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Justice as a Security Strategy?  
International Justice and the Liberal Peace in the Balkans

Iavor Rangelov<sup>1</sup>

**Abstract**

*The establishment of the International Criminal Tribunal for the Former Yugoslavia (ICTY) in the midst of the war in Bosnia and Herzegovina was seen by many as a radical innovation in security thinking and practice. This paper examines the security implications of international justice in the Balkans by situating the analysis within the broader context of international interventions in the region. The paper starts by elaborating a distinctive conception of ‘security’ that emerges from the pursuit of international justice, addressing questions such as security for whom, security from what, and security by what means. It then examines the jurisprudence of the ICTY to determine whether judicial practice has tended to promote this distinctive approach to security. The final section explores the interactions of international justice and liberal peace interventions in the Balkans, focusing in particular on peacemaking, peacekeeping and peacebuilding. The paper argues that the revival of international justice half a century after the Nuremberg Trials can be understood as signaling a shift in security paradigms from statism to human rights, while also giving rise to deep tensions between them. These tensions are most clearly expressed in the interactions of international justice with other security instruments of the liberal peace, which are often employed by the international community in situations where international crimes occur.*

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## 1. Introduction

The establishment of the International Criminal Tribunal for the Former Yugoslavia (ICTY) in the midst of the war in Bosnia and Herzegovina was hailed by some as a development that marked the beginning of the end of impunity for egregious human rights violations, ushering in an era in which global security policy would be underpinned by concern for the security of individuals and communities and not only the security of States. Others were much more sceptical, however, arguing that the international community of States, acting through the UN Security Council and its Chapter VII powers to maintain international peace and security, was setting up courts to prosecute atrocities it could have prevented from occurring in the first place, staging trials instead of putting their soldiers' lives on the line to protect civilians.

Neither side was wrong. The deliberations at the Security Council that led to the creation of the Tribunal were dominated by statements expressing concern for the plight of civilians in the Balkans and enthusiasm for a revival of the Nuremberg legacy that could pave the way for a permanent international criminal court.<sup>2</sup> In less than a decade, the International Criminal Court had been established and questions of accountability and justice for serious international crimes were featuring regularly in global security discussions. Shortly after it had decided to put in place a tribunal for the former Yugoslavia, the Security Council was preoccupied with the unfolding genocide in Rwanda. A twin court, the International Criminal Tribunal for Rwanda (ICTR), was set up in the wake of the most dramatic failure of the international community since the end of the Cold War to prevent and stop mass slaughter: "Law became a euphemism for inaction."<sup>3</sup>

These early debates are still relevant because they highlight the need to analyse the role of international justice in the security arena at two levels: with respect to the evolving normative underpinnings of security concepts and practices and, at the same time, in relation to other security instruments that are employed (or not) by the international community alongside international justice. Understanding the distinctive logic of international justice as a security instrument is important but insufficient on its own; it has to be complemented by an examination of the interactions of international justice with other security instruments that are simultaneously deployed and brought to bear in a particular context, especially when such instruments may constrain or reinforce the pursuit of justice in significant ways.

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<sup>2</sup> See Record of the 3175<sup>th</sup> Meeting of the UNSC, 22 February 1993, UN Doc. S/PV.3175 (1993).

<sup>3</sup> GJ Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (Princeton University Press 2000) 215.

This article examines the security implications of international justice in the Balkans by situating the analysis within the broader context of international interventions in the region. It argues that the revival of international justice half a century after the Nuremberg and Tokyo trials could be interpreted as signaling a shift in security paradigms from statism to human rights while also giving rise to deep tensions between them. These tensions are most clearly expressed in the interactions of international justice with a set of security instruments associated with the ‘liberal peace’, which in one form or another have been routinely employed in situations where serious international crimes occur since the 1990s.<sup>4</sup> The argument is elaborated in relation to the Balkans, a region that has served as a laboratory for the international community in developing both transitional justice and liberal peace approaches to conflict-affected states. The concurrent evolution of these approaches over the past two decades has reinforced the idea that transitional justice is central to liberal peacebuilding and claims to that effect have become commonplace among practitioners and scholars.<sup>5</sup> The analysis presented here suggests that such claims should be treated with caution, however, and calls for a critical re-consideration of the relationship between transitional justice and the liberal peace. It also raises questions about a core set of critiques of the liberal peace that identify as the main problem the ‘liberalism’ of the interveners: “If only they were not, in various ways, so *liberal*, then it is alleged external intervention or assistance may potentially be much less problematic.”<sup>6</sup>

The contribution reflects the overall preoccupation of the special issue with ‘security cultures’ as an analytical lens for investigating the role of law and justice in global security. A security culture combines a set of ideas and a set of practices that tend to reinforce each other. As Kaldor points out, a security culture is not a static concept; it is constructed and has to be continuously reproduced: “Understanding the mechanisms through which cultures are constructed enables us to identify openings and closures – points at which policy innovations are possible and where they are stuck... The aim is to substantiate specific security cultures

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<sup>4</sup> The article focuses on security instruments at the sharp end of the ‘liberal peace’, which refers to a broader set of interventions in fragile and conflict-affected states based on the idea that peace depends on the existence of liberal political and economic institutions that are functioning and effective, and aimed at constructing liberal polities, economies, and societies. See, e.g. A Bellamy, ‘The “Next Stage” in Peace Operations Theory’, in A Bellamy and P Williams (eds) *Peace Operations and Global Order* (Routledge 2007); M Duffield, *Global Governance and the New Wars: The Merging of Development and Security* (Zed Books 2001); R Paris, *At War’s End: Building Peace after Civil Conflict* (CUP 2002); O Richmond, ‘The Problem of Peace: Understanding the “Liberal Peace”’ (2006) 6(3) *Conflict, Security & Development* 291-314.

<sup>5</sup> See *Rule of Law and Transitional Justice in Conflict and Post-conflict Societies, Report of the Secretary General*, UN Doc. S/2004/616 (223 August 2004). See generally CL Sriram, ‘Justice as Peace? Liberal Peacebuilding and Strategies of Transitional Justice’ (2007) 21(4) *Global Society* 579-591.

<sup>6</sup> D Chandler, ‘The Uncritical Critique of ‘Liberal Peace’’ (2010) 36 *Rev of Int’l Studies* 137-155, 144.

and the ways in which they are constructed so as to understand and interpret their different internal logics.”<sup>7</sup> This approach is productive for examining international justice and the liberal peace because it draws attention to the ways in which their relationship is mediated by certain sets of ideas and practices that reflect particular logics and these logics, in turn, structure their interactions. Peace usually refers to peace between states, whereas human rights tend to be about the domestic arena. The liberal peace is statist in that the priority is peace between collective actors (the warring parties) rather than human rights, which are at the heart of the project of international justice. As a security culture, the liberal peace involves a combination of statist objectives and statist methods of enforcement that contradicts the logic of a human rights approach and complicates its pursuit in practice.

