

FOREWORD

SCOTT L. SILLIMAN*

While normative provisions promulgated with a view toward prohibiting acts of aggression and violations of humanitarian law have been the subject of many articles, books and conferences, the same emphasis seemingly has not been given to the question of the enforcement of these normative provisions. The *Duke Journal of Comparative & International Law* seeks to do just that in this special Symposium on the Enforcement of Humanitarian Law.

This year heralds the 50th anniversary not only of the United Nations, but also the International Military Tribunal at Nuremberg which convened at the close of World War II. This *ad hoc* tribunal, comprised of representatives of the four victorious powers, weighed the evidence presented as against charges of crimes against peace, war crimes and crimes against humanity.¹ It thereafter rendered judgment upon twenty-two German war criminals, sentencing twelve to death, seven to varying terms of imprisonment, and acquitting three.² More importantly, with respect to violations of international humanitarian law, this first international tribunal established a precedent of accountability to the rule of law.³ Notwithstanding worldwide acceptance of the Nuremberg Principles,⁴ the international community went for a period of almost five decades without any further attempts to bring to justice those who committed violations of the Geneva Conventions or the laws of war, although such violations were clearly documented in conflicts in Korea, Cambodia, Afghanistan and Iraq.

* Executive Director of the Center on Law, Ethics and National Security, and Senior Lecturing Fellow, Duke University School of Law. B.A., J.D., University of North Carolina.

1. Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Charter of the International Military Tribunal, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279.

2. TELFORD TAYLOR, *THE ANATOMY OF THE NUREMBERG TRIALS* 587-99 (1992)

3. "That four great nations, flushed with victory and stung with injury, stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of the law is one of the most significant tributes that Power has ever paid to reason . . ." Robert H. Jackson, American Chief Counsel for the Prosecution (and Associate Justice of the U.S. Supreme Court), in his opening statement to the International Military Tribunal at Nuremberg on November 20, 1945.

4. G.A. Res. 95, U.N. GAOR, 1st Sess., 55th plen. mtg., at 485, U.N. Doc. A/236 (1946).

On May 25, 1993, prompted by widely publicized accounts of atrocities committed by the warring factions in the Balkans, the United Nations Security Council adopted Resolution 827 establishing the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991.⁵ As of the time of this writing, the Tribunal has indicted over fifty suspects, including Bosnian Serb leader Radovan Karadzic and his military chief, General Ratko Mladic, yet only one trial has commenced—that of Bosnian Serb Dusan Tadic who is already in the Tribunal's custody.⁶

This *ad hoc* Tribunal, although limited in jurisdiction to certain specified offenses⁷ which have occurred in the Former Yugoslavia

5. S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/RES/827 (1993). A second *ad hoc* tribunal, with jurisdiction over serious violations of international humanitarian law committed in the territory of Rwanda or by Rwandan citizens responsible for such crimes in neighboring states, between January 1, 1994 and December 31, 1994, was established by United Nations Security Council Resolution 955 on November 8, 1994. S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg., U.N. Doc. S/RES/955 (1994). The Statute for the Rwanda Tribunal specifies that the Prosecutor and the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia shall serve both tribunals.

6. Tadic was originally arrested in February of 1994 and held in Germany pending an investigation being conducted by the Germans regarding allegations of crimes committed in the Former Yugoslavia. In the Fall of that year, the Tribunal formally requested that Germany defer to its primacy with regard to further criminal proceedings against Tadic, and on March 31, 1995, the German Parliament passed legislation in which it agreed to cooperate with the Tribunal. Tadic was moved from Germany to a jail at the Tribunal's seat at the Hague on April 24, 1995, and thereafter had his initial appearance before Trial Chamber II. He moved to challenge the jurisdiction of the Tribunal on the grounds that it had an illegal foundation, that there was wrongful primacy over national courts, and that there was a lack of jurisdiction *ratione materiae*. On August 10, 1995, Trial Chamber II denied Tadic's motion challenging the Tribunal's jurisdiction and, four days later, he filed notice of appeal alleging an error of law. On October 2, 1995, the Tribunal's five member Appeals Chamber, by votes of four to one in an extremely convoluted opinion, affirmed the lower chamber and decided (1) that the Tribunal was empowered to rule on a challenge to its own jurisdiction, (2) that Tadic's plea was to be dismissed, (3) that the challenge to the primacy of the International Tribunal over national courts was also to be dismissed, and (4) that the Tribunal had subject-matter jurisdiction over Tadic's case. The Prosecutor v. Dusko Tadic, Case No. IT-94-1-AR72, International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991 (1995).

