging sense of hypocrisy that permeates much in the world of international law and politics. Whether the international community is prepared to address violations of international criminal law clearly depends on who is alleged to be committing crimes and how they are placed geopolitically.

The trial of Saddam Hussein in Iraq seems an appropriate example to begin with. The Iraqi Tribunal was initially a court set up under US occupation. In late 2006, it was repromulgated by the Iraqi Parliament as a domestic criminal court. Despite considerable pressure to involve the United Nations in the construction and mandate of the court (to set up an international or hybrid court model), the United States (and Iraq) resisted — no doubt in part because that would have required compliance with fundamental fair trial rights and, of course, because that would have precluded the death penalty. Saddam Hussein was tried, convicted and swiftly executed by a US-backed court that ran a sham trial and delivered an inevitable result.<sup>19</sup>

The arrest and transfer of Al Qaida and Taliban forces from Afghanistan (and elsewhere) to Guantanamo Bay military prison has led to an increasingly homogenous view that human rights violations, including torture and denial of fundamental criminal process rights, were inflicted upon the hundreds of detainees;<sup>20</sup> that brazen violations of the Geneva Conventions and customary international law were committed;<sup>21</sup> and, that new and previously unheard of crimes were charged.<sup>22</sup> Indeed, a Judge sitting on the *Qatini* trial recommended that those responsible for torture of detainees be prosecuted. Even so, it is hardly conceivable that former US President George W. Bush, former US Secretary of Defence Donald Rumsfeld, or our own former Prime Minister John Howard, will be investigated let alone prosecuted.<sup>23</sup>

Another interesting example of the politics of international criminal justice is the reaction to the Rwandan government report on France's involvement in the genocide of 1994 which saw around 800 000 people killed. These allegations were hardly surprising, particularly given the longstanding animosity between

the French and Tutsi-led Rwandan government. They did, however, merit something more than the mild media interest and dismissive responses from French ministers and palpable silence from the rest of the international community.<sup>24</sup>

Rolling back the clock a little further, the refusal of the Prosecutor of the ICTY to fully investigate war crimes alleged to have been committed by NATO forces in the bombing campaign of Serbia in 1999 has also been seen as an example of selectivity in the fight by the international community to end impunity and address violations of international criminal law.<sup>25</sup> This coordinated and protracted military campaign was well justified as an act of humanitarian intervention. However, while States and international law experts jumped on the existence of a right to use armed force against a sovereign State committing massive human rights violations against its own people as a justification for the bombing<sup>26</sup> — and while there was clearly a humanitarian disaster of massive scale wrought by the Serbian leadership — the excesses and poor judgment of NATO leaders and soldiers that led to thousands of civilian deaths certainly warranted a serious investigation by the ICTY, instead of a political whitewash.<sup>27</sup>

There are layers of complexity to the determination of who is prosecuted and for what crimes. A purist view of international criminal justice as a legal system dedicated to the task of prosecuting war criminals and free from the interference of the political process, is one devoid of the realities of war crimes prosecutions.<sup>28</sup> The international criminal tribunals, excepting the ICC, have all been created to address a particular set of crimes, in a particular location, with limited geographic, temporal and subject-matter jurisdictions. The prosecution of those most responsible for atrocity in the former Yugoslavia, Rwanda, East Timor, Sierra Leone, Cambodia and (to an even more limited extent) in Iraq and Lebanon, was made possible by a political process ratified by the United Nations General Assembly and/or Security Council. None of these countries represented major world powers or their close allies. For example, they did not include any member of the five permanent members of the Security Council and, as can be seen from the discussion above, where these powerful states have been implicated (for example, France in Rwanda and the USA and UK in respect to Iraq and Guantanamo Bay) the politics of international criminal justice have not provided for genuine investigation let alone prosecution.

19. For a discussion of the Saddam trial and flaws in the Tribunal and trial process, see, eg, Human Rights Watch, *Iraq: Saddam Hussein Put to Death*, <hrw.org/en/news/2006/12/29/iraq-saddam-hussein-put-death>, at 12 February 2009.

20. See, eg, Amnesty International, 'USA: Guantánamo and beyond: The continuing pursuit of unchecked executive power', <amnesty.org/en/library/asset/AMR51/063/2005/en/dom-AMR510632005en.html>, at 12 February 2009; Vikram Dodd, 'This is a US Torture Camp', *The Guardian* (London, UK), 12 January 2007, <guardian.co.uk/commentisfree/2007/jan/12/comment.foreignpolicy>, at 12 February 2009.

21. See George H. Aldrich, 'The Taliban, al Qaeda, and the Determination of Illegal Combatants' (2002) 4 *Humanitaires Völkerrecht* 202–206; Marco Sassoli, 'The Status of Persons Held in Guantanamo under International Humanitarian Law' (2004) 2 *Journal of International Criminal Justice*, 96–106.

22. 'In the Matter of the Legality of the Charge against David Hicks', Expert paper, 8 March 2007, <http://law.anu.edu.au/accel/Media/Rothwell%20-%2008%20March%202007.pdf>, at 12 February 2009.