The article proceeds in three sections. The first section traces the evolution of international justice from its origins in the wake of World War II to its revival half a century later with the establishment of the Yugoslav Tribunal. The aim is to elaborate a distinctive conception of ‘security’ that emerges from this trajectory, addressing questions such as security for whom, security from what, and security by what means. The following section examines the jurisprudence of the ICTY to determine whether judicial practice has tended to promote this distinctive approach to security. The final section explores the interactions of international justice and liberal peace interventions in the Balkans, focusing in particular on three types of security instruments that have been deployed in the region in conjunction with international justice: peacemaking, peacekeeping and peacebuilding.

## **2. Reinventing Justice, Reframing Security**

The foundations of international criminal justice were laid down by the Allies in the wake of World War II with the establishment of the International Military Tribunal at Nuremberg (Nuremberg Tribunal) and the International Military Tribunal for the Far East in Tokyo (Tokyo Tribunal) for the prosecution of major war criminals of the defeated Axis powers.<sup>8</sup> International justice had been suspended for nearly five decades when the Security Council

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<sup>7</sup> M Kaldor, ‘Security Cultures’, Security in Transition Working Paper, July 2015, 9.

<sup>8</sup> Charter of the International Military Tribunal, annexed to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, 8 August 1945, 59 Stat. 1544, 82 UNTS 279 (1945) (hereinafter Nuremberg Charter); Charter of the International Military Tribunal for the Far East, reproduced in *International Military Tribunal of the Far East, Established in Tokyo, Jan. 19, 1946*, US Department of State Pub. No. 2675 (1946) (hereinafter Tokyo Charter).

unanimously decided to establish the ICTY in February 1993.<sup>9</sup> The decision was seen as advancing the principles and legacy of the Nuremberg trials. There were, however, fundamental differences between the birth of international justice and its resurrection half a century later. With respect to the main purpose and justification of conducting criminal prosecutions at the international level, the Nuremberg Tribunal was set up to punish violations of state sovereignty committed in the context of a ‘total war’, whereas the Yugoslav Tribunal was created to prosecute human rights violations inflicted in pursuit of ‘ethnic cleansing’. The different rationales are reflected in the character of the central offense and have shaped the exercise of international justice at these junctures in other important ways, harnessing international law and forum to promote shifting paradigms of security.

An early version of the rationale behind the Nuremberg trials was set out in a report of the Czechoslovak delegate to the United Nations War Crimes Commission (UNWCC, a body created to investigate crimes and identify suspects) in March 1944, which made the case for the offenses subsequently codified in the Nuremberg Charter as ‘crimes against peace’:

His thesis was that the paramount crime was the launching and waging of the Second World War, and that individuals responsible for it should be held penally liable and tried accordingly. The criminal nature of the last war was found to derive from its aim and methods. The aims were to enslave foreign nations, to destroy their civilization and physically annihilate a considerable section of their population on racial, political or religious grounds. The methods arose from the fact that it was a “total” war, which disregarded all humanitarian considerations lying at the root of the laws and customs of war, and introduced indiscriminate means of warfare and barbaric methods of occupation.<sup>10</sup>

The central offense selected for prosecution and punishment was the violation of state sovereignty pursued by means of military conquest and occupation. Crimes against peace were prosecuted as the paramount crime at Nuremberg, defined as “planning, preparation, initiation or waging of war of aggression, or a war in violation of international treaties, agreements and assurances, or participation in a common plan and conspiracy for the

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<sup>9</sup> SC Res 808, UN Doc S/RES/808 (1993); SC Res 827, UN Doc S/Res/827 (1993) adopted the Statute of the International Tribunal as annexed to the Report of the Secretary General pursuant to paragraph 2 of SC Res 808, UN Doc S/25704 (1993) (hereinafter ICTY Statute).

<sup>10</sup> UNWCC, *History of the United Nations War Crimes Commission and the Development of the Law of War* (H.M.S.O. 1948), 180.

accomplishment of any of the foregoing.”<sup>11</sup> War crimes and crimes against humanity were also prosecuted at Nuremberg but these offenses were seen as secondary because they emanated, as it were, from the cardinal crime of planning and waging aggressive war. The hierarchy of crimes was made explicit in the Charter of the Tokyo Tribunal, where crimes against humanity and war crimes on their own were not sufficient for assuming jurisdiction: “The Tribunal shall have the power to try and punish Far Eastern war criminal who as individuals or members of organizations are charged with offenses that include Crimes against Peace.”<sup>12</sup> The Nuremberg Judgment reaffirmed the superior status of crimes against peace in relation to other international crimes:

The charges in the Indictment that the defendants planned and waged aggressive wars are charges of the utmost gravity. War is essentially an evil thing. Its consequences are not confined to the belligerent States but affect the whole world.

To initiate a war of aggression, therefore, is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole.<sup>13</sup>

Nuremberg’s obsession with aggression has been the subject of much criticism. One problem was the way it affected the framing of crimes against humanity, the other major innovation of the trials, by establishing a nexus to international armed conflict. Crimes against humanity could be prosecuted only in connection with either crimes against peace or war crimes, even though this charge was supposed to capture the crimes of the Holocaust. Hannah Arendt observed that what had prevented the judges from doing full justice to crimes against humanity was that the Nuremberg Charter “demanded that this crime, which had so little to do with war that its commission actually conflicted with and hindered the war’s conduct, was to be bound up with the other crimes.”<sup>14</sup> Others have argued that the Nuremberg legacy was compromised by limiting the enforcement of human rights to atrocities committed in the course of pursuing aggressive war by the defeated party, raising the problem of ‘victors’ justice’. David Luban observes that the aspirations of the Nuremberg trials to vindicate the rights of human beings were called into question by the

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<sup>11</sup> Nuremberg Charter, Article 6.

<sup>12</sup> Tokyo Charter, Article 5.

<sup>13</sup> International Military Tribunal (Nuremberg). Judgment and Sentences, 1 October 1946, reproduced in 41(1) *AJIL* 172-333 (1947), 186.

