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**Book Review of War Crimes: Brutality, Genocide, Terror, and the
Struggle for Justice by Aryeh Neier**

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War Crimes: Brutality, Genocide, Terror, and the Struggle for Justice

by Aryeh Neier
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Reviewed by Ruti G. Teitel

Aryeh Neier's *War Crimes: Brutality, Genocide, Terror, and the Struggle for Justice* knowledgeably and articulately discusses the principal wars and atrocities of this century, inviting us to think creatively about which legal responses might be appropriate and effective. The book weaves together the terrible facts of the age—from the two world wars up to the recent genocides and war crimes in the Balkans and Rwanda—with a lucid account of the steady development of international criminal law. Tracing two centuries of legal evolution, the book makes a strong case for international criminal justice. Neier's narrative history of this war-riven century, it should also be said, is well crafted and easily accessible to a general audience.

War Crimes moves on two levels: it proceeds in chronological fashion, reviewing historical cases and then moving forward to contemporary controversies, including firsthand accounts of the author's personal involvement as the former director of Human Rights Watch. It also proceeds on an analytical level, as it identifies and evaluates problem areas in the criminal-law responses to atrocity, such as the punishment-amnesty debate or the problem of how to ascribe responsibility to individuals in the context of mass murder and systemic repression.

The book's great merit lies in Neier's ability to identify plausible legal responses to actual atrocities. But the very force of its narrative raises a paradox that the book itself does not completely resolve. Given a

fifty-year forward march of international human-rights norms, how can we explain the seemingly unending perpetration of war crimes and atrocities? The power of Neier's narrative inevitably casts a shadow over his hopes and ours for international criminal justice. In the context of recurring hostilities, what can the international community expect from criminal law? To what extent is international criminal law a proportionate response to the grim reality of human-rights abuses? Is it an effective way to handle the problem or a symbolic gesture, the expression of an aspiration?

And what underlying purposes are served by the international criminal-law response to human-rights abuses? This last question defies any simple answer. Neier argues in favor of individual trials for war crimes, even though he admits that such trials are often held for the "wrong reason." He makes this argument in a chapter dealing with the Balkans conflict, titled "Calling for a Tribunal, the Right Deed for the Wrong Reason?" The case for the ad hoc tribunal preceded the peace. Rationalized in terms of the peace, the tribunal was established at the behest of the Security Council. Neier interestingly compares the post-World War II trials with the current Balkan war-crimes proceedings convened in The Hague. Because they followed a substantial Allied intervention, the postwar trials have been criticized as examples of "victors' justice." Yet, if the contribution to peace of the International Tribunal for the Former Yugoslavia is more controversial, this is because its

organizers did not intervene decisively in the region. Today, those who would try war crimes apparently want victors' justice without having first achieved a battlefield victory.

The heinous massacres that were perpetrated at Srebrenica, in any case, took place after the tribunal's establishment, casting doubt on its effectiveness as a deterrent. Furthermore, as Neier correctly observes, invocations of "peace" in this context sound, at least in part, like a pretext for avoiding action, given the international community's failure to intervene effectively in the conflict in the first place. If the tribunals, and international criminal law more generally, are justified as means to deter ongoing violence, as this book's narrative suggests, to what extent can international legal responses be undertaken without regard to the politics-on-the-ground? Might there not be circumstances (such as we find in the Balkans in the 1990s) where, given the political realities of a negotiated peace agreement, criminal proceedings may well be destabilizing and therefore antithetical to a future turn toward liberal democracy?

Where *War Crimes* addresses this question, it endorses the aims of "legalism," the aim of espousing adherence to the rule of law (p. 222). The purposes of international criminal justice are always forward-looking. They have little to do with the traditional retributive purposes of the criminal law. Yet, if the purpose of war-crimes trials is to emphasize the consequences that flow from actions, then the question shifts to what exactly the criminal law is doing, here, that could not be accomplished by some other means. When legal proceedings are convened in the midst of political violence, as in the Balkans, the mere promise of a trial is unlikely to restore or reinforce the rule of law. What is more, this promise may even be used—as Neier observes—as a pretext to avoid more effective measures. This suggests that "justice," however desirable in itself, must sometimes yield to other more pressing moral aims, such as averting catastrophe and human suffering.