23. See Tim McCormack, 'Guantanamo's closure is just the beginning', *The Age* (Melbourne), 2 February 2009: <theage.com.au/opinion/guantanamos-closure-is-just-the-beginning-20090201-7uvn.html>, at 12 February 2009.

24. See, eg, 'Rwandan Genocide: Commission Publishes Allegations Against France', <spiegel.de/international/world/0,1518,570204,00.html>, at 12 February 2009.

25. See 'Prosecutor's Report on the NATO Bombing Campaign, and Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991', 13 June 2000, <un.org/icty/pressreal/p510-e.htm>, at 12 February 2009.

26. See, eg, Christopher Greenwood, 'Is there a right of humanitarian intervention?' (1999) 49(2) *The World Today*, 34–40.

27. See William J. Fenrick, 'Targeting and Proportionality during the NATO Bombing Campaign Against Serbia' (2001) 12 *European Journal of International Law* 489.

28. The many complex arguments surrounding supporters and detractors of the different approaches to, and effects of, war crimes trials, are discussed in Gerry Simpson, *Law, War and Crime* (2007) ch 1; Gary Jonathan Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (2000) ch 8.

There are also many political aspects to the prism of international criminal justice. Following the ICC's endorsement of the Prosecutor's indictment of the President of Sudan President al-Bashir has expelled aid agencies, putting the living conditions and livelihood of many in that country in further serious jeopardy. There is a price for pursuing international justice and the international community needs to be careful to weigh up the cost to innocent lives against the benefits perceived and real. Sudan and its people may well benefit in future from al-Bashir's indictment, but the international community must also be prepared to back up what is at present a symbolic act with protection and aid.

## Conclusion

While there is much to concern us in both the mechanics and the political landscape of international criminal justice, it is easy to forget just how wondrous have been its successes over the past decade. The

development, in almost a blink of the eye, of a solidified idea that tyrants who murder their own and other peoples may be held accountable as criminals by the international community, was something unthinkable even at the inception of the ICTY in 1993. Of course, it still matters who is being killed and who is doing the killing. We are not going to see in a hurry George W Bush, Tony Blair, Vladimir Putin or indeed John Howard on charges for war crimes or human rights violations. But we have seen the Presidents of Serbia, Liberia, Iraq, Sudan and Chile, placed on the scales of international justice. This, along with the recent momentum and — hopefully — the learned lessons of past trials of senior politicians, just might herald the development of something of a golden age in international criminal justice.

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## MENTIONS

### Forthcoming conferences

#### July 2009

##### The Changing Human Rights Landscape

17 July 2009, State Library of Victoria, Melbourne  
Castan Centre 2009 Human Rights Conference  
<[law.monash.edu.au/castancentre/events/2009/conference-09.html](http://law.monash.edu.au/castancentre/events/2009/conference-09.html)>

##### Disability & Age Discrimination Law Reform Summit

30–31 July 2009, Swissotel, Sydney  
<[iir.com.au/conferences/human-resources/the-disability-age-discrimination-law-reform-summit](http://iir.com.au/conferences/human-resources/the-disability-age-discrimination-law-reform-summit)>

#### August 2009

##### Indigenous young people, crime and justice conference

31 August – 1 September 2009, Crowne Plaza Hotel, Parramatta  
Contact Mercedes Mendoza, Australian Institute of Criminology [Mercedes.Mendoza@aic.gov.au](mailto:Mercedes.Mendoza@aic.gov.au) or phone 02 6260 9272

#### September 2009

##### Is Prison Obsolete? Sisters Inside Inc Conference

2–4 September 2009, Mercure Hotel, Brisbane  
More information phone 07 3844 5066, or email [admin@sistersinside.com.au](mailto:admin@sistersinside.com.au)

### Inclusive Justice — CLCs in Action

14–17 September 2009, Hyatt Hotel, Perth  
CLC National Conference, co-hosted by NACLC and the CLC Association (WA) and Western Australian CLCs.  
Further information is available at <[naclc.org.au/topics/2296.html](http://naclc.org.au/topics/2296.html)> or from the NACLC office, phone 02 9264 9595.

#### October 2009

##### 2009 Protecting Human Rights Conference

2 October 2009, Art Gallery of NSW, Sydney  
Gilbert + Tobin Centre of Public Law  
Registration is online at <[gtcentre.unsw.edu.au](http://gtcentre.unsw.edu.au)>

##### Wild Law

16–18 October 2009, Woodhouse Activity Centre, The Rymill Centre, Adelaide  
Australia's first conference on Earth Jurisprudence.  
For further information, contact Peter Burdon on 08 8211 6872, or email [peter.d.burdon@adelaide.edu.au](mailto:peter.d.burdon@adelaide.edu.au)

##### The Human Rights Policy & Practice Forum

20 and 21 October 2009, InterContinental Melbourne The Rialto  
<<http://liquidlearning.com.au/llg08/October/human-rights-policy-and-practice-forum-2009.html>>