<sup>14</sup> H Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (Penguin 1994), 258.

failure to prosecute crimes committed in Germany before the war as well as those committed by Allied war criminals.<sup>15</sup>

Against the background of Nuremberg, the creation of the Yugoslav Tribunal could be interpreted not simply as a revival but a reinvention of international criminal justice, signalling a paradigm shift. The main concern of the international community was the growing evidence of mass atrocities in the former Yugoslavia. By late 1992, the Security Council had put in place a commission to investigate violations of international humanitarian law committed in the region.<sup>16</sup> The Commission of Experts reported that mass killings, rape, torture and destruction of civilian, cultural and religious property had been committed in the context of ethnic cleansing, and suggested that an international criminal tribunal was established to investigate and prosecute the ongoing violations.<sup>17</sup> Acting under Chapter VII powers of the UN Charter to maintain international peace and security, the Security Council established the ICTY with a mandate to bring to justice those responsible for serious violations of international humanitarian law committed on the territory of the former Yugoslavia since 1991.<sup>18</sup>

The primacy of human rights in the new paradigm is evident from what was included in the substantive jurisdiction of the Tribunal – war crimes (grave breaches of the Geneva Conventions of 1949 and violations of the laws and customs of war), crimes against humanity, and genocide – and what was missing: crimes against peace. Prosecution and punishment at the international level was justified in relation to suppressing human rights violations rather than violations of state sovereignty. Despite the fact that the Security Council acted under Chapter VII and the disintegration of Yugoslavia had sparked heated debates over sovereignty, international justice was not concerned with aggression – the classic threat to international peace and security as these are traditionally understood. It was invoked as a response to ethnic cleansing targeting the civilian population. In line with this approach, the definition of crimes against humanity was expanded to incorporate offenses such as rape and torture.<sup>19</sup>

The Security Council established the ICTY in the midst of the war in Bosnia and Herzegovina on the understanding that bringing perpetrators of international crimes to justice

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<sup>15</sup> D Luban, *Legal Modernism* (University of Michigan Press 1994).

<sup>16</sup> SC Res 870, UN Doc S/RES/870 (1992).

<sup>17</sup> See Interim Report of the Commission of Experts, reproduced in Annex I of Letter dated 9 February 1993 from the Secretary General addressed to the President of the Security Council, UN Doc S/25274 (1994).

<sup>18</sup> See supra n 8.

<sup>19</sup> ICTY Statute, Article 5.



would contribute to halting and redressing such violations and this, in turn, would facilitate the restoration and maintenance of peace.<sup>20</sup> This unorthodox approach was animated by a particular logic, reflecting the idea that the prospect for peace in the former Yugoslavia depended on suppressing extreme nationalism and criminalizing its goals and methods: ethnic cleansing and genocide.<sup>21</sup> International justice was viewed as a particularly suitable instrument in that respect because it focused on perpetrators and victims as individuals, effectively countering the narratives of collective guilt and victimhood that were prevalent in the region and fuelling the conflict. Madeline Albright, who spearheaded the efforts to establish the Yugoslav and Rwanda Tribunals while serving as US Ambassador to the UN, put it this way at the time:

[T]he tribunal will make it easier for the Bosnian people to reach a genuine peace. The scars left on the bodies and in the minds of the survivors of this war will take time to heal. In too many places, neighbours were betrayed by neighbour and friend divided by friend by fierce and hostile passion. Too many families have assembled at too many cemeteries for us to say that ethnic differences in Bosnia do not matter. But responsibility for these crimes does not rest with Serbs or Croats or Muslims as peoples; it rests with the people who ordered and committed the crimes. The wounds opened by this war will heal much faster if collective guilt is expunged and individual responsibility is assigned.<sup>22</sup>

This particular framing of the Tribunal's contribution to peace in the Balkans by individualising guilt for atrocity crimes was subsequently embraced by the judges and prosecutors as well; in fact, they have gone to great lengths to dispel any suspicion that that the Tribunal might be meting out collective guilt and punishment. Former Chief Prosecutor Carla Del Ponte emphasized that point in her opening speech at the trial of Slobodan Milošević: "No state or organisation is on trial here today. The indictments do not accuse an entire people of being collectively guilty of the crimes, not even the crimes of genocide."<sup>23</sup> This is a self-consciously liberal conception of justice, centred on individuals as bearers of rights and responsibility for violations, and its contribution to peace.

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<sup>20</sup> SC Res 827.

<sup>21</sup> I Rangelov, *Nationalism and the Rule of Law: Lessons from the Balkans and Beyond* (CUP 2014), 86-90.

<sup>22</sup> MK Albright, Address at the US Holocaust Memorial Museum, Washington, DC, 12 April 1994, available at <http://www.silent-edge.org/mt/rwanda/albright.html> (accessed 20 May 2015).

<sup>23</sup> *Prosecutor v. Milošević*, IT-01-51-I, Transcripts, 12 February 2002, 4.

In sum, the evolution of international justice from its origins at the Nuremberg trials to its reinvention half a century later with the establishment of the Yugoslav Tribunal could be interpreted as a shift in security paradigms from statism to human rights. A distinctive conception of ‘security’ can be detected in the pursuit of international justice in the former Yugoslavia by addressing three questions. First, security for whom? Breaking with the state-centricity of the Nuremberg paradigm, in the new paradigm of international justice the referent object of security are individuals rather than states. Second, security from what? The key shift in this respect is from violations of state sovereignty to violations of human rights, in particular atrocities, expulsions and other human rights abuses committed in the context of ethnic cleansing. Finally, security by what means? International justice contributes to security by enforcing the rights of victims to redress under international law and holding perpetrators accountable by assigning individual criminal responsibility, and thereby also serving to suppress extreme nationalism and counter narratives of collective guilt. Taken together, these three dimensions effectively recast international justice as a security strategy premised on a liberal understanding of criminal law’s contribution to security.<sup>24</sup>

### **3. Adapting and Developing the Law**

Although the pursuit of international justice in the Balkans appeared to promise a shift in security thinking and practice, it was also clear from the start that fulfilling that promise even partially was bound to involve grappling with serious challenges and was anything but predetermined. Some of the challenges were beyond the control of the Tribunal, for example arresting and transferring suspects to The Hague, but others were within its powers. This section examines a set of tensions and problems arising in the jurisprudence of the Tribunal and considers the ways in which the judges have sought to respond by adapting and developing international law.

Adapting the law to the logic and purposes of the new paradigm has been pursued by the ICTY primarily in two ways: firstly, by addressing some of the statist assumptions of the Nuremberg paradigm and international humanitarian law to better reflect the character of the violence in the former Yugoslavia and, secondly, by extending the normative reach of the law to encompass new subjects and offenses that become important from a human rights perspective.

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<sup>24</sup> As Alan Norrie has pointed out, “Criminal law is, at heart, a practical application of liberal political philosophy.” A Norrie, *Crime, Reason and History: A Critical Introduction to Criminal Law* (Weidenfeld & Nicolson 1993) 10.

