The Law in Force, 1941–1945, Versus Postwar Law

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Abstract

This paper examines the temporal application of international criminal law to conduct occurring in occupied Slovenia between 1941 and 1945, focusing on the distinction between the law in force during the Second World War and legal developments that emerged after 1945. It begins with the principle of nullum crimen sine lege, emphasizing that criminal responsibility must be grounded in a legal rule applicable at the time of the conduct. The analysis identifies the 1907 Hague Regulations, the 1929 Geneva Convention relative to the Treatment of Prisoners of War, customary international law, and established laws and customs of war as the principal legal sources for evaluating wartime conduct. It then examines the significance and limitations of the Nuremberg Charter and judgment, Control Council Law No. 10, and subsequent jurisprudence of the ICTY and International Criminal Court, distinguishing rules that clarified or codified pre-existing law from genuinely subsequent legal developments that cannot simply be applied retroactively. Particular attention is given to the legal consequences of military service under occupation, domestic treason, and individual participation in war crimes, as well as the more complex temporal questions surrounding crimes against humanity. Applying the same temporal standard to both the Slovene Home Guard and the Partisan movement, the paper argues that neither political allegiance nor organizational membership establishes criminal responsibility without proof of conduct prohibited by the law applicable at the relevant

time. It proposes a two-stage methodology: first determining whether conduct was criminal under the law in force in 1941–1945, and second, where appropriate, assessing how the same conduct would be characterized under modern international criminal law. This approach seeks to avoid both anachronistic criminalization and anachronistic exoneration while preserving the principle of individualized criminal responsibility.

I. The Fundamental Principle of Temporal Legality

Any legal assessment of conduct occurring in occupied Slovenia between 1941 and 1945 must begin with a fundamental principle of criminal law: **a person should not be punished for conduct that was not criminal under applicable law at the time it occurred**. Expressed in the traditional maxim *nullum crimen sine lege, nulla poena sine lege*—no crime without law, no punishment without law—the principle requires that criminal liability be based upon a legal norm existing at the time of the conduct.

This principle presents a particular challenge in historical analysis of the Second World War because the principal international criminal tribunals were established **after** the conduct under examination. The International Military Tribunal at Nuremberg was established by the London Agreement of 8 August 1945, and its Charter expressly defined crimes within the Tribunal's jurisdiction. Article 6 classified crimes against peace, war crimes, and crimes against humanity and provided for individual responsibility.

The existence of a postwar tribunal, however, does not mean that all of the legal rules it applied were created in 1945. Much of the law applied at Nuremberg was derived from treaties and customary international law that predated the war. The essential legal task is therefore to distinguish between:

1. **rules already binding in 1941–1945;**
2. **postwar formulations that clarified or codified pre-existing rules; and**
3. **genuinely new legal rules that cannot properly be applied retroactively to conduct occurring before their creation.**

That distinction is indispensable when evaluating the conduct of both the Slovene Home Guard and the Partisans.

II. The Primary International Law Applicable During the War

For occupied Slovenia, the starting point is the **1907 Hague Convention IV respecting the Laws and Customs of War on Land and its annexed Regulations**.

The Hague Regulations were already in force decades before the German and Italian occupation of Yugoslavia. They established the basic legal framework governing belligerent occupation, including the authority and obligations of an occupying power, treatment of inhabitants, requisitions, property, military operations, and certain prohibited methods of warfare.

Article 42 defined occupation by reference to the existence of authority of the hostile army. Article 43 required the occupant to take measures necessary to restore and ensure public order and safety while respecting, unless absolutely prevented, the laws in force in the occupied country.

Article 45 provided an especially important protection for inhabitants:

"It is forbidden to compel the inhabitants of occupied territory to swear allegiance to the hostile Power."

This provision is directly relevant to the historical question of oaths imposed upon Slovenian inhabitants and military formations. It demonstrates that the law of occupation distinguished between the authority exercised by an occupying power and the continuing legal position of the inhabitants of the occupied territory.

The Hague Regulations therefore provide the principal international-law framework within which the legal status of Slovenian military and civilian conduct during the occupation must initially be examined.

III. The Hague Regulations Were Not a General Criminal Code

An important methodological point follows.

The Hague Regulations were not a comprehensive criminal code containing a provision stating that "collaboration with the occupying power" was an international crime. Nor did they establish a general offense of "treason" applicable to inhabitants of occupied territory.

Instead, they established rules governing occupation and warfare.

Some provisions expressly prohibited particular conduct. Article 23, for example, prohibited various methods of warfare, including treacherous killing or wounding, killing or wounding an enemy who had surrendered, and compelling nationals of the hostile party to take part in military operations directed against their own country.

