IS A PERMANENT NUREMBERG ON THE HORIZON?

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Is a world criminal court a dream that could soon come to fruition? Or is it a hopeless notion born of utopian fantasies?

Such questions have filled the pages of law journals since the end of the trials at Nuremberg and Tokyo after World War II. There are no simple answers or clear predictions concerning the feasibility of an international criminal tribunal. Given the spectacular growth in the acceptance and enforcement of internationally recognized human rights since the adoption of the Universal Declaration of Human Rights in 1948, it is logical to assert that the next step is to have international mechanisms to impose criminal sanctions on those individuals or nations that willfully reject international human rights norms.

There are now at least eight U.N. agencies that monitor state compliance with the various U.N. covenants on human rights. Philip Alston's magisterial volume *The United Nations and Human Rights* (Oxford University Press, 1992) demonstrates dramatically how mechanisms have been established to warn and cajole the nations of the world to comply with the moral norms set forth in instruments such as the International Covenant on Economic, Cultural and Social Rights (ICECS).[1] But Alston's essay on ICECS, and his comments on the other entities like the U.N. Commission on Human Rights, convey a sense that many states want to be seen as countries that comply with at least those minimum requirements on human rights that are generally considered binding as customary international law. Slavery and torture are just two examples of offenses forbidden by customary international law; even nations that have not signed or ratified the major U.N. covenants on human rights accept these basic customary laws.

Viewing the growing awareness of internationally recognized human rights and the increasing number of mechanisms for their enforcement, one must wonder whether one of the next steps might be the establishment of a world criminal court to handle the worst and most persistent malefactors. Whenever that possibility has been raised over the last 40 years, lawyers have insisted on raising difficult legalistic points about jurisdiction, venue, the applicable rules

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of evidence, and, of course, the nature of the penalties. Debates about the admittedly difficult legal problems that will confront an international criminal court have tended to weaken whatever enthusiasm might exist for a permanent Nuremberg.

But the dream of putting nations on trial should not and will not die. Indeed, the present may provide a better chance for an international criminal court than at any moment since the victorious Allies of World War II, wearied of their efforts at Nuremberg, walked away from the massive files gathered on the second- and third-tier Nazi leaders.

What the United States, the Soviet Union, China, France, and England did at Nuremberg and Tokyo stands as a triumph for all time of the principles of individual and national accountability. Nuremberg is also unforgettable because it repudiated for the first time in international law the notion that individuals are not culpable if they act pursuant to the orders of a superior. These principles of moral accountability were adopted and upheld in the resolutions of the General Assembly of the United Nations and in international law. The problem today is to devise in the post-Cold War world some form of credible legal machinery to enforce the principles adopted at Nuremberg by the community of nations.

The legal, moral, and political problems of establishing such machinery are vast. At the same time, there is a growing sense that an international criminal tribunal is imperative for a world united by the end of the Cold War. All of the vast literature on a world criminal court over the last 40 years is in a sense obsolete because the writers during that period assumed that the rivalry between the superpowers would continue indefinitely. However idealistic commentators tried to be, they concluded almost unanimously that the level of distrust between the nations of the Warsaw Pact and the "free world" was so high that a world court following a universally accepted rule of law was neither conceivable nor realistic. Accordingly, any discussion in 1994 of a world criminal court must start at the beginning.

Other crucial factors also have changed radically. During the Cold War, theorists contemplating a new and permanent Nuremberg assumed that U.N. attempts to enforce any judgment of a world court would be feeble, almost non-existent. Today, the United Nations is stronger and more active than ever before; the number and effectiveness of its missions have increased dramatically. The Blue Helmets are operating in Cambodia, El Salvador, and nearly 20 other countries. In addition, the United Nations has unprecedented power to pass and enforce economic sanctions against nations that violate basic international law. Even though it took several years to induce South Africa to move to free elections and majority rule, the sanctions against that country have been effective.

There is, in addition, a much deeper desire for a new international law than at any moment in world history. Instant telecommunications, international trade of unprecedented dimensions, and the longings of millions of people in the post-colonial nations for human rights and social justice are intense and ineradicable.

Some observers have compared the world today to the 15 years during which the United States struggled to be a viable nation under the Articles of Confederation. The Framers of the U.S. Constitution, as well as the inhabitants of the 13 colonies, knew that only a radical shift to a national government with broad and strong powers could prevent the further fraying of the colonies. The Framers wisely centralized the government of the nation and made the states subservient in several ways to the president, the Congress, and the federal courts. To facilitate this process, they created federal tribunals with the power to impose criminal sanctions on those who acted against the common national welfare.

The 184 member-states of the United Nations are, like the 13 original colonies, pleading for some form of international legal machinery to punish their leaders when they violate those moral norms agreed upon by the legislators and the individuals of all nations. There was a unanimous feeling of relief in December 1993 when the U.N. General Assembly finally established the office of the U.N. High Commissioner for Human Rights. But this new office has little if any enforcement power, and ultimately must be content with mobilizing shame against those states that defy basic moral norms of human rights.

