

Transitional Justice, Time between War and Peace: War Crime and its Prosecutions

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Abstract:

The ongoing Russia-Ukraine conflict, marked by Russia's military invasion, has now entered its second year, with no apparent resolution in sight. A notable aspect of this war is the active discourse and legal proceedings concerning war crimes, with both Russia and Ukraine accusing each other and prosecuting opposing soldiers. The international community is also engaged in addressing not only war crimes but also the legality of the conflict itself, utilizing various platforms such as the United Nations and the International Criminal Court (ICC). The ICC initiated an investigation shortly after the invasion and issued an arrest warrant for Russian President Vladimir Putin on war crimes charges. These developments reflect the strengthening of international humanitarian and human rights norms and underscore the heightened expectation for justice in the context of war crimes. Concurrently, discussions are underway regarding potential 'exit strategies' for a ceasefire. While some argue that war crime prosecutions might hinder ceasefire efforts, historical precedents suggest that such prosecutions can be integral to post-conflict stability. This paper explores the role of war crime prosecutions within exit strategies, positing that these prosecutions are crucial for the transition from military conflict to peace. By examining historical cases, such as the Nuremberg Tribunal and the International Criminal Tribunal for the former Yugoslavia, the paper aims to refine the concept of exit strategies and expand policy options by highlighting the strategic objectives shared between ending conflicts and establishing long-term peace.

Keywords: Transitional Justice, Just War Theory, War and Peace, War Crime, jus Post bellum

I. INTRODUCTION

The Russia-Ukraine war, initiated by Russia's military invasion, has entered its second year with no clear prospects for resolution. One characteristic of this conflict is the vigorous discourse surrounding war crimes, accompanied by investigations and movements towards criminal prosecutions, which have been active since the early stages of the war. Both Russia and Ukraine have accused each other of war crimes and are prosecuting soldiers from the opposing side in their respective war crimes tribunals. Additionally, the international community is addressing not only war crimes but also the illegality of the war itself (the crime of aggression), conducting investigations and pursuing criminal accountability of those responsible through various channels, including the United Nations, individual nations, and NGOs.¹ The International Criminal Court (ICC) decided to initiate an investigation into this matter four days after the military invasion, and on March 17, 2023, a year later, it issued an arrest warrant for Russian President Vladimir Putin on charges of war crimes. This series of actions reflects the deepening of international humanitarian and human rights norms since the 1990s and has heightened expectations for the pursuit of 'justice' through movements surrounding war crimes. Meanwhile, there are sporadic discussions concerning 'exit strategies' that Russia, Ukraine, and the international community should adopt to achieve an early ceasefire. There is a strong negative view that pursuing war crime prosecutions while hostilities continue could delay a ceasefire. However, war crime prosecutions are not merely issues of law and justice. In some past cases, policies surrounding war

¹ Lee, Yoochul. (2022) "Conflict between the Order and Norms in the War in Ukraine: From the Ethics of Power to Immoralismus" *Korean Journal of International Relations* 62.4 pp. 7-56.

crime prosecutions were considered and implemented even before a ceasefire, with the aim of maintaining stable conditions post-conflict. Here, the issue of war crime prosecutions is regarded as inseparable from the manner in which a war is concluded. This paper aims to explore how the issue of war crime prosecutions should be positioned within the so-called 'exit strategy.' Given that war crime prosecutions are rarely mentioned in the context of exit strategies, discussing their relationship might seem incongruous. However, as will be seen below, both share strategic objectives in considering the transition from military withdrawal to the establishment of order and stability afterward, that is, the transition from the 'end of war (armed conflict) to the establishment of peace thereafter.' Examining the relationship between the two is crucial for refining the concept of exit strategies and broadening the scope of policy options.

In what follows, I will first define the concept of exit strategies and propose that in this paper, an exit strategy is 'not merely a roadmap to an exit but a strategy aimed at creating a desirable situation after the exit.' Subsequently, the paper will examine the Nuremberg International Military Tribunal held after World War II, the International Criminal Tribunal for the former Yugoslavia (ICTY) established by the United Nations Security Council in 1993, and the cases referred to the ICC by the Security Council in the 2000s concerning the situations in Darfur and Libya and consider their relationship with exit strategies. All these cases are examples where war crime prosecutions were designed as either a driving force for ending the war or as part of a larger policy, or to complement that policy, with a strong awareness of the transition from war termination to peace.

II. THE ROLE OF WAR CRIME PROSECUTIONS IN EXIT STRATEGIES

WHAT IS AN EXIT STRATEGY?

Initially a business term, "exit strategy" began to be applied in diplomatic and military contexts around 1993, when the United States sought to withdraw from Somalia.² In these domains, an exit strategy refers to strategies concerning the withdrawal of military forces from large-scale combat or peace operations, essentially focusing on "how to end a war." Since the 1990s, this term has been used in various contexts, often synonymously with the "end state," making its precise meaning sometimes unclear. Here, we will first clarify the definition of an exit strategy and then consider the significance of war crime prosecution policies within what is termed an exit strategy.