In a chapter dealing with individual responsibility in situations of systemic repression, Neier again takes up the question of norms in deciding what ought to be the priorities in punishment policy. The issue has arisen in the ad hoc tribunals adjudicating atrocities in

the Balkans and Rwanda, where Neier advocates going after those with the "highest responsibility for the most egregious crimes" (p. 214). This normative principle seems right, so long as it is interpreted in a broader policy context. For instance, where the stated purposes of the tribunal are to bring peace and establish the rule of law, prosecutions may be justified only so long as they advance stability in the region.

In the second half of the book, some of the other purposes and values of international criminal justice come into focus, such as its important role in representing (in the sense of re-presenting), or drawing public attention to, the political violence of this century. That is one indirect consequence of international criminal law's adjudication of human-rights violations as "war crimes," "crimes against humanity," and "genocide." This issue is raised in a chapter devoted to the treatment of rape under international criminal law, which provides a thorough summary both of rape's use as an instrument of terror in war and of the growing recognition of it as a war crime under international humanitarian law. Despite the contemporary movement for expanding new human-rights law in this area, Neier correctly observes that rape has long been recognized as a war crime under international humanitarian law. Nevertheless, he argues against prosecuting rape in the Balkans as "genocide," apparently out of a concern for dilution of the law. He sometimes suggests that his objection to genocidal-rape prosecutions is merely evidentiary (p. 187), while, in other places, the basis for his hesitation appears to run deeper (p. 191). But rape in Bosnia appears to have been used in an attempt to destroy an ethnic group, as a method of "ethnic cleansing." This strongly suggests that it should be prosecuted as a "crime against humanity." Rape policy mediates at the intersection of race and gender. When rape operates, as it did in the Balkans, both to violate women and to destroy an ethnic group, it could furnish arguably the basis for a charge of genocide.

The development of contemporary international criminal case law, concerning sexual violence in contemporary armed conflicts, illuminates the intimate connection between human-rights politics and law. The very architecture of the normative law, here, is inextricably entwined with political violence on the

ground, since international criminal law has become a mechanism for public recognition, albeit after the fact, of the victims' right to equal protection. This is, incidentally, a purpose that Neier endorses (p. 22). Understanding this "mirroring" or awareness-building function of international criminal law helps to resolve the paradox of how a growing international consensus on the normative binding power of rights could have been accompanied by an *increase* in the very atrocities that the apparatus seeks to publicize or represent.

To what extent does international criminal justice offer a "liberal" response to the horrors of contemporary persecution and injustice? Insofar as international criminal justice offers a small degree of individual accountability, it affirms a core feature of the liberal state. But today's international criminal-justice system lacks the support, in places like Rwanda and Bosnia, of established democratic national structures. The rule of law can never be fully stabilized from abroad, and without domestic support. Neier understands this quite well. The international criminal justice that he eloquently advocates therefore reflects a thin, procedural conception of the rule of law, although it is one

that is evocative of a more substantive ideal of justice. International criminal accountability offers the hope of outcomes agreeable to a liberal outlook, despite extraordinary circumstances and the unavailability of a genuine, locally supported rule of law. Even a thin rule of law, under international auspices, would appear to be better than its utter absence. Nevertheless, the danger of such gestures is that they may reduce justice to a principle of equal protection that is applied only symbolically and *ex post facto*, without requiring any serious humanitarian intervention on the part of the international community. Hence we need to exercise caution in entrenching international criminal law as our main technique for enforcing human rights. For if we just settle for the rule of law in extraordinary circumstances, we risk lowering our sights and forfeiting a more robust sense of justice and liberal democratic identity.

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