BOOK REVIEW

The Law of War Crimes: National and International Approaches edited by Timothy L H McCormack and Gerry J Simpson (The Hague: Kluwer, 1997) pages i–xxvii, 1–262. Price NLG 175.00 (hardback). ISBN 90 411 0273 6.

This book provides a compelling insight into the apparently irreconcilable problems that have arisen in the attempts to institutionalise the prosecution of alleged war criminals. In a series of essays, the study examines the various national and international efforts in this regard. Although not purporting to be a comprehensive survey and analysis of all war crimes prosecutions, the large sample brought together in this volume leaves the lasting impression that the international community has done very little to bring to justice individuals who have been guilty of violations of the most fundamental norms of the international community. The editors have no qualms about recognising this in the preface when they state that 'the requirements of *realpolitik* have too often come between war criminals and prosecution', and further '[t]oo often it seems that the punishment for war crimes atrocities is a place at the negotiating table.'[1] The fact that the United Nations ('UN') has consistently placed peace over justice in defining the goals of the post-1945 world order is not really surprising in that the UN Charter has the clear aim of setting up a collective security system, not a judicial system whereby states and individuals can be held to have breached the criminal norms of the international community. However, the increasing quasi-judicial capacity in the post-Cold War period of the Security Council vis-à-vis states — Iraq, Libya, Serbia, Sudan — has also resulted in a greater willingness to lift the corporate veil of the state and set up mechanisms to try individuals (whether constitutionally responsible leaders or not) within states (though not always the same states).

The Dayton Peace Accords of November 1995[2] illustrated how the still paramount policy of securing peace clashed with the desire to punish those guilty of atrocities. In order to secure Bosnian Serb compliance with the peace agreement, very little mention was made in the Accords as regards the International Criminal Tribunal for the Former Yugoslavia already established by the Security Council. However, arguably the main obstacle to securing a lasting peace has been the continued presence of major war criminals in the various parts of Bosnia. Others would argue that to capture and try Karadžić and Mladić (to name the most

[1] Timothy McCormack and Gerry Simpson (eds), *The Law of War Crimes* (1997) xx.

[2] *Dayton Agreement on Implementing the Federation of Bosnia and Herzegovina*, 10 November 1995, Republic of Bosnia and Herzegovina–Federation of Bosnia and Herzegovina, (1996) 35 ILM 170; *Basic Agreement on the Region of Eastern Slavonia, Baranje and Western Sirmium*, 12 November 1995, Croatia–Local Serbian Community, (1996) 35 ILM 184.

obvious) would undermine the fragile peace that has been achieved. These opposing views have been reflected in the differing levels of commitment shown by the contributing states to the Implementation Force ('IFOR'), now the Stabilization Force ('SFOR'), in arresting suspected war criminals. The international community is at a crossroads — does it stick to its policy of preferring peace over justice or does it attempt to reconcile the two by recognising, by its actions and not simply in its rhetoric, that lasting peace can only be attained if justice is achieved?[3]

The first essay by Gerry Simpson entitled 'War Crimes: A Critical Introduction'[4] raises these conceptual issues and many more. This reviewer found it to be the most incisive and thought-provoking chapter in the book. The issues it raises provide a structure which could have been used to draw the other chapters together. The collection is an informative but discrete set of essays on war crimes trials — a description of what has happened with hints at what might happen, whereas it could have taken a greater step towards the future by considering in greater depth the points raised by Simpson. With the debates on the creation of a Permanent International Criminal Court reaching their climax, the book would then have had a greater impact. It is this reviewer's opinion that the book, laudable though it is, does not fulfil the potential suggested by the opening chapter.