Other provisions regulated the conduct of an occupying power. Article 43 required the occupant to preserve public order while respecting existing law unless absolutely prevented from doing so. Article 45 prohibited compelling inhabitants to swear allegiance to the hostile power.

Consequently, the legal question concerning a Slovenian who worked for, served, or cooperated with an occupying authority cannot simply be answered by identifying that person as a "collaborator."

The relevant inquiry is whether the person's **specific conduct violated a rule that was legally applicable at the time**.

IV. Military Service Under an Occupying Power

This distinction is particularly important with respect to the Slovene Home Guard.

A modern observer might reason that because the Home Guard operated in cooperation with German occupation authorities, membership in the organization was itself criminal. That conclusion does not follow automatically from the law applicable during the war.

The Hague Regulations did not create a general international offense of serving in an enemy military organization. They did, however, impose restrictions upon the occupying power's ability to compel inhabitants to assist the enemy war effort.

The distinction between **voluntary military service and compelled service** is therefore legally significant.

The circumstances surrounding recruitment, enlistment, military oaths, command relationships, training, deployment, and actual duties must be established before drawing legal conclusions.

This does not mean that voluntary service for an occupying power was necessarily lawful in every respect. An individual could simultaneously be subject to domestic criminal law concerning treason and, if he participated in prohibited conduct, incur international criminal responsibility. But **military service itself cannot simply be equated with a war crime without identifying the applicable legal rule and the individual's conduct.**

This distinction is particularly important for the Home Guard because the historical record contains evidence concerning its military relationship with German authorities, while individual Home Guard members performed different functions and served under different circumstances.

The appropriate legal analysis is therefore:

membership → military status → circumstances of service → actual conduct → applicable criminal prohibition → individual responsibility.

V. Domestic Treason and International War Crimes Are Not the Same Offense

The distinction becomes even more important with the concept of **treason**.

Treason is principally a matter of domestic criminal law. Whether a Slovenian or Yugoslav citizen committed treason depends upon the domestic law applicable to that person and territory at the relevant time.

International humanitarian law does not establish a universal offense under which every national who cooperates with an occupying power becomes a war criminal.

Thus, a person might have committed an offense under domestic law by assisting an enemy power without having committed a violation of the international laws of war.

Conversely, a person could commit a war crime even though the person's conduct did not constitute “treason” under domestic law.

The categories must therefore remain analytically separate:

treason ≠ collaboration ≠ military service ≠ war crime.

They may overlap in an individual case, but proof of one does not automatically establish the others.

This distinction is particularly important when evaluating the Home Guard. A historical determination that the organization was a collaborationist military formation may be relevant to understanding its political and military relationship with Germany. It does not, standing alone, establish the criminal liability of every person who belonged to it.

VI. The Law Governing the Partisans Must Be Examined Under the Same Temporal Standard

The same principle must be applied to the Partisan movement.

The fact that the Partisans fought against Axis occupation does not place their conduct outside the laws of war.

The legal status of a resistance movement and the legality of the conduct of individual resistance fighters are separate questions.

A Partisan who engaged German military forces in combat was participating in warfare. A Partisan who deliberately killed a surrendered enemy soldier, tortured a prisoner, or deliberately attacked civilians could, depending upon the applicable legal framework and circumstances, incur individual criminal responsibility.

The political legitimacy of resistance does not create a legal exception to the laws and customs of war.

This is essential to the methodology of this paper. The Home Guard and Partisans must be subjected to **the same temporal and substantive legal rules**.

The relevant question is not:

Which side was politically justified?

It is:

What rule of law governed the conduct when it occurred, and did the individual violate that rule?

VII. The 1929 Geneva Convention Relative to Prisoners of War

The legal framework existing during the war was not limited to the Hague Regulations.

The **1929 Geneva Convention relative to the Treatment of Prisoners of War** was also applicable to the treatment of prisoners of war by states that were parties to the Convention.

This is particularly relevant to allegations involving:

- killing prisoners;
- mistreatment of prisoners;
- torture;
- unlawful detention;

- denial of basic protections;
- and other forms of abuse of persons who had fallen into enemy hands.

The existence of the 1929 Convention reinforces an important point: **many forms of conduct that would later be prosecuted at Nuremberg were already prohibited during the war.**

Accordingly, when examining an alleged crime in Slovenia, the researcher should not begin with the Rome Statute or the postwar jurisprudence of the ICTY. The first question should be:

What treaty or customary rule governed this conduct in 1941, 1942, 1943, 1944, or 1945?