For every plea over the last 40 years for an international criminal court there have been a thousand objections; they include both the practical criticisms of states and the arcane objections of lawyers. The protesters have usually expressed their objections by rehearsing the undeniable legal difficulties, such as the complications of developing a system of jurisprudence acceptable to nations with profoundly different legal systems, and the dilemmas included, for example, in attempting to try defendants *in absentia*. Skeptics also have theorized that such a tribunal might become dangerously politicized.

But underlying all the stated difficulties is the assumption that nations are immune from having their leaders or even their people tried by a panel of foreigners. The notion of state sovereignty is deeply embedded in the psyche of all nations. For more than 300 years, international law has been deemed to be the law between nations, all of which are sovereign and independent. The idea that individuals as well as nations have rights that are cognizable and enforceable is very new in international law. Many international legal scholars are ambivalent about the emerging custom that grants the *individual* a place in *international* law. Diplomats and public officials are even more resistant to the transformation that has occurred in international law since the United Nations made the enforcement of basic human rights an essential part of the law of nations.

Several nations have defied this principle by giving amnesty to political figures charged by an international entity with violating the law of nations. Leaders in Argentina and Brazil granted immunity to officials who were convicted of crimes that violated the code of conduct developed by the judges at Nuremberg. El Salvador egregiously violated the principle of personal accountability promulgated at Nuremberg when, a few days after the U.N. Truth Commission declared that certain military officials in El Salvador were murderers, the legislature and President Alfredo Cristiani gave unconditional amnesty

to all persons named in the report of the Commission. The amnesty was extended even in the case of the November 1989 murders of six Jesuits; the convicted killers were granted pardons. The legislature in El Salvador gave this amnesty even though the new constitution of El Salvador specifically states that amnesty cannot be given to individuals who have been convicted of serious crimes during the presidency of the chief executive who signs the amnesty order.

The deep attachment to national sovereignty and autonomy of nations is reflected in the U.S. Foreign Sovereign Immunities Act passed by the Congress in 1976. Under that legislation, the United States decrees not to hold foreign nations accountable in U.S. courts for their misdeeds. The Foreign Sovereign Immunities Act replicates similar laws adopted by the majority of nations. These regulations, which offer almost blanket immunity on a reciprocal basis to the family of nations, are problematic for those who are convinced that the creation of a permanent Nuremberg would be a giant step forward in the improvement of international law.

The Inspiration of Nuremberg

Relying on Nuremberg as a model for the proposed international criminal court has serious limitations. The most recent exposition of these limits has been put forth by former Nuremberg chief prosecutor Telford Taylor, in his book *The Anatomy of the Nuremberg Trials* (Alfred Knopf, 1992). In this definitive treatment on the post-World War II tribunal, Taylor notes that Nuremberg was initiated by the victors to prosecute the vanquished. As a result, Taylor implies, the tribunal in some crucial ways cannot be proclaimed a true international criminal court. Others have challenged the model of Nuremberg by questioning the tribunal's subject matter jurisdiction.

Aside from these difficulties, the teaching and precedent of Nuremberg are compelling, indeed overwhelming. Nuremberg was the embodiment of the warning given on 13 January 1942 by the nine European powers allied against the Nazis. The declaration issued at St. James Palace in London bluntly informed the Axis powers that there would be punishment for those responsible for war crimes; this responsibility would hold regardless of whether they ordered, perpetrated, or participated in the offenses. Never before in human history had such a group of powers planned for a tribunal after a war. The architects of Nuremberg could rely on the Kellogg-Briand Pact of 1928, which officially condemned recourse to war, but the final Nuremberg decrees went substantially beyond Kellogg-Briand. The founders of Nuremberg also relied on the fact that in 1920, the League of Nations had urged the establishment of a permanent international court. Indeed, throughout the 1920s and 1930s, jurists and scholars had examined the desirability and feasibility of such a tribunal. These developments prior to the Nuremberg trials reflected a growing consensus that certain crimes warranted international prosecution.

In 1946, the General Assembly of the United Nations unanimously adopted the "Principles of International Law Recognized by the Charter of the Nurem-

berg Tribunal." Those principles acknowledge the existence of international war crimes and crimes against humanity, and stipulate that violators can be tried and punished by an international tribunal even if their acts do not violate domestic law. Moreover, the Nuremberg legacy as incorporated into international law by the U.N. General Assembly confirms that persons can be punished even where they are acting under orders of a superior.

The Nuremberg principles were accepted in the four Geneva Conventions of 1949 and were incorporated into the military law of the United States, England, and other countries. The dramatic trial of Lt. William Calley for his involvement in the My Lai massacre demonstrates that the U.S. Army sought to apply the principles of Nuremberg to America's struggle in the jungles of Vietnam.

There is, therefore, sufficient law, tradition, and precedent to justify — indeed compel — the creation of an international criminal tribunal designed to punish war criminals. One painful element in this conclusion is the possibility that a well-established permanent international criminal tribunal might have deterred dictators like Marcos in the Philippines, the military rulers in Argentina from 1976 to 1983, the Shah of Iran, and leaders like Quadaffi and Hussein from committing massive human rights violations.