One aspect of the state-centricity of international humanitarian law concerns the classic distinction between ‘international’ armed conflict between states and ‘non-international’ or ‘internal’ armed conflict within states. The emphasis on state borders and sovereignty animates this distinction not only in a descriptive sense but also normatively since the same type of abuses may be proscribed and give rise to individual criminal responsibility when committed in interstate conflicts but not in civil ones – a discrepancy in the laws of war that Steven Ratner has called one of the ‘schizophrenias’ of international criminal law.<sup>25</sup> A lot was at stake for the Tribunal when it secured its first defendant, Duško Tadić, and the proceedings began. The Security Council had abstained from determining the character of the hostilities in the former Yugoslavia when it established the Tribunal, leaving the issue to the judges.

There were two problems in applying the distinction to the Yugoslav wars of disintegration. First, the conflict in Bosnia and Herzegovina did not fit easily either the ‘international’ or ‘internal’ category. State borders in the former Yugoslavia were porous, shifting, and hotly contested; if anything, the character of the conflict appeared to be regional and transnational.<sup>26</sup> Second, the distinction was normatively loaded in a way that could not withstand critical scrutiny. Given the gravity of the violations committed in the region, the distinction risked frustrating the humanitarian purposes of the law and appeared unsustainable from a human rights perspective. In dealing with these problems, the ICTY has pursued a twofold approach in its jurisprudence. On the one hand, it has acknowledged that an armed conflict may have both international and non-international elements and has sought to determine under what circumstances an internal conflict may become ‘internationalized’.<sup>27</sup> At the same time, the judges have strived to narrow the gap in protection and have criticised the distinction on principle. In the *Tadić Jurisdiction Appeal*, the Appeals Chamber highlighted the problems with the distinction as far as human beings were concerned:

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<sup>25</sup> SR Ratner, ‘The Schizophrenias of International Criminal Law’ (1998) 33(1) *Texas Int’l LJ* 237-256.

<sup>26</sup> On regional conflicts, see generally P Wallenstein and M Sollenberg, ‘Armed Conflict and Regional conflict complexes’ (1997) 35(5) *Journal of Peace Research* 621-634.

<sup>27</sup> The *Tadić Appeal Judgement* stipulated that an internal conflict “may become international (or, depending upon the circumstances, be international in character) if (i) another State intervenes in that conflict through its troops, or alternatively, (ii) some of the participants in the internal armed conflict act on behalf of that other States”. *Prosecutor v. Tadić*, T-94-1-A, Judgement, 15 July 1999, para. 84 (hereinafter *Tadić Appeal Judgement*). For a critique of internationalized armed conflict, which argues for a single law applicable to all armed conflict, see JG Stewart, ‘Towards a Single Definition of Armed Conflict in International humanitarian Law: A Critique of Internationalized Armed Conflict’ (2003) 85 *RICR/IRRC* 313-349.

Why protect civilians from belligerent violence, or ban rape, torture or the wanton destruction of hospitals, churches, museums or private property, as well as proscribe weapons causing unnecessary suffering when two sovereign States are engaged in war, and yet refrain from enacting the same bans or providing the same protection when armed violence has erupted “only” within the territory of a sovereign State? If international law, while of course duly safeguarding the legitimate interests of States, must gradually turn to the protection of human beings, it is only natural that the aforementioned dichotomy should gradually lose its weight.<sup>28</sup>

The state-centric view of war that underpinned much of the relevant international law presented other challenges for the Tribunal. What Mary Kaldor calls ‘new wars’ are typically fought by networks of state and non-state actors.<sup>29</sup> In the Yugoslav wars of disintegration, such networks included an array of military and paramilitary forces, regular and irregular police units, militias, criminal groups, private security companies and other actors. One of the legacies of Nuremberg and subsequent domestic trials for the Holocaust in places like France was that crimes against humanity required a nexus to state policy.<sup>30</sup> Dusko Tadic, however, was not a modern-day Eichmann or Goering; he had been running a café and karate courses in Kozarac, a small town in North-Western Bosnia, not armies or ministries. To do justice to crimes against humanity committed in the context of ethnic cleansing in the Balkans, where these offenses appeared to capture both the goals and methods of warfare, the Tribunal had to acknowledge the important role of non-state actors. The Trial Chamber held that “the law in relation to crimes against humanity has developed to take into account forces which, although not those of the legitimate government, have *de facto* control over, or are able to move freely within, defined territory.”<sup>31</sup>

The significance of these developments at the ICTY has been widely acknowledged. William Schabas, for example, argues that as a result of such developments in the law, “perpetrators of serious violations of human rights during non-international armed conflict, including non-State actors, are far less likely to escape justice than they were in the past.”<sup>32</sup>

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<sup>28</sup> *Prosecutor v. Tadić*, IT-94-I, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 97 (hereinafter *Tadić Jurisdiction Appeal*).

<sup>29</sup> M Kaldor, *New and Old Wars: Organised Violence in a Global Era* (Polity 1999).

<sup>30</sup> See, for example, Klaus Barbie, Judgement (Chambre criminelle de la Cour de Cassation), 20 December 1985.

<sup>31</sup> *Prosecutor v. Tadić*, IT-94-1-T, Opinion and Judgement, 7 May 1997, para. 654. See also the analysis of the ambiguity created by this interpretation of the law in WA Schabas, ‘Punishment of Non-State Actors in Non-International Armed Conflict’ (2003) 26 *Fordham Int’l LJ* 907-933, 926-929.

<sup>32</sup> *Ibid.* 922.

Much more controversial – and disruptive for the Tribunal itself – has been the effort to adapt the law that relates to modes of criminal liability in ways that could capture the role of state actors in network-based warfare and ethnic cleansing. The complex formal and informal chains of command and the murky relationships forged in the wartime networks in the former Yugoslavia were bound to create problems for the Tribunal. Established theories of liability, such as ‘direct commission’ and ‘command responsibility’, often appeared inadequate when applied to the facts on the ground; at the same time, Nuremberg’s controversial theories of collective criminal liability, such as ‘conspiracy’ and ‘criminal organisation’, were also to be avoided.