Only after answering that question should later jurisprudence be introduced.

VIII. Nuremberg Did Not Create the Law of War From Nothing

The Nuremberg proceedings are extremely important for understanding the development of international criminal law, but their legal significance must be handled carefully.

Article 6(b) of the Nuremberg Charter defined war crimes as violations of the laws or customs of war and specifically identified such conduct as murder, ill-treatment or deportation of civilian populations in occupied territory, murder or ill-treatment of prisoners of war, killing of hostages, plunder, and destruction not justified by military necessity.

The Tribunal subsequently explained that the category of war crimes rested upon existing laws and customs of war. Its judgment therefore treated the Hague Regulations and other established rules as sources of the law governing wartime conduct.

This is critically different from saying that the Nuremberg Charter itself transformed conduct that had previously been lawful into criminal conduct.

For the purposes of this paper, the proper approach is therefore:

Nuremberg may be used to clarify the meaning, application, and individual-responsibility consequences of rules that already existed, but it should not automatically be used as the source of a criminal prohibition for conduct that was not criminal when committed.

IX. The Nuremberg Principle of *Nullum Crimen Sine Lege*

The issue of retroactivity was expressly raised at Nuremberg.

The defense argued that punishment of conduct not previously established as criminal violated the principle *nullum crimen sine lege*. The Tribunal acknowledged the principle as one of justice, although it rejected the argument that it prevented prosecution for aggressive war under the circumstances before it. The Tribunal emphasized the existing international legal obligations concerning aggressive war and treaties renouncing war as an instrument of national policy.

This aspect of the judgment should be treated carefully.

The Tribunal's reasoning concerning aggressive war was specific to the legal circumstances of the defendants before it. It should not be generalized into a proposition that any conduct could retrospectively be made criminal merely because a later tribunal considered it morally reprehensible.

For historical analysis of Slovenia, the safer principle is considerably narrower:

A postwar tribunal may apply a postwar procedural mechanism to conduct occurring during the war, but the substantive criminal prohibition must be grounded in a rule that existed at the time or in a rule recognized as already forming part of customary international law.

This distinction is particularly important when discussing alleged crimes committed by Home Guard or Partisan personnel.

X. Crimes Against Humanity Require Particular Caution

The concept of **crimes against humanity** presents a more difficult temporal problem.

Article 6(c) of the Nuremberg Charter defined crimes against humanity to include murder, extermination, enslavement, deportation, and other inhumane acts committed against civilian populations, as well as political, racial, and religious persecution, when committed in connection with crimes within the Tribunal's jurisdiction.

The postwar Control Council Law No. 10 subsequently contained a broader formulation, defining crimes against humanity to include murder, extermination, enslavement, deportation, imprisonment, torture, rape, other inhumane acts, and political, racial, or religious persecution. That law was enacted on 20 December 1945.

This creates an important distinction for historical research.

The modern concept of crimes against humanity is considerably broader than the formulation contained in the Nuremberg Charter. Modern international criminal law recognizes crimes against humanity as a distinct category with elements developed through subsequent treaties, jurisprudence, and customary international law.

It would therefore be legally problematic to take the modern definition and simply declare that conduct occurring in Slovenia in 1945 **was a crime against humanity because it satisfies the Rome Statute today**.

The correct question is more nuanced:

Would the conduct have constituted a crime under the international law applicable at the time, or was it subsequently recognized as falling within a category of criminal conduct that already existed under customary international law?

That distinction allows historical analysis without retroactively applying the Rome Statute or later jurisprudence as though they were in force in 1945.

XI. The Rome Statute Cannot Be Applied Directly to 1945

The Rome Statute of the International Criminal Court, adopted in 1998, provides an important modern framework for defining genocide, crimes against humanity, war crimes, and aggression. But it is not the law that governed Slovenia in 1945.

Accordingly, the Rome Statute can be used in this paper for a **comparative legal analysis**, but not as the direct source of criminal liability for conduct occurring during the Second World War.

This distinction actually strengthens the historical argument.

One may ask:

“If the conduct occurred today, would it satisfy the elements of a crime against humanity under modern international criminal law?”

That is a legitimate and useful analytical question.

But it is different from asking:

"Was the conduct a crime under international law in 1945?"

The first is a **modern comparative assessment**.

The second is a **historical legality assessment**.

The two conclusions should never be presented as though they were the same.

XII. Later International Criminal Tribunals: Clarification Rather Than Automatic Retroactivity

The jurisprudence of the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), and the International Criminal Court can likewise be extremely useful in analyzing historical conduct.

