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# Milošević and Hussein on Trial

Alfred P. Rubin†

Saddam Hussein is the easier case, so we will discuss it first.

Now that he has been captured by Coalition (American?) forces, the question is what to do with him. The obvious answer is to try him for something. But who should try him and for what? The answer most often given is that an international tribunal should try Hussein in The Hague for various crimes, just as the International Criminal Tribunal for the former Yugoslavia (ICTY) is trying Slobodan Milošević. That approach, however, presents numerous difficulties. I shall mention only four. First: A special tribunal is trying Milošević, a tribunal to which he, as President of Serbia, agreed.<sup>1</sup> No such tribunal currently exists with regard to Iraq.

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1. Article IX of the General Framework Agreement for Peace in Bosnia and Herzegovina (GFA) provides that the Parties (including the Republika Srpska), "shall cooperate fully with all entities involved in implementation of this peace settlement . . . pursuant to the obligation of all Parties to cooperate in the investigation and prosecution of war crimes and other violations of international humanitarian law." General Framework Agreement for Peace in Bosnia and Herzegovina, Dec. 14, 1995, 35 I.L.M. 75 (1996) [hereinafter GFA]. Whether a court in The Hague is an appropriate tribunal, whether any acts of Milošević violate international humanitarian law etc. are not at all clear. See *id.* Annex 6. Apparently, the participants at the conference that drafted these articles conceived of international human rights as including all the rights listed in Chapter I to this Annex, although they are not defined; e.g., the right to life has no exception for judicial sentencing; the right not to be subjected to torture does not define torture, etc. The summary by Paul C. Szasz, says that the GFA "is an extremely complex instrument, and is the center-piece of an even more complicated and extensive set of arrangements . . ." Paul Szasz, *Introduction to General Framework Agreement for Peace in Bosnia and Herzegovina*, 35 I.L.M. 75, 77 (1996). The so-called Dayton Accords appear at p. 170-187 of the same *International Legal Materials (ILM)*. Szasz writes that Slobodan Milošević headed the Federal Republic of Yugoslavia (FRY) Delegation, but I did not find his signature on any of the documents except a note addressed to the Acting Secretary-General of NATO "wish[ing] to assure you that the FRY shall take all necessary steps, consistent with the sovereignty, territorial integ[rity] and political independence of Bosnia and Herzegovina, to ensure that the Republika Srpska fully respects and complies with commitments to NATO . . ." *Id.* at 107. Another note addressed to Alija Izetbegović as President of the Republic of Bosnia and Herzegovina stating the "intention" of the Republika Srpska and the FRY to see "established passenger and freight rail service on a regular schedule" along various established rail lines, and identical notes to the UK, French, Russian, German, and American delegation leaders saying that "Dr. Nikola Kolijević is authorized to sign the Annexes for the Republika Srpska." *Id.* at 163-66. Several of the GFA documents are signed by Milan Milutinović as Minister of Foreign Affairs of the FRY and it is difficult to believe that he did not have an equivalent authority. In a concluding statement issued at Dayton by President Izetbegović (for the Republic of Bosnia and Herzegovina), President Zubak (for the Federation of Bosnia and Herzegovina), President Tudjman (for Croatia) and President Milošević (on behalf of the FRY and the Republika Srpska) it is said that they initialed the GFA and its annexes "signifying their consent to be bound thereby." *Id.* at 169. The U.N. Security Council

Second: What is the reason for the *criminal* trial, indeed, for the criminal law generally? Is it retribution: "An eye for an eye?" Deterrence of the actor: What are the chances the Iraqis will elect or select Hussein for a leadership position again? Deterrence of others: Like who? George W. Bush? Vladimir Putin? Fidel Castro? The Chinese leaders? What are the chances that any of them will be deterred by a trial of Hussein? To stake out a moral leadership position for the captors: Moral as judged by whom? Is our perception of what is moral binding on Iraqis; is theirs binding on us? Closure for the villain's victims: Are they informed of the capture? What of the villain's supporters? This seems to be the most significant of the reasons for Hussein's trial, but is it sufficient? To avoid reciprocal atrocities: Is there any evidence that Hussein's supporters plan them or will be deterred by the trial of Hussein? I would have expected an attitude of reciprocity more than one of deterrence and an acknowledgment that our view of Hussein and Milošević is the superior one.

