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EDITORIAL

March 2006 has been a black month for the UN tribunal authorities in The Hague. Not only has the nationalist Serb war criminal Milan Babić committed suicide in his prison cell, but the man against whom Babić testified in 2002, Slobodan Milošević – the first head of state to be indicted for war crimes – has also died. Milošević's trial was being seen as a crucial test of international law.

The former Yugoslav president's death doubtless diminishes the legacy of the most important court to be established in Europe since the end of the Second World War. Despite a four-year trial, the world will never know with legal certainty whether the genocide charge against him would have been proved. The lack of any trial of the still fugitive war crimes suspects Ratko Mladić and Radovan Karadžić further undermines confidence in war crimes justice generally. The names of sentenced war criminals such as Tadić, Jelisić, Nikolić and Blaškić have left their mark on the history of law, bringing about substantial developments in the legal domain. But the absence of the most important suspects bearing the overall political and military responsibility during the war in Bosnia carries a much higher cost, not only for the perception of all the international tribunals but also for the broader objectives of international criminal law.

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The principle that individuals are and can be held accountable for violations of the law of war dates back to early civilization. International criminal courts to address the problem of war crimes gained force after the Nuremburg and Tokyo trials, instituted to deal with the major crimes committed by the Nazis and Japanese military leaders in the Second World War. Those trials took place after military victory and unconditional surrender. They were simultaneously a reminder that the existing international legal structure did not have a standing body with the means or jurisdiction to prosecute such crimes.

States bear the primary responsibility for prosecuting and sentencing their own criminals, including those who have committed international crimes. The record is disastrous with respect to domestic efforts to punish those universal crimes, and national prosecution tends more to be inversely proportional to the violations committed in wartime. Non-state warring parties shamelessly copy this behaviour. Furthermore, though firmly anchored in international law, application of the principle of universal jurisdiction has remained disputed. It won and lost prominence with Belgium's 1993 law, reduced in scope ten years later – a step not

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solely attributable to the forthcoming creation of the International Criminal Court (ICC), which did not lessen the need to exercise national jurisdiction over any perpetrator, regardless of his or her nationality or the place where the offence was committed.

States have tried, with all kinds of international or internationalized tribunals, to strengthen the signal that action must be taken against impunity. But the call for international justice is often a substitute and cannot make up for the lack of willingness of states to prosecute their own national criminals, often cheered as heroes within their communities, or other international criminals. The two ad hoc Tribunals set up by the UN Security Council to deal with crimes in the former Yugoslavia and Rwanda were and remain the first testing ground for the permanent International Criminal Court. Mistakes made by the two Tribunals have been noted – mainly the failure in their early phases to provide an outreach programme to ensure that people in the former Yugoslavia and Rwanda felt directly affected by the evidence unfolding in courts far away. Other criminal tribunals with diverse international dimensions in Sierra Leone, Cambodia, East Timor, Kosovo and also Iraq have contributed to the proliferation of international and internationalized criminal justice systems, but have placed greater emphasis on the need to embrace national elements in their establishment and implementation – with varying results.

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The International Criminal Court was eventually established in 2002 as a permanent tribunal to prosecute individuals particularly for genocide, crimes against humanity and war crimes, as defined most prominently by the Rome Statute that brought it into being. The ICC is designed to complement existing national judicial systems and can exercise its jurisdiction only if national courts are genuinely unwilling or unable to investigate or prosecute such crimes; it is thus a 'court of last resort'. It leaves the primary responsibility for the exercise of jurisdiction over alleged criminals to individual states.

In the absence of any enforcement mechanisms, the ICC has to rely on the co-operation of states – including that of (some very important) states not party to the ICC treaty. It has to take action especially in situations where the co-operation of the state most concerned can hardly be expected, either because that state is unwilling to prosecute the criminals in question or because it is in such disarray that any form of meaningful co-operation is beyond its ability. The potential failure of the Court's work is consequently inherent in the very conditions set for it. In other words, the ICC has to step in precisely where it is most difficult to conduct a full-scale criminal investigation. Gathering testimonies, collecting and securing evidence, and eventually apprehending the alleged perpetrators of crimes will be possible only if other states, the United Nations or non-state players provide active co-operation and support. Yet they are usually pursuing other missions and mandates which could even be impeded if their active support in gathering evidence is perceived to be against the interests of a warring party or the local population. The ICRC, for its part, though sharing the goal of bringing war

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criminals to justice, refuses to lend its operational help so as not to jeopardize its fundamental mission to protect and assist conflict victims in accordance with the Geneva Conventions, both in the area concerned and throughout the world.

There is a huge challenge, against all odds, to make the ICC effective and indispensable to the maintenance of a decent world order. And there is hope. The Prosecutor of the International Criminal Court has opened an investigation into situations referred to it by Uganda, the Democratic Republic of Congo and the UN Security Council (the latter in relation to the Darfur region in Sudan) and the first public arrest warrants have been issued. Following the arrest and surrender into the Court's custody of Thomas Lubanga Dyilo, accused of having conscripted and enlisted children under the age of fifteen and used them to participate actively in hostilities in one of the most murderous though hidden armed conflicts in eastern Congo, the International Criminal Court started its preliminary hearings. And even Charles Taylor, who miraculously escaped prosecution in Liberia, has ultimately been extradited to face justice for his crimes.

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