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Introduction: Atrocity Crimes Litigation During 2008

David Scheffer*

¶1 In conjunction with the second annual Atrocity Crimes Litigation Year-in-Review (2008) Conference convened by the Center for International Human Rights at Northwestern University School of Law on January 29, 2009, the editors of the *Northwestern University Journal of International Human Rights* invited three of the speakers to draft the articles appearing in this special edition. The purpose of the annual conference is to provide a review by practitioners and scholars of the immediately preceding year's jurisprudence and practice of the leading international and hybrid criminal tribunals. These include the International Criminal Court, the International Criminal Tribunals for the former Yugoslavia and Rwanda, the Special Court for Sierra Leone, the Extraordinary Chambers in the Courts of Cambodia, and the War Crimes Chamber in the Court of Bosnia and Herzegovina. Aside from the authors described below, the other speakers included Chief Prosecutor Hassan Jallow of the Rwanda Tribunal, Chief Prosecutor Stephen Rapp of the Special Court for Sierra Leone, Deputy Prosecutor Norman Farrell of the Yugoslav Tribunal, International Co-Prosecutor Robert Petit of the Cambodia Tribunal, and former Judge Elizabeth Fahey of the Bosnia War Crimes Chamber. Also speaking were Jonathan Fanton, the President of the John D. and Catherine T. MacArthur Foundation, and Professors John Hagan and Stephen Kinzer of Northwestern University.¹

¶2 This special edition publishes outstanding articles by Professor Beth Van Schaack of Santa Clara University School of

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¹ The full transcript and video and audio records of the conference can be accessed at www.law.northwestern.edu/humanrights/events.html.

Law, Defense Counsel Gillian Higgins of the Yugoslav Tribunal, and Legal Advisor Rod Rastan of the Office of the Prosecutor of the International Criminal Court. All three authors spoke at the conference and further elaboration of their views can be found on the posted transcript.

¶3 Professor Van Schaack served as the distinguished academic scholar of the conference and her article, *Atrocity Crimes Litigation: 2008 Year-In-Review*, amply demonstrates why she was chosen for the task.² Van Schaack provides a tour de force of the jurisprudence emerging from the international criminal law (ICL) tribunals during the calendar year of 2008. While she notes that “the rate of innovation in substantive ICL is slowing considerably,” she recognizes that recent decisions “are increasingly applying established law to novel facts. ICL has thus begun to exhibit features of a more mature body of law with modern innovations happening primarily at the outer edges of doctrine.” She addresses several legal concepts and describes how the tribunals developed a better understanding of them as the year progressed.

¶4 Perhaps one of the most significant characteristics of the atrocity crimes of genocide, crimes against humanity, and war crimes is the requirement that the commission of such crimes achieve sufficient gravity, or magnitude, before they fall within the jurisdiction of the ICL tribunals. Van Schaack describes how the Pre-Trial Chamber of the International Criminal Court examined the gravity requirement in its consideration of whether to approve an arrest warrant against two defendants in the Democratic Republic of Congo situation before the Court. Though the rulings date back to 2006, the related Appeals Chamber decision of that year was not made available publicly until April 28, 2008, when the arrest warrant was unsealed. The Appeals Chamber ruled that war crimes, as defined in Article 8(1) of the Rome Statute of the International Criminal Court, must retain a lower threshold of gravity than would be expected of genocide or crimes against humanity. In other words, the Rome Statute affords the possibility of a relatively smaller magnitude of war crimes to trigger the Court’s jurisdiction even though there is an invitation to examine, “in particular,” war crimes committed “as part of a plan or policy

² See Beth Van Schaack, *Atrocity Crimes Litigation: 2008 Year-In-Review*, 7 NW. U. J. INT’L HUM. RTS. 170 (2009).

or as part of a large-scale commission of such crimes.” As the lead U.S. negotiator of the Rome Statute, I can confirm that the Appeals Chamber preserved the original intent of the negotiators. Indeed, the United States originally wanted to make the high threshold requirement mandatory for war crimes in the Rome Statute but most of its NATO allies countered that to do so would leave the erroneous impression that there was a high bar for any prosecution of violations of grave breaches of the 1949 Geneva Conventions, which are a key part of Article 8. The negotiators concluded that the “in particular” language was most appropriate as it suggested the importance of prosecuting war crimes of considerable gravity but did not make it an automatic requirement for jurisdiction.