² Gideon Rose, 'The Exit Strategy Delusion', *Foreign Affairs*, Vol. 77, No. 1, 1998, p. 57.

1. Discussions Surrounding the Definition of Exit Strategy

One of the initial challenges in considering the concept of an exit strategy is the unclear relationship between its objectives and means. What is the goal of an exit strategy? Is it the withdrawal of military forces itself, or is it the establishment of a desirable state post-withdrawal (after the end of the war or mission accomplishment)? If the latter, then is the method of withdrawal central to the exit strategy? In the contexts of Somalia and subsequently Bosnia, where exit strategies began to be explicitly mentioned, the focus of strategy designers was on the realization of U.S. military withdrawal. This focus was driven by increasing casualties and worsening situations.

Regarding strategies focused on "exit," Gideon Rose points out the importance of considering how to stabilize objectives achieved to some extent by military force after troop withdrawal.³ From this perspective, although Rose himself is skeptical about the concept of "exit strategy," his discussion offers one definition of it. Related to this is the second issue concerning the time frame an exit strategy considers. If the objective is troop withdrawal itself, the strategy would be short-term and military-focused. However, if it considers the post-withdrawal period, it becomes a long-term, highly political strategy requiring the involvement of various actors beyond just military organizations. A useful reference in this regard is the 2000 discussions by the UN Security Council on exit strategies for peacekeeping operations.

Based on experiences from the 1990s, these discussions addressed how to decide on the termination or change of peacekeeping operations, culminating in a 2001 report by the UN Secretary-General. The report identifies three situations necessitating an "exit strategy": ① when a mission is successfully completed, ② when a mission is not accomplished, and ③ when a mission is partially accomplished. For situation ①, maintaining at least minimal order post-withdrawal is crucial to establishing sustainable peace, linking exit strategies to post-ceasefire peacebuilding activities.⁴ In situation ②, an exit strategy signifies the termination of activities, but the report highlights the need for the Security Council to remain engaged with the situation and find alternatives if continued involvement is impossible.⁵ Regarding situation ③, the report emphasizes whether partially achieved objectives can be sustained upon activity

³Ibid., p. 60.

⁴No exit without strategy: Security Council decision-making and the closure or transition of United Nations peacekeeping operations: Report of the Secretary-General, 20 April 2001, S/2001/394, para. 8-13.

⁵Ibid., paras. 26-27.

termination.⁶

In any case, the importance of "transition" post-activity is highlighted in peacekeeping exit strategies. Indeed, an exit strategy in peacekeeping does not imply a complete end to international community involvement in post-conflict societal recovery. Richard Caplan argues that the "exit" in exit strategies should be regarded as a "process of transition" in state-building discussions.⁷

Thirdly, "exit strategies" have both a "passive meaning," which involves withdrawal to reduce costs, and an "active meaning," leading to a new phase.⁸ In the former, the strategy's objective is to realize withdrawal as quickly as possible. The decisions on withdrawal become feasible in situations where blame for deteriorating security post-withdrawal can be shifted to other entities, enabling responsibility transfer without undermining the legitimacy of the decision to use force itself. However, with military presence continuing without achieving objectives by that point, determining the timing of withdrawal is clearly challenging. Consequently, the challenge faced by exit strategies becomes why a decision to withdraw cannot be made.

On the other hand, in the latter, withdrawal itself is not the main agenda; rather, "when and how to withdraw" becomes central to the strategy. What becomes crucial here is conducting the withdrawal in a manner that maintains order and stability post-withdrawal, specifically transitioning to non-military means to sustain the objectives achieved through the use of force. Similar to the passive understanding, in the active sense of exit strategies, the fundamental issue is how to ensure the legitimacy of the use of force or the mission.

Therefore, due to the relationship between objectives and means surrounding the exit, the time frame considered by the strategy, and the dual nature of the strategy, exit strategies can have various meanings depending on the context. However, as recent international conditions, the policies of various actors, and existing research indicate, there is a shared understanding that, at least, exit strategies are strategies with the "process" of transition from military withdrawal to post-withdrawal in mind. What becomes important here is the realization and stabilization of the objectives initially intended to be achieved through the use of force. Furthermore, in exit strategies, it is crucial that the realization and stabilization of these objectives are strongly conscious of ensuring the overall legitimacy of

⁶Ibid., para. 29

⁷Richard Caplan, 'Exit Strategies and State Building' in Richard Caplan eds., *Exit Strategies and State Building*, Oxford University Press, 2012, p. 5.

⁸Lee, Yoochul (2024). When the War Ended: Most Urgent Moral and Political Priorities for the Transition to Peace. *Korea and Global Society*, 8(4), 991-1017.

the mission. In the context of not just ending combat but also considering the desirable state post-combat, an exit strategy encompasses not just military issues but also highly political and even moral issues. In other words, an exit strategy is not only about winning the war but also about winning the peace.

(2) Exit Strategies and War Crime Prosecutions in Modern Armed Conflicts

As previously mentioned, if we view an exit strategy as encompassing the series of processes from military withdrawal to the post-withdrawal period, including the "transition from war to peace," then war crime prosecution policies can be considered within this scope. Is it possible, then, to find policy compatibility between exit strategies and war crime prosecutions? This question also leads to considering the strategic significance of war crime prosecutions.