As a result, a number of cases at the ICTY have involved prosecuting suspects, including Slobodan Milošević, for offenses committed as part of a Joint Criminal Enterprise (JCE) – a doctrine that seemed to offer a viable solution but also aroused much controversy among international lawyers. Initially, the issue with JCE appeared to be that prosecutors and judges at the Tribunal might be using the doctrine as a ‘catch-all’ device,<sup>33</sup> whereas in subsequent cases the judges narrowed its interpretation in ways that were seen by some observers as undermining “JCE’s unique ability to describe criminal arrangements too complex to fit within traditional theories of criminal liability.”<sup>34</sup>

JCE divided the Tribunal and sparked public controversy in the case of *Gotovina et al.*, involving three Croatian generals prosecuted for crimes against humanity committed in Operation Storm – the offensive of the Croatian forces in Krajina that effectively ended the war in Croatia. The Trial Chamber unanimously found two of the defendants, Ante Gotovina and Mladen Markač, responsible for participation in a JCE aimed at “the permanent removal of the Serb civilian population from the Krajina by force or threat of force, which amounted to and involved persecution (deportation, unlawful attacks against civilians and civilian objects and discriminatory and restrictive measures), deportation and forcible transfer,” and sentenced them to 24 and 18 years, respectively.<sup>35</sup> A divided Appeals Chamber (three to two), however, reversed the finding of the Trial Chamber that a JCE existed beyond reasonable doubt and acquitted the defendants on that basis.<sup>36</sup> In a strongly worded dissenting opinion, Judge Pocar entertained the possibility that the majority might be driven by ulterior motives in quashing

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<sup>33</sup> See S Powles, ‘Joint Criminal Enterprise: Criminal Liability by Prosecutorial Ingenuity and Judicial Creativity’ (2004) 2 *J of Int’l Criminal Justice* 606-619.

<sup>34</sup> A O’Rourke, ‘Joint Criminal Enterprise and Brđanin: Misguided Over-Correction’ (2006) 47(1) *Harvard Int’l LJ* 307-325, 307.

<sup>35</sup> *Prosecutor v. Gotovina, Markač & Čermak*, IT-06-90-T, Judgement, 15 April 2011, paras. 2600, 2617-2618.

<sup>36</sup> *Prosecutor v. Gotovina & Markač*, IT-60-90-A, Judgement, 16 November 2012, paras. 98, 158.

the JCE and characterised the entire Judgement as contradicting “any sense of justice.”<sup>37</sup> In Croatia, the public and the State were galvanized by these verdicts, united first in condemnation and then in celebration of the rulings; in Serbia, the reverse was the case.<sup>38</sup>

The other issue that has generated much controversy in recent years, both at the Tribunal and in the public domain, concerns aiding and abetting liability. It turns on whether the *actus reus* of this mode of liability requires ‘specific direction’, i.e. assistance provided by the accused to those who commit crimes that is specifically directed to aiding the commission of the crimes, or whether it is sufficient to establish knowledge that the aided forces are committing crimes and the aid provided would assist them in doing that. The ICTY Trial Chamber rejected the specific direction standard and convicted Momčilo Perišić, former Chief of Staff of the Yugoslav armed forces, for aiding and abetting Bosnian Serb forces implicated in atrocities in Srebrenica and Sarajevo.<sup>39</sup> The Appeals Chamber, however, upheld the specific direction standard. Considering the nature of the aid and the suspect’s remoteness from the theatre, it concluded that it could not be proven beyond reasonable doubt that the aid provided by Perišić was specifically directed to assist the commission of the crimes, and reversed the conviction.<sup>40</sup> As Marko Milanovic has pointed out, the implication of the approach adopted in the *Perišić Appeal Judgement* is that “it will be practically impossible to convict under aiding and abetting any political or military leader external to a conflict who is assisting one of the parties even while knowing that they are engaging in mass atrocities, so long as the leader is remote from the actual operations and is not stupid enough to leave a smoking gun behind him.”<sup>41</sup> Adopting this narrow approach to aiding and abetting liability (in conjunction with finding, separately, that the accused did not participate in a JCE) subsequently led the Trial Chamber to acquit Jovica Stanišić and Franko Simatović, former chiefs of Serbia’s State Security Service (DB), who had been involved in setting up and running irregular units implicated in mass atrocities in Bosnia and Croatia.<sup>42</sup>

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<sup>37</sup> *Prosecutor v. Gotovina & Markač*, IT-60-90-A, Dissenting Opinion of Judge Fausto Pocar, 16 November 2012, paras. 30, 39.

<sup>38</sup> In an intriguing twist, when Gotovina arrived in Zagreb to a hero’s welcoming, he did not try to fuel the nationalist passions his acquittal had aroused across the country as many had predicted; instead, he made a surprising appeal for reconciliation and return of Serb refugees to Croatia. B Pavelic, ‘Gotovina: Unlikely Hero of Croat-Serb Dialogue’, *BalkanInsight*, 7 December 2011, available at <http://www.balkaninsight.com/en/article/gotovina-unlikely-hero-of-croat-serb-dialogue> (accessed 10 June 2015).

<sup>39</sup> *Prosecutor v. Perišić*, IT-04-81-T, Judgement, 6 September 2011, paras. 1624, 1838.

<sup>40</sup> *Prosecutor v. Perišić*, IT-04-81-A, Judgement, 28 February 2013, paras. 17-74.

<sup>41</sup> M Milanovic, ‘The Limits of aiding and Abetting Liability: The ICTY Appeals Chamber Acquits Momcilo Perisic’, *EJIL: Talk!*, 11 March 2013, available at <http://www.ejiltalk.org/the-limits-of-aiding-and-abetting-liability-the-icty-appeals-chamber-acquits-momcilo-perisic/> (accessed 15 June 2015).

<sup>42</sup> *Prosecutor v. Stanišić & Simatović*, IT-03-69-T, Judgement, 30 May 2013, paras. 2356-2363.

The controversy was fuelled when Frederik Harhoff, the Danish judge sitting on the ICTY, attacked the President of the Tribunal, Theodor Meron, in a letter that was leaked to the media. The letter accused Judge Meron of exerting pressure on his fellow judges to acquit defendants like Gotovina and Perišić, allegedly acting on behalf of powerful States such as the United States and Israel where the military establishment “felt that the tribunal was getting too close to top-ranking military commanders.”<sup>43</sup> The Harhoff scandal precipitated the most serious crisis in the entire existence of the ICTY. Since then, the tensions in the Tribunal and its jurisprudence on aiding and abetting liability have deepened. The Appeals Chamber in *Šainović et al.* held that specific direction was not an element of aiding and abetting liability under customary international law and stated that it “unequivocally rejects the approach adopted in the *Perišić* Appeal Judgement as it is in direct and material conflict with the prevailing jurisprudence on the *actus reus* of aiding and abetting liability and with customary international law in this regard.”<sup>44</sup> As this article goes to press the much-anticipated decision of the Appeals Chamber in *Stanišić & Simatović* is pending and the controversy continues.

