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Judgment at The Hague

Ruti Teitel

When the first international war crimes trial in half a century opened in May 1996 at The Hague, it was justice in a vacuum—first it was justice completely isolated from the raging conflict on the ground in war-torn Yugoslavia, and, later, justice poised on a precarious peace, a delicate balance. It was justice in a vacuum almost literally, for the entire courtroom was wrapped in bulletproof glass, as if to protect the fragile legal processes from a violent threat. In other notorious war crimes trials, such as the trial of Adolf Eichmann, it was the perpetrator who was separated by glass. At The Hague, not only the accused, but the entire proceeding stands separated, as if vulnerable in its search for a rule of law in extraordinary circumstances. What is law's potential in an isolation booth? What is the role for trials during wartime and in a fragile peace?

Though there are similarities between Nuremberg and the Hague Tribunal, the differences are profound. Most prominent is the order of events—trials, then peace. The WWII trials sought justice after peace, punishing Germany and Japan's crimes after the war had ended. But the Hague Tribunal began while the bloody war still raged. Its hope was that bringing individuals responsible for war crimes to justice would also bring about a peace. Thus while Nuremberg sought justice after peace, The Hague seeks peace through justice.

This is something new, and it raises profound questions for international law. What is the connection between justice and peace? The Tribunal at The Hague has little more than hope to offer here,

but in a form that offers something new for international law in unsettled times.

Evidence and individual responsibility

The nature and purposes of the Tribunal's justice leads back to its origins in the Balkan conflict. In the spring of 1992, Bosnian Serbs, with the assistance of the Yugoslav army, began a drive to "ethnically cleanse" all non-Serb inhabitants from broad swaths of Bosnia. After three years, employing siege warfare tactics, widespread systematic persecution, torture, murder, rape, beatings, harassments, discrimination, and displacement, the Bosnian Serbs virtually completed their task—"cleansing" eastern Bosnia, leaving a quarter of a million dead, tens of thousands of refugees, and thousands of victims of civilian torture.

After the television cameras caught up with the massacre, the UN Security Council was forced to act. At first there were warnings that the warring parties must comply with international humanitarian law. When that failed, the Security Council established a commission, modeled on the 1943 Allied War Crimes Commission, to investigate the atrocities committed in the region. By February 1993, the "Commission of Experts" had concluded that there had been willful killing, organized massacres, torture, rape, pillage, and destruction of civilian property—all in a campaign to render "an area ethnically homogeneous, using force and intimidation to remove persons of given groups from the area." (See UN Doc. S/25274.) In eastern Bosnia, the tactics were plainly war crimes, "grave breaches" of the laws of war governing international conflict, as well as "crimes against humanity" as

defined at the Nuremberg trials and by international law. Ethnic cleansing was part of a much larger attempt by Bosnian Serb forces to commit genocide against Bosnian Muslims and other non-Serbs (see UN Doc. S/26274). On May 25, 1993, the Security Council, operating under its Chapter VII powers, established the "International Criminal Tribunal for the former Yugoslavia" as "a measure to maintain or restore international peace and security." Bringing individuals to justice, the Security Council said, would contribute to the restoration and maintenance of the peace.

But how? The Tribunal faced practical as well as conceptual problems. Unlike Nuremberg, the Tribunal lacked the power that comes with traditional victor's justice. Thus it was unable to gain custody of the accused, and incapable of gaining access to evidence. The Dayton accords did not help. Though the accords obligated the signatories to support the Tribunal (Arts. IX and X), and hand over suspected war criminals, they lacked explicit enforcement mechanisms. There was no mention of whose responsibility it was to arrest indicted war criminals. These powers were said to lie outside the mandate of the NATO peace implementation force (IFOR). And thus despite persistent calls for the arrests of Serbian leaders Radovan Karadzic and Ratko Mladic, IFOR, even when in their proximity, seemingly did their best to avoid confrontation.

This inaction only underscored the growing gap between the Tribunal's objective and the UN's failure of support. And as time has passed, this impotence has become more pronounced. In a speech to the UN General Assembly, on November 7, 1995, Tribunal presiding judge Antonio Cassese compared the Tribunal to "a giant who has no arms and no legs. To walk and work, he needs artificial limbs. These artificial limbs are the state authorities; without their help the Tribunal can not operate." Like Gulliver amongst the Lilliputians, the Tribunal is paralyzed by the inaction of the international community, until they see fit to support the Tribunal's efforts to accomplish its mission.

But it was also unclear how, even with the appropriate support, such a Tribunal was to work—in particular, how justice was to advance peace. One pur-

pose for holding war crimes trials during the conflict was said to be deterrence. Like the French trials of German soldiers during WWI, or the Allies threats of punishment during WWII, the idea was that trials might deter the commission of further atrocities. But they did not. Massacres committed well after the Tribunal's establishment make plain the irrelevance of the trials to the military conduct on the ground.