Assuming that there is a reason for the trial, nobody trusts an Iraqi court in Iraq to come to a decision based on the justice of the case alone. Of course, the concepts of justice, fairness, and equity vary with the judge(s); what is just to one is unjust to another. We can be certain, however, that justice in an Iraqi court will be seen by many as unjust, unfair or inequitable no matter what the result.

The same considerations apply to Milošević. Would any Serbian without a hidden agenda trust a Serbian court to come to a fair, equitable, or just decision regarding Milošević? It may be that Americans and Europeans would regard an Iraqi tribunal, with a judge or judges appointed or approved by us to be fair, but the real question is would Iraqis regard such a tribunal as fair? Are the American aims in trying Hussein consistent with American aims in installing a democracy in Iraq? Is a democracy incapable of electing villains to be their leaders?

Third: The International Court of Justice (ICJ) in The Hague does not have jurisdiction to try anybody for any crimes; its jurisdiction is limited to disputes among states, and for that matter, only those states that are parties to the creating statute of the court, who do not have pertinent reservations and who have submitted themselves to its authority with regard to the type of cases presented. The United States, since losing a case before the court involving Nicaragua in 1986,<sup>2</sup> has amended its own submission to the ICJ to cover only some cases, none of which appear to have been vio-

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also passed two resolutions dealing with the FRY, *id.* at 188-92, but neither seems pertinent to this discussion. Milošević might also be mentioned elsewhere (e.g., in the side-letter signed by Momčilo Krajišnik and Nikola Koljević and Aleksa Buha for the FRY, reproduced at *id.* at 153). It seems clear only that Milošević's signature was intended to bind the Republika Srpska and the FRY, but not himself personally. The punishment for the parties bound by international law would seem to be subject to negotiation and the whim of the other parties to the various documents.

2. Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27), available at [http://www.icj-cij.org/icjwww/icasess/inus\\_ijudgment/inus\\_ijudgment\\_19860627.pdf](http://www.icj-cij.org/icjwww/icasess/inus_ijudgment/inus_ijudgment_19860627.pdf).

lated by Hussein's Iraq.<sup>3</sup>

Fourth: the International Criminal Court (ICC) in The Hague, set up in 2000 by the Treaty of Rome, does not apply to events prior to its coming into force in 2002.<sup>4</sup> Thus, not only are its judges regarded as unfair, unjust, or inequitable by many (including many Americans as evidenced by the fact that the United States is not a party to the statute of the court), it cannot apply any law to most of Saddam Hussein's tenure in Iraq, including his bloodiest killings. Moreover, the treaty setting up the Tribunal permits each state party to handle any case by itself, and refers the accused to the Tribunal only when the state with normal jurisdiction to prescribe, to adjudicate, or to enforce fails.<sup>5</sup> Whether the court system of any particular state has failed is a matter left to the judges of the ICC,<sup>6</sup> and the selection of those judges is a highly political matter.<sup>7</sup> The court system of Iraq might fail in the opinion of many, but that is not yet the case.

Another possibility is to set up a special tribunal in The Hague to apply some law to Saddam Hussein. Submission to that tribunal, however, would have to be an act of the government of Iraq. And who is that government at this moment? The United States? The politically appointed Iraqi Governing Council, composed of people selected for other reasons by the United States? The government elected a few weeks ago by what we regard as the population of Iraq? Would anybody believe that their decisions with regard to Hussein would be free from political manipulation? The same problems would exist with regard to a tribunal in any state, including one in the United States, and were even behind the convening of the tribunal that tried the major Nazi war criminals in Nuremberg, Germany, and not in any allied victor state of the Second World War.