At the same time, shifting the lens from statism to human rights has enabled the Tribunal to extend the normative reach of the law in relation to the substantive offenses within its jurisdiction, making visible and prompting prosecution of certain types of human rights violations that had previously been overlooked or dismissed. In the Nuremberg paradigm, for example, atrocities involving civilians were often viewed as aberrations that were not dictated by the logic of ‘total war’ and in some cases directly conflicted with it by diverting resources away from the front and encumbering the war effort. This is one reason why the Holocaust appeared almost incomprehensible at Nuremberg, although once the shocking nature and scale of these atrocities had been revealed in the course of the proceedings they did move the judges and influenced their sentencing practices.<sup>45</sup> Other atrocities against civilians were typically understood as regrettable side effects of the hostilities, largely unrelated to the conduct of the war itself; as one contemporary commentator put it, “It should be remembered that these crimes are committed chiefly against enemy innocent civilians, non-combatants; that these violations have no relationship with military and strategic considerations.”<sup>46</sup>

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<sup>43</sup> Excerpts of the letter in English were quoted in Marlise Simons, ‘Judge at War Crimes Tribunal Faults Acquittals of Serb and Croat Commanders’, *New York Times*, 14 June 2014.

<sup>44</sup> *Prosecutor v. Šainović et al.*, IT-05-87-A, Judgement, 23 January 2014, paras. 1649-1650.

<sup>45</sup> RS Clark, ‘Nuremberg and Tokyo in Contemporary Perspective’, in TLH McCormack and GJ Simpson (eds) *The Law of War Crimes: National and International Approaches* (Kluwer Law International 1997), 175.

<sup>46</sup> MH Myerson, *Germany’s War Crimes and Punishment: The Problem of Individual and Collective Criminality* (Macmillan Co. of Canada 1944), 230-231.

One of the implications of the new paradigm of international justice that emerged in the 1990s was that certain types of human rights violations, which had been consistently neglected in the past, were coming into focus and taken up for prosecution and punishment. Historically, wartime rape and other forms of sexual violence have been viewed as little more than an incidental by-product of armed conflict. The trials after World War II largely neglected abuses involving sexual violence, even in cases where such abuses had a direct relationship to the war effort such as the ‘comfort women’ system run by the Japanese military.<sup>47</sup> Half a century later the United Nations Special Rapporteur for Violence Against Women, Radhika Coomaraswamy, argued that rape was still “the least condemned international crime.”<sup>48</sup>

Amid reports of widespread and systematic rape in Bosnia, the Security Council explicitly referenced sexual assaults when it created the ICTY and incorporated rape as a crime against humanity in the Statute.<sup>49</sup> Richard Goldstone notes that the strong condemnation of sexual violence was a key aspect of the motivation for establishing the Tribunal in the first place.<sup>50</sup> Reinforced by sustained attention to such violations in civil society and the media, these developments paved the way for a series of ground-breaking cases that prosecuted various forms of sexual violence as war crimes and crimes against humanity.<sup>51</sup> When evaluating the overall legacy of the Tribunal, observers often emphasise the “huge strides in redressing gender crimes and demonstrating that sexual violence is strategically used as a weapon of war and an instrument of terror. The two Tribunals [for Yugoslavia and Rwanda] have together rendered Judgments recognizing rape and other forms of sexual violence as crimes against humanity, war crimes, instruments of genocide, means of persecution, and forms of torture, particularly sexual violence manifested in the form of rape, sexual slavery, forced nudity, and sexual mutilation.”<sup>52</sup> Such developments in the law have to

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<sup>47</sup> See G Hicks, *The Comfort Women: Japan’s Brutal Regime of Enforced Prostitution in the Second World War* (Norton 1995); C Chinkin, ‘Women’s International Tribunal on Japanese Military Sexual Slavery’ (2001) 95(2) *AJ Int’l L* 335-341.

<sup>48</sup> Special Rapporteur on Violence Against Women, *Preliminary Report on Violence Against Women, Its Causes and Consequences*, UN Doc E/CN4/1995/42 (1994), para. 42.

<sup>49</sup> See Report of the Secretary General Pursuant to Paragraph 2 of Security Council Resolution 808, UN Doc S/25704 (1993), paras. 9, 11, 48, 88, 108; ICTY Statute, Article 5(g).

<sup>50</sup> RJ Goldstone, ‘Prosecuting Rape as a War Crime’ (2002) 34 *Case W Res J Int’l L* 277-285, 278.

<sup>51</sup> See, e.g., *Prosecutor v. Furundžija*, IT-95-17/1-T, Trial Judgement, 10 December 1998 (rape as a violation of the laws or customs of war); *Prosecutor v. Mucić et al.*, IT-96-21-T, 16 November 1998 (rape constitutes torture and a grave breach of the Geneva Conventions); *Prosecutor v. Kunarac et al.*, IT-96-23/1-T, 22 February 2001 (rape as an instrument of terror, a violation of the laws or customs of war and a crime against humanity).

<sup>52</sup> KD Askin, ‘Reflections on Some of the Most Significant Achievements of the ICTY’ (2002/3) *New Eng L Rev* 903-914, 909-910. See generally KD Askin, ‘Prosecuting Wartime Rape and Other Gender-Related Crimes under International Law: Extraordinary Advances, Enduring Obstacles’ (2003) 21(2) *Berkeley J Int’l L* 288-349.



be understood in terms of the Yugoslav Tribunal's self-conscious conception of the relationship between international law and shifting paradigms of security. In this respect, when examining challenges to the Tribunal's jurisdiction in its very first case, the judges held that "a state-sovereignty-oriented approach has been gradually supplanted by a human-rights-oriented approach."<sup>53</sup>

#### **4. International Justice and the Liberal Peace**

Adapting and developing the law is of little significance if the former Israeli Ambassador to the United States, Abba Edan, is right that international law is the law "the wicked do not obey and the righteous do not enforce."<sup>54</sup> Compliance and enforcement have indeed been central problems for the Yugoslav Tribunal over the past two decades. Especially with respect to arresting and transferring suspects to The Hague, the interests of States often appeared to trump human rights considerations and obstructed the course of justice. It could be argued that the problems of compliance and enforcement manifest a broader set of tensions between statism and human rights, which arise when international interventions associated with the liberal peace are pursued alongside international justice. These tensions are most clearly expressed in the interactions of international justice with security instruments at the sharp end of the liberal peace, although they can also be detected elsewhere in the toolbox of liberal peace interventionism. The argument is elaborated by examining three types of security instruments that have been deployed concurrently with international justice in the Balkans: peacemaking, peacekeeping and peacebuilding.

As already noted, the establishment of the Yugoslav Tribunal advanced a distinctive approach to security by recasting individuals as the referent object of security and human rights violations as a threat to security, and by reframing as means for promoting security the enforcement of rights, prosecution and punishment of perpetrators, and suppression of mutually exclusive nationalisms and narratives of collective guilt. And yet, at key junctures when international justice was supposed to promote this approach, other security instruments were employed by the international community that have often contradicted and undermined its logic and purposes. One such juncture was Dayton. Peacemaking and international justice initially appeared to be mutually reinforcing rather than conflicting. The ICTY indicted the

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<sup>53</sup> *Tadić Jurisdiction Appeal*, para 97.

