

1995

War Crimes Tribunal Dismisses Jurisdictional Challenge

Diane F. Orentlicher

American University Washington College of Law, orentlic@wcl.american.edu

Follow this and additional works at: <https://digitalcommons.wcl.american.edu/hrbrief>



Part of the [Human Rights Law Commons](#), and the [International Law Commons](#)

Recommended Citation

Orentlicher, Diane F. "War Crimes Tribunal Dismisses Jurisdictional Challenge." Human Rights Brief 3, no. 1 (1995): 1, 20-21.

This Article is brought to you for free and open access by the Washington College of Law Journals & Law Reviews at Digital Commons @ American University Washington College of Law. It has been accepted for inclusion in Human Rights Brief by an authorized editor of Digital Commons @ American University Washington College of Law. For more information, please contact kclay@wcl.american.edu.



HUMAN RIGHTS

Center for Human Rights and Humanitarian Law

BRIEF

Washington College of Law • American University

Volume 3, Number 1 • Fall 1995

War Crimes Tribunal Dismisses Jurisdictional Challenge

by Diane F. Orentlicher*

On October 2, 1995, the Appeals Chamber (Chamber) of the International Criminal Tribunal for Yugoslavia (IT) rendered one of the most important rulings on war crimes since the Nuremberg judgment. At that time, the laws of war applied almost exclusively to wars between states. Fifty years ago, if governments went to war against their own citizens, international law would look the other way, however gruesomely the battles were waged. No longer. In a decision on jurisdiction, the Chamber ruled that some atrocities committed in civil wars are international crimes — crimes for which an international court can summon individuals to account.

This ruling reflects a profound change in the nature of armed conflict since World War II, and a corresponding change in the laws of war. As the decision notes, the law previously enforced a "stark dichotomy," elaborately regulating wars between states while shielding the conduct of civil wars from the scrutiny of global conscience. But the dichotomy has gradually broken down, the Chamber noted, in part because the "State-sovereignty-oriented approach" that left states alone when it came to internal con-

flicts "has been gradually supplanted by a human-being-oriented approach" in postwar international law.

At the same time, civil wars have become both more frequent (one study has identified 94 armed conflicts during a recent six-year period; of these, only four were classic inter-state conflicts) and more savage, often entailing violence on a scale so vast

The State-sovereignty-oriented approach that left states alone when it came to internal conflicts has been gradually supplanted by a human-being-oriented approach.

that their effects reverberate across an increasingly interdependent world. In consequence, the Chamber concluded, "the international community can no longer turn a blind eye to the legal regime of such wars."

No case better illustrates the point than the one which gave rise to the judgment. The decision arose out of a challenge to the Tribunal's jurisdiction by its first defendant, Dusko Tadic, a former café owner and karate instructor in the Prijedor district of northeastern Bosnia. His alleged crimes are emblematic of the depravity with which contemporary ethnic conflicts have been waged. When I visited a refugee camp in Croatia two and one-half years

continued on page 20

Beijing Panel Brings Together Activists and Delegates

by Alison E. Graves

On September 9, 1995, the Washington College of Law's (WCL) Center for Human Rights and Humanitarian Law and the Women and International Law Program presented a panel, *Women's Human Rights and the Platform for Action*, at the UN Fourth World Conference on Women in Beijing. The goal of the session was to create a human rights bridge between the NGO Forum, which concluded on September 8th and the main conference which began its session on September 4th and concluded on September 15th. Drawing on the perspectives that emerged during the NGO Forum and the first week of the confer-

continued on page 10

See page 12 for
Point/Counterpoint on
The Quandary of
Economic Sanctions

INSIDE:

Future of Inter-American Human Rights System	Page 2
Enforcement of Human Rights Through ILO	Page 4
World Bank Withdraws from Project at Panel's Recommendation	Page 5
Pioneering Strategies for Mental Disability Rights	Page 6
Lobbying for Specific Language in Beijing Platform	Page 16
Indigenous People File Suit	Page 18