Beyond deterrence, there were other more ambitious hopes. Individual accountability was thought to be a way to break a cycle of ethnic retribution. "Absolving nations of collective guilt through the attribution of individual responsibility is an essential means of countering the misinformation and indoctrination which breeds ethnic and religious hatred." (See Prosecutor's Response to the Defense Motions filed on June 23, 1995, Dusko Tadic case No. IT-94-IT.) This reasoning hearkened back to a traditional purpose of the criminal law—the control of private vengeance by formally attributing responsibility. In this way, war crimes trials were to enable the move from ethnic conflict to peace and reconciliation, by treating the collective wrongs of the warring factions as individual wrongs.

The focus was on ethnic cleansing. Reaffirming Nuremberg's central principle that responsibility for war crimes was individual, the Tribunal prosecuted ethnic cleaning as crimes against humanity (as "inhuman acts" that are "widespread and systematic," "perpetrated on any civilian population, on an ethnic basis") and as genocide against individuals throughout the chain of command. The massacres were undeniable, but the legal standard of proof for each charge would be severe: Genocide required proof of specific intent of racial, religious, or ethnic persecution. By the spring of 1992, the Commission of Experts's final report had concluded that mass murder, torture, and rape, committed in the area of Opstina Prijedor in north-western Bosnia against civilians both inside and outside of detention camps, unquestionably constituted crimes against humanity, and that a court of law would find it to be genocide. Genocidal intent to destroy ethnic and religious groups was also present in the distinctive patterns of Bosnian Serb ethnic cleansing, widespread mas-

sacres, and systematic rapes. In the words of the Tribunal, July 1995, "the Muslim population of the enclave of Srebrenica [a UN "safe area"] was virtually eliminated by Bosnian Serb Military personnel . . . under the command and control of Radovan Karadzic and Ratko Mladic." In its indictments of these Serbian leaders, the Tribunal concluded there was prima face evidence that the facts "disclose above all, the commission of genocide." But locating that collective intent in the minds of individual actors would be a different matter; and so too its effectiveness in ending the ethnic conflict.

From Superindictments to truth

The Tribunal's conception of what is criminal in the Balkans is also a significant move away from established legal views. While traditionally, victorious powers punished crimes committed in the course of a war, The Hague condemns another injustice, not necessarily tied to international conflict. The Tribunal's jurisdiction extends to crimes against humanity committed in armed conflict, whether international or not. Ethnic persecution, even that occurring wholly within a state, is prosecuted as an "international" war crime. As it departs from the traditional paradigm, the Tribunal exemplifies a new understanding of accountability that makes heinous and systematic rights violations an international matter.

This is something new. Prosecuting ethnic persecution is the mirror image of the traditional case: the shift is from judging the wrongs committed by foreign invaders or occupiers against civilians to judging the abuses that states commit against their own citizens. For victims of ethnic persecution are citizens who have been rendered aliens within their own homeland. They have neither a state, nor courts, nor law to protect them. The International Tribunal now takes their side. This decision illustrates the potential of an expansive practice of international humanitarian law: A state's persecution of its citizens need not be confined within national boundaries, but transcends to the international sphere.

But this humanitarian project, though ambitious, is again utterly frustrated by the constraints

of a cold peace. Most of those responsible for war crimes remain at large. Seated in the Netherlands, remote from the scene of the crimes, most of the evidence necessary to establish individual wrongdoing is in effect at large as well. Operating within these constraints, the Tribunal's justice has been non-traditional as well. In the main, its work has been limited to the process of indictment. And while at Nuremberg some of those indicted (such as Martin Bormann) were tried and convicted in absentia, such was not to be the case at The Hague. The inability to gather defendants or evidence raised the fear that trials in absentia would become the norm and so, under Tribunal rules, they are strictly forbidden. Thus as the Serbian leadership continues to evade responsibility, the Tribunal has persevered with its indictments, an utterly Balkanized legal process, split off from political reality in the region.

The indictments appear to have their own purpose, unrelated to the eventual conviction of any individual. Tribunal indictments, so-called superindictments, are now an elaborate public proceeding, a recitation of offenses and presentation of the evidence. Like American grand juries, the proceedings marshal all the evidence, and seem fairer than trials in absentia, since in the accused's absence, there is no judgment. The "superindictments" are public and even televised with live witness testimony. (In the US, Court TV covered two such spectacles "live.") And with seventy-five pending indictments, and only five suspects in custody, we can expect more of these public recitatives.