<sup>54</sup> Quoted in WK Lietzau, 'Combating Terrorism: The Consequences of Moving from Law Enforcement to War', in D Wippman and M Evangelista (eds) *New Wars, New Laws? Applying the Laws of War in 21<sup>st</sup> Century Conflicts* (Transnational Publishers 2005).

most senior leaders of the Bosnian Serbs, Radovan Karadžić and Ratko Mladić, in the run-up to the peace negotiations at Dayton. The US envoy leading the talks, Richard Holbrooke, has argued that the indictments made the job of the negotiators easier by allowing them to marginalise Karadžić and Mladić.<sup>55</sup> The Dayton Accords were concluded in November 1995 and incorporated provisions requiring the parties to cooperate with the Tribunal.<sup>56</sup>

The international community was desperate for peace in Bosnia and negotiated a deal that ended the hostilities by effectively rewarding the extremists responsible for human rights abuses and legitimising the outcome of ethnic cleansing. The Dayton Accords created a patchwork of ethnic entities and enclaves and set up a framework of power-sharing between the three ‘constituent peoples’: Bosniaks, Croats and Serbs. If the pursuit of international justice was intended to vindicate human rights, promote accountability and suppress nationalism, the international community appeared to be doing the opposite at Dayton – even as it demanded cooperation with the Tribunal on paper. By entrenching ethnic divides and elites in power structures instead of creating the conditions for dismantling them, the settlement has engendered a sort of permanent crisis and two decades later it still requires the presence of peacekeepers. As Timothy Donais notes, the result is that “the country’s politics remains largely segregated along ethnic lines, nationalist rhetoric continues to be the key currency of Bosnian political life, and the practice of reaping the spoils of office for the benefit of self or party continues to be the norm.”<sup>57</sup>

The Dayton agreement affected the prospects for human rights and accountability in Bosnia and the wider region in several ways. The tensions between the constitutional order constructed at Dayton and international human rights standards have been highlighted by the European Court of Human Rights. In *Sejdić and Finci* it held that Bosnia’s constitutional provisions preventing persons not affiliated with one of the three ‘constituent peoples’ to stand for election to the House of Peoples and the Presidency amounted to ethnic discrimination.<sup>58</sup> In the first years after Dayton, suspects like Karadžić and Mladić were allowed to move freely despite ICTY arrest warrants. In fact, Karadžić has insisted that in

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<sup>55</sup> ‘Seven Questions: Richard Holbrooke on Radovan Karadzic’, Foreign Policy, 24 July 2008, available at <http://foreignpolicy.com/2008/07/24/seven-questions-richard-holbrooke-on-radovan-karadzic/> (accessed 15 June 2015).

<sup>56</sup> See The Dayton Peace Agreement, General Framework Agreement for Peace in Bosnia and Herzegovina, 21 November 1995, U.S. Dept. State Dispatch Supp. 7(1).

<sup>57</sup> T Donais, ‘Power Politics and the Rule of Law in Post-Dayton Bosnia’ (2013) 7(2) *Studies in Social Justice* 189-210, 202.

<sup>58</sup> *Sejdić and Finci v. Bosnia and Herzegovina*, App. Nos. 27966/06 and 34836/06, Judgment of the Grand Chamber, 22 December 2009.

1996 Holbrooke made an agreement with him to withdraw from public life in exchange for immunity from prosecution.<sup>59</sup> Holbrooke denied the allegations but other credible sources have corroborated them and suspicions persist.<sup>60</sup> Dayton also had the effect of strengthening the repressive regimes of Slobodan Milošević and Franjo Tuđman, both of which had been implicated in wartime atrocities. By entrenching Milošević (hailed as a ‘peacemaker’<sup>61</sup> at that time) and neglecting the brewing crisis in Kosovo, the settlement paved the way for the campaign of ethnic cleansing in the province that prompted the 1999 NATO bombing of Yugoslavia.

Peacekeeping operations have also been disruptive for the logic and aims of international justice. The underlying statist understandings of security and stability that often inform such operations have tended to contradict and undermine the human rights approach. One expression of these tensions has involved a clash between force protection and human rights enforcement. States that had earlier spearheaded the effort to establish the Yugoslav Tribunal, such as the United States, became reluctant to put the lives of their soldiers in Bosnia at risk in order to apprehend suspects wanted by the ICTY: “With the memory of the eighteen U.S. soldiers killed in Somalia in 1993 still fresh, the U.S Joint Chiefs of Staff had signed off on the [Dayton] peace agreement only after receiving assurances from the White House that U.S. troops would not be ordered to hunt down war criminals.”<sup>62</sup> In line with force protection priorities, in the initial years NATO peacekeepers in Bosnia were instructed to take into custody individuals indicted by the ICTY only if they surrendered or happened to stumble upon international forces.

Another example is the Kosovo crisis. The problems with the NATO bombing of Yugoslavia from a human rights perspective are well-known: use of cluster bombs and depleted uranium missiles; bombing the Serbian television and accidentally bombing the Chinese embassy in Belgrade; air strikes that caused civilian casualties and accelerated ethnic cleansing on the ground.<sup>63</sup> At a time when the NATO air campaign appeared to be losing momentum and public support, indicting Milošević was embraced as a way of legitimating the war and putting more pressure on Belgrade: “After years of refusing to turn over sensitive

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<sup>59</sup> See *Prosecutor v. Karadžić*, IT-95-5/18-AR73.4, Decision on Karadžić’s Appeal of Trial Chamber’s Decision on Alleged Holbrooke Agreement, 12 October 2009.

<sup>60</sup> M Simmons, ‘Study Backs Bosnian Serb’s Claim of Immunity’, *New York Times*, 21 March 2009.

<sup>61</sup> See A LeBor, ‘Milosevic the Peacemaker’, *IWPR*, TU332, 7 November 2003, available at <https://iwpr.net/global-voices/comment-milosevic-peacemaker> (accessed 15 June 2015).

<sup>62</sup> C Sudetic, ‘The Reluctant Gendarme’, *Atlantic Monthly*, April 2000.