War Crimes Tribunal, continued from page 1

ago, relief workers told our delegation (which also included Visiting WCL Professor Karen Musalo) about a recent arrival from Bosnia who was experiencing extreme trauma. The refugee, who had been detained at the notorious Omarska camp in Prijedor, had been forced to bite off the testicles of another detainee, who died of his injuries. Tadic has been charged with responsibility for this incident, along with a grim litany of other crimes committed in Bosnia. At one time Tadic's depredations would have shocked universal conscience, but the laws of war would have had little to say about them, since

The Chamber's decision made clear that the IT has emerged as a genuinely independent body.

both Tadic and his alleged victims are citizens of the same state.

In larger perspective, the Chamber's decision made clear that the IT has emerged as a genuinely independent body. Notably, the decision reversed key portions of the Trial Chamber's ruling on jurisdiction, demonstrating the Appeals Chamber's ability and willingness to provide meaningful review. In contrast, defendants at Nuremberg were denied any right to appeal judgments against them. In further demon-

The IT thereby asserted a power of judicial review over the Council that even the International Court of Justice has hesitated to claim.

stration of judicial independence, the Chamber declined to adopt some of the key positions advanced by the prosecution.

These hallmarks of independence are especially noteworthy in view of the Tribunal's creation by the quintessential political body, the UN Security Council. The Chamber declared itself competent to judge the Council's own authority in establishing the Tribunal, and proceeded to do just that. The IT thereby asserted a power of judicial

review over the Council that even the International Court of Justice has hesitated to claim. (Intimations of such review in a case arising out of the Lockerbie incident has fairly tantalized international lawyers.)

More importantly, the Chamber's decision on jurisdiction goes a long way toward neutralizing the Council's capacity to eviscerate the process of accountability it instituted two years

The Chamber's decision on jurisdiction goes a long way toward neutralizing the Council's capacity to eviscerate the process of accountability it instituted two years ago.

ago. Since its creation, the Tribunal has operated under the Damoclean threat that, in exchange for their agreement to a peace accord, the architects of "ethnic cleansing" would be granted impunity — a deal that the UN could honor only if the Security Council abolished the Tribunal. Significantly, however, the Chamber noted that "universal jurisdiction" is "nowadays acknowledged in the case of inter-

The Chamber noted that universal jurisdiction is nowadays acknowledged in the case of international crimes.

national crimes." As international crimes, the alleged depredations of suspects like Tadic can be punished, in short, by any state to which they may travel. The Chamber has thus helped assure that those responsible for Balkan war crimes will face the specter

The Chamber has thus helped assure that those responsible for Balkan war crimes will face the specter of prosecution the world over.

of prosecution the world over — if not by the Tribunal, then by any state. In fact, as of early November, far from offering impunity in exchange for a peace accord, United States negotiators took the position that the proposed accord should include an agreement by the parties to cooperate with the Tribunal.

The first voices of the victims to atrocities in the former Yugoslavia to testify before this Tribunal will echo throughout the world.

The Chamber's decision was soon followed by the IT's first proceeding under its "super indictment" procedure. From October 9 through 13, 1995, one of the IT's two trial Cham-

continued on next page

WCL Inaugurates War Crimes Tribunal Research Office

The Center for Human Rights and Humanitarian Law at WCL has established a Research Office for the International Criminal Tribunals for the Former Yugoslavia and Rwanda in August of this year. Utilizing the work of WCL faculty and students, the Research Office provides legal support and technical assistance to the Prosecutors Office in prosecuting individuals responsible for the crimes committed in the former Yugoslavia and Rwanda. Under the direction of Professor Diane Orentlicher, the Research Office is coordinated by Rochus J.P. Pronk, a lawyer from the Netherlands and recent WCL LL.M. graduate. The Office is financed by the Open Society Institute.

The Research Office invites those interested in contributing to this effort to contact Mr. Pronk via the Center for Human Rights and Humanitarian Law.