It is, of course, possible to find a state willing to be the seat of such a trial; Belgium, which has enacted a universal jurisdiction to adjudicate stat-

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3. The United States of America is not currently bound by any general declaration recognizing the compulsory jurisdiction of the ICJ. See *Declarations Recognizing as Compulsory the Jurisdiction of the Court*, 56 ICJ YEARBOOK 117 (2002). The United States of America had been so bound. *Id.* at 117 n.1. There are many bilateral and multilateral agreements to which the United States of America is a party, under which questions of interpretation are referred to the ICJ. See *id.* at 162-81 for a full list of treaties (including many of which the United States of America is not a party).

4. The history of the court is very complex. The Statute was essentially negotiated in 1998, reached its current form in the year 2000, and entered into force in 2002. See Alain Pellet, *Entry into Force and Amendment of the Statute*, in *THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY* 145 (Antonio Cassese et al. eds., 2002) for a discussion of the process behind the adoption of the Statute.

5. The Statute of the ICC was completed on 17 July 1998, but provides that it would not enter into force until sixty days after the deposit of the sixtieth instrument of ratification. See Rome Statute of the International Criminal Court art. 126, July 17, 1998, 2187 U.N.T.S. 90, available at <http://www.un.org/law/icc/statute/rome fra.htm>. The ICC has jurisdiction only with respect to "crimes committed after the entry into force of this Statute." *Id.* art. 11. I am indebted to Professor M. Cherif Bassiouni for a copy of the Treaty.

6. *Id.* arts. 17-19.

7. *Id.* art. 36. The selection procedure is extremely complex, as the framers of the Rome Statute sought to reduce the impact of politics on the selection of judges. It seems to me that they were unsuccessful.

ute, comes to mind. But Belgium has limited the scope of its own statute under the pressure of reality, and such doubts over jurisdiction and applicable law must arise that a conviction by such a tribunal, although satisfying to some, must be very unsatisfying to many others. Iran is another possibility, if Saddam can be accused of violating Iranian or international law in Iran. But it appears that he cannot be effectively accused of any such acts. The Kurds are, of course, Iraqis themselves, and violations of the international laws of war lead to national sanctions by the forces involved in the violations, which, in the case of Saddam Hussein, would seem to be Iraq, not Iran. Additionally, "war crimes" against Iranians depend upon the definition of "war crimes"; the Geneva Conventions are not helpful there.<sup>8</sup>

That leaves only Iraq. But what Iraqi law has Saddam Hussein violated? That is a major question. Iraqi law does not seem to have been violated by Saddam Hussein, although it is entirely possible that some Iraqi law-maker will develop a theory under which some Iraqi criminal law would appear to have been violated by Saddam Hussein's horrible acts. Some would reply that he violated international law; a law that is argued to forbid genocide and other killings in his own country. But whether there is such a law is really an open question.<sup>9</sup>

At Nuremberg, the Communists were not tried for various atrocities committed against their own and other nationals. Fidel Castro is not being tried today, nor are others who may be accused of violating various aspects of what is argued to be applicable international criminal law (assuming there is such a thing). Indeed, the British sent Napoleon into exile in Elba (from which he escaped) and St. Helena (where he was probably poisoned by the British) rather than try him for anything, and his successor regime in France was not even given that option. Indeed, it is more than doubtful that Saddam Hussein has violated any international law by killing his Iraqi opponents in Iraq, no matter what they or others may say. Thus, experience indicates that there is no violation of an hypothesized but probably non-existent international criminal law of universal application, but that politically it might be wise to exile him or otherwise get rid of him without asking too many embarrassing questions.