One also might ask whether the United States would have been deterred from some of its own adventures if the president and the Congress knew that individual Americans could be prosecuted in an international tribunal for violating the rules of Nuremberg. While the vast literature about the need for a world court tends to focus on notorious rulers like Idi Amin, reflecting on America's war-like activities may also be fruitful. If a permanent Nuremberg had existed in the 1960s, would it have sought to try President Johnson for his role in the bombing of North Vietnam? Would such a tribunal have deterred other presidents from their military ventures in Grenada, Panama, and Kuwait? It is relevant to note that the U.N. General Assembly condemned America's invasion of Grenada by a vote of 109 to 8. The invasion of Panama by the United States also was overwhelmingly disapproved of by the Organization of American States (OAS), and was condemned by the OAS as being contrary to international law. If a country like El Salvador could have brought action against the U.S. leaders in an international criminal tribunal, would the United States have intervened with massive military might on the side of one party in that long-standing civil war?

The United States cringes from the possibility of being summoned before a Nuremberg-like tribunal. Indeed, this seems impossible in the American way of thinking. The United States created Nuremberg for heinous malefactors. The principles for Nuremberg ostensibly were derived for "them" and not for "us." There is a pretense of innocence on the part of Americans. Having assumed the role of prosecutor of crimes outside the borders of the United States, Americans find it difficult to conceive that they, too, might be called before an international criminal tribunal.

Perhaps the U.S. inclination to appear innocent in the eyes of the world explains why the United States has never been involved in advancing the

concept of an international tribunal with jurisdiction over violations of the laws of war. Is America's incapacity to incriminate itself for international legal violations the fundamental reason behind the U.S. reluctance to ratify several of the human rights covenants approved by the United Nations?

It is possible that the long pattern of abstention by the United States from the global struggle of jurists and diplomats to obtain an international criminal court is now coming to an end. The United States urged the creation of the office of U.N. High Commissioner for Human Rights. That entity was finally established by the U.N. General Assembly in December 1993. The United States also has aggressively advanced and substantially funded the international criminal tribunal established to try war criminals in the former Yugoslavia.

While these steps fall short of the U.S. support that would be required to induce the United Nations to establish a permanent Nuremberg, they are promising signs nonetheless. Given the collapse of the Cold War, the United States may finally be psychologically and even politically prepared to create a permanent Nuremberg tribunal.

The International Tribunal Created to Adjudicate War Crimes in the Former Yugoslavia

It is amazing that from 1945 to 1992 the possibility of creating an international criminal court lay dormant. Why did the world community fail to act against Soviet leaders when the Soviet Union invaded Afghanistan? Indeed, why on dozens of other occasions did the United Nations not even discuss the desirability of reinventing Nuremberg in order to punish aggressors and malefactors? The United Nations was certainly active in other ways in its quest to defend human rights. The U.N. Commission on Human Rights continues to send missions to troubled areas and issues scores of reports. The U.N. General Assembly approved over 30 covenants on human rights and transmitted them to its member states for ratification. The United Nations at every level persistently denounced apartheid in South Africa and elsewhere. The world court ruled that the detention of 52 U.S. diplomats by Iran violated the U.N. Charter and the fundamental objectives of international law.

Indeed the entire history of the United Nations has been devoted to formulating, defining, and declaring the parameters of customary international law, or *jus cogens*. Why, then, did it fail to take what is logically the most important step — the creation of a judicial entity capable of trying and punishing those individuals who have violated laws which by the consent of humanity are binding on all nations? Every nation, new or old, spends a good deal of its collective energy devising and implementing ways to deter or punish crime. Why was the United Nations for almost 50 years unable or unwilling to undertake that basic role of the state? It could have been the East-West divisions that made consensus or action in the Security Council impossible or highly unlikely. It could have been the lack of interest on the part of nations — especially the United States — or it could have been the virtual intractability of the issues involved.

Why then was the decades-old incapacity to even think about a world criminal court suddenly overcome when bloodshed and chaos erupted in the former Yugoslavia? Perhaps the extreme brutality in Europe's backyard awakened the world consciousness. It may be that the inability of the European powers to agree on a formula for intervention prompted the U.N. Security Council to act by establishing the international tribunal on 25 May 1993. In any event, a confluence of events impelled the Security Council to respond to atrocities in the former Yugoslavia.

The legal basis for action by the Security Council is clear. The atrocities, the "ethnic cleansing," and the creation of an estimated two million refugees triggered the Security Council's mandatory authority under Chapter VII of the U.N. Charter. The Security Council responded to credible reports of atrocities in the former Yugoslavia in its Resolution 764, adopted on 13 July 1992; the mandate emphasized that "persons who commit or order a commission of grave breaches of the Geneva Covenant are individually responsible in respect of such breaches." Since then, it has taken a number of additional steps to bring the former Yugoslavia into line.

On 6 October 1992, the Security Council established, by Resolution 788, the "War Crimes Commission" — the first such commission created since World War II. In late January 1993 the War Crimes Commission agreed to a plan for the exhumation of mass graves and investigations into allegations of mass rapes. The U.S.-based non-governmental organization Physicians for Human Rights arranged to exhume two