After recounting that both the signing of the London Charter by the Allies establishing the Nuremberg Tribunal and the bombing of Nagasaki by the United States occurred on 8 August 1945, Simpson states that:

> The history of war crimes is a history suffused with irony but the conjunction of these two acts — one, a manifesto declaring the subordination of force to law, the other, an unprecedented act of violence contrary to a basic requirement of the laws of war — is perhaps the most tragically ironic of all.[5]

Nuremberg (and to a lesser degree Tokyo) created the 'widespread assumption that the trials of war criminals have generally occurred only where defeat and criminality coincide.'[6] However, Simpson points out that they are in many ways atypical — many war crimes trials have been under domestic law, or under military jurisdiction, or have tried war criminals rather than just defeated war criminals (as in the former Yugoslavia and Rwanda). Nevertheless, the problem of partiality so prevalent at Nuremberg is at the heart of the selectivity of war crimes trials. It is worth citing Simpson in full here:

> In the sphere of international criminal law there is a regularised tension between the retributive urge and the realist demand, between the necessary and the possible, the visceral and the pragmatic. Each new atrocity brings in its train a fresh call for war crimes prosecutions. This, in turn, is routinely met with re-

[3] Christopher Blakesley, 'Atrocity and Its Prosecution: The *Ad Hoc* Tribunals for the Former Yugoslavia and Rwanda' in McCormack and Simpson (eds), above n 1, 189, 191–2.

[4] Gerry Simpson, 'War Crimes: A Critical Introduction' in McCormack and Simpson (eds), above n 1, 1.

[5] Ibid 4.

[6] Ibid 5.

> luctance and caution from those with the power to set in motion the mechanics of such a trial. Justice and diplomacy are engaged in a perpetual *pas de deux* over whether to prosecute or rehabilitate. It is only an unexpected confluence of events that leads to the establishment of such tribunals. One need only think of the apparent inevitability of prosecutions of Khmer Rouge leaders in Cambodia or the Iraqi military elite following the Gulf War and the ultimate decision not to hold these trials as examples of the unexpected results of this conflict. Ultimately, war crimes law will be hostage to *realpolitik* whether it be the need to renegotiate with the Khmer Rouge or the desire to maintain a strong anti-clerical government in power in Baghdad. This will always occur and will leave war crimes law, as practised through the creation of *ad hoc* tribunals, open to accusations of bias, selectivity and partiality. In anarchical societies, like the international legal order, powerful private and state interests will not be ready to yield to the dictates of legality. The price of peace must often be a promise not to begin war crimes proceedings. So each war crimes trial is an exercise in partial justice to the extent that it reminds us that the majority of war crimes remain unpunished. If Yugoslavia, why not Somalia; if Rwanda, why not Guatemala?[7]

In the area of war crimes, contradictions do exist as a result of the prima facie incompatibility of placing a criminal code within a consensual legal system.[8] Furthermore, the enforcement of international criminal law is not consistently possible in a system of sovereign states. The capture of Saddam Hussein or indeed General Aideed would violate state sovereignty, and international law has traditionally placed sovereignty at the centre of its universe. The capture of these criminals requires there to be volunteers, a posse if you like, to carry out tasks mandated by the Security Council in accordance with the decentralised nature of the UN security system. Inevitably this job falls to the powerful states who may sometimes want to take the risk but more than likely will not. Indeed, states which may be persuaded to undertake peace missions may be deterred if additional criminal justice tasks are attached to their mandates. To build a stable and impartial mechanism to try war criminals in such a parlous environment will be difficult if not impossible.

National prosecutions of war crimes, although more numerous, are equally selective. As Simpson states:

> [A] message of the Barbie trial is that torture in Algeria is not a war crime or that Vichy France was not as anti-semitic as Nazi Germany. The Australian legislation[9] in *Polyukhovich*[10] excludes Indonesian brutalities in East Timor from its definition of war crimes.[11]

National prosecutions, by generally focusing on Nazi atrocities, provide exculpation for the prosecuting states. A state which prosecutes war criminals, by appearing to be one of the few upholding justice, is portraying itself as incapable of committing these acts itself. Yet the United States' bombing of Hiroshima and

[7] Ibid 7.
[8] Ibid 16–19.
[9] *War Crimes Act 1945* (Cth) (as amended by the *War Crimes Amendment Act 1988* (Cth)).
[10] *Polyukhovich v Commonwealth* (1991) 172 CLR 501.
[11] Simpson, above n 4, 23 (citations added).

