

## HOSTAGES OR PRISONERS OF WAR: WAR CRIMES AT DINNER

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*The taking of hostages is prohibited.*<sup>1</sup>

*Measures of reprisal against prisoners of war are prohibited.*<sup>2</sup>

### I. Introduction

The images filled the world's television screens. Depicted were dejected, scared soldiers chained to obvious military targets. The nightly newscasts revealed new levels of depravity, and contempt for law, in the war in Bosnia. It was war crimes at dinner. In response to NATO air attacks, the Bosnian Serb leadership directed the seizure of hundreds of United Nations "peacekeepers" as hostages. The Serbian leadership made it plain that these United Nations peacekeepers would be held until the United Nations agreed to stop any future NATO air strikes. To protect military targets from future attacks some of the captives were chained to likely targets. When criticism of the chaining began to mount, the Serbs declared that the captives were prisoners of war. (As if that change in designation made a difference!) The United Nations responded that they could not be prisoners of war because no war existed.<sup>3</sup> Therefore, they

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<sup>1</sup>Article 34, Geneva Convention of August 12, 1949 Relative to the Protection of Civilian Persons in Time of War, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GC].

<sup>2</sup>Article 13, Geneva Convention Relative to the Treatment of Prisoners of War, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GPW].

<sup>3</sup>*Red Cross Says UN Peacekeepers Are Not Hostages*, REUTERS, June 2, 1995, available in LEXIS, News Library, Current News File. See also JEAN S. PICTET, COMMENTARY IV 51 (1958) (Pictet wrote a commentary on each of the four Conventions) [hereinafter Pictet IV], which states the following:

Every person in enemy hands must have some status under international law: he is either a prisoner of war, and as such, covered by the Third Convention, a civilian covered by the Fourth Convention, or again, a member of the medical personnel of the armed forces who is covered by the First Convention. There is no intermediate status; nobody in enemy hands can be outside the law.

were hostages. However, the International Committee of the Red Cross denied that they were hostages and claimed that they were prisoners of war because they were taken in response to an attack on Serbian forces by NATO acting for the United Nations.<sup>4</sup> In a television news interview after the prisoner of war declaration, Radovan Karadzic, the apparent leader of the Bosnian Serbs, initially characterized the captives as "hostages," then corrected himself and called them "war prisoners." Does their status, whether prisoners of war or hostages, really affect their right to be treated in accordance with the requirements of international law? No. The law quoted above is clear. If civilians (as the United Nations seems to believe), the war crime was complete when they were taken. If prisoners of war (as the ICRC and, at the time, the Serbian captors seemed to believe), war crimes were committed while they were held.

While the conflicts in the Former Yugoslavia could be used as a comprehensive training package in how to commit war crimes,<sup>5</sup> the action of the Serbs in seizing and deliberately endangering the detained United Nations personnel may be the most visible example of an ongoing war crime in history. What sets this particular war crime apart is its blatant criminality. Usually a belligerent accused of committing a war crime will either deny that a crime has occurred or raise an arguable defense (e.g., combat conditions justified the act under the theory of military necessity). The hostage takers here have not even bothered to make a claim that taking the hostages was lawful. And, if the captives are considered to be prisoners of war, there are a myriad of requirements for their treatment. The Serbs have complied with none of them.

Today, unlike a soldier, the kidnaper or terrorist will more likely prefer the hostage-taking tactic.<sup>6</sup> The taking of hostages is an illegal act. In one of the most damning photographs to come out of the United Nations hostage-taking incident, a menacing Serb soldier is shown "guarding" a captive who is handcuffed to a building. The guard wears a ski mask to hide his identity. That is strong evidence that even the Serbs recognize that they have crossed the line from a

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<sup>4</sup>*Id.*

<sup>5</sup>War crimes have occurred on all sides of the conflict. "All sides in the Bosnian war hold civilians for subsequent exchanges for combatants captured by an opposing party." HELSINKI WATCH, WAR CRIMES IN BOSNIA-HERCEGOVINA 12 (1992). "Prisoners are routinely beaten and otherwise tortured. Serbian forces also have used prisoners as human shields to ward off attack by Muslim and Croatian forces." *Id.*

<sup>6</sup>Interestingly, in press reports of kidnappings for money, the captive is usually referred to as a "victim." When the captive is illegally taken for political reasons or during a war he is usually referred to as a "hostage." The word "victim" originally denoted a person or an animal killed as a sacrifice. "Hostage" originally denoted someone held as a pledge or security for a promise. The word hostage is etymologically unrelated to the English word "host." JOHN AYTO, DICTIONARY OF WORD ORIGINS (1990).

lawful act of war to a war crime. Lawful soldiers in lawful combat rarely have reason to hide their identity from the world.

It makes no difference that the Bosnian Serb leadership has since released all the captives unharmed. War crimes have occurred. The shorter the time hostages are held, or prisoners of war are mistreated, the better, however, quick release is only a factor to be considered in mitigation—it is not a defense. The world cannot simply sit idly by and permit such craven lawlessness. There must be some consequence. Accepting that the conflict in the Former Yugoslavia is now fully covered by the law of war,<sup>7</sup> this article will review the historical practice relating to wartime hostages and their treatment, examine the modern law regarding hostages, and explore the criminal liability of those responsible for committing this war crime.

## II. Definitions

### A. *True Hostages*

In the past, the giving and receiving of hostages was an accepted part of warfare. Hostages often were held as surety that the other side in a conflict would comply with its obligations, either as set out in a particular ad hoc agreement or as part of a larger rule of the law of war. One party might demand that hostages be produced as evidence of the other party's good faith. The hostages provided were living proof of one party's bona fides. They were often of high social status, usually well treated, and, on fulfillment of the agreed conditions, released. While held, they often were given free run of the community. However, if the terms of the agreement were violated, or if war broke out, the hostages were to be treated as prisoners of war. That a hostage escaped with the connivance of his government was

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<sup>7</sup>Early in the fighting the status of the conflict was debated. Was it a civil (internal) war? If so, it would be governed by common Article 3 of the Geneva Conventions which applies to internal conflicts. If it were an internal conflict, the right of the United Nations to get involved would be suspect. *But see* Theodor Meron, *The Authority to Make Treaties in the Late Middle Ages*, 89 A.J.I.L. 1, 7-11 (1995). The escalation of the fighting and the involvement of Croatia and Serbia clearly support the position that the full law of war now applies. *See generally* Jordan J. Paust, *Applicability of International Criminal Law to Events in the Former Yugoslavia*, 9 AM. U. J. INT'L L. & POL'Y 499 (1994). The United Nations War Crimes Commission also has determined that "the conflicts (sic) in Yugoslavia are international and thus that all the laws of war, including, of course, the rules governing war crimes, are applicable." Theodor Meron, *War Crimes in Yugoslavia and the Development of International Law*, 88 A.J.I.L. 78 (1994). However, common Article 3 prohibits the taking of hostages even in noninternational or internal conflict. The prohibitions listed in common Article 3 are the most basic of humanitarian safeguards. Thus, even if the war is considered to be an internal conflict, the taking of hostages is prohibited by the law of war.

just cause for war. If the hostage acted alone or without the authority of his government in escaping, then he was subject to punishment if captured.<sup>8</sup>

In addition to surety hostages, the Romans sometimes took hostages to ensure that the inhabitants of occupied territory refrained from attacks on the occupation troops. The Romans recognized that for the hostage taking to have the desired preventive effect, the persons held must have had some personal relationship to the inhabitants responsible for the attacks. For this reason, hostages usually would be taken only from the immediate vicinity of the area in which the attacks occurred.

By the Middle Ages, captives had a monetary value and the practice of holding prisoners for ransom became firmly established. While the ransom system usually applied to prisoners of war captured in combat, hostages continued to be held as living performance bonds for promises made. In France in 1360, the Treaty of Brétigny addressed the ransom of the French King and the settlement of English claims to French lands. To ensure compliance with the treaty's terms, forty French hostages were furnished to the English.<sup>9</sup>

This practice continued for several centuries. In 1764, the treaty between the British and the Seneca Indians provided that three Indian Chiefs were to be held by the British and released "on due performance of these articles."<sup>10</sup> Hostages held pursuant to such formal agreements were entitled to be well treated and often were involved in the activities of the high society of the captor. Little was to be gained by the deliberate mistreatment of hostages because they were held only as surety for a promise. Mistreatment simply might lead the other side to void the agreement. However, the practice of providing for the delivery, custody, and release of hostages in a formal agreement has been abandoned. The modern practice is to provide for the temporary transfer of control of territory as a guarantee of compliance with the terms of a treaty.<sup>11</sup>

Sometimes hostages were held as security for requisition demands and the payment of contributions. The hostages would be

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<sup>8</sup>For the treatment of hostages by the Greeks and Romans, see 1 COLEMAN PHILLIPSON, *THE INTERNATIONAL LAW AND CUSTOM OF ANCIENT GREECE AND ROME* 398-406 (1911).

<sup>9</sup>The hostages were released as the ransom amount was paid. Some stayed in England for ten years. The incident is discussed in BARBARA W. TUCHMAN, *A Distant Mirror* 189-203 (1978). The Treaty also is discussed in Meron, *supra* note 7, at 7-11.

<sup>10</sup>Ellen Hammer & Marina Salvin, *The Taking of Hostages in Theory and Practice*, 8 A.J.I.L. 20, 21 (1944).

<sup>11</sup>In the Franco-Prussian Treaty of 1870, the Germans continued to hold parts of France that Germany had occupied during the war. Germany released portions as France made the treaty-imposed indemnity payments. *Id.* at 21-22 & n.11.

held until the governing body of an area was able to raise enough funds to pay the demand.<sup>12</sup>

During the Civil War, in General Order 100, the Union forces attempted to set out the prevailing rules of the law of war. Articles 54 and 55 concerned hostages:

54. A hostage is a person accepted as a pledge for the fulfillment of an agreement concluded between belligerents during the war, or in consequence of a war. Hostages are rare in the present age.