The Appeals Chamber also rejected the remarkably narrow view of the Pre-Trial Chamber in describing the categories of perpetrators who may be prosecuted before the Court. Rather than focus only on the most senior leaders involved in the situation under investigation and those most capable of preventing the commission of atrocity crimes, the Appeals Chamber allowed that “individuals who are not at the very top of an organization may still carry considerable influence and commit, or generate the widespread commission of, very serious crimes.” As Van Schaack writes, “the Appeals Chamber appropriately refocused the gravity inquiry on qualitative rather than quantitative factors, ensuring flexibility in pursuing cases and enhancing the deterrent power of the Court.”

¶5 Van Schaack examines principles of military necessity, proportionality, and distinction in the prosecution of war crimes during 2008. The Appeals Chamber of the Yugoslav Tribunal largely affirmed the Trial Chamber’s findings in the *Martić* case, namely that the defendant’s order to use twelve M-87 Orkan rockets containing cluster bomb warheads against Zagreb constituted a widespread attack against the civilian population and was *per se* an indiscriminate attack notwithstanding the presence of any lawful military targets. The Appeals Chamber ruled that Milan Martić knew how such shelling could result in deadly injury to civilians and that it could not be viewed as a lawful reprisal or as self-defense.

¶6 In the *Strugar* case before the Yugoslav Tribunal, the Appeals Chamber confirmed the standards for what constitutes a victim’s direct participation in hostilities: the prosecution must

show beyond a reasonable doubt that at the time of the injury, the victim was not committing “acts of war which by their nature or purpose are likely to cause actual harm to the personnel or equipment of the enemy’s armed forces.” Van Schaack recites the interesting distinction made by the Appeals Chamber in what does and does not constitute *direct* participation in hostilities as well as the *indirect* participation that would *not* deny a civilian his or her civilian immunity from attack. The Appeals Chamber emphasized the case-by-case analysis required in determining a civilian’s status.

¶7 In a judgment of critical importance to how the United States and other governments should evaluate the fight against terrorism within the context of warfare and the law of war, the Yugoslav Tribunal determined in the *Boškoski* case that an armed conflict existed in Macedonia in 2001 even though so-called terrorist acts occurred within the context of other armed engagements. The Trial Chamber ruled that what matters is “whether acts are perpetrated in isolation or as part of a protracted campaign that entails the engagement of both parties in hostilities. It is immaterial whether the acts of violence perpetrated may or may not be characterized as terrorist in nature.” Therefore, isolated acts of terrorism may not reach the threshold of armed conflict, but “when there is protracted violence of this type, especially where [the acts] require the engagement of the armed forces in hostilities, such acts are relevant to assessing the level of intensity with regard to the existence of an armed conflict.” Van Schaack also describes how the Trial Chamber sets forth factors that need to be considered in determining the organizational character of an armed group (that might also be viewed as a terrorist group) and thus, its relevance to law of war categorization and analysis.

¶8 The ICL tribunals addressed many other key issues that Van Schaack reviews in her article. These include how the Appeals Chamber of the Special Court for Sierra Leone clarified and strengthened the crime of recruiting child soldiers and, in a “landmark opinion,” established the crime of forced marriage as an “Other Inhumane Act” among crimes against humanity. By contrast, she writes, gender justice received setbacks when (a) the Yugoslav Tribunal refused to permit the Prosecution to amend the indictment in the *Lukić* case to include crimes of rape, torture, and enslavement allegedly committed within a rape camp established by the defendants, and (b) the Rwanda Tribunal acquitted

Tharcisse Muyunyi on rape charges in his trial after witnesses could not be traced or refused to testify, leaving only witnesses who were not raped by the specific group of subordinates led by Mujunyi, even though their testimony was judged to be reliable by the Trial Chamber.