Nagasaki, its widespread use of napalm and other indiscriminate weapons in Vietnam, its bombing of non-military targets in Iraq all suggest otherwise, as does the United Kingdom's involvement in the latter and its contribution to the bombings of Libya in 1986.

Even states' domestic attempts to try Nazi war criminals often appear rather pathetic. The United Kingdom's *War Crimes Act 1991* (UK)[12] and the amendment of the Canadian *Criminal Code*[13] deserve particular mention. Simply put, action was too little and too late. Even Israel's prosecution of war criminals appears to have had limited success. *Eichmann*[14] is the most obvious exception, but as Jonathan Wenig points out in his chapter entitled 'Enforcing the Lessons of History: Israel Judges the Holocaust',[15] Israel devoted as much effort to meting out justice to Jewish collaborators, particularly the *Kapos* or Jewish policemen in the concentration camps. '[I]t says much about Israel's justice system that immediately after legislating in relation to war crimes, it did not shy away from turning that law on its own war criminals.'[16] However, although Israel's record against war criminals is perhaps more honest than other states, it still focuses its attention on the atrocities committed under the Nazi regime, and it fails to prosecute Israelis guilty of ordering or committing war crimes against Arabs — mention need only be made of the Israeli bombing of Qana in 1996.

The impression this reader has of the various national approaches reviewed in chapters 3 to 6, is accurately summarised by Axel Marschik:

> [A]nalysis of the State practice yields an impression that States point to their prosecution of Nazi war criminals in order to hide their inactivity as regards other humanitarian crimes. Considering that states are running out of war criminals from World War II, the Yugoslav tragedy could become a convenient new means of acting in accordance with humanitarian obligations in one specific field and thereby diverting attention from politically sensitive cases where national interests outweigh the willingness to comply with international humanitarian law.[17]

The question remains whether international tribunals have had a greater impact, and whether a permanent International Criminal Court will improve the situation further.

[12] *War Crimes Act 1991* (UK) c 13; see, eg, Axel Marschik, 'The Politics of Prosecution: European National Approaches to War Crimes' in McCormack and Simpson (eds), above n 1, 65, 87–9.

[13] RSC 1970 c C-34; see, eg, Sharon Williams, 'Laudable Principles Lacking Application: The Prosecution of War Criminals in Canada' in McCormack and Simpson (eds), above n 1, 151, 159–63.

[14] *Attorney-General of the Government of Israel v Eichmann* (1961) 36 ILR 5 (District Court of Jerusalem); (1962) 36 ILR 277 (Supreme Court of Israel).

[15] Jonathan Wenig, 'Enforcing the Lessons of History: Israel Judges the Holocaust' in McCormack and Simpson (eds), above n 1, 103.

[16] Ibid 119.

[17] Marschik, above n 12, 101.

Timothy McCormack in his chapter 'From Sun Tzu to the Sixth Committee: The Evolution of an International Criminal Law Regime'[18] examines the history leading up to the proposal for the Permanent International Criminal Court.[19] The *Hagenbach* trial of 1474 is much cited by international humanitarian lawyers as an early instance of an international tribunal.[20] Although McCormack states that the trial would better be characterised as 'supranational' as opposed to 'international', he does appear to rely on it as an early precedent.[21] However, as he moves nearer the present day, the gap between the rhetoric on the need for an international court and the reality seems to widen. The presence of unimplemented war crimes provisions in the *Treaty of Versailles* of 1919[22] is just one example, as is the presence in the *Genocide Convention* of 1948 of a reference to an international penal tribunal which was not established.[23]