55. If a hostage is accepted, he is treated like a prisoner of war, according to rank and condition, as circumstances may admit.<sup>13</sup>

The wording of the two articles reflects the prior practice. The hostage was "accepted," not taken. The rationale for holding the hostage was the "pledge" made by one belligerent to the other in "fulfillment of an agreement." In short, where hostages were held it was because both sides consented. Under these circumstances it is not surprising that the hostage was to be treated as a prisoner of war.

### *B. Indirect Hostages*

Although the practice of "accepting" hostages had become rare even by the midnineteenth century, the practice of "taking" hostages to ensure the peaceableness of the population of an occupied territory continued through World War II. Napoleon took hostages during his Italian campaign to ensure the cooperation of the inhabitants. However, the penalty to be exacted should the inhabitants continue to threaten the French forces was deportation of the hostages to France.<sup>14</sup>

Despite the language of General Order 100, both Union and Confederate forces seized innocent civilian inhabitants of occupied territory in attempts to force the other side, or those loyal to it, to perform, or refrain from, particular acts. Hostages often were taken into custody and held until a person responsible for attacks on the occupying force was surrendered. For example, in November 1863, General Grant decreed that "[f]or every act of violence to the person of an unarmed Union citizen a secessionist will be arrested and held

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<sup>12</sup>GERHARD VON GLANN, *THE OCCUPATION OF ENEMY TERRITORY* 237 (1957).

<sup>13</sup>Series III, 3 OFFICIAL RECORDS OF THE UNION AND CONFEDERATE ARMIES 154 (1899).

<sup>14</sup>Editorial Comment, *The Execution of Hostages*, 36 A.J.I.L. 271-72 (1942).

as a *hostage* for the delivery of the offender."<sup>15</sup> These captives were not held because they provided some security for the performance of an agreement. They were held because having them in custody might have an indirect effect on the conduct of third parties, i.e., the members of the general population. The practice of holding such indirect or third party-hostages bears a strong resemblance to the Roman procedure. However, the requirement that the person held have some personal relation to those actually responsible for attacks on the military forces of the captor became less important. The advent of mass media meant that everyone in a particular area could be expected to know that when an allegedly illegal act threatened the security of the occupant innocent people might pay a price for it. In short, the relationship between the hostage and the alleged miscreant became increasingly indirect.

### *C. Prophylactic Hostages*

During the nineteenth century, another practice involving the seizure of innocent individuals developed. During the Civil War, trains often were the target of unauthorized combatants (most often called guerillas or partisans). To deter attacks on military trains, some commanders placed prominent local civilians on the locomotives as shields against such attacks. For example, in Alabama in 1862 the Union commander, General Rosseau, ordered that "preachers and leading men of the churches . . . be arrested and kept in custody, and that one of them be detailed each day and placed on board the train. . . ."<sup>16</sup> However, by the end of the nineteenth century, the practice of shielding military targets with innocent captives was roundly condemned. Lord Roberts, the British commander in the South African Boer War, had directed that innocent civilians be placed on trains to safeguard the trains against attacks.<sup>17</sup> Although this order was withdrawn after only eight days,<sup>18</sup> Roberts was

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<sup>15</sup>Quoted in WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* 797 (G.P.O. ed. 1920).

<sup>16</sup>*Id.* at 797 n.61.

<sup>17</sup>The order not only provided for prophylactic hostages, it delineated the consequences of attacks on the trains. In pertinent part it read:

3. As a further precautionary measure, the Director of Military Railways has been authorized to order that one or more of the residents, who will be selected by him from each district, shall from time to time personally accompany the trains while travelling (sic) through their district.

4. The houses and farms in the vicinity of the place where the damage is done will be destroyed, and the residents of the neighbourhood dealt with under martial law.

92 BRITISH AND FOREIGN STATE PAPERS 1899-1900, 1089 (1903).

<sup>18</sup>Only the portion permitting the Director of Railways to require local residents to ride the trains was withdrawn. The provision authorizing the destruction of houses and farms remained. *Id.* at 1091.

severely criticized in the House of Commons for the order. In language that the modern day military lawyer would surely appreciate, James Bryce deplored that Roberts "had no competent legal advisor with him who would have prevented him from issuing a proclamation so entirely at variance with the recognized authorities on war."<sup>19</sup> Despite these concerns, this practice persisted into the twentieth century as the Germans continued to shield military targets during the Franco-Prussian War and in both World Wars.

Furthermore, despite Bryce's condemnation of shielding and his call for competent legal advisors for commanders, it remained unclear whether the practice of taking and deploying hostages as human shields (to prevent unlawful attacks conducted by illegal combatants against legitimate targets) constituted a violation of the law. Essentially, where attacks against military objectives were conducted by illegal combatants, shielding was considered to reflect prior military practice; a legally permissible act. This view apparently was based on the idea that placing a hostage on a target that was subject only to attack by people acting unlawfully did not make the hostage taker directly responsible for the fate of the hostage. In other words, it was the illegal act of associates of the hostage which led to his precarious predicament, not the act of the occupant in placing him on the target. However, it generally was viewed as improper to shield a legitimate military objective from lawful attack by lawful combatants by placing noncombatants on or near it and, in effect, daring the other side to attack. The 1914 *British Manual on Military Law* demonstrates that this practice soon fell into a gray area of the law. In typical British understatement, the manual opined that the placing of civilians on legitimate military objectives (such as trains) would necessarily expose the hostages to both lawful and unlawful attacks and "cannot be considered a commendable practice."<sup>20</sup>

Nonetheless, the practice of shielding military targets with hostages continued. Saddam Hussein held many Americans as "human shields" in 1990 prior to the start of the Gulf War. (Even Saddam Hussein did not refer to them as hostages but as "guests."<sup>21</sup>) Those held in occupied Kuwait were "protected persons" under the Civilians Convention. Those held in Iraq were not protected by the Civilians Convention so long as the United States main-

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<sup>19</sup>Hammer & Salvin, *supra* note 10, at 23.

<sup>20</sup>BRITISH WAR OFFICE, *MANUAL OF MILITARY LAW* ¶ 463 (1914) [hereinafter *BRITISH MANUAL ON MILITARY LAW*].

<sup>21</sup>Adam Fresco, "Guests" Go Before the Camera with Messages, *THE TIMES*, Aug. 28, 1990, available in LEXIS, News Library, Archive News File.

tained diplomatic relations with Iraq.<sup>22</sup> Had Saddam Hussein continued to hold his Iraqi "guests" after the start of hostilities, whether as hostages or as human shields, this action would have violated the law of war.

#### *D. Reprisal Prisoners*

Placing hostages on military targets was intended to protect the target from attack, whether by lawful or unlawful combatants. But, suppose the attacks occurred anyway. Could the hostages be taken and shot by the captors as a reprisal? There is a recognized right to take action as a reprisal for a prior illegal act of the opposing belligerent.<sup>23</sup> Even if the acceptance of hostages as such was falling into disfavor in the nineteenth century, taking innocent persons hostage pursuant to the law of reprisal still flourished and these persons often were referred to as "reprisal prisoners."<sup>24</sup> The usual explanation for the difference in terminology between "reprisal prisoners" and indirect hostages is that reprisal prisoners are taken after, and in response to, an allegedly illegal act of the other side.

An example is again found in the Civil War. In May 1861, the Confederate government commissioned the ship *Savannah* as a privateer. The *Savannah* was empowered by the Confederacy to prey on northern merchant shipping. In June 1861, the ship was captured and its crew brought to New York. After an indictment, the crew was charged with piracy—a crime for which the sentence might be death—and tried in federal court in New York City. Confederate President Jefferson Davis responded to the threat of trial with a directive that a like number of Union prisoners of war, recently captured at the Battle of First Manassas, be selected by lot for treatment similar to that meted out to the *Savannah's* crew. In a personal communication to the Union government, specifically President Lincoln, Davis set out his intentions:

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<sup>22</sup>The Civilians Convention applies in all "cases of partial or complete occupation." See GC, *supra* note 1, art. 2. However, the Convention excludes from its coverage "nationals of a neutral State who find themselves in the territory of a belligerent State . . . while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are." *Id.* art. 4. At the time that the Americans were being held in Iraq, the United States was a "neutral" State. See generally Theodor Meron, *Prisoners of War, Civilians and Diplomats in the Gulf Crisis*, 85 A.J.I.L. 104 (1991).

<sup>23</sup>Reprisals remain an accepted part of the law of war. However, there are limits on those against whom a reprisal action might be taken. See DEP'T OF ARMY, FIELD MANUAL 27-10, LAW OF LAND WARFARE, para. 497 (July 1956) [hereinafter FM 27-10].

<sup>24</sup>In World War II, German general orders concerning such prisoners sometimes referred to these individuals as "expiatory prisoners." See *United States v. List*, 11 T.W.C. 759, 873 (1950) [hereinafter *Hostages Case*]. This series, entitled, "Trials of War Criminals," includes the official reports of the criminal trials of the second tier of the Nazi leadership conducted by the United States.