Since World War II, the legal framework surrounding armed conflicts has evolved, and from the 1980s onward, international human rights norms have deepened rapidly. By the 1990s, various international criminal tribunals were established, and the International Criminal Court (ICC), a longstanding aspiration of international law since Nuremberg, commenced its activities in 2002. As David Kennedy points out, in today's international community, all actors can examine and discuss the appropriateness or inappropriateness of war through the "common language" of international humanitarian law.⁹ Indeed, general awareness of "war crimes," "crimes against humanity," and "genocide" has increased, and the international community has shown a keen interest in the humanization of war and the pursuit of justice. Furthermore, the information technology revolution has enabled ordinary people to access information about inhumane acts against civilians in conflict zones more easily. Consequently, in modern armed conflicts, there is a continual international effort to denounce inhumane acts as war crimes and hold those responsible accountable when such acts are recognized.

This is crucial in understanding modern armed conflicts. The parties involved must not only conduct combat operations in accordance with international humanitarian law but also demonstrate their compliance with international law and efforts to minimize civilian harm. This involves asserting the legality and legitimacy of their combat operations and securing domestic and international public support for their wartime actions.¹⁰

This phenomenon is particularly evident in the Russia-Ukraine war. From its early stages, there has been an

⁹David Kennedy, *Of War and Law*, Princeton University, 2007, p. 25.

¹⁰James Gow, *War and War Crimes: The Military, Legitimacy, and Success in Armed Conflict*, Hurst, 2013, pp. 40-42.

unprecedented number and speed of mutual accusations of "war crimes" between Russia and Ukraine, leading to war crime trials, as well as investigations and prosecutions pursued by NATO countries, UN agencies, and NGOs. The series of actions surrounding war crimes highlights the international community's emphasis on justice in this conflict.¹¹ Simultaneously, the active use of war crime discourse and the pursuit of criminal prosecutions by various countries indicate that securing the legality and legitimacy of the war itself has become more critical than before. The movements surrounding war crime prosecutions are strategic actions aimed at justifying one's own wartime actions and delegitimizing those of the opponent.¹²

Indictments by international courts and the issuance of arrest warrants label individuals as "criminals," undermining their legitimacy and isolating them both domestically and internationally. They also hinder these individuals' ability to travel freely outside their territories. Meanwhile, Ukrainian President Volodymyr Zelensky has consistently emphasized the criminal prosecution of Russian war crimes, repeatedly stating that "justice" is a condition for "peace."¹³ Here, the realization of justice for victims is emphasized, with no room for compromise. However, it is also true that certain amnesties or immunities have historically been part of peace negotiations.¹⁴ Additionally, branding an opposing leader as a war criminal could complicate future peace talks, raising the question of whether negotiating with a "criminal" can be justified.

Amid these circumstances, a year after the investigation began, the ICC issued arrest warrants for President Putin and his associates. While exit strategies for the war are being explored, the approach to war crime prosecutions is also being considered, yet a desirable end state has not yet emerged.

So, how should we consider the relationship between exit

¹¹For the detail, Kristen E. Eichensehr ed., 'Contemporary Practice of the United States Relating to International Law: International Organizations, International Institutions Mobilize to Impose Accountability on Russia and Individual Perpetrators of War Crimes and Other Abuses', *The American Journal of International Law*, Vol.116, No.3, 2022, pp. 631-642

¹²For references, Lee, Yoochul. "Intervention, between Sovereignty and Human Rights: J. Habermas versus C. Schmitt." *Korea and World Review* 6.5 (2024): 987-1009.

¹³For example, Speech by the President of Ukraine at the G20 Summit, 15 November 2022: <https://www.president.gov.ua/en/news/ukrayina-zavzhdi-bula-liderom-mirotvorchih-zusil-yaksho-rosi-79141>

¹⁴This point was also noted in March 2022 when U.S. President Joseph R. Biden referred to Russian President Putin as a "war criminal." For further details, see "Ukraine conflict: Biden brands Putin a 'war criminal'," BBC News, 16 March 2022: <https://www.bbc.com/news/world-us-canada-60773626>

strategies and war crime prosecutions in modern armed conflicts where both are emphasized? In the following sections, we will examine past cases of international war crime tribunals to explore this question further.

2. The Nuremberg Trials and Post-World War II International Order

The Nuremberg International Military Tribunal was established by the Allies in 1945 to prosecute and punish Nazi German leaders responsible for "crimes against peace" (aggressive war), "war crimes," and "crimes against humanity" committed during World War II. While the trials were not explicitly positioned as an "exit strategy" at the time, they were clearly intended to maintain the post-war international order, which aligns with the current understanding of exit strategies.