Nuremberg and Tokyo in 1945, and Rwanda and Yugoslavia in the mid to late 1990s, provide the rather fragile framework for a permanent international criminal tribunal. Roger Clark's chapter on 'Nuremberg and Tokyo in Contemporary Perspective'[24] contains a sober analysis of the strengths and weaknesses of the earlier tribunals and their impact not only on international criminal law but also on the debate on the establishment of a permanent court. His analysis is succinct and revealing. Only twenty-two defendants were tried at Nuremberg, while twenty-eight were tried at Tokyo. Jurisdiction was given to the Nuremberg Tribunal (the same issues are to be found at Tokyo) over crimes against peace, war crimes and crimes against humanity. The court was very progressive in finding that wars of aggression gave rise to individual responsibility, despite lack of reference to this in the *Kellogg-Briand Pact* of 1928.[25] However, it was cautious on the offence of crimes against humanity, which it confined to offences committed in connection with, or in execution of, the other crimes within the Tribunal's jurisdiction — the effect of which was to limit crimes against humanity to the period of the Second World War. Nevertheless, despite the appearance of being hard on crimes against peace, and soft on crimes against humanity, the Tribunal actually concentrated on the category of war crimes, recognising that it was these offences which had traditionally been viewed as giving rise to individ-

[18] Timothy McCormack, 'From Sun Tzu to the Sixth Committee: The Evolution of an International Criminal Law Regime' in McCormack and Simpson (eds), above n 1, 31.

[19] See, eg, *Report of the Working Group on a Draft Statute for an International Criminal Court*, in *Report of the International Law Commission on Its Forty-sixth Session* (1994) UN Doc A/49/10.

[20] See, eg, Georg Schwarzenberger, *International Law As Applied in International Courts and Tribunals* (1968) 462–6.

[21] McCormack, 'From Sun Tzu to the Sixth Committee: The Evolution of an International Criminal Law Regime', above n 18, 31, 38–9.

[22] *Treaty of Peace between the Allied and Associated Powers and Germany*, 28 June 1919, 2 Bevans 43 ('*Treaty of Versailles*').

[23] *Convention on the Prevention and Punishment of the Crime of Genocide*, opened for signature 9 December 1948, 78 UNTS 278, art 6 (entered into force 12 January 1951).

[24] Roger Clark, 'Nuremberg and Tokyo in Contemporary Perspective' in McCormack and Simpson (eds), above n 1, 171.

[25] *General Treaty for the Renunciation of War*, opened for signature 27 August 1928, 94 LNTS 57 (entered into force 24 January 1929) ('*Kellogg-Briand Pact*').

ual responsibility. Although Professor Clark is at pains to point out that the Nuremberg Tribunal's approach does not affect later tribunals,[26] it is curious that while there has been greater agreement on the definition and application of war crimes in later tribunals, crimes against humanity still give definitional problems and crimes against peace are still on the verge of international criminal law. This is shown by the latest view coming from some states at the Preparatory Committee for the International Criminal Court that aggression should be excluded from the crimes capable of being tried by the proposed court. Although the law appears to have become more sophisticated and settled since Nuremberg, the same problems remain.

Christopher Blakesley's chapter entitled 'Atrocity and Its Prosecution: The *Ad Hoc* Tribunals for the Former Yugoslavia and Rwanda',[27] brings us up to date on the trial of war crimes by international tribunals. The analysis is thorough and convincing, though more could have been done to place the tribunals in context. One of the problems he points to is the fact that:

> International criminal law conventions in the past have often been negotiated by international lawyers, whose expertise does not extend to matters of criminal law. The requirements of criminal justice, such as an *actus reus* and a *mens rea*, which constitute a specifically-prohibited social harm must be included.[28]

Nevertheless, he does recognise that some international criminal norms contain *mens rea*, which is not only notoriously difficult to prove when attempting to invoke state responsibility, but can be equally elusive when considering individual responsibility. The *Genocide Convention* of 1948 states that 'genocide means any of the [listed] acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group'.[29] Did the United States leaders 'intend' to destroy the Japanese as a race 'in whole or in part' in 1945? 'Proving specific intent to kill is one thing; proving the specific invidious intent required for genocide is another.'[30] This may well prove to be a major issue before the International Criminal Tribunal for Rwanda. If the tribunal does not find genocide has occurred as regards the bloodbath in that country, then the proposed International Criminal Court, which has genocide at the centre of its list of crimes, will face difficulty.

Timothy McCormack and Gerry Simpson consider the proposed new court in the last chapter entitled 'Achieving the Promise of Nuremberg: A New International Criminal Law Regime?'[31] As the authors state at the outset of their thoughtful chapter:

[26] Clark, above n 24, 177.
[27] Blakesley, above n 3, 189.
[28] Ibid 204.
[29] *Convention on the Prevention and Punishment of the Crime of Genocide*, opened for signature 9 December 1948, 78 UNTS 278, art 2 (entered into force 12 January 1951).
[30] Blakesley, above n 3, 209.
[31] Timothy McCormack and Gerry Simpson, 'Achieving the Promise of Nuremberg: A New International Criminal Law Regime?' in McCormack and Simpson (eds), above n 1, 229.

> Institution-building in international law is an architecture of compromise. The United Nations, in attempting to establish a permanent international criminal court, again finds itself between the impulse towards a hopeful universalism and the hesitancies of deeply ingrained statism.[32]

The court (assuming it is established) may have the appearance of a criminal court in the true sense, but the reality is that the trial of alleged criminals is dependent upon state consent. States must not only ratify the treaty which will establish the court, but (genocide apart) also must 'opt in' for the specific crimes.

> In effect, a state must complete a two part-process before it is deemed to have ceded jurisdiction for an offence to the Court. Consequently, it is quite conceivable that a state may choose to recognise the Court's jurisdiction for, say, serious violations of the laws of war and the treaty crime of apartheid, without ceding jurisdiction in any other cases. Other states, may choose, by declaration, simply to accept jurisdiction for a particular case while declining to ratify the Statute of the Court.[33]

Ideally an international criminal court dealing with violations of the most basic human rights standards should have greater intrusive capacity than established human rights supervisory organs. It should in some respects be placed above the states if it is to be a true criminal court. However, such wishful thinking is inevitably dashed against the rocks of statism.

The crime of aggression seems to be heading for the same rocks, with the United States insisting that if it is to be included at all, it must be dependent on the Security Council first making a determination under article 39 of the UN Charter.[34] In effect, this would give the permanent five members of the Security Council immunity from determination that nationals of those states have been guilty of crimes against peace. The sheer self-interest of this position may lead to the crime of aggression being left out of the final treaty, and so we will have a list of crimes which will not include aggression. This will actually mean that we have regressed since Nuremberg where the Tribunal stated that 'to initiate a war of aggression ... 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'.[35]

It is in the light of this depressing reality that the delegates to the forthcoming conference on the adoption of a treaty to create an international criminal court[36] should read this book. The following extract from Gerry Simpson's opening chapter deserves their particular attention:

> It is obvious that recent history, if it tells us anything, warns us that we forget at our peril. The object of a functioning international criminal court, and indeed, an *ad hoc* tribunal, is not to prevent history from repeating itself (we are, after all, condemned to repetitious exercises of violence in a world of sovereign

[32] Ibid 230.
[33] Ibid 241–2.
[34] Ibid 242–5.
[35] Clark, above n 24, 175.
[36] United Nations Conference of Plenipotentiaries on the Establishment of an International Criminal Court, to be held in Rome, Italy, from 15 June to 17 July 1998.

States), but rather to tell us when we do. There is a need to convert the current interest in war crimes prosecution into a methodical and systematic judicial framework to replace efforts at a national and international level. The Tribunal for the Former Yugoslavia can either continue an old tradition of systemic bias or inaugurate a new tradition in which war crimes are prosecuted regularly, consistently and fairly. It is fitting, surely, that crimes against humanity should be prosecuted and tried in the courts of humanity.[37]

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[37] Simpson, above n 4, 30.

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