The superindictment proceedings have become substitutes for trials. In a sense, they are "show trials," not because their results are rigged, but because their main purpose is to tell a story. Their function is expressive. Through these public indictment proceedings, the Tribunal establishes and condemns wrongdoing. Following indictments, an international warrant of arrest is issued, the evidence published, and the accused publicly branded as an international fugitive from justice. These superindictments and their stigmatization is the Tribunal's first sanction, though lack of political support may make them its only sanction as well.

By pursuing the truth about atrocities in the region, the Tribunal returns to an old understanding of "prosecution," signifying the investigation of the truth of a contested event. Indeed, the UN Court has been described as an exercise in "truthtelling." According to the Clinton Administration's John Shattuck, "establishing the truth about what happened in Bosnia and Croatia is essential not just to justice, but to peace." Truth, too, becomes the tool of peace, following the view of some that establishing the "truth" about a state's repressive past can lay the foundation for national reconciliation. National truth commissions, in Argentina, Chile, and most recently South Africa, have been touted as critical features of successful political transition. The promise of just such a reconciliation in the Balkans was symbolized by the appointment, as the Tribunal's chief prosecutor, of Richard Goldstone, known for his leadership in South Africa's peaceful transition from apartheid. Indeed, at the first superindictment proceeding, on October 9, 1995, Goldstone likened the public indictments to the national truth commissions, declaring the "public record will assist in attributing guilt to individuals and be an important tool in avoiding the attribution of collective guilt to any nation or ethnic group."

Yet again, the traditional pattern is reversed. Just as war crimes trials have traditionally followed peace, not preceded it, so too in countries where truth commissions have been convened, it was not "truth" that brought on the peace, but rather peace that enabled the search for truth. Once again, a traditional end, in Bosnia, has become a political means. While truth, like justice, has formerly been the fruit of peace, in Bosnia, both are now pursued for their promise of peace.

There are questions about this strategy. It is also not clear how the criminal process advances truth. In one sense, of course, it does by enabling formal documentation, adhering to very high standards of past wrongdoing. Yet criminal proceedings aim primarily not at establishing the truth of a contested event; rather, their objective is to ascribe individual responsibility for past wrongdoing, and then to pass judgment. Indeed there is a tension between this idea of truth through crimi-

nal prosecution and truth as a means of justice. For individuals should not be prosecuted simply as a means to establish the truth. An indictment is not a conviction and justice demands that the presumption of innocence ought be maintained. Though the criminal process may well establish some sense of truth about individual wrongdoing, it is for this reason precisely that it is not well suited to a working through of a region's conflictual history. Historical inquiry requires a broader lens than that of the individual trial. And if truth were the UN's goal, then the better course might well have been to continue the historical mission of the Commission of Experts in 1993.

Neutrality's justice

But a more profound concern is raised by the nature of the story told by the Tribunal. Through exemplary justice, and the juxtaposition of atrocities, Serb, Croat, and Muslim perpetrators, and victims, all line up. The story is of an ancient and intractable ethnic enmity; the conflict made to seem natural and inevitable. All sides are guilty. Implicitly, the Tribunal thereby offers the West a justification for its nonintervention, suggesting a haunting connection between justice and peace. Traditionally, war crimes trials tell a story that rationalizes the victor's military policy, and more importantly, the victor's military intervention. But the Hague Tribunal makes the case for another sort of military policy—nonintervention. The lesson of this Tribunal is of eternal atrocities, of justice without victors and without heroes, instead of a cycle of perpetrators and victims. In this account, international criminal law rises above harsh political and military realities, to portray a strange deracinated victim's justice. In its landmark decision regarding its jurisdiction under the UN's Charter, the Tribunal justified its dominion over the crimes at issue by asserting that these "cannot be considered political offenses, as they do not harm a political interest of a particular state," and the "norms prohibiting them have a universal character." The Tribunal advances this normative function, condemning ethnic persecution as a profound offense against the entire international community, but

from a perspective detached from the struggle.

For both in wartime and in peace, here was a Tribunal presided over by nonvictors and neutrals. Within the international human rights community, this neutrality is thought to render the trials at The Hague superior to prior war crimes trials. And no doubt there is an undeniable, even if misguided, appeal to the idea of neutrality in the midst of hostilities, that avoids the partiality of victor's justice.

But this does not leave the Tribunal with clean hands. For though the Tribunal may appear impervious to the challenges traditionally leveled against victor's justice, this does not mean there are no question of justice to be raised against the UN in this conflict. The UN's role raises grave questions of moral responsibility, and therefore by association, it raises questions about the Tribunal's authority. Victor's justice is at its most vulnerable when those sitting in judgment have unclean hands. The "tu quoque" challenge was raised loudly at Nuremberg because of the Soviet judges. Yet here, nonintervention does not leave the UN innocent. Rather, it is its failure to intervene that is questionable. For it was the UN's own creation of the safe havens that drew Muslims and Croats into the concentrated enclaves, and these enclaves facilitated part of the genocide that the Tribunal now adjudicates.