7. The Tribunal's jurisdiction is limited to grave breaches of the Geneva Conventions of 1949, violations of the laws or customs of war, genocide, and crimes against humanity. Statute of the International Tribunal, *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808*, U.N. SCOR, 48th Sess., Annex, arts. 2-5, U.N. Doc. S/25704 (1993). It should be noted that the jurisdictional articles of the Tribunal's Statute do not contain any reference to crimes against peace, which were a highly controversial part of the Nuremberg Tribunal's Charter.

since January 1, 1991, represents the first international effort since World War II to bring to justice those who have violated international criminal law. It differs significantly from what occurred fifty years ago in that the Nuremberg Tribunal was chartered only by the four victorious powers of World War II, while the International Criminal Tribunal for the Former Yugoslavia is empowered by the United Nations, representing ostensibly the entire international community. Further, the Tribunal is forbidden from having trials in absentia (as was done in the Nuremberg case of Martin Bormann), and is limited in its sentencing to life imprisonment.⁸ More significantly, the Tribunal does not have an independent power of arrest, and must rely on states to cooperate as far as the apprehension, detention and ultimate surrender to the Tribunal of persons indicted.⁹

A pivotal question regarding the Tribunal is whether its authority and credibility will survive in the context of an international quest for peace in the Balkans. If given the choice between brokering a lasting peace, which may depend upon the cooperation of those same individuals which the Tribunal has indicted or may in the future indict, will the international community opt for strict enforcement of the rule of law or the possible chance for a peaceful settlement? Or can both be accommodated? The answer to that question may come soon now that a peace agreement has been initialed in Dayton, Ohio, between Slobodan Milosevic of Serbia, Franco Tudjman of Croatia, and Alija Izetbegovic of Bosnia and Herzegovina. Although the agreement calls for all parties to cooperate with the Tribunal, it remains to be seen whether Karadzic, Mladic and other high-ranking Serbs will be surrendered to the Tribunal.

The inherent limitations and problems associated with an *ad hoc* tribunal beg the question of whether the international community would be served better with the establishment of a *permanent* international criminal court,¹⁰ as has been often suggested. Much concerning this concept remains to be resolved and agreed to, especially regarding the crimes over which such a permanent court

8. *Id.* arts. 21(4)(d), 24. Article 24, after establishing imprisonment as the maximum punishment available to the Tribunal, goes on to state that "in determining the terms of imprisonment, the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia."

9. *Id.* art. 29.

10. *See generally* United Nations International Law Commission: Report of the Working Group on a Draft Statute for an International Criminal Court, July 16, 1993, *reprinted in* 33 I.L.M. 253 (1994).

would have jurisdiction, but it remains the hope of many who see in it a firm and lasting commitment to the rule of law that would not and could not be swayed by the international politics of the moment.

In the pages of the *Journal*, you will find a discussion of these and many other issues respecting the enforcement of international humanitarian law. The articles are drawn from papers presented at two separate conferences which were co-sponsored by the Center on Law, Ethics and National Security at Duke University School of Law, and the Center for National Security Law at the University of Virginia. The first conference, entitled "Deterring Humanitarian Law Violations: Strengthening Enforcement," was held in Charlottesville, Virginia, on November 4-5, 1994, while the second, entitled "Strengthening Enforcement of Humanitarian Law", was held in Durham, North Carolina, on March 10-11, 1995. We believe the articles contained herein represent a significant contribution to the literature in this extremely important area of the law.