These tribunals have developed detailed jurisprudence concerning:

- individual criminal responsibility;
- command responsibility;
- aiding and abetting;
- persecution;
- murder;
- torture;
- deportation and forcible transfer;
- sexual violence;
- attacks against civilians;
- superior responsibility;
- and the distinction between combatants and protected persons.

But later jurisprudence cannot simply be substituted for the law in force in 1941–1945.

Instead, the researcher should ask whether a later tribunal is:

1. **interpreting a pre-existing rule;**
2. **identifying customary international law that existed before the conduct;**
3. **clarifying the elements of an established offense;**
4. or **developing a new legal formulation that did not exist at the relevant historical moment.**

Only the first two categories can ordinarily provide strong evidence concerning the legality of conduct during the Second World War.

The distinction is particularly important because the ICTY itself was established decades after the events under examination. Its jurisprudence is therefore highly valuable as interpretive material, but the existence of the ICTY does not itself establish that every rule formulated by the Tribunal existed in identical form in 1941–1945.

XIII. The Martens Clause and Customary International Law

One further source of law must also be considered: **customary international humanitarian law**.

The Hague Convention's famous Martens Clause recognized that, in cases not covered by specific treaty provisions, populations and belligerents remained under the protection of principles derived from the usages established among civilized nations, the laws of humanity, and the dictates of the public conscience.

This provision is important because the law of war in 1941–1945 was not limited to the literal text of the Hague Regulations.

International humanitarian law consisted of:

- treaty law;
- customary international law;
- generally recognized laws and customs of war;
- and established principles governing armed conflict.

Consequently, the absence of a provision expressly stating that a particular act was prohibited does not necessarily establish that the conduct was lawful.

But the reverse is equally important:

The fact that modern international law now regards conduct as criminal does not establish that the same conduct was criminal in 1941–1945.

Evidence of customary international law at the relevant time is therefore essential.

XIV. A Temporal Method for Evaluating Historical Crimes

For purposes of this paper, every alleged offense committed in occupied Slovenia should be analyzed through a **temporal legality test**.

Step One: Identify the date

When did the alleged conduct occur?

The applicable law may have changed between:

- April 1941;
- the Italian capitulation in September 1943;
- the German takeover of the Italian occupation zone;
- the final months of the war;
- and May 1945.

A legal conclusion should therefore not simply refer to "the law of World War II" as though the entire period constituted a single legal moment.

Step Two: Identify the status of the victim

Was the victim:

- a civilian;
- a combatant;
- a prisoner of war;
- a person who had surrendered;
- a wounded person;
- a member of an enemy armed force;
- or a person otherwise protected under applicable law?

The victim's status can determine which legal rules apply.

Step Three: Identify the actor

Was the accused:

- a German soldier;
- an Italian soldier;
- a Slovene Home Guard member;
- a Partisan;
- a police officer;

- a civilian official;
- or another person?

The actor's status may affect the applicable law, but it does not by itself determine criminal responsibility.

Step Four: Identify the conduct

The allegation must be stated with precision:

“killed five civilians at location X on date Y”

is legally meaningful.

“was a collaborator”

is not, standing alone, an allegation of an international crime.

Step Five: Identify the law existing at that time

The researcher must determine which treaty or customary rule applied when the conduct occurred.

Step Six: Determine whether the conduct violated that rule

The elements of the alleged offense must then be established.

Step Seven: Determine individual participation

Finally, the evidence must establish whether the particular person:

- committed the act;
- ordered it;
- instigated it;
- aided or assisted it;
- or otherwise incurred individual responsibility under the applicable law.

This procedure should be applied equally to Home Guard and Partisan cases.

XV. Why This Matters for the Home Guard

This temporal framework has particular significance for the Slovene Home Guard.

A historian may conclude that the Home Guard was a collaborationist military organization operating under German occupation. That is a historical characterization.

A lawyer must ask a different question:

What legal consequence followed from that relationship in 1943 or 1944?

If the answer is “treason,” the applicable domestic law must be identified.

If the answer is “violation of the law of occupation,” the particular Hague or customary rule must be identified.

If the answer is “war crime,” the prohibited conduct and the applicable international rule must be identified.

If the answer is “crime against humanity,” the researcher must establish the applicable legal basis at the relevant time rather than simply applying the modern definition retroactively.

This framework makes it possible to acknowledge the extensive evidence of German control and cooperation without collapsing **organizational collaboration into individual criminal responsibility**.

XVI. Why This Matters Equally for the Partisans

The same analysis applies to Partisan conduct.