[I]f driven to the terrible necessity of retaliation, by your execution of any of the officers and crew of the *Savannah*, that retaliation will be extended so far as shall be requisite to secure the abandonment of a practice unknown in the warfare of civilized man, and so barbarous as to disgrace the nation which shall be guilty of inaugurating it.<sup>25</sup>

In short, privateering was a lawful means of warfare and to treat the crew as pirates rather than as prisoners of war violated international law. To stop the violation the South would respond in kind. "Self-protection and the enforcement of the laws of nations and of humanity alike required, in this instance at least, full and ample retaliation."<sup>26</sup> The status of those Union soldiers selected for execution would change from prisoner of war to "reprisal prisoner." Interestingly, the taking of reprisal prisoners in response to an illegal act by the enemy was one of the accepted means of enforcing compliance with the law. The jury acquitted the crewmembers and the incident was defused. Today, the law of war prohibits making prisoners of war the object of reprisals.

President Davis was responding to a specific act which was undertaken by the enemy state, not by unauthorized individuals loyal to that state. An example of a belligerent state reacting to attacks by members of the enemy population is found in German actions in World War I Belgium. After nighttime destruction of the railroad tracks (not the trains themselves) and telegraph lines by unknown persons (presumed to be members of the local civilian population) the German commander ordered that local civilians be seized and held as hostages. He then published a notice to the population:

In future, the localities nearest the place where similar acts take place will be punished without pity; *it matters little if they are accomplices or not*. For this purpose hostages have been taken from all localities near the railway line, thus menaced, and at the first attempt to destroy the railway line, or the telephone or telegraph line, they will be shot.<sup>27</sup>

While it might be possible to protect a train by placing innocent members of the local population on the train, this tactic does not work when the target of the damage is the tracks. Accordingly, the German commander threatened to execute innocent persons already in custody if further attacks occurred.

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<sup>25</sup>J. THOMAS SHARP, HISTORY OF THE CONFEDERATE STATES NAVY 76 (1977 ed.).

<sup>26</sup>*Id.* at 75

<sup>27</sup>ELLERY C. STOWALL & HENRY F. MUNRO, II INTERNATIONAL CASES, WAR AND NEUTRALITY 164 (1916).

The two types of hostages were beginning to meld. There always had been some prophylactic effect intended in publicly seizing, holding, and threatening hostages. There might be an even greater prophylactic effect when the innocent hostage was put in the position of being the first victim of his fellow countryman's actions. Real harm to the hostages (at least the ultimate harm, execution) at the hands of the captor would come only in response (reprisal) to the commission of a prohibited act by others who might logically be considered to be associates of the hostage.

By the turn of the century, there was established precedent for taking hostages as a reprisal for the illegal acts of other members of the population. Precedent also existed for taking hostages to ensure the general peaceable conduct of citizens in occupied territory. Furthermore, there was even some precedent for executing hostages as a reprisal for the illegal acts of others. Whether or not the opposing belligerent state had authorized, condoned, or encouraged the prerequisite illegal act did not seem to matter.

### III. Modern Hostages Law

#### *A. Hostages in Occupied Territory*

At the turn of the last century, there was a movement to codify the law of war. The effort culminated in two Hague Treaties, one in 1899<sup>28</sup> and one in 1907.<sup>29</sup> Both treaties established rules for the proper administration of occupied territory. Neither treaty specifically mentioned hostages. However, Article 50 of the 1907 Hague Regulations prohibited the imposition of collective punishment on the population of an occupied area. It could be argued that taking hostages in response to the illegal acts of a segment of the population was the "imposition of a collective punishment." During this time, the practice of taking and holding hostages became legally intertwined with the law of occupation. Yet, hostage taking also continued to be an important part of the general law of reprisals.

Where the taking, holding, and even the endangering, of hostages was predicated on prior illegal acts of partisans in an area governed by the law of occupation, it still was not clear that the hostage taker had violated the law. The civilian population of an area under occupation had no legal right to attack the occupying

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<sup>28</sup>Hague Convention No. II with Respect to the Laws and Customs of War on Land, July 29, 1899, 32 Stat. 1803, 1 Bevans 247.

<sup>29</sup>Hague Convention No. IV Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631 [hereinafter Hague Convention No. IV].

forces. The law of occupation presumes that the civilian population will refrain from harming the occupant. When an inhabitant of occupied territory commits an act harmful to the occupant or which interferes with the conduct of the occupation, the offense generally is known as "war treason."<sup>30</sup> The phrase is a recognition that there is a duty owed by the inhabitants of occupied territory to the occupant and a breach of that duty constitutes a special kind of crime, somewhat akin to the duty a citizen usually owes his own government, i.e., the displaced sovereign of the occupied territory. If members of the population desire to frustrate the occupant, they are obligated to organize themselves into military style commands. As a result, the application of the rules during an occupation can be quite situational. What was the legal status of the territory? What actions did the partisans or those responsible for the harm take to comply with the law? What was the relationship of the hostages seized to the attackers? The answers to these questions are key to establishing criminal liability.

### *B. The Hostages Case*

By World War II, the practice of providing and accepting hostages as surety for an agreement had left the battlefields. The German occupation of Europe was often resisted by a sizable percentage of the local population. Those responsible for much of the resistance generally were referred to as partisans. In response, the Germans sometimes took hostages. These hostages were held to put pressure on other inhabitants to comply with the security requirements of the occupation (indirect or third-party hostages); in short, to secure public order (at least the German concept of order). The Germans also used hostages to shield lawful military objectives,

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<sup>30</sup>*The British Manual* provides an extensive list of examples of war treason:

Many other acts, however, which may be attempted or accomplished in occupied territory, or within the enemy's lines by private individuals or by soldiers in disguise, are also classed as war treason, although perfectly legitimate if done by members of the armed forces. For instance, damage to railways, war material, telegraphs, or other means of communication, in the interests of the enemy; aid to enemy prisoners of war to escape; conspiracy against the armed forces or against members of them; intentionally misleading troops in the interest of the enemy, when acting as guide; voluntary assistance to the enemy to facilitate his operations, (for instance, by giving supplies and money and acting as guides); inducing soldiers to serve as spies, to desert, or to surrender; bribing soldiers in the interests of the enemy; damage or alteration to military notices and signposts in the interests of the enemy; fouling water supply and concealing animals, vehicles, supplies, and fuel in the interests of the enemy; knowingly aiding the advance or retirement of the enemy, circulating proclamations in the interests of the enemy.

BRITISH MANUAL ON MILITARY LAW, *supra* note 20, ¶ 445.

including trains, from partisan attacks (prophylactic hostages).<sup>31</sup> If attacks on German forces and equipment continued, then a specified number of those held might be executed in response (reprisal hostages).<sup>32</sup>

The legal questions concerning the ultimate fate of hostages were at the core of *United States v. Wilhelm List*,<sup>33</sup> one of the "subsequent proceedings" cases tried before a United States Military Commission. The issue was how far could the occupant go in its treatment of hostages. If taking and holding hostages as part of a reprisal was legal, was it also legal to kill the hostages as part of an escalated reprisal? List's actions were the subject of what became known as the "*Hostages Case*." The opinion in the case has been criticized. Nonetheless, it stands as the best explanation of the problems with the law as it existed before and during World War II.

List had been the German commander in Yugoslavia where partisan activity against the German forces was especially heavy. To rein in the partisans, hostages were taken. Tried along with List were other high-ranking German commanders who also were charged with responsibility for the killing of hostages in their areas of operations. Often a significant number of those taken hostage were executed in retaliation for German soldiers killed by partisans.

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<sup>31</sup>The use of hostages to immunize a military objective from attack has been called a "prophylactic reprisal." MORRIS GREENSPAN, *THE MODERN LAW OF LAND WARFARE* 417 (1959). The International Military Tribunal at Nuremberg was presented evidence on the German shielding practice in Belgium. A witness, Van der Essen, described the usual procedure:

When hostages were taken it was nearly always university professors, doctors, lawyers, men of letters, who were taken hostage and sent to escort military trains. At the time when the resistance was carrying out acts of sabotage to railways and blowing up trains, university professors . . . were taken and put in the first coach after the locomotive so that, if an explosion took place, they could not miss being killed. I know of a typical case which will show you it was not exactly a pleasure trip. Two professors of Liege, who were in a train of this kind, witnessed the following scene: The locomotive passed over the explosive. The coach in which they were, by an extraordinary chance, also went over it, and it was the second coach containing the German guards which blew up, so that all the German guards were killed.

*Trial Transcript, International Military Tribunal*, VI I.M.T. 540 (1947).

<sup>32</sup>The most notorious incident of killing innocent people for the death of a German occurred in the Czech village of Lidice. In retaliation for the assassination of Reinhard Heydrich, the Acting Protector of Bohemia and Moravia, in May 1942, every inhabitant of the village was either summarily shot or sent to concentration camps. In a farmer's field, 172 men and boys were machine gunned. The village was completely razed. WILLIAM L. SHIRER, *THE RISE AND FALL OF THE THIRD REICH* 992 (1960). In another incident, after explosives were discovered in the French village of Oradour-sur-Glane, the German commander ordered the village burned and its inhabitants shot. A postwar French court found that 642 people had perished in the carnage. *Id.* at 993.

<sup>33</sup>See *Hostages Case*, *supra* note 24, at 759, 873.

Thus, there were two hostage-related issues in the case. First, under what circumstances can hostages be taken and held? Second, when is it appropriate to kill hostages in retaliation for the acts of members of the civilian population?