That seems to have been what was done in the case of the genocide in Rwanda, the Milošević situation in the former Yugoslavia, and in many

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8. See Alfred P. Rubin, *Is International Criminal Law "Universal"?*, 2001 UNIVERSITY OF CHICAGO LEGAL FORUM 351, 360-61 (2001) for a discussion of many other Conventions, including the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. TREATY DOC. NO. 100-20, 1465 U.N.T.S. 85, and the Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, T.I.A.S. No. 1021, 78 U.N.T.S. 277. All prescribe a tribunal in the territory in which the offense allegedly occurred, in this case Iraq. The punishment for violation of this provision is not a separate criminal trial of the villain(s) concerned, but a loss of the reputation of the state involved which has breached its word.

9. The various treaties usually cited as creating an international criminal law do no such thing. See generally Rubin, *supra* note 8 (expressing skepticism regarding the effectiveness of international law).

other instances. The proponents of international criminal law have cited these examples as precedents for a general international law by which individuals are held criminally liable for various acts. But the cases seem to be based on either a special treaty or the dominance of a victor who presumes to dictate rules to the vanquished that do not apply to its own activities. That leaves us with the gap in coverage which has always existed and might well continue to exist, although nobody, at least it seems no American or European, doubts the villainy of Saddam Hussein. The best way of handling that problem with the least hypocrisy seems to be to hand Saddam over to an Iraqi tribunal which will deal with him as it sees fit, bending Iraqi law and applying either its version of that law or its version of an international law which can (and surely will) be denied by those who look closely at the situation.

One should remember that there are lawyers on both sides of many (if not all) cases and those on the other side are as convinced of the righteousness of their position as those on our side. Who is to say that they are wrong? Whose opinion is truly objective or reflects eternal verities? Those who happen to agree with us at this time? Who are we to say so?

As to Milošević, the case is not much clearer. The so-called Dayton Accords<sup>10</sup> feature only the three parts of the former Yugoslavia (the Republic of Bosnia and Herzegovina, the Republic of Croatia and the FR Yugoslavia, comprising the Serb-dominated areas plus Kosovo) as signatories. This means that only they have the legal power to interpret the Accords, and any violations might be the subject of diplomatic or other action by them, but not by the witnesses.<sup>11</sup> Moreover, the United Nations Security Council created the ICTY as an act, or so the Security Council Resolution claimed, under Chapter VII of the United Nations Charter.<sup>12</sup> But the Security Council has never decided that there has been a "threat to the peace, breach of the peace, or act of aggression" in the former Yugoslavia required under Article 39 of Chapter VII of the Charter to trigger the use of Chapter VII.<sup>13</sup> This situation is not unique to the situation in the former Yugoslavia, but repetition does not make law unless coupled with an *opinio juris*, a conviction that the act is law-declaring or law-making.<sup>14</sup>

10. GFA, *supra* note 1, at 76-80, 89-187.

11. The witnesses are the representatives of the European Special Negotiator, the French Republic, the Federal Republic of Germany, the Russian Federation, the United Kingdom and the United States of America. *See id.*

12. The Secretary-General, *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, ¶ 6, delivered to the Security Council, U.N. Doc. S/25704 (May 3, 1993), available at <http://www.un.org/icty/legaldoc-e/basic/statut/s25704index.htm> ("[T]he Council decided, acting under Chapter VII of the Charter of the United Nations, that all parties and others concerned in the former Yugoslavia, and all military forces in Bosnia and Herzegovina, should comply with the provisions of that resolution, failing which the Council would need to take further measures under the Charter.").

13. U.N. Charter art. 39.

14. There is much debate about the proper meaning of "*opinio juris*" in this context. I have used a minimal interpretation of the Latin words and do not mean to exclude any other meanings appropriate to particular circumstances.