(1) War Deterrence and International Order

What were the views of the Nuremberg stakeholders on the post-war international order? Chief Prosecutor Robert H. Jackson stated in his opening remarks at the Nuremberg Trials that "this trial is part of the great effort to make peace more secure."¹⁵ Specifically, by criminalizing aggressive war through "crimes against peace" and prosecuting and punishing German leaders responsible, they hoped to deter future wars in the international community. This reflects the Allied vision of a post-war world characterized by lasting stability and prosperity. Jackson expected that the principles established through the Nuremberg Trials and their judgments would become significant pillars of international law, arguing that "[those] laws and principles must apply to every nation, including those belonging to the Allies, that engage in acts of aggression."¹⁶

Indeed, the core of the Nuremberg Trials was "crimes against peace," and there was an expectation that Nuremberg would become a "trial to end all wars."¹⁷

(2) Post-War Reform of German Society

Meanwhile, discussions among U.S. policymakers who led the Nuremberg initiative reveal that the trials were conceived within the context of post-war policy towards Germany. Key questions included how to normalize relations between victors and the vanquished and how to respond to the increasingly

¹⁵Jackson's Opening Statement for the prosecution, in International Military Tribunal for the Trial of Major German War Criminals, 'The Trial of the Major German War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945 – 1 October 1946 [Hereafter Trial], Vol. II, p. 154.

¹⁶Ibid.

¹⁷David Luban, *Legal Modernism*, The University of Michigan Press, 1994, p. 343.

apparent mass atrocities committed by Nazi Germany. In the fall of 1944, as Germany's defeat loomed, the idea of "punitive peace" emerged in Washington, advocated by a group led by Treasury Secretary Henry Morgenthau, which proposed a stringent economic suppression policy to scale down Germany's industrial capacity post-war. However, Secretary of War Henry Stimson believed that Morgenthau's excessively punitive plan could provoke rather than deter future conflicts.¹⁸ There was a reflection on how the severe reparations imposed after World War I had led to the rise of Nazism in Germany.

Stimson proposed war crime trials as an alternative. Historian Bradley F. Smith notes that Stimson saw systematic punishment of Nazi leaders and organizations through a comprehensive war tribunal system as the best way to assuage Allied grievances against Nazi Germany and ensure future global peace.¹⁹ Indeed, both sides faced the issue of handling grievances at the end of a war that had exacted heavy sacrifices. Some in the Allied camp favored summary executions or show trials of Nazi leaders. However, there was a recognition among U.S. policymakers that simply dismantling the Third Reich was insufficient. For the establishment of post-war order, it was essential to eliminate the root causes of conflict (Nazism, militarism), and reforming the defeated enemy was considered crucial for this purpose.²⁰

The complete victory and demands for unconditional surrender were necessary to eliminate the root causes of conflict.²¹ The realization of the Nuremberg Trials, with post-war German social reform in mind, was made possible because these conditions were met. Stimson successfully shifted President Franklin Delano Roosevelt's focus towards the war crime initiative, suppressing the Morgenthau Plan and ideas of summary execution.

What, then, was the reform policy for post-war German society? John H. Herz analyzes this policy in terms of the "4Ds"²²: denazification, demilitarization, decentralization, and

¹⁸Document 13: From Henry L. Stimson to Henry Morgenthau, Jr., September 5, 1944, in Bradley F. Smith, *The American Road to Nuremberg: The Documentary Record 1944-1945*, Stanford, Hoover Institution Press, 1982, p. 30.

¹⁹Bradley. F. Smith, *The American Road to Nuremberg: The Documentary Record 1944-1945*, Hoover Institution Press, 1982, p. 9.

²⁰Peter. H. Maguire, *Law and War: An American Story*, Columbia University Press, 2001, p. 284.

²¹Lee, Yoochul (2024). When the War Ended: Most Urgent Moral and Political Priorities for the Transition to Peace. *Korea and Global Society*, 8(4), 991-1017.

²²John. H. Herz, 'Denazification and related policies', in J. H. Herz (ed.), *From Dictatorship to Democracy: Coping with the Legacies of*

decartelization. War crime prosecutions were directly related to denazification, demilitarization, and the accompanying democratization. Accepting the criminality of Nazism and rejecting the legitimacy of Nazi leaders was an important step in Germany's post-war reforms, both for the international community and the German people themselves. War crime trials were seen as a means to document Nazi Germany's actions and hold its leadership accountable, leaving a record for the future.²³

Simultaneously, holding individual Nazi leaders accountable through trials was expected to have a significant effect in promoting denazification. In his opening statement at the Nuremberg Trials, Jackson emphasized that Nazi aggression had devastated not only neighboring countries but also Germany itself, and that the defendants owed an explanation to the German people.²⁴ The intention was to distinguish Nazi leaders from the general German populace, isolating the former and separating them from the latter to advance denazification. Above all, unlike after World War I, the aim was to prevent the resurgence of Nazism in German society by avoiding placing the entire German population under the burden of war guilt.