<sup>63</sup> See Independent International Commission on Kosovo, *The Kosovo Report: Conflict, International Response, Lessons Learned* (OUP 2000).

intelligence data to the Tribunal in order to protect “sources and methods,” the United States and Britain were hurriedly handing over reams of satellite imagery, telephone intercepts, and other top secret information to the Prosecutor to make the case against Milosevic.”<sup>64</sup>

Milošević and four members of his regime were indicted on 22 May 1999, sixty days into the seventy-eight day NATO air campaign.<sup>65</sup>

The potential of international justice to advance human rights, promote accountability and defuse ethnic tensions was overshadowed by the effects of NATO air strikes and peacekeeping, which pulled in the opposite direction. The bombing of Yugoslavia had the effect of radicalizing Serbian nationalism and fuelling its narratives of victimization, reinforcing the traction of collectivist framings of the conflict and crimes in Serbian politics and society. When Serb forces pulled out of Kosovo, KFOR deployed some 40,000 peacekeepers to the province; their presence, however, did not prevent ethnic cleansing targeting the remaining Serbs and revenge attacks against Albanians accused of collaboration. The Kosovo Human Losses database at the Humanitarian Law Center (Belgrade and Pristina) has documented more than 1,600 casualties in Kosovo for the first year and a half of international peacekeeping (June 1999-December 2000), of which around a quarter are Albanian and the rest are Serb, Roma and other minorities, including many disappearances.<sup>66</sup> This high level of casualties at a time when peacekeepers had been deployed in large numbers reflects the reluctance of KFOR to send a clear message early on, particularly to the Kosovo Liberation Army (KLA), that international forces would not tolerate human rights abuses. The abuses and entrenchment of the KLA in power structures that occurred at that time have had far-reaching consequences for accountability by instilling fear in victims and witnesses, who have often been reluctant to come forward and testify in cases involving KLA members at the ICTY and at Kosovo’s hybrid courts for war crimes.

The most significant peacebuilding instrument employed by the international community in the region is the Stabilisation and Association Process (SAP) for the Western Balkans, a regional policy framework established by the European Union (EU) in 1999 for the countries of the former Yugoslavia (excluding Slovenia) and Albania. The aim of the instrument is to promote stabilisation through a process of progressive partnership with these countries that includes the prospect of association and, eventually, accession to the EU. Full cooperation with the ICTY was set as a key condition for moving forward in the SAP,

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<sup>64</sup> MP Scharf, ‘The Legacy of the Milosevic Trial’ (2003) 37(4) *New Eng L Rev* 915-933, 924.

<sup>65</sup> *Prosecutor v. Milošević et al.*, IT-99-36, Indictment (Kosovo), 22 May 1999.

<sup>66</sup> Data on file with the author.

alongside demonstrating respect for minority rights, offering real opportunities for displaced persons and refugees to return home and demonstrating a clear commitment to regional cooperation. The war crimes conditionality has been one of the most contentious aspects of the SAP and has often dominated the politics of EU integration in the region.<sup>67</sup> It was crucial for ensuring that all suspects sought by the Tribunal from the original list of 161 indicted persons were eventually apprehended and transferred to The Hague to stand trial, a lengthy and difficult process that was completed in 2011 with the arrests of Ratko Mladić and Goran Hadžić.

At the same time, the ICTY conditionality was applied rather unevenly in the SAP, raising the issue of selectivity, and created divisions in the EU as some Member States insisted on a principled approach while others preferred compromise and accommodation. The tensions were expressed most clearly when the EU was using the war crimes issue to advance strategic considerations for stability and public order at the expense of the SAP's normative commitments to accountability and human rights.<sup>68</sup> In the case of Croatia, the EU suspended accession negotiations over its failure to apprehend Gotovina and reopened them only after the Tribunal had been satisfied with Croatia's efforts to cooperate. In the case of Serbia, however, the ICTY conditionality was repeatedly compromised and used by the EU as a bargaining chip in order to influence political developments in the country and to shape its response to Kosovo's declaration of independence. Jelena Subotić observes that in that context "the issue of justice for crimes against humanity became an issue of the lowest order, a matter of deal making and compromise setting, removed as far as possible from the ideas and norms of dealing with the past."<sup>69</sup> With the completion of the Tribunal's remaining cases in sight, the EU has started to shift attention in the SAP from international justice to domestic prosecution of war crimes. So far, however, the focus has been on building capacity for conducting such trials at the various domestic and hybrid courts in the region, rather than requiring applicant countries to demonstrate effective investigation and prosecution of war crimes.

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<sup>67</sup> See J Batt and J Obradovic-Wochnik (eds) *War Crimes, Conditionality, and EU Integration in the Western Balkans*, ISS Chaillot Paper 116, June 2009.

<sup>68</sup> See I Rangelov, 'Democracy or Stability? European Approaches to Justice in Peace and Transitional Processes' (2014) 5(2) *Global Policy* 191-200.

<sup>69</sup> J Subotić, *Hijacked Justice: Dealing with the Past in the Balkans* (Cornell UP 2009), 81.

## 5. Conclusion

The pursuit of international justice in the former Yugoslavia half a century after the Nuremberg trials signals a shift in security paradigms from statism to human rights, while also giving rise to deep tensions and contradictions between them. Judicial practice at the ICTY has tended to advance this shift by adapting and developing the law in line with a human rights approach to security but it has not been immune to setbacks and interference, especially when the jurisprudence of the Tribunal has appeared to challenge entrenched interests and practices of States. To the extent that the exercise of international justice depends on States for enforcement and for its continued existence, the Yugoslav case suggests that there are inherent tensions between statism and human rights that cannot be addressed by judicial bodies alone, in the absence of a parallel shift in the security thinking and practices of States.

These tensions have affected the ability of international justice to offer a security strategy in the Balkans in important ways. The potential of international justice to promote a rights-based approach to security has been repeatedly compromised when liberal peace interventions in the region have been working at cross-purposes with international justice. Key security instruments that have been employed by the international community in the Balkans, such as peacemaking, peacekeeping and peacebuilding, reflect a set of state-centric ideas about security and involve related security practices that often disrupt the pursuit of international justice and undermine its logic and purposes. The interactions of international justice with such instruments could be understood as a series of tensions between elite-mediated peace deals, force protection priorities and an overarching concern for stability, on the one side, and normative commitments to promote accountability and enforce human rights, on the other. When key international actors engaged in the Balkans have viewed stability and justice as competing security strategies, the former has tended to trump the latter in practice.

As a security culture, the liberal peace in its current form involves a set of state-centric ideas and practices that cannot be easily reconciled with the distinctive rights-centric conception of security advanced by international justice and often undermine its logic and purposes. More research is needed to illuminate the complex relationship between liberal peace interventions and justice instruments in situations where both are deployed. The Balkan case, however, calls into question the widespread assumption that transitional justice is an integral part of liberal peacebuilding and suggests that analysis along those lines may be misguided and counterproductive. Finally, the tensions between international justice and the

liberal peace raise questions about one of the standard lines of critique of liberal peacebuilding, which argues that the problem with the liberal peace is that it is too liberal. If 'liberal' means treating individuals as the referent object of security and placing human rights at the heart of the means and ends of public security provision, the problem with the liberal peace might well be the opposite.