This leaves us in a rather peculiar position. Szasz himself points out that the precise legal relationship between these several agreements and the constitution, which are all coequal annexes to the General Framework Agreement for Peace in Bosnia and Herzegovina (GFA) is not entirely clear.<sup>15</sup> Among many other things, Article I of the GFA provides that “[t]he Parties shall conduct their relations in accordance with the principles set forth in the United Nations Charter” but does not set out what those principles might be.<sup>16</sup> Surely the authors of Article I do not mean the text of the Charter itself; the sovereign equality of the parties to the GFA is explicit, thus incorporating Article 2.1 of the Charter, but without the provision of Article 1.2 that requires states to “respect” the “principle of equal rights and self-determination of peoples.”<sup>17</sup>

It should also be borne in mind that the parties to the GFA are not members of the United Nations; indeed, the representatives of the former Yugoslavia in the General Assembly of that organization were not present in Dayton. Instead the GFA is signed by The Republic of Bosnia and Herzegovina, the Republic of Croatia, the FRY (presumably the Serbian entity), the European Union, the French Republic, the Federal Republic of Germany, the Russian Federation, the United Kingdom of Great Britain and Northern Ireland, and the United States of America.<sup>18</sup> Annex I-A, dealing with military measures, was signed by the Republika Srpska and not by anybody representing the FRY, which appears as endorsing the Annex, but not being a party to it.<sup>19</sup> The Introductory Note by Paul C. Szasz calls the GFA “an extremely complex instrument” and the “center-piece of an even more complicated and extensive set of arrangements involving numerous international organizations and some individual states.”<sup>20</sup> Rather than attempt to simplify it, which is patently impossible without some distortion, it seems best to point out that each organization and party had its own agenda, and that the final agreement and its annexes represents compromises and a witnessing by people not directly involved in anything that was decided at Dayton other than lending it the importance of their presence!

It seems important to point out, however, that nothing in the Dayton Accords and its Annexes created an international criminal tribunal. That was done, instead, by the United Nations Security Council. The new constitution for Bosnia-Herzegovina does, however, contain an annex which lists fifteen human rights agreements to be applied in Bosnia and Herzegovina.<sup>21</sup> The Republika Srpska and Croatia seem to be envisaged in the Dayton documents as part of the new entity. The new constitution for Bosnia and Herzegovina is approved by the representative of that entity, but

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15. See GFA, *supra* note 1, at 80.

16. See *id.* art. 1.

17. U.N. Charter arts. 1.2, 2.1.

18. See GFA, *supra* note 1, at 90 (art. XI).

19. *Id.* Annex 1-A, at 91.

20. *Id.* at 77.

21. *Id.* at 126.

not signed by anybody else; its relationship to the other parties to the GFA remains unclear, while such questions as who has the authority to amend the constitution, remain unresolved (different people might make different interpretations of parts of the constitution, and some might even find authority to amend the constitution in general language). But it seems clear that there is nothing to specify which of the fifteen agreements should be implemented directly by any Bosnia-Herzegovina tribunals, or how.<sup>22</sup> Nor is there anything in the GFA to indicate in which order (legal, moral, political, economic or other) those rights belong. Annex 6, which relates solely to human rights provides some clues, but precisely what is meant in its Article I by "life" or "torture" or "liberty" (to name only a few) remains unclear. Interpretation and enforcement are left to a Commission on Human Rights and a Human Rights Chamber (apparently a court) composed of fourteen members. They are to be appointed by the presidency of Bosnia-Herzegovina, but how those appointments are to be freed of political manipulation, remains unclear.

It may be concluded that the legal situation regarding both Hussein and Milošević is extremely unclear; that different lawyers may take different positions as to the meaning of the legal documents; that there are doubts with regard to political, moral, and other meanings as well. The best course seems to be to hand Hussein over to the Iraqi authorities (whoever they may be) for disposition, and to hope that Milošević dies before his trial ends. Neither hope seems terribly far fetched; certainly not as farfetched as the wish of many international lawyers that there was a certainty to the law and that it supported their particular version of morality.

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22. Some of those treaties provide only precatory language and do not represent any agreement as to current action. See *supra* note 1 and accompanying text. It is interesting to note also that the list of applicable treaties appended to the Annex dealing with human rights has sixteen rather than fifteen treaties in it. The additional treaty is the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, and the Protocols thereto. Why this treaty is not in the list of fifteen remains something of a mystery to be resolved by people who were at the Conference in Dayton, New York, Paris or Rome.