(3) Justification of the Allies' Position

An interesting aspect here is that, alongside the criminalization of aggressive war and the denazification and democratization of post-war Germany, the Allies saw the war crimes trials as a means to justify their position. The difference between the proposed summary executions or show trials and the concept of war crime prosecutions was the latter's emphasis on the rule of law. Jackson stated in a report to the president:

"The punishment of these crimes without a fair trial would be an affront to our sense of justice and would not be consistent with what our children should remember with pride."²⁵

The Nuremberg Trials were not a barbaric act of vengeance or punishment but an embodiment of the rule of law. Moreover, the justice system that originated in America was applied even to the crimes of enemy leaders.²⁶ Such a war crimes trial,

Authoritarianism and Totalitarianism, Westport, Greenwood Press, 1982, pp. 17-18.

²³Bradley. F. Smith, *The Road to Nuremberg*, Andr Deutsch, 1981, p. 76.

²⁴Jackson's Opening Statement, in *Trial*, Vol.II, p. 103.

²⁵Report to the President of the United States by Robert H. Jackson, Chief of Counsel for the United States, 7 June 1945 in R. H. Jackson, *The Nürnberg Case*, as presented by Robert. H. Jackson, together with other documents, Alfred A. Knopf, 1947, p. 8.

²⁶Document 14: Secretary of War (Stimson) to the President,

which could embody the victors' sense of pride, was aligned with the Allied cause of fighting fascism. Stimson himself believed that the record of Nazi crimes created through the trials would serve as a record of the Allies' efforts to end Nazism and prevent its resurgence. Such a record was also necessary for the countries that had demanded significant sacrifices from their citizens to justify those sacrifices.²⁷ The emphasis on moral superiority by the tribunal throughout the trial reflects this necessity.

Thus, the Nuremberg Trials were not merely criminal trials but part of the Allies' policy, aimed at maintaining world order after military victory and eliminating Nazi Germany, which could disrupt that order. The objective was the restoration of international order, a continuation of the war aims against the Axis powers. As some scholars describe international war crime tribunals as "the last act of war and the first act of peace," the war crimes trials were policies with the transition from war termination to post-war order-building in mind.²⁸ At the same time, they had to align with the ideals of the Allied powers, which promoted the rule of law, and the self-image of being free and democratic. The war crimes trials met these criteria. In other words, as an "exit strategy," Nuremberg played a significant role both practically and symbolically. Initially criticized as "victors' justice" or "ex post facto law," the Nuremberg Trials were generally conducted fairly and contributed to building relations between Germany and Western countries.²⁹

3. The International Criminal Tribunal for the Former Yugoslavia (ICTY) and Post-Conflict Societal Transition

Approximately half a century after the Nuremberg and subsequent Tokyo Trials, the international community once again witnessed international war crime tribunals with the establishment of the ICTY. While heavily influenced by Nuremberg, the ICTY also reflected new norms and demands of the post-Cold War international community. Although not

September 9, 1944, in Smith, American, p. 31.

²⁷Smith, Road, pp. 250-251.

²⁸Barry Paskins and Michael Dockrill, *The Ethics of War*, Duckworth, 1979, p. 266.

²⁹The aspect of war crimes trials as postwar policy towards defeated nations is even more pronounced in the International Military Tribunal for the Far East (Tokyo Trials), which prosecuted Japanese leaders following Nuremberg. The Tokyo Trials were designed as a significant part of the U.S. occupation policy towards Japan, specifically its demilitarization and democratization strategies, with the transitional phase of how the U.S. would consolidate victory in war and manage postwar processes in mind. However, unlike Nuremberg, the evaluation of the Tokyo Trials is not necessarily high, leaving lingering resentment at various levels of postwar Japanese society.

explicitly designed as an "exit strategy," the ICTY was established during ongoing conflicts with the expectation, through a UN Security Council resolution, that it would play a role in the "transition" from conflict resolution to post-conflict peacebuilding. If we understand an exit strategy as not merely a roadmap to exit but as a strategy aimed at creating a desirable post-exit situation, the Security Council's envisioned "exit strategy" can be discerned in the background.

(1) Security Council's Coercive Measures and the International Criminal Tribunal

The ICTY was established in 1993 as a coercive measure by the Security Council to "prosecute those responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia."³⁰ It is significant that the Security Council recognized not only the armed conflict itself but also "the widespread violations of international humanitarian law in the former Yugoslavia" as threats to international peace and security.³¹ The establishment of the ICTY was underpinned by the clear recognition that war crimes were not merely issues of law and justice but also matters of security under the Security Council's jurisdiction.

The ICTY's first annual report states that its objectives, as revealed through the Security Council resolution, were threefold: "the realization of justice," "deterrence of future crimes," and "contribution to the restoration and maintenance of peace."³² Regarding the first objective, the report notes that the ICTY, as mandated by Security Council Resolution 827, was to prosecute those responsible for war crimes in the former Yugoslavia—this being the primary function of a war crimes tribunal. The tribunal was established to address war crimes as threats to international peace and security, executing its mandate through war crime prosecutions. However, the ICTY's role extended beyond this, as evident in its other two objectives.

(2) Deterrence of War (Crimes) and Peace Negotiations

Second, established during ongoing conflicts, the ICTY was expected to have a "deterrent effect on future crimes," as noted in the preamble of Security Council Resolution 827. The ICTY itself was aware that one of the Security Council's

³⁰U.N. Doc. S/RES/827, May 25, 1993.