A Partisan operation against German forces may have been entirely consistent with the law of armed conflict.

A Partisan execution of a prisoner who had surrendered raises a fundamentally different question.

A Partisan attack on a German military installation presents another legal question.

A Partisan killing of a civilian because of political affiliation presents another.

A postwar mass execution of prisoners or surrendered personnel requires still another legal analysis.

The fact that the Partisans were fighting an occupying power cannot itself resolve any of these questions.

Nor should the legal analysis assume that every person killed by the Partisans was a protected civilian. The status of each victim must be established from the historical evidence.

The same principle applies to Home Guard victims of Partisan operations.

XVII. Postwar Law Can Still Be Powerful Evidence

The distinction between wartime and postwar law does not mean that later law is irrelevant.

Quite the opposite.

Postwar jurisprudence can provide valuable evidence concerning:

- the meaning of established Hague rules;
- the scope of customary international humanitarian law;
- principles of individual criminal responsibility;
- the treatment of prisoners and civilians;
- command responsibility;
- and the distinction between lawful military operations and criminal violence.

But the legal historian should identify the precise function of the later authority.

For example:

“The ICTY later interpreted this rule in the following manner.”

is materially different from:

“The ICTY created this rule, and therefore it applied to Slovenia in 1945.”

The first may be legally useful.

The second may constitute an impermissible retroactive application of law.

XVIII. The Proper Use of Modern International Criminal Law

Modern international criminal law is nevertheless extremely useful for the broader research project.

A researcher can legitimately conduct a **two-stage analysis**.

Stage One: Historical legality

Was the conduct criminal under the international law applicable in 1941–1945?

Stage Two: Modern characterization

If the same conduct occurred today, would it satisfy the elements of a war crime, crime against humanity, genocide, or another international crime under contemporary international criminal law?

The answers may differ.

That difference is not a defect in the analysis. It is precisely what the distinction between historical and modern law is designed to reveal.

For example, a pattern of postwar killings might satisfy the elements of a modern crime against humanity, but the legal historian must still determine what criminal rules existed in 1945 and whether those rules could lawfully support prosecution at that time.

XIX. The Central Principle for the Slovenian Historical Record

The appropriate legal principle can therefore be stated as follows:

Conduct occurring in occupied Slovenia between 1941 and 1945 must first be judged according to the international and domestic law applicable at the time of the conduct. Later international criminal law may be used to clarify, compare, or illuminate that conduct, but it cannot simply be substituted for the law that governed the actors when they acted.

This principle protects against two opposite historical errors.

The first is **anachronistic criminalization**—declaring conduct criminal in 1941–1945 solely because modern international law now prohibits it.

The second is **anachronistic exoneration**—assuming that because a modern legal category did not yet exist in precisely its present form, conduct that was already prohibited by the Hague Regulations or customary international law was therefore lawful.

The correct method lies between these extremes.

XX. Conclusion: Law Must Follow the Conduct, Not the Label

The legal history of occupied Slovenia therefore requires a disciplined separation between **historical characterization and legal liability**.

“Collaborator,” “traitor,” “Partisan,” “Home Guard,” “German auxiliary,” and “resistance fighter” are historical descriptions. None of those labels, standing alone, establishes an international crime.

The legally decisive question is whether the particular conduct violated a rule that was legally applicable when the conduct occurred and whether the evidence establishes the individual's responsibility for that violation.

The Hague Regulations provide the essential starting point for the law of occupation. The 1929 Geneva Convention provides additional protection concerning prisoners of war. Customary international law supplies rules not exhausted by treaty text. The Nuremberg Charter and judgment provide the first major postwar articulation of individual international criminal responsibility. Control Council Law No. 10 further developed the postwar legal framework. Later tribunals, including the ICTY and ICC, have elaborated these principles considerably.

But the chronology matters.

1945 cannot simply be judged by 1998, and 1941 cannot simply be judged by 2026.

At the same time, 1945 must not be treated as a legal vacuum merely because later international criminal law is more fully developed. Many fundamental protections of civilians, prisoners, and surrendered combatants were already established before the occupation of Yugoslavia.

The resulting methodology is therefore both historically and legally demanding:

First identify the law that existed. Then identify the conduct. Then determine whether the conduct violated that law. Finally determine whether the individual can be held responsible.

That methodology should govern the analysis of **both the Slovene Home Guard and the Partisans**. It avoids collective guilt while preserving the possibility of individual criminal responsibility. It also permits the historical record to be examined according to a single legal standard rather than according to the political identity of the organization to which the accused belonged.