¶9 In the *Martić* case, the Appeals Chamber of the Yugoslav Tribunal ruled that the Prosecution could not expand the term “civilian” in the definition of crimes against humanity to include *hors de combat* combatants, but also held that not every victim of a widespread or systematic attack against a civilian population must be a civilian. Indeed, some *hors de combat* combatants could be victims of crimes against humanity. Maintaining the legal distinction between civilians and *hors de combat* combatants remains essential, however. Van Schaack writes that in the Civil Defense Forces case, the Appeals Chamber of the Special Court for Sierra Leone confirmed that an attack against a civilian population can still provide the predicate for crimes against humanity charges even where “the ultimate objective of the fighting force was legitimate and/or aimed at responding to aggressors.” In fact, there can be co-existing attacks of differing legal consequence: one directed against a civilian population alongside one targeting opposing forces.

¶10 Van Schaack concludes her article by reviewing the many developments in the law governing forms of liability in ICL cases, including joint criminal enterprise, superior responsibility, co-perpetration, conspiracy, and chains of liability. The Pre-Trial Chamber of the Cambodia Tribunal wrestled with the Co-Prosecutors’ attempt to establish a joint criminal enterprise in its charges against Kaing Guek Eav (alias Duch) and ultimately rejected its use, setting up an appeal that reached into 2009. The interesting issue will be whether, on appeal, the Cambodia Tribunal finds that joint criminal enterprise theory existed in the late 1970’s as a theory of responsibility. The outcome also will have profound influence on the imminent joint trial of four other suspects.

¶11 In the *Hadžihasaović* case before the Yugoslav Tribunal, the Appeals Chamber determined, in Van Schaack’s description, “that there was no customary international law basis to hold a superior liable for the crimes of his or her subordinates when such crimes are committed prior to the superior assuming his or her position of

command.” This finding (as well as the subsequent *Orić* judgment) elicited strong dissenting views by three judges and Van Schaack joins them when she argues, “The *Hadžihasanović* decision is wrong as a matter of law, flawed as a matter of logic, and counter-productive as a matter of policy.” She believes that “it manifests all of the grounds recognized by courts all over the world for overturning prior precedent, notwithstanding the imperatives of predictability and stability guaranteed by *stare decisis*.”

¶12 Defense Counsel Gillian Higgins provides a reality check in her article, *The Impact of the Size, Scope, and Scale of the Milosevic Trial and the Development of Rule 73bis before the ICTY*.³ Slobodan Milosevic died in 2006 before the Yugoslav Tribunal reached judgment on the sixty-three counts against him in three indictments. But enough time now has transpired for a sober assessment of how his trial was conducted and how indictments and procedures of the ICL tribunals could be improved in the future. Higgins describes the evolution of the indictments against Milosevic and makes a compelling argument for why the Appeals Chamber probably got it wrong when it ordered that the three indictments pertaining to atrocity crimes in Kosovo, Croatia, and Bosnia, respectfully, “be tried together on the basis that the acts alleged therein formed part of the same transaction.” If the Kosovo indictment, for example, had been prosecuted alone and perhaps first, there would have been a better chance that judgment could have been reached on at least one set of alleged crimes within a reasonable period of time, which, in retrospect, we can safely speculate would have occurred while Milosevic remained alive.

¶13 The long and ultimately dismissed Milosevic trial, with its many delays, excursions into procedural disputes, and finally the death of the defendant, had the positive effect, Higgins contends, of increasing judicial powers under Rule 73bis of the Yugoslav Tribunal’s Rules of Procedure and Evidence to control the presentation of the prosecution’s case. Armed with various amendments to Rule 73bis, including one approved two months after Milosevic’s death, the judges can better manage the number of witnesses and time allotted to each, the number of crime sites or incidents that are relevant for the presentation of evidence, the

³ See Gillian Higgins, *The Impact of the Size, Scope, and Scale of the Milosevic Trial and the Development of Rule 73bis before the ICTY*, 7 *NW. U. J. INT’L HUM. RTS.* 239 (2009).

number of counts which the Prosecutor can charge in the indictment, and the Prosecutor's selection of counts upon which to proceed. The Prosecutor, not surprisingly, has objected to how Rule 73bis is being applied by the judges as it tends to replace their reasoning for his on how to prosecute the charges against the defendant.