³¹U.N. Doc. S/RES/808, February 22, 1993.

³²Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, 29 August 1994 [O] ICTY Report, 1994 n, para. 11 [ICTY Report (1994)]: http://www.icty.org/x/file/About/Reports%20and%20Publications/AnnualReports/annual_report_1994_en.pdf

goals was to legally prosecute those responsible for war crimes to prevent parties in the armed conflict from committing further atrocities.³³ In the Yugoslav conflict, it was noted that atrocities, violations of international humanitarian law, were not merely byproducts of war but strategically employed to conduct the war. Halting ongoing war crimes and deterring further criminal acts were seen as contributing to the end of the war itself. Moreover, it was expected that this deterrent effect would extend beyond the Yugoslav conflict to the broader international community.

Assessing whether the ICTY had such a deterrent effect or contributed to the conflict's resolution is challenging. It is noteworthy that one of the most horrific events of the conflict, the Srebrenica massacre, occurred in July 1995, several years after the ICTY began operations. On the other hand, there was criticism that attempting to prosecute war crimes during ongoing conflicts could hinder the peace process. This criticism relates to the classic debate over the "peace versus justice" dilemma in war crime prosecutions. As seen with figures like Radovan Karadžić, Ratko Mladić, and former Serbian President Slobodan Milošević, those responsible for large-scale violence are often also responsible for peace negotiations.³⁴ To negotiate with them and halt atrocities on the ground, there were arguments for offering immunity rather than pursuing war crime prosecutions, as the latter could incentivize continued violence.

From this perspective, war crime prosecutions could be seen as obstructing exit strategies. In response to such criticism, the ICTY's annual report states:

"In fact, the Tribunal contributes to the peace process by creating conditions that facilitate a return to normalcy. Can the rule of law and the stable, constructive, and sound development of inter-ethnic relations be expected if perpetrators remain unpunished?"³⁵

This does not directly address the criticism that prosecutions delay the peace process because the report speaks not to the ceasefire itself but to inter-ethnic relations in post-conflict society. In other words, the ICTY was considering not just the peace process but also the post-peace process. This understanding is supported by the third objective outlined by the Security Council.

(3) "Restoration" and "Maintenance" of International Peace and Security

³³ICTY Report, 1994, para. 13.

³⁴For example, Anthony D'Amato, 'Peace vs. accountability in Bosnia', *The American Journal of International Law*, Vol.88, 1994; Anonymous, 'Human rights in peace negotiations', *Human Rights Quarterly*, Vol.18, 1996.

³⁵ICTY Report, 1994, paras. 15.

The third effect expected from the ICTY by the Security Council was its "contribution to the restoration and maintenance of peace." Considering the significance of war crime prosecutions as a security policy, the language of Security Council Resolution 827 is important. When invoking coercive measures, the phrases typically used in existing Security Council resolutions were either "maintenance," "restoration," or "maintenance or restoration" of international peace. However, Resolution 827 uniquely employed the phrase "restoration and maintenance" for the first time as the objective of establishing the tribunal.

The usual phrase "maintenance or restoration" suggests these are separate or independent tasks. "Maintenance" implies the preservation of existing peace, while "restoration" suggests that peace and security are absent or threatened, requiring the removal of threats and the restoration of peace and stability. The former is a long-term task of maintaining a certain state, while the latter is a relatively short-term task of creating a certain state. However, from the phrase "restoration and maintenance" in Resolution 827, it is evident that the ICTY was expected to undertake both tasks.³⁶

Furthermore, the choice of "restoration and maintenance" over "maintenance and restoration" is significant. Hans Kelsen notes that "maintenance of international peace means preventing its destruction," and "if peace is destroyed, it cannot be maintained but only restored."³⁷ The initial task is to "restore" peace, and only upon its success can the task of "maintenance" proceed. The ICTY's focus was not just on restoring peace but on maintaining the restored peace during the "transitional period." The challenge was not only "how to end the armed conflict" but also "how to maintain peace afterward."³⁸

The emphasis on the transitional period was due to the characteristics of the Yugoslav conflict. As recognized by the Security Council, the conflict was marked by widespread and horrific war crimes, including genocide and crimes against humanity, many of which intentionally targeted civilians under the guise of ethnic identity. The increase in civilian casualties and the ethnic hatred it fueled complicated inter-ethnic coexistence, making the achievement of lasting peace and stability difficult even after the conflict ended. The crucial task was to eliminate the seeds of future conflicts and prevent the recurrence of violence. Carl August Fleischhauer, then UN Under-Secretary-General for Legal Affairs, described the ICTY's objectives as "ending war crimes, prosecuting those

³⁶Madoka Futamura, *War Crimes Tribunals and Transitional Justice: The Tokyo Trial and the Nuremberg Legacy*, Routledge, 2008, p. 4.

³⁷Hans Kelsen, *The Law of the United Nations: A Critical Analysis of Its Fundamental Problems – with Supplement*, Stevens and Sons Limited, 1951, p. 13.