This is crime by omission. Post-Nuremberg, crimes by omission, especially by those charged with political responsibility over a geographic region, raise profound questions of international criminal responsibility. Hence, exactly one year after the Srebrenica "safe area" massacres, the UN has a deep interest in holding public indictment proceedings to assign responsibility to others—to Serbian leaders Karadzic and Mladic, in particular. And their absence from the courtroom, as well as NATO's unconcern about their arrest, affirms a craven international neutrality.

Internationalizing justice

The liberal hope was that, despite hostilities, this exercise of rule of law in a political vacuum would somehow triumph. Yet with the UN's dirty hands, and the perpetual unearthing of mass graves in the region, the constructions of "international law," of

"universality," of "crimes against humanity," of "genocide," even as they attempt to rise above the political, do not succeed in pushing aside haunting questions about the meaning of the judicial response to ongoing persecution. What is the point of justice, always after the fact? What is the hope of justice, before any peace?

In these political circumstances, the Tribunal's project is necessarily more limited than that of traditional criminal justice. Yet the Tribunal's justice does have a point. Its aim is transitional, characteristic of a more general phenomena that we might call "transitional justice." The role of the Tribunal is to insure some measure of accountability during extraordinary periods of lawlessness. International criminal justice is justified by the failings of national justice to respond to ethnic persecution. Thus, international crimes against humanity jurisdiction transcends national borders because of the distinctive nature of ethnic persecution and genocide. In the former Yugoslavia and Rwanda, persecution on the basis of ethnicity triggers extraordinary extensions of international criminal jurisdiction. In Croatia, there have been thousands of trials involving members of the opposing forces held in absentia. In Rwanda, tens of thousands of Hutus were held in prolonged detention, yet not one national trial has been held. In such extraordinary contexts, internationalization of justice offers a way out for victims of persecution. Yet, for the same reason, when the rule of law is restored, indictments should be turned over to the affected states. Ultimately, the message of ethnic reconciliation is best enforced by pluralistic states committed to liberal principles of dignity and equal regard under the law. But in the meantime, the aim of international criminal jurisdiction must be to aid in that transition.

In the international human rights community, some believe that the Tribunal brings us a step closer to a permanent international criminal court. The Hague precedent suggests that even those opposing a permanent international criminal court might well support an international criminal court along the lines of the Tribunal—a Court that would prosecute only the most grave offenses, to fill in

where national systems of justice have failed. They might support, that is, an international tribunal jurisdiction that is explicitly transitional and, rather than imposing justice claims on outlaw nations, is aimed at moving a nation towards the conditions within which it can adjudicate justice claims applying the rule of law.

For those in the Bosnia slaughterhouse, justice alone cannot bring peace. Nor is the Tribunal's practice of justice ideal. Nevertheless, ultimately,

the Tribunal's carefully drawn indictments of persecution should be supported, if understood as bounded and contingent transitional justice, delineating a thin line of international law, that might transcend the brutality of local power.

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The War Crimes Tribunal in the Yugoslav Context

Vojin Dimitrijevic

*My daddy is
a criminal of war.
Just try hard
to sentence him.
No one has the [...]
to take him to court.*

Popular folk song during the war in
Bosnia by Baja Mali Knindza

Very popular in 1992 and early 1993, this ditty echoed the mood of many Serbs, not only in Bosnia, Croatia, and Serbia, but also among the Serb diaspora in the US and other Western countries. Crudely bellicose sentiments were enkindled by the media in Serbia and Montenegro, and by an influential part of the intellectual establishment in Belgrade and other cultural centers. A description of all the ingredients of this mood would lead me far from the subject of this symposium. But the underlying psychological posture can be summarized as follows. Serbs have for centuries been the victims of genocide, injustice, and oppression, especially in WWII when they suffered more than anyone else at the hands of their Slav "brothers" in Yugoslavia. Earlier Serb efforts to accommodate and use peaceful means to resolve disputes have been futile and naive, leaving war as the only solution to the "Serb ques-

tion." The second part of this bracing world view is that the ongoing holy war is a war for the creation of a state, that it, a war for survival, a war against arch-foes, where mercy and sentiment are out of place, even toward one's conationals. In this kind of war, there are no rules. It is a holy mission, where individuals are of no concern, neither as victims nor as perpetrators.

Serbs found it sublimely simple to adopt this "macho" demeanor when they seemed militarily victorious, as many observers, at home and abroad, saw them to be towards the end of 1992. At that stage in the hostilities, foreign powers (Europe and the US) displayed anything but resolute resistance to Serb military advances and "foreigners" were dismissed as weak and indecisive by most Serb leaders. This Serb perception is partly explained by the fact that the Serb leadership was made up mostly of former Communist officials and officers of the