¶14 One interesting consequence, however, is a diminution of the historical record. I find it shortsighted how the Trial Chamber in the *Stanisic* case simply concluded that “the Tribunal was established to administer justice, and not to create a historical record.” Tell that to the victims and to later generations of Bosnians, Croatians, and Serbs. There has traditionally been a balancing act in the ICL tribunals to ensure that a reasonable record of historical value is recorded while rendering justice fairly, including protection of the rights of the defendant under international standards of due process. Being cavalier about the historical record, which the prosecution has the ability to bring to the forefront of the trial for good reason, undercuts those judges in the ICL tribunals who acknowledge the historical record's unique value.

¶15 Nonetheless, Higgins presents the reader with a fascinating “what if” scenario on the Milosevic trial that should better inform how large, complex, and politically controversial atrocity crimes trials could be better managed. There likely will be many of them before the International Criminal Court and, as Higgins notes, already its Prosecutor appears to be applying some lessons from the Milosevic case by narrowly framing his indictments (a good example being the *Lubanga* case).

¶16 In his article, *Review of ICC Jurisprudence 2008*, Rod Rastan provides his own perspective at the International Criminal Court on some of the same issues raised by Van Schaack.⁴ On modes of liability, Rastan examines two Pre-Trial Chamber decisions on confirmation of charges in 2008 and concludes that “a distinct path for identifying the responsibility of principals among a plurality of perpetrators” is being forged by the Court. Because Article 25(3) of the Rome Statute is a more detailed and codified treatment of individual criminal responsibility than has been the

⁴ See Rod Rastan, *Review of ICC Jurisprudence 2008*, 7 NW. U. J. INT'L HUM. RTS. 261 (2009).

experience of the Yugoslav and Rwanda Tribunals, the joint criminal enterprise theory developed by the latter tribunals will not translate easily or entirely to the International Criminal Court. Although the control of the crime theory may be helpful as a doctrinal guide to liability before the Court, Rastan postulates that it may need to evolve either with more flexible types of organizational structures in mind or with a broader framework for principal liability. For example, he questions why the common purpose doctrine of Article 25(3)(d) of the Rome Statute is necessarily viewed as a secondary form of liability that eschews leadership crimes.

¶17 The highest profile litigation of 2008 before the International Criminal Court was the *Lubanga* case where the non-disclosure of documents obtained under conditions of confidentiality (Article 54(3)(e) of the Rome Statute) slammed head-on into the Prosecutor's duty to disclose potentially exculpatory evidence (Article 67(2) of the Rome Statute). Rastan expertly explains that the Appeals Chamber resolved the controversy by essentially allowing the confidentiality privilege to trump the disclosure duty regarding exculpatory evidence, but with a heavy dose of caveats and guidelines that should prove very useful in future litigation.

¶18 Rastan's discussion of victims' participation in cases highlights the ruling of the Appeals Chamber in *Lubanga* on July 11, 2008, namely that the harm alleged by a victim and his or her personal interest in a particular case must be linked with the charges confirmed against the accused. This and other judgments of the Appeals Chamber "will have a significant impact in shaping the contours of victims' participation in future trial proceedings," he writes. Finally, Rastan provides an interesting summary of how the Trial Chamber of the International Criminal Court has reaffirmed the prohibition on "witness proofing" by the prosecution despite the common practice of this procedure by the Yugoslav and Rwanda Tribunals. He argues in favor of the Court drawing its own procedural roadmap "rather than *a fortiori* whether it can be discerned from principles and rules of international law or general principles of law derived from national laws of legal systems of the world."

¶19 This special edition of the *Journal*, inspired by the Atrocity Crimes Litigation Year-in-Review (2008) Conference, makes a significant and timely contribution to a better understanding of the ICL tribunals and their influence on the substantive development

of international criminal law. I suspect the year 2009 and what transpires at Northwestern University School of Law shortly thereafter to record the evolution of the ICL tribunals will prove no different.