³⁸Futamura, *War Crimes*, p. 6.

responsible, and breaking the cycle of hatred and revenge."³⁹ Through war crime prosecutions, the aim was to restore peace, achieve justice, and maintain long-term peace, with these goals complementing each other to achieve the "restoration and maintenance" of peace.⁴⁰

(4) Post-Conflict Societal Reform

How, then, can peaceful inter-ethnic coexistence be promoted, and lasting peace achieved? The ICTY's report notes that if the responsibility for heinous crimes is not attributed to individuals, there is a risk that entire ethnic or religious groups could be stigmatized as war criminals or targets for revenge by other groups. It emphasizes the importance of suppressing the desire to pursue "collective responsibility."⁴¹ Additionally, the importance of creating a "legitimate historical record" was highlighted. By seeking individual responsibility and documenting it through trials, a war crimes tribunal could respond to calls for justice from victims while aiming for peaceful coexistence among previously hostile ethnic groups. From the discourse of those involved in the ICTY's establishment and activities, it is evident that the Nuremberg experience as a policy for post-German reform strongly influenced the understanding of such international tribunals' functions. Indeed, the ICTY's anticipated role in post-conflict societal transition shares many aspects with Nuremberg's policy towards Germany.

The initial criticism that war crime prosecutions impeded peace negotiations and prolonged the war gradually subsided in the context of the ICTY as the Bosnian conflict ended in 1995. Subsequent discussions shifted towards how criminal trials could contribute to building lasting peace in post-conflict societies. Regarding the ICTY's evaluation from this long-term perspective of an "exit strategy," there are diverse opinions, as shown in existing discussions surrounding transitional justice.

4. The Conflict Between ICC Prosecutions and Exit Strategies

Following the establishment of the ICTY and the International Criminal Tribunal for Rwanda (ICTR), the International Criminal Court (ICC) was set up and began its activities, initially dealing with self-referrals from governments of countries embroiled in civil wars. Simultaneously, referrals from the UN Security Council drew attention. In 2005 and 2011, the conflicts in Darfur, Sudan, and Libya, respectively,

³⁹Quoted in V. Morris and M. P. Scharf, *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia: A Documentary History and Analysis*, volume 1, Irvington-on-Hudson, Transnational Publishers, 1995, p. 334.

⁴⁰ICTY Report, 1994, paras. 17-19.

⁴¹Ibid., para. 16.

were recognized by the Security Council as "threats to international peace and security" and referred to the ICC. Like the ICTY, these cases involved attempts by the Security Council to prosecute war crimes during ongoing conflicts, with the ICC issuing arrest warrants for the leaders of both nations during these conflicts. However, unlike the ICTY, which considered the transitional phase from ceasefire agreements to post-conflict peacebuilding, the Security Council in these cases appeared to focus on the end of the conflict.

(1) The Darfur Issue and the Security Council's ICC Referral

The armed conflict between government forces and rebel groups in Darfur, Sudan, which began in 2003, became widely known for its large-scale war crimes and inhumane acts against civilians. In response, the Security Council decided in 2005 to refer the situation to the ICC under Chapter VII of the UN Charter.⁴² Security Council Resolution 1593, which first decided on referral to the ICC, did not include the language of "restoration and maintenance" of peace seen in resolutions establishing the ICTY and ICTR. However, the resolution's mention of Article 16 of the Rome Statute, which allows the Security Council to defer ICC investigations or prosecutions for 12 months under Chapter VII, raised speculation that the Security Council might use the ICC as a tool in peace negotiations.

However, such negotiations became untenable when the ICC issued an arrest warrant in March 2009 for Sudanese President Omar Al-Bashir on charges of war crimes and crimes against humanity. Andrew Natsios, then U.S. Special Envoy to Sudan, strongly criticized the ICC, arguing that the arrest warrants incentivized continued conflict by the Sudanese president and government, thus hindering peace negotiations.⁴³ More serious was the potential impact on the activities of the UN-AU Mission in Darfur (UNAMID), established in 2007. Concerns arose not only about operational disruptions but also about the safety of its personnel.⁴⁴ Although these fears did not materialize, the Security Council's decision to establish UNAMID after referring the situation to the ICC cast doubt on the political neutrality of criminal prosecutions.⁴⁵

The arrest warrant for a sitting head of state later led to

⁴² U.N. Doc. S/RES/1593, March 31, 2005.

⁴³ Andrew Natsios, 'Waltz With Bashir', *Foreign Affairs*, March 23, 2009: <https://www.foreignaffairs.com/articles/africa/2009-03-23/waltz-bashir>.

⁴⁴ See Allard Duursma and Tanja Müller, 'The ICC indictment against Al-Bashir and its repercussions for peacekeeping and humanitarian operations in Darfur', *The Third World Quarterly*, Vol. 40, No.5, 2019, pp. 890-907.