War Crimes Tribunal,
continued from previous page

bers convened a public hearing to receive evidence against Dragan Nikolic, the first suspect indicted by the Prosecutor. The aim of the hearing was to secure an international arrest warrant against Nikolic, who has thus far eluded capture. On October 20th, the Chamber confirmed the indictment and issued an international arrest warrant. At the hearing, some of Nikolic's victims were given a precious chance to secure some measure of accountability by bearing witness in a court of law. In the words of Chief Prosecutor Richard Goldstone at the opening of the hearing, theirs were "the first voices of the victims to atrocities in the former Yugoslavia to testify before this Tribunal and by so doing those voices will echo throughout the world."

Once widely viewed as a cynical figleaf for the international community's acquiescence in "ethnic cleansing," the Tribunal has converted many of its early critics, and its accomplishments in October further enhanced its reputation. Still, the month ended on a

sobering note — one that pointed up the challenges that perennially threaten the IT's ability to complete the task with which it has been entrusted. Faced with inadequate funds for Tadic's defense team, the IT was forced to

Its work may emerge as one of the most significant tributes that power has ever paid to reason.

postpone the beginning of its first trial, which was originally set to begin in October.

In his closing argument at Nuremberg, Chief American Prosecutor Robert Jackson memorably invoked the redemptive power of law. "Goaded," he said, by the immensity of Nazi evil, "we were moved to redress the blight on the record of our era." Fifty years later, the international community has once again acted to redress its failure to check "ethnic cleansing" in the heart of Europe by establishing an international criminal tribunal. While the IT still faces formidable challenges, it has

already given cause to hope that, like the Nuremberg precedent, its work may emerge as "one of the most significant tributes that power has ever paid to reason" — and, at last, to the rule of law. 🌐

** Diane Orentlicher is Associate Professor of Law and Director of WCL's newly-established War Crimes Tribunal Research Office.*



FACULTY/STAFF NEWS

by Dima Malhas & Jennifer Merkle

Tom J. Farer, Director, J.D./M.A. Joint Degree Program in Law and International Affairs, commented on the draft Ugandan Constitution. As a member of the Inter-American Dialogue Working Group, he also presented a paper evaluating strategies for defending and promoting democratic regimes. In his role as board member of Human Rights Watch/Americas, Farer briefed the former Prime Minister of Canada regarding methods of strengthening the Inter-American Human Rights System. He also participated in a conference, "The Role of the Military in Humanitarian Emergencies", sponsored by the Refugee Studies Programme of Oxford University and was the keynote speaker at a conference organized by the Center for Human Rights Law of the University of Nottingham on "The Inter-American System for the Defense of Human Rights."

Lauren Gilbert, Executive Director of Women and International Law Pro-

gram, led the Human Rights Caucus Task Force on Refugee, Migrant & Displaced Women at the United Nations Fourth World Conference on Women in Beijing. She also coordinated and moderated a panel on Women's Human Rights and the Platform for Action.

Robert K. Goldman, Professor of Law, Co-Director of the Center for Human Rights and Humanitarian Law and Interim Director of the International Legal Studies Program, will begin in January 1996 his four-year term on the Inter-American Commission on Human Rights. On October 7 and 8, the Center hosted the Annual Meeting of the Executive Council of the World Organization against Torture/SOS Torture. Goldman is the North American Member of the Council of this Geneva-based NGO.

Claudio Grossman, Dean of the Washington College of Law, Co-Director of the Center for Human Rights and

Index of Case Resolutions of the Inter-American Commission on Human Rights

The American University Journal of International Law and Policy

The Index, found in the Fall 1994 issue of the Journal, is a comprehensive summary of all published case reports of the Commission. It is categorized by articles of the American Convention on Human Rights and the American Declaration on the Rights and Duties of Man violated, as determined by Commission, as well as by subject-matter.

4410 Massachusetts Avenue, N.W., Suite 409, Washington, DC 20016.

E Mail: AUILJ@american.edu.

continued on page 24