The occupation of Yugoslavia presented special problems for the German forces. The terrain and institutionalized infighting among the various ethnic groups in Yugoslavia made finding and capturing the partisans difficult. The Germans resorted to taking hostages to pressure the locals into either ceasing the partisan activity or revealing information about the partisans. When attacks continued, the Germans began executing hostages in retaliation. A ratio of 100-1 was established, although whether such a high number were actually executed is uncertain. In response to a partisan attack at Topola, in which twenty-two German soldiers were killed, 449 persons were executed.<sup>34</sup>

The *List* court attempted to set out the law regarding hostages. The court acknowledged that many of the partisan attacks against the German forces were unlawful and, therefore, would justify a German measure in reprisal. The court's opinion drifted from the law regarding hostages to the law regarding reprisals. The court recognized that hostages were no longer "accepted" and that innocent persons held in modern war were more likely to be persons taken in reprisal for a previous unlawful act attributed to the other belligerent and directed against the occupying forces. The court established a working definition of the two classes of persons who might be held:

For the purposes of this opinion the term hostages will be considered as those persons of the civilian population who are taken into custody for the purpose of guaranteeing with their lives the future good conduct of the population of the community from which they were taken. The term "reprisal prisoners" will be considered as those individuals who are taken from the civilian population to be killed in retaliation for offenses committed by unknown persons within the occupied area.<sup>35</sup>

The court recognized that the inhabitants of occupied territory owe a duty to the occupant and must not harm the occupation forces. To help maintain the peace, the occupant must take certain precau-

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<sup>34</sup>*Id.* at 1267-68.

<sup>35</sup>*Id.* at 1249. Unfortunately, a personality conflict existed between the presiding judge, Charles F. Wennerstrum of Iowa, and the prosecution team. The judge attacked the prosecution and the overall fairness of the trials after he had concluded the case. In response, the Chief Prosecutor, Brigadier General Telford Taylor, described the judge's criticism as "wanton, reckless nonsense." JOHN ALAN APPLEMAN, *MILITARY TRIALS AND INTERNATIONAL CRIMES* 190-91 (1954). The feud is also discussed at 43 A.B.A.J. 310 (Apr. 1948).

tionary measures, such as posting regulations for the information of the population. Obviously, these regulations would forbid attacks directed against the occupying forces and provide for the punishment of those who commit such acts. The occupant also might require that the local inhabitants register with the authorities, avoid particular places, and comply with any established curfew. Only if these preliminary measures fail to curb the acts of violence can the occupant take and hold hostages. If hostages are taken, those selected should have some connection to the likely culprits responsible for the attacks. The names of those taken hostage should be published and a clear statement included that these persons will be punished if acts of war treason continue to occur. In short, the court recognized that there was a legal right to take hostages and that, if all the requirements were met, those people taken as hostages might be made to pay the ultimate price.<sup>36</sup>

The court then discussed "reprisal prisoners." These persons are taken hostage not only to deter future violent and illegal conduct, but, if necessary, to be available for punishment in response to any act of war treason committed by other members of the population. If the taking of hostages was lawful, then the legal question became one of their treatment and fate. The court found a right to execute hostages and unfortunately held, or seemed to hold, that "[h]ostages may be taken in order to guarantee the peaceful conduct of the population of occupied territories and when certain conditions exist and the necessary prerequisites have been taken, *they may, as a last resort, be shot.*"<sup>37</sup> The harshness of this statement simply invited criticism of the opinion.<sup>38</sup>

However, the court set out some procedural requirements that must be satisfied before taking the last resort. The court said that while it is permissible to execute persons as a reprisal for the acts of others, such an execution can only be carried out after a judicial inquiry into the facts and circumstances of the precedent illegal conduct or attack. The inquiry must confirm that all preliminary steps had been taken and that there has been "meticulous compliance with the foregoing safeguards against vindictive and whimsical orders of military commanders."<sup>39</sup> If the requisite meticulous compliance is established, then the judicial inquiry must consider the need for the execution. In other words, how successful would the execution of a particular hostage, or group of hostages, be in deterring future illegal activity? The inquiry also must examine the

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<sup>36</sup>*Id.* at 1249-50.

<sup>37</sup>*Id.* at 1249 (emphasis added).

<sup>38</sup>See Lord Wright, *The Killing of Hostages as War Crime*, 25 B.Y.I.L. 296 (1948).

<sup>39</sup>*Hostages Case*, *supra* note 24, at 1251.

extent to which the occupant had complied with its obligations regarding the civilian population, particularly the extent to which the civilian population had been warned of the consequences of continued illegal attacks on the occupation forces.<sup>40</sup> Again, the execution of hostages was always the last resort, permissible only when every other attempt to quell the disturbances had failed.

Perhaps it was the court's enunciation of procedural niceties, the completion of which would permit the execution of innocent persons for the offenses of others, that led to the condemnation of the court's opinion and reasoning. Yet, the court was correct in some respects. The taking of hostages, while increasingly rare, had not been outlawed by any treaty. And, throughout much of history, hostages had been taken in reprisal for illegal acts committed against occupation forces by people with no demonstrable connection to the hostages. But actually killing the hostages "seems to have been originated by Germany in modern times. . . . No other nation has resorted to the killing of members of the civilian population to secure peace and order so far as our investigation has revealed . . ." <sup>41</sup> In spite of the uniqueness of the German practice, the court saw this history as strong, if not compelling, evidence that customary international law did not prohibit reprisal executions.<sup>42</sup>

Confusion was exacerbated by the court's attempt to differentiate between hostages and reprisal prisoners. As one official commentator noted:

It may be thought that, according to the stress placed by the Tribunal, such prisoners [reprisal prisoners] differ from hostages in that they are killed after, and not in anticipation of, offences on the part of the civilian population; but, in practice, the difference is not likely to be great, since reprisals are essentially steps taken to prevent future illegal acts, just as are the taking and killing of hostages according to the Tribunal's definition . . . . In fact, the only practical difference between "hostages" and "reprisal prisoners" seems to be that the former are taken into custody before, and the latter only after, the offenses as a result of which they are executed.<sup>43</sup>

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<sup>40</sup>As an example of such a warning, see *supra* text at note 27.

<sup>41</sup>*Hostages Case*, *supra* note 24, at 1251.

<sup>42</sup>The Charter of the Nuremberg Tribunal listed the killing of hostages as a war crime. The Hostages Tribunal apparently viewed this crime as not including a killing done as part of a reprisal.

<sup>43</sup>*United States v. List*, 8 L.R.T.W.C. 61, 79 (1949). The quote is from the compiler of this series, entitled, "Law Reports of the Trials of War Criminals," which contains summarized reports of many of the war crimes cases.

In other words, it is not when the prohibited acts of the partisans occur, but when an innocent person is made captive that determines his or her status as either a "hostage" or a "reprisal prisoner." In sum, the court found that the law of war permitted the taking of hostages and sanctioned their execution so long as certain conditions were met. Although the court was not pleased with the result, apparently it felt that it had to take the law as it was, and not as it would like it to be. Several of the defendants, including List, were convicted. None were sentenced to death. The court concluded, "That international agreement is badly needed in this field is self-evident."<sup>44</sup> The international community would soon demonstrate its concurrence with the court's sentiments.

In *United States v. Von Leeb*, also known as the *High Command Case*, a different tribunal commented on the Hostages Tribunal's reasoning:

It was held [by the Hostages Tribunal] further that similar drastic safeguards, restrictions, and judicial preconditions apply to so-called "reprisal prisoners." If so inhumane a measure as the killing of innocent persons for the offenses of others, even when drastically safeguarded and limited, is ever permissible under any theory of international law, killing without full compliance would be murder. If killing is not permissible under any circumstances, then a killing with full compliance with all mentioned prerequisites still would be murder.<sup>45</sup>

The *High Command* court's subtle criticism of the reasoning in *Hostages* reveals the unsettled nature of the law when hostages actually are killed. If the killing is done as part of a lawful reprisal, there was some support for its legality. However, despite its legality, it was not a desirable practice.

### C. *The Rauter Case*

In *List*, the defendants were tried before a United States Military Commission for crimes committed in Yugoslavia. Postwar courts in the Netherlands tried many Germans for crimes committed in the Netherlands, among them was General Hans Rauter, former German SS and Gestapo chief in occupied Holland. The facts of his case provided the perfect opportunity to further articulate the law related to killing hostages.

Along with other crimes, he was accused of having illegally ordered the execution of innocent civilians and, in doing so, "inten-

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<sup>44</sup>*Id.* at 63.

<sup>45</sup>11 T.W.C. 528 (1950).



tionally committed systematic terrorism against the Netherlands people."<sup>46</sup> His defense was that the executions were part of a lawful reprisal for the criminal acts of local partisans against German forces.

In response to acts of violence directed against the German forces, innocent Dutch citizens were taken hostage. In January 1944, Rauter informed the Dutch people that he had "arrested" fifty inhabitants of Leiden in response to an attack on a Reich official. Three of the fifty were killed while "trying to escape."<sup>47</sup> On several occasions he directed that ten Dutch civilians be shot for every German killed by partisans. In April 1944, after an attack against two Dutch Nazi sympathizers in the towns of Baverijk and Velsen, Rauter directed that 480 men be arrested. In publicly announcing the arrests, Rauter proclaimed:

The arrest of 480 young men . . . is a reprisal action with regard to Beverijk municipality, the intention being to prevent further attempts from being started. . . . For that reason it had to reach as wide a circle as possible, a great number of whom I am quite convinced are innocent. I have to stick to these measures because it must be made quite clear to all Dutch municipalities that in similar cases I shall answer in the same way, and it is only in this fashion that I can frighten the circle of those who act thus and who, at least outwardly, assert they are acting in the national interests.<sup>48</sup>

When this action failed to "frighten the circle" he began to publicly execute some persons previously seized and held as "*todeskandidaten*" (death candidates).<sup>49</sup> The Dutch trial court convicted him and sentenced him to death.<sup>50</sup> The case was reviewed on appeal.

Both courts recognized that the law on hostages and reprisals was unsettled. However, the Dutch courts' opinions contributed "to the gradual elimination of the existing uncertainty and difficulties."<sup>51</sup>

An initial question concerned the right of the Dutch people to resist the German occupation under the terms of the surrender of the Dutch military command to the Germans. The trial court found that the terms of the surrender did not preclude partisan activity.

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<sup>46</sup>*Trial of Hans Albin Rauter*, 14 L.R.T.W.C. 89 (1949) [hereinafter *Rauter*].

<sup>47</sup>*Id.* at 102.

<sup>48</sup>*Id.* at 103.

<sup>49</sup>*Id.* at 105.

<sup>50</sup>*Id.* at 107.

<sup>51</sup>*Id.* at 124.

Nor did the surrender automatically make all partisan activity illegal under either Dutch or international law. That the Dutch people could engage in partisan activity without violating the terms of the Dutch surrender did not mean, however, that the Germans could not punish those individuals who did so and were caught. The trial court distinguished between legitimate reprisal measures and actions that merely were retaliatory.

As the official reporter described the trial court's reasoning:

[T]he alleged reprisals were all unlawful and for this reason criminal . . . . [T]he accused never made attempts to apprehend the actual perpetrators of the offenses concerned, and killed hostages as a measure of revenge or intimidation . . . . [B]y killing several hostages at a time for the death of one member of the German authorities, he [Rauter] had committed excessive reprisals in violation of the rule requiring due proportion.<sup>52</sup>

The appellate court took a slightly different approach to the case. It likewise focused on the warlike acts of the partisans and the requirement that they be unlawful before the defense of reprisal could be successfully raised. The appellate court held that for an act to be a lawful reprisal it must be taken in response to an unlawful act of the opposing belligerent (i.e., the Dutch government), not in response to unlawful acts of individuals.<sup>53</sup> The acts charged against Rauter were taken "as retaliation not against unlawful acts of the state with which he is at war, but against hostile acts of the population of the [occupied] territory in question or of individual members thereof, which in accordance with the rights of occupation, he is not bound to tolerate."<sup>54</sup> Relying on Article 50 of the 1907 Hague Convention, the court held that taking action against members of the population in retaliation for the acts of other members of that population amounted to a collective penalty and was prohibited. Essentially, the court held that true reprisals could be taken only when the opposing state had committed a prior illegal act. Where the inhabitants of occupied territory commit illegal acts against the occupant, the occupant is entitled to punish those actually responsible, but not their innocent fellow countrymen. Rauter's death sentence was confirmed.<sup>55</sup>

Both cases illustrate the basic problem. How far may the occupant go in maintaining law and order in the area under his control?

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<sup>52</sup>*Id.* at 130.

<sup>53</sup>*Id.* at 132.

<sup>54</sup>DEPT OF STATE, 10 WHITEMAN DIG., § 10 *Conduct of Hostilities*, at 10.

<sup>55</sup>*Rauter*, *supra* note 46, at 89.

The *Hostages* court found no specific rule prohibiting, and some prior practice supporting, the execution of hostages as acts of reprisal. It then established procedural safeguards intended to place the population on notice that illegal activity would be punished, if necessary, by the execution of innocent inhabitants. The Dutch appellate court held that the prerequisite for a reprisal was illegal *state* action, or at least state-sanctioned action, by the opposing belligerent. Where no connection between the inhabitants of the occupied territory and an illegal act of the displaced sovereign could be shown, reprisals against innocent inhabitants were always illegal. It would take a specific provision of an international agreement to clarify the law.

#### IV. The 1949 Geneva Conventions

##### A. *The Civilians Convention*

The law of war paid little attention to civilians before the adoption of the 1949 Geneva Conventions. There were established rules which applied in periods of occupation, but very little protection existed for civilians outside of occupied territory. When the drafters met to revise the law of war after World War II it was clear that civilians needed greater protection. The result was a fourth Geneva Convention specifically concerning civilians.<sup>56</sup>

Article 34 of the Civilians Convention is categorical: "The taking of hostages is prohibited." The prohibition applies in both occupied territory and the territory of a belligerent. The official commentary to the Convention explains that the article concerns "the taking of hostages as a means of intimidating the population in order to weaken its spirit of resistance and to prevent breaches of the law and sabotage in order to ensure the security of the Detaining Power."<sup>57</sup> The commentary also states that the word "hostage must be understood in its widest possible sense."<sup>58</sup> The prohibition on the taking of hostages was phrased in the most absolute terms. The intent of the original Red Cross drafters was to enshrine in the Convention the principle of law that no one should pay with his or her freedom for the acts of another.

In case any doubt existed as to the impact of Article 34 on the law of reprisals, Article 33 prohibits the imposition of collective penalties and also specifically forbids taking reprisals against pro-

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<sup>56</sup>See GC, *supra* note 1.

<sup>57</sup>PICTET IV, *supra* note 3, at 230.

<sup>58</sup>*Id.*

tected persons. Thus, if the United Nations captives in Bosnia are considered to be civilians, to hold them hostage is a clear breach of the Geneva Civilians Convention. To hold them as some sort of reprisal prisoner is likewise a clear breach.<sup>59</sup>

Two other provisions of the Civilians Convention clearly address the treatment of the United Nations hostages (presuming, of course, that they are civilians and not prisoners of war). Article 28 provides that the "presence of a protected person may not be used to render certain points or areas immune from military operations." Note that this article is actually addressed to the captor, not the attacker. In essence, the article states that no military advantage will be gained by placing "protected" persons near military objectives. Therefore, it is assumed that because the target will not gain any immunity by the presence of protected persons, no reason exists to place a protected person near it.

Article 83 of the Civilians Convention provides that the "Detaining Power shall not set up places of internment in an area particularly exposed to the dangers of war." The Commentary to the provision states that the intent was to have "internees . . . treated . . . by analogy with the prisoners of war."<sup>60</sup> Wartime internment (the process of holding civilians in camps) of enemy civilians is a severe measure regulated by extensive provisions of the Civilians Convention.<sup>61</sup> When addressing the war in Bosnia, the legal relationship of the hostages to the Serb captors is crucial in determining whether this provision applies. For it to apply, the hostages must be considered to be both civilians *and* enemies of the Serbs. Regardless of how one characterizes the hostages, the prohibition on exposing them to the "dangers of war" is certainly broad enough to prohibit their being chained to likely targets. There is no evidence that the Serbs made the slightest attempt to comply with the safeguards established in the Convention for the treatment of internees.

### *B. The Prisoner of War Convention*

The Prisoner of War Convention also is relevant. The Serbs are in no better position if the captives are considered to be prisoners of war. But are they prisoners of war? Generally, prisoners of war are

<sup>59</sup>The United States Army manual on the law of war sets out the current rules for American soldiers in a paragraph dealing with reprisals: "The taking of hostages is forbidden (GC, art. 34). The taking of prisoners by way of reprisal for acts previously committed (so-called "reprisal prisoners") is likewise forbidden." FM 27-10, *supra* note 23, para. 497g.

<sup>60</sup>PICTET, *supra* note 3, at 382.

<sup>61</sup>Articles 79-135 of the Civilians Convention, or about one-third of the Convention, covers internment of civilians. The "regulations applicable to civilians reproduce almost word for word the regulations relating to prisoners of war." *Id.* at 370.

persons belonging to the armed forces "who have fallen into the power of the enemy."<sup>62</sup> If the capturing power decrees that persons held by it are prisoners of war, there is no logical reason for the state of which those persons are nationals to reject the characterization. Nor should the United Nations question the designation. The Prisoner of War Convention provides much more extensive protections to captives than does the Civilians Convention.

If they are considered prisoners of war, then they obviously can be held. But their captivity must meet all the requirements of the Prisoner of War Convention. Article 23 of the Convention prohibits detaining a prisoner of war in an area where he might be exposed to the "fire of the combat zone." Like the Civilians Convention, Article 23 also provides that the presence of a prisoner of war may not be used to "render certain points or areas immune from military operations." The prohibition on exposing the prisoner of war to fire in the combat zone is intended to ensure that prisoners of war are evacuated from the front as soon as possible and that they are not then held near military objectives.<sup>63</sup> Again, the place to which they are evacuated, if it is an otherwise valid military objective, can not be rendered immune from attack by their presence. Accordingly, there is no reason to place prisoners of war near military objectives. Although the United Nations forces understandably may be reluctant to attack a target where their compatriots are being held, the advantage gained by the Serbs is at best merely tactical and most assuredly remains illegal and impolitic.

The expected response of a war criminal charged with using prisoners of war to shield a target is that the act was required by "military necessity." That a tactical advantage might have been gained by the prohibited act is no defense to a charge of violating unambiguous and nondebtable rules of the law of war. The United States Army manual on the law of war explains, "Military necessity has been generally rejected as a defense for acts forbidden by the customary and conventional laws of war inasmuch as the latter have been developed and framed with consideration for the concept of military necessity."<sup>64</sup> The Bosnian Serbs have made no effort to meet

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<sup>62</sup>GPW, *supra* note 2, art. 4.

<sup>63</sup>JEAN S. PICTET, COMMENTARY III 171 (1960).

<sup>64</sup>FM 27-10, *supra* note 23, para. 3. See also *In re Burghoff* in ANNUAL DIGEST OF PUBLIC INTERNATIONAL LAW YEAR 1949, Case 195 (H. Lauterpacht, ed., London 1955). Burghoff was convicted of shooting a number of Dutch citizens without trial as part of an illegal reprisal. He raised the defense of military necessity. The Dutch appellate court addressed the defense of military necessity as follows:

This vain effort to defend crimes stems from the proposition only too often put forward by belligerents, particularly Germany, that military necessity is sufficient justification for offenses against the laws of war. This proposition is directly contrary to the principles of the laws of war,

their obligations under the Prisoner of War Convention and could not successfully plead military necessity as a defense to a charge of endangering the captives.

### *C. The 1977 Protocols*

The 1977 Protocols to the Geneva Conventions,<sup>65</sup> while perhaps not directly binding on the parties to the conflict, nevertheless provide useful background information on the subject.<sup>66</sup> Article 44 of Protocol I provides that any "combatant . . . who falls into the power of an adverse Party shall be a prisoner of war." Because combatants generally include all members of the armed forces of a party to the conflict, the members of the national armed forces made available to the United Nations, if not considered to be civilians *vis-a-vis* the Serbs, would be considered combatants. The Protocol provision does not refer to an "enemy," but simply an "adverse Party." Even if the Serbs, through some distortion of a common sense definition, are not characterized as the "enemy" of the United Nations peacekeepers, they most assuredly have made themselves an adverse party (especially by their actions in taking and endangering the lives of the captives). Article 45 of the Protocol provides that should there be any doubt as to the status of a person who "falls into the power of an adverse Party he shall be presumed to be a prisoner of war." The Protocols would, therefore, clearly tip the scale in favor of prisoner of war status for the hostages held by the Serbs.

However, Protocol I also provides some guidance should the captives be considered civilians. The 1949 Conventions did not squarely address the problem. Article 51 of the Protocol addresses the protection of the civilian population and their use as prophylactic prisoners:

The presence or movements of the civilian population shall not be used to render certain points or areas

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which are expressly directed to keeping military action within the bounds prescribed by those laws and to delimit the spheres in which an appeal to military necessity may be allowed.

*Id.* at 551-52.

<sup>65</sup>1977 Protocols to the 1949 Geneva Conventions, reprinted in DEP'T OF ARMY, PAMPHLET 27-1-1, PROTOCOLS TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 (Sept. 1979) [hereinafter PROTOCOL I]. The United States is not a Party to the Protocols. Nonetheless, many of the provisions reflect customary international law.

<sup>66</sup>For purposes of the International Tribunal's jurisdiction, but not for the purpose of setting out principles of customary international law, Protocol I is relevant, at least according to the United States Ambassador to the United Nations. Ambassador Albright said, "it is understood that the laws and customs of war referred to [in the Statute for the Tribunal] include all obligations under humanitarian law agreements in force in the territory of the former Yugoslavia at the time the acts were committed, including . . . the 1977 Protocols Additional to these Conventions." Quoted in Meron, *supra* note 7, at 80.

immune from military operations, in particular in attempts to shield military objectives from attacks or to shield, favour or impede military operations. The Parties to the conflict shall not direct the movement of the civilian population or individual civilians in order to attempt to shield military objectives from attacks or to shield military operations.<sup>67</sup>

In sum, it really does not matter how the United Nations personnel are characterized.<sup>68</sup> Whether they are considered to be civilian noncombatants or prisoners of war, there have been violations of the law.

## V. Criminal Liability

The Geneva Conventions make distinctions between "grave" breaches of the Conventions and lesser violations. Where a grave breach of the Conventions has occurred, every party is obligated to "search for persons alleged to have committed . . . grave breaches, and shall bring such persons, regardless of their nationality, before its own courts."<sup>69</sup> A party also may choose to hand the suspect over to another party for trial. The sum of these obligations is usually referred to as a duty to "prosecute or extradite."<sup>70</sup> Grave breaches are universal jurisdiction crimes and, therefore, are subject to prosecution in every state. Where a lesser or simple breach is alleged, the primary duty is on the state of the offender to take such action as is necessary to suppress future violations.

The Civilians Convention lists the "taking of hostages" as one of its grave breaches.<sup>71</sup> Most, if not all, domestic penal codes prohibit the taking of hostages for any reason. The hostage taking that is prohibited—and made a grave breach of the Civilians Convention—includes the added element of a threat to either prolong the detention or put the hostage to death. In effect then, the taking, to be a

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<sup>67</sup>PROTOCOL I, *supra* note 65, art. 51, ¶ 7.

<sup>68</sup>There also is a draft treaty concerning United Nations personnel. See Convention on the Safety of United Nations and Associated Personnel *reprinted in* 34 I.L.M. 484 (Mar. 1995). This treaty prohibits the "intentional commission of . . . kidnapping or other such attack upon the person or liberty of any United Nations or associated personnel." *Id.* art. 9(1)(a). Each state party is obligated to make the commission of any of the prohibited acts a crime under its national law "punishable by appropriate penalties which shall take into account their grave nature." *Id.* art. 9(2). Article 14 creates a prosecute or extradite obligation. However, the treaty is not yet in force.

<sup>69</sup>See *e.g.*, GC, *supra* note 1, art. 129.

<sup>70</sup>See generally A.R. Carnegie, *Jurisdiction over Violations of the Laws and Customs of War*, 39 BRIT. Y.B.I L. 402 (1963).

<sup>71</sup>GC, *supra* note 1, art. 147.

grave breach, must be more than the domestic law tort of wrongful imprisonment. The commentary explains why: "[T]he fact of taking hostages, by its arbitrary character, especially when accompanied by a threat of death, is in itself a very serious crime; it causes in the hostage and among his family a mortal anguish which nothing can justify."<sup>72</sup> Conceiving of a hostage situation which does not include the threat to either hold the hostage for a prolonged period of time or to kill that hostage is difficult. In any event, if the Serb hostage takers did not intend to prolong detention or put the hostages to death, they can try to raise their lack of intent to threaten or harm the hostages as a defense in court.

The Prisoner of War Convention also includes a list of grave breaches.<sup>73</sup> Although the taking of hostages is not a grave breach of the Prisoner of War Convention (because captives covered by this Convention are properly held), this Convention declares "inhuman treatment" and "willfully causing great suffering" to prisoners of war to be grave breaches. Chaining a person to a likely target is surely "inhuman treatment." The woeful countenance on each prisoner's face demonstrates that they were caused "great suffering."

Article 13 of the Convention requires that "Prisoners of War must at all times be humanely treated." Article 13 adds definition to the concept of inhuman treatment and prohibits "any act or omission causing death or seriously endangering the health of a prisoner of war . . . ."<sup>74</sup> Undoubtedly, chaining a prisoner of war to a valid military objective, which might at any time be attacked, clearly endangers the health of the prisoner. Article 13 also provides that endangering the health of a prisoner of war "will be regarded as a serious breach of the present Convention."<sup>75</sup>

What does all this mean? The Serbs have committed grave breaches of the Geneva Conventions by taking and endangering the United Nations personnel and every state party to the Conventions is obligated to take action to "prosecute or extradite" those responsible for the breaches. In language common to each of the Conventions a "High Contracting Party" is required to "search for persons alleged to have committed . . . grave breaches . . . and . . . bring such persons, regardless of their nationality before its own courts."<sup>76</sup> The broad language of the obligation ("search for," "alleged," "bring")

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<sup>72</sup>PICTET IV, *supra* note 3, at 600-01.

<sup>73</sup>GPW, *supra* note 2, art. 130.

<sup>74</sup>*Id.* art. 13.

<sup>75</sup>In Article 13, the word "serious" is used rather than "grave." The equally authentic French text uses the word "grave" in both articles. No distinction is intended. HOWARD S. LEVIE, PRISONERS OF WAR IN INTERNATIONAL ARMED CONFLICT 352 (1979).

<sup>76</sup>*See* GC, *supra* note 1, art. 146.



refutes any suggestion that the "prosecute or extradite" obligation is limited to the trial of a defendant actually in custody. Preparing appropriate indictments is clearly part of prosecution action and is a precursor to bringing the defendant before the courts. States which do not take steps to prosecute or extradite are themselves violating the Geneva Conventions. There is no room in the law related to grave breaches for political considerations.

## VI. Enforcing the Law

The conflict in the Former Yugoslavia is a military, legal, and political quagmire. Yet, in that quagmire we can find at least one point of firm terrain—the law of war. Violations of the law of war have occurred on all sides of the conflict. But, regarding the hostage-taking incident, only the Serbs are responsible. There is no doubt as to the law or as to its violation by the Serbs. To simply take a "let bygones be bygones" approach to law enforcement in the hope of reaching some sort of peace settlement would be a tragic mistake. Yet, unfortunately, this is all too often suggested as part of, if not key to, any proposed "diplomatic solution." If the Serbs will negotiate only after an assurance of immunity from prosecution, why not give them the immunity? The answer is that any agreement containing such a provision is unlikely to stand for long. Further, there would be no way to immunize the Serbs from enforcement action taken by countries which had no part in the agreement, but which take their obligations under the Geneva Conventions seriously and are prepared to enforce them. If Serbian war criminals cannot be given total, universal, and absolute immunity—an apparent impossibility—then why make immunity a key to "peace?" But, there is a larger issue. If recognized war criminals are able to negotiate away their crimes, then much of the *raison d'être* for the law of war is negated. Such blatant contempt for the law must have a consequence.

Of course, the initial goal when a belligerent commits a war crime is to force that belligerent to stop. As this is written, the Serbs apparently have released the hostages, so one might be tempted to accept the argument that because the war crime has ceased, there is nothing left to be done. Unfortunately, this is absolutely wrong. When a kidnaper releases his victim, society does not simply walk away and take no action against the kidnaper. Although the release of the victim always remains the primary goal, accomplishing that goal does not wipe the slate clean. The kidnaper must pay a price for his actions. Why should any less be demanded, or expected, of the

wartime hostage-taker?

One clearly permissible consequence is simply to conduct a reprisal operation. The action of the Serbs is clearly illegal. A follow up, and strengthened, air raid to punish them, and, thereby, prevent such crimes in the future, would be a most appropriate reprisal action. In this author's opinion, the reprisal action should be accompanied by a clear and unequivocal statement that the reprisal attack is occasioned solely by the prior illegal act of the Serbs in taking the hostages and, if further violations of the law occur, so too will further reprisal actions. While such action might again endanger the peacekeepers or simply invite counter-reprisals by the Serbs, these possibilities should not automatically be a bar to military action. The Serbs must be made to believe, or at least worry, that there might be a heavy price to pay for their continued violations of the law of war. Sometimes, we need to quit speaking softly, or even loudly, and use the "big stick."<sup>77</sup>

It might also help to constantly remind the Bosnian Serbs that the protection of human rights is a fundamental aim of the international community. If the Serbs intend to fight a war, they must do so in compliance with the law that regulates war. Nothing prohibits the international community from getting more involved in the conflict to protect the human rights of noncombatants. The world is appalled at the actions of the Bosnian Serbs. They have chosen to conduct the Bosnian war using methods not seen since those same methods were condemned during and after World War II. If the prosecution of war criminals was an Allied war aim in World War II,<sup>78</sup> how can the world sit by and allow a reversion to pre-World War II atrocities to go unpunished today?

Every press release or news conference concerning the war in Bosnia should include a statement that the world expects some action on the part of the Serbs directed at punishing those who have publicly exhibited such contempt for law. Further, every diplomatic utterance should include a demand for trial and a reminder that the nations of the world intend to take whatever action is required to

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<sup>77</sup>The "big stick" quotation is attributed to President Theodore Roosevelt. There was a somewhat analogous event to the hostage taking in Bosnia during his presidency. In 1904, an American, Ion Perdicaris, was taken hostage by a Moroccan bandit named Raisuli. Raisuli intended to hold Perdicaris until the Moroccan government agreed to his demands. Roosevelt sent a message to the Moroccan government outlining two options: "Perdicaris alive or Raisuli dead!" Perdicaris was released, but only after the Moroccan government paid a ransom to Raisuli. But, suppose a message were sent to the Bosnian Serbs along the lines of "The peacekeepers free or Karadzic dead!" Such a message certainly would serve as an "attention getter" and would be so out of character with the normal diplomatic language that one might reasonably expect results, and quickly.

<sup>78</sup>See *The Moscow Declaration*, reprinted in 38 A.J.I.L. 7 (Supp. 1944).

place those responsible for this outrage in the defendant's dock.

Karadzic's public approval of the taking of the hostages and his approval of their mistreatment is a prosecutor's dream. It is now impossible for him to claim a lack of knowledge or disapproval of the hostage taking. If there was ever any doubt as to the propriety of making him an international bandit, that doubt has been removed by his actions. But, in addition to providing the fact finder with videotaped evidence of his individual criminal responsibility, he also has made any criminal defense by his subordinates very difficult. His characterization of the captives as "war prisoners" clearly placed all Serbian military subordinates on notice as to their officially recognized status. When the captives were declared to be prisoners of war, any question as to the standard for their treatment and their coverage by the Prisoner of War Convention was removed. From that moment on, his subordinates were on actual notice that the captives were considered by their leadership to be prisoners of war and their treatment governed by the Prisoner of War Convention. And, as is the case with all criminal law, even Bosnian Serb "soldiers" are presumed to have knowledge of the law.

War crimes have occurred on all sides of the war in Bosnia. The usual explanation/defense/excuse for one side's violations of the law of war is that the other side has done exactly the same thing. This is the equitable doctrine of *tu quoque* or "thou also." <sup>79</sup> The essence of this doctrine is "If I did it, you did it too! And, therefore, who are you to pass judgment on me?" Even though it is not a legal defense to a war crimes charge, it is the type of argument that can make war crimes trials appear to be driven more by politics than law. But, in seizing United Nations personnel and holding them as hostages, this plea simply is not available. United Nations forces never held Bosnian Serbs hostage.

What should be done? First, every former hostage should be interviewed regarding the circumstances of his capture and the conditions of his imprisonment. Statements should be taken for use in any criminal trial. The identity of the commanders who carried out the seizure as well as the identity of those who served as guards should be established. The evidence needs to be collected quickly and preserved.

As soon as possible, those states whose nationals have been held and abused should prepare indictments against the Serbian captors, identified by the foreign equivalents of "Jane Does" and "Richard Roes" if necessary. But, most importantly, all those identified members of the Serbian leadership who have publicly embraced

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<sup>79</sup>See HOWARD S. LEVIE, *TERRORISM AT WAR* 521-25 (1993).

the hostage taking should be named in the indictments. All those who actually participated in the taking, mistreating, and endangering of the captives also should be promptly indicted.

Obviously, an indictment based on the hostage taking should also be prepared by the Prosecutor's office at the Special Tribunal established by the United Nations to hear war crimes cases arising in the conflict.<sup>80</sup> Furthermore, other countries throughout the world—and especially the United States—should make clear that they also are prepared and willing to aid in the capture and prosecution of war criminals. As the world's only superpower, the United States has the ability to truly be a "bully pulpit" from which to make, and enforce, a demand for justice. As a practical matter, the United States is now in a position to condition foreign aid, governmental recognition, and a host of other favorable actions on virtually any lawful goal it wants to establish. One of those goals should be the termination of all support for countries that engage in war crimes or which take no action to punish war criminals.<sup>81</sup> If necessary, the United States should stand ready to prosecute war criminals in its courts, basing its jurisdiction on the universality principle. The United States should review the available forums in which such a trial might take place, including the possibility of bringing war criminals to trial before general courts-martial and military commissions.<sup>82</sup> Both military forums have statutory jurisdiction to try "any person" for a violation of the law of war.<sup>83</sup>

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<sup>80</sup>The Tribunal was established on May 25, 1993 by the United Nations Security Council pursuant to its Chapter VII authority as outlined in the United Nations Charter. See generally James C. O'Brien, *The International Tribunal for Violations of International Humanitarian Law in the Former Yugoslavia*, 87 A.J.I.L. 639 (1993).

<sup>81</sup>The debate over the establishment of diplomatic relations with Vietnam has focused on the prisoner of war/missing in action issue. Apparently, there has been no demand by the United States that Vietnam demonstrate its compliance with its obligations under the Geneva Conventions to punish Vietnamese soldiers who tortured American prisoners of war held in North Vietnam. In this author's opinion this is a grievous mistake. Compliance with the fundamental precepts of international law should be a prerequisite to membership in the community of nations. The same mistake should not be made if and when the issue of establishing formal diplomatic relations arises regarding the Bosnian Serbs.

<sup>82</sup>Robinson O. Everett & Scott L. Silliman, *Forums for Punishing Offenses Against the Law of Nations*, 29 WAKE FOREST L. REV., 509, 519 (1994). "Very little attention has been paid in recent years to the possibility of using American military tribunals to enforce the law of war. Such a use, however, appears to be a permissible option supported by precedent."

<sup>83</sup>"General Courts-martial also have jurisdiction to try any person who by the law of war is subject to trial by a military tribunal and may adjudge any punishment permitted by the law of war." 10 U.S.C. § 818. "The provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions, provost courts, or other military tribunals of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions, provost courts, or other military tribunals." *Id.* § 821.

The chain of command of the Serbian military forces is known. The Hague Prosecutor's Office already has indicted the Bosnian Serb Army commander, General Ratko Mladic,<sup>84</sup> as a war criminal for previously committed crimes. But a commander also can be held criminally responsible for the actions of his subordinates. The commander's criminal liability extends at least to those cases where he knew, or should have known, of the offense and took no action to either prevent it or to stop it.<sup>85</sup> Given the publicity that the taking and holding of the hostages generated, it would be most unlikely for a Serbian commander to successfully plead a lack of knowledge. If any Serb commander made an effort to stop the offense and to punish those responsible, it has yet to be reported. Therefore, Serbian commanders, with either chain of command responsibility for the hostage takers or territorial responsibility for the areas in which they were held, should be indicted and given an opportunity to make their case in a judicial forum.

Once indictments are prepared, a complete international police effort should be mounted. No effort should be spared in bringing the suspects into a judicial forum. Arrest warrants should be prepared and distributed around the world. The list of the indicted should be forwarded to INTERPOL for inclusion in its computer data base. Having one's name listed as a wanted criminal in INTERPOL's computer network sends a global message that those who violate the law of war are no different than any other transnational criminal. Once indicted, the "mugshots" of every known suspect, including Karadzic, should be on the first page of every bulletin issued by INTERPOL. INTERPOL serves chiefly as an information exchange mechanism rather than as an action agency. But, with such obvious war crimes, it becomes important to focus attention on the crime and the criminal. With attention comes pressure and when the pressure is great enough, action might be taken to bring the criminals to justice.

However, suppose that the effort to bring the suspects into court fails. Even though the International Tribunal for Yugoslavia is prohibited from trying a person *in absentia*, some consideration should be given to doing so in the domestic criminal courts of those states in which the war criminals are indicted. Trials *in absentia* are an accepted part of many domestic legal systems and Martin

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<sup>84</sup>In early August 1995, Karadzic formally removed Mladic from command. The removal apparently had nothing to do with Mladic's indictment by the Hague Tribunal as a war criminal, a distinction shared by Karadzic. Rather, the removal appears to be related to battlefield losses to the Croats. His removal has been challenged by other Bosnian Serb generals. *Bosnian Serb Generals Reject Demotion*, WASH. POST, Aug. 7, 1995, at A14.

<sup>85</sup>See generally William H. Parks, *Command Responsibility for War Crimes*, 62 MIL. L. REV. 1 (1993).

Bormann was tried *in absentia* by the Nuremberg Tribunal.<sup>86</sup> Those responsible for the daily atrocities in the Former Yugoslavia should be made to worry about the possibility of such a trial. The benefit of considering trials *in absentia* is clear:

If there is enough evidence collected, the mere fact that the accused is not accessible to the tribunal cannot impede his prosecution. If there is a possibility of trying individuals *in absentia* . . . main war criminals will not escape international condemnation and punishment. If there is such a possibility, it will provide the way to isolate perpetrators as well as the governments giving shelter and refusing to extradite war criminals.<sup>87</sup>

An *in absentia* trial does not mean that the defendant cannot make an appearance, it means only that the trial will not be delayed while the court awaits an appearance. Additionally, any indictments for war crimes would be made globally public and the world's media certainly would cover the trial. The defendant would be on notice as to all the proceedings and the prosecution's case against him. The trial would not take place in some sort of "Star Chamber" in which the defendant is given no opportunity to present a defense. What could be wrong with offering war criminals the opportunity to publicly appear in a properly established court and explain and defend their actions?

The country with the greatest influence on the Bosnian Serbs is Serbia proper. Serbia should be especially reminded that the lifting of the international embargo against it is absolutely dependant on its cooperation in bringing war criminals to justice. The Bosnian Serb people also should be made to understand that they might avoid some of the world's approbation, and take a giant step toward international legitimacy, by trying the war criminals themselves. Of course, the trials would have to be legitimate and something more than mere show. In short, treat war criminals like war *criminals*, not as respected national leaders.

Incredibly, a Serbian leader has been quoted as saying "I expect we have gained a lot of respect from this. The international community has started to respect us as much as all the others in

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<sup>86</sup>German General Heinz Lammerding, who ordered the destruction of Oradour-sur-Glane, was tried by the French *in absentia* after the war. Shirer, writing in the late 1950s, reported that Lammerding never had been found. SHIRER, *supra* note 32, at 993.

<sup>87</sup>Symposium, *Should There Be an International Tribunal for Crimes Against Humanity*, VI PACE INT'L L. REV. 69 (1994) (remarks of Kresimir Persl, Counselor, Embassy of Croatia, Washington) [hereinafter Symposium].

this conflict."<sup>88</sup> Where such contempt for the law and human decency are publicly displayed, respect never should be the result. The taking of these hostages should lead to the international community "respecting" these war criminals to the same extent as the Bosnian Moslems and the other Serb victims "respect" them. If so, indictments and preparations for trials should not be long delayed.

These war criminals should be forced to live as international outcasts, unable to leave their enclaves without fear of being arrested. At the same time, international recognition of the legitimacy of their cause should be absolutely intertwined with the willingness of the Serbian forces to comply with the minimum standards of the law of war, including the public prosecution of those who fail to do so. When the commission of war crimes is seen as a tactic in which any short-term tactical advantage is far outweighed by the long-term adverse consequences to the cause as a whole, war crimes will diminish considerably. It is an elementary principle of physics: for every action there is a reaction. When war crimes are committed, the individual and the cause should expect to pay a price.<sup>89</sup> Putting war criminals, regardless of political station, in the defendant's dock is certainly an appropriate reaction to the crimes committed. This is not a quixotic quest. There is no doubt as to the law; no doubt as to its violation; no doubt as to the identity of some of those responsible; and no doubt as to the duty imposed on the rest of the world. What is missing is a demonstrated determination to enforce the law.

As this article is being written (Summer 1995), the tide of war is running strongly in the Bosnian Serbs' favor. It is quite probable that the string of Serb military successes will continue and that the Bosnian government may be forced to submit to the Serbs. Should

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<sup>88</sup>Christine Spolar, *Bosnian Serbs Say World 'Has Started to Respect Us'*, WASH. POST, June 9, 1995, at A21.

<sup>89</sup>The price to be paid could include monetary damages. Article 3 of the Fourth Hague Convention of 1907 provides:

A belligerent which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.

Hague Convention No. IV, *supra* note 29. The 1949 Conventions reflect the same sentiment in a provision common to all four Conventions:

No High Contracting Party shall be allowed to absolve itself or any other High Contracting Party of any liability incurred by itself or by another High Contracting Party in respect of breaches referred to in the preceding Article.

GC, *supra* note 1, art. 148; GPW, *supra* note 2, art. 131. Regarding this provision, Pictet has stated that "The State remains responsible for breaches of the Convention and will not be allowed to absolve itself from responsibility on the grounds that those who committed the breach have been punished. For example, it remains liable to pay compensation." PICTET IV, *supra* note 3, at 602-03. Each of the hostages, their state of nationality, and the United Nations might demand monetary compensation based on these provisions.

this happen, the effort to punish those responsible for egregious violations of the law of war should be redoubled, not reduced or eliminated. Victory on the battlefield can not be seen as leading to immunity in the courts. Entry into the family of civilized nations must be predicated on a demonstrated ability to live by and enforce those basic rules of law recognized as binding on every member of the family. Again, if the Serbs cannot, or will not, produce the defendants for trial in the Hague Tribunal or in the courts of another state, they have the right to meet their law of war obligations by trying the defendants themselves.

In the wake of the Serbian seizure, in a conflict a thousand miles away and on the edge of another continent, the world witnessed yet another hostage taking.<sup>90</sup> Chechnyan rebels seized hundreds of hostages, executed some, and announced that more would be killed unless the Russian government gave in to their demands. Not unexpectedly, the few Chechnyan guards photographed also wore masks to hide their identity. It is not too much to suggest that the Chechnyan hostage taking was based on the apparent success of the Serbs in extracting some sort of promise from the United Nations that there would be no more attacks on Serb positions. Whether or not such a promise was actually made is irrelevant. Others react to what they see as a positive outcome for obvious violations of the law by committing the same violations. Conceivably, the Chechnyan rebel leadership might have been less willing to take and then execute hostages if the Serbs had been treated as international outlaws rather than as successful military commanders and lawful players on the world scene. Just as in Bosnia, this crime must be punished.

The prosecution of war criminals can be a major weapon in the arsenal of law available in the much-touted New World Order. The weapon may be a little rusty from lack of use, but it can be cleaned and polished and once again made to do its duty in enforcing the law. The prosecution of a war criminal forces the individual criminal to explain his actions and endure the consequences. But additionally, the public trial of war criminals ensures that the criminal personalities of those responsible for committing atrocities become known to their countrymen. At the conclusion of the Nuremberg trials, Herman Göring discussed the significance of the trials with the prison psychologist. Göring, Hitler's onetime trusted lieutenant, said of his Fuhrer's legacy: "You don't have to worry about the Hitler legend any more. When the German people learn all that has been revealed at this trial, it won't be necessary to condemn him; he has

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<sup>90</sup>Lee Hockstader, *Gunmen Hold 500 Hundred Hostages in Russian Town*, WASH. POST, June 16, 1995, at A1.



condemned himself."<sup>91</sup> If we substitute the Serbian leadership for Hitler, and the Serbian people for the Germans, the same analysis might again be made for the importance of war crimes trials in this case.

Some argue that the prosecution of war criminals might hinder a return to peace. However, this is not true. A viable rule of law is crucial to establishing lasting stability and peace. The people of Bosnia, on all sides, are not likely to forget the crimes that have been committed against them. Not every member of the Bosnian Serb forces is a war criminal. Very likely, many of them are as appalled by these crimes as is the rest of civilization. When war criminals are brought into court and their misdeeds recounted for the world, the result is to focus attention, and condemnation, on those actually responsible for the atrocities. In the words of the Bosnian Ambassador to the United Nations, "[W]hen we identify and prosecute the guilty, we exonerate the innocent."<sup>92</sup>

In 1941, the world watched in horror as the Nazis systematically conquered Europe and imposed a brutal regime on the peoples of Europe. In October 1941, two months before the United States entered the war, President Roosevelt discussed the Nazi practice regarding hostages:

The practice of executing scores of innocent hostages in a reprisal for isolated attacks on Germans in countries temporarily under the Nazi heel revolts a world already inured to suffering and brutality. Civilized peoples learned long ago the basic principle that no man should be punished for the deed of another. . . . These are the acts of desperate men who know in their hearts that they cannot win. Frightfulness can never bring peace to Europe. It only sows the seeds of hatred which will one day bring fearful retribution.<sup>93</sup>

President Roosevelt's words were prophetic. They are as relevant for the war in Bosnia today as they were for the war in Europe over fifty years ago. While it may be difficult for the world to understand what this war in Bosnia is all about,<sup>94</sup> a failure to punish

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<sup>91</sup>G. M. GILBERT, NUREMBERG DIARY 392 (1947).

<sup>92</sup>See Symposium, *supra* note 87, at 63 (remarks of Ambassador Muhamed Sacirbey).

<sup>93</sup>*Hostages Case*, *supra* note 21, at 798-99.

<sup>94</sup>One author has described the cause of the war as follows:

Bosnia's war is cruelly simple. It is the result of the resurrection in our time of the aggrieved and historical quests of two great Balkan powers of medieval origin, Serbia and Croatia, and the attempt to re-establish their ancient frontiers with modern weaponry in the chaos of post-communist eastern Europe.

those responsible for the atrocities which have occurred certainly will make it easier to understand at least part of what the next war in the Former Yugoslavia will be about—unrequited revenge.

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ED VULLIAMY, *SEASONS IN HELL* 5 (1994). While this might offer an explanation of the cause, it does not quite answer the question, "Why?" In answer to this question another author writes:

But finally there must and does come the question why, which is the hardest to answer because there are hundreds of answers to it, none of them good enough. No graphics, drawings or maps can be of any genuine help, because the burden of the past—symbols, fears, national heroes, mythologies, folksongs, gestures and looks, everything that makes up the irrational and, buried deep in our subconscious, threatens to erupt any day now—simply cannot be explained.

SLAVENKA DRAKULIĆ, *BALKAN EXPRESS* 7 (1993).