⁴⁵ Ibid., pp. 891-892.

widespread criticism and dissatisfaction with the ICC among African countries, with many viewing its implementation as unlikely. However, following a military coup in 2019, President Bashir was deposed, and in August 2021, Sudan's transitional government announced it would hand over the former president to the ICC. This move likely reflects the transitional government's intent to secure public support by aligning with the democratic revolution's call for justice, which had led to Bashir's fall.⁴⁶

(2) The Libyan Situation and the Security Council's ICC Referral

Despite deep-rooted criticism of the ICC's investigatory and prosecutorial activities during ongoing conflicts, the Security Council again referred the situation in Libya to the ICC in February 2011 through Resolution 1970.⁴⁷ Like the Darfur resolution, it did not include the language of "restoration and maintenance" of peace but did reference Article 16 of the Rome Statute. Following the resolution, the ICC began investigations and issued arrest warrants in June of the same year for Colonel Muammar Gaddafi and others on charges of war crimes and crimes against humanity. These arrest warrants also faced diplomatic criticism, as Western countries were reportedly seeking a ceasefire agreement through Gaddafi's exile, even compiling lists of non-ICC member states as potential asylum destinations.⁴⁸

What lay behind this apparent double standard of Western countries? Notably, after referring the situation to the ICC, the Security Council adopted a resolution authorizing the use of force against Libya.⁴⁹ This led to NATO countries initiating airstrikes in March. Mark Kersten argues that Western countries used the ICC for political purposes, aiming for Gaddafi's ouster. They hoped that the ICC's investigations would lend an impression of justice to military intervention while isolating and pressuring Gaddafi internationally. Initially, NATO countries expressed support for the ICC's activities. However, as the rebels gained the upper hand and the regime collapsed, their stance shifted rapidly. Kersten

⁴⁶Mark Kersten, 'Between justice and politics: the ICC's intervention in Libya' in Edited by Christian De Vos, Sara Kendall, and Carsten Stahn eds., *Contested Justice: The Politics and Practice of International Criminal Court Interventions*, Cambridge University press, 2015.

⁴⁷ U.N. Doc. S/RES/1970, February 26, 2011.

⁴⁸ Mark Kersten, 'Between justice and politics: the ICC's intervention in Libya' in Edited by Christian De Vos, Sara Kendall, and Carsten Stahn eds., *Contested Justice: The Politics and Practice of International Criminal Court Interventions*, Cambridge University press, 2015, pp. 465-466.

⁴⁹ U.N. Doc. S/RES/1973, March 17, 2011. (56) Kersten, 'Between', pp. 466-468.

analyzes that the Western claim that "Gaddafi's fate is a matter for the Libyan people" marked a pivot towards building relations with post-Gaddafi Libya.⁵⁰ Without substantial support, the ICC later faced frequent obstruction from Libyan authorities in its investigations and execution of arrest warrants for suspects other than the deceased Gaddafi.

The cases of Darfur and Libya highlight that while ICC investigations and prosecutions during conflicts are criticized for potentially prolonging conflicts, the ICC itself cannot be said to be conducting activities that have such effects. The fact that the Security Council, after deciding on ICC referrals, adopts resolutions authorizing peace operations or the use of force to end conflicts, coupled with insufficient support for ICC investigations, has led to criticism that the Security Council is using the ICC to justify military intervention. However, as seen in Sudan's transitional government's statement and the transfer of former President Milošević to the ICTY, there are cases where arrest warrants issued during conflicts move towards execution due to political and social changes within the country after a ceasefire. The Security Council's war crime prosecution policy, unintentionally, has presented an end state that local populations must realize in post-conflict societies.

III. CONCLUSION

This paper has analyzed past cases to consider the issue of war crime prosecutions from the perspective of "exit strategies," whose importance has been increasingly recognized recently. If we view an exit strategy not only as a journey to an exit but also as a strategy aimed at creating desirable conditions thereafter, certain past cases of war crime prosecutions exhibit strong affinities with exit strategies. In the instances of Nuremberg and the ICTY, attempts at prosecuting war crimes were positioned not merely as legal policies for the pursuit of justice but as political policies keenly aware of domestic and international order and stability following the use of force. By aiming for transformation and transition in the affected societies, they sought to establish and maintain order. These two cases were strongly conscious of not just ending the war but also ensuring the peace that follows, thus sharing the objectives of exit strategies.

However, there is a deep-rooted concern that war crime prosecutions might hinder the conclusion of conflicts or withdrawals themselves. The cases of Darfur and Libya illustrate instances where the Security Council pursued war crime prosecution policies during ongoing conflicts. Here, the attempt to prosecute war crimes could potentially contribute to the challenge of "why withdrawal is not possible" within exit strategies, making the coexistence of war crime prosecutions and (early) withdrawal challenging. In these cases, it is also evident that the Security Council may use war

⁵⁰Kersten, 'Between', pp. 466-468.

crime prosecutions as leverage in peace negotiations or to justify military interventions. Nevertheless, utilizing "justice" as a "political tool" entails legal, moral, and political issues.

Thus, the relationship between exit strategies and war crime prosecutions as seen in past cases can be both complementary and adversarial. In today's international community, where international humanitarian law and human rights norms have deepened, adopting a policy of not prosecuting war crimes or politically exploiting war crime prosecutions is not easy. The issue of war crime prosecutions will present a challenging dilemma in exit strategies that are conscious of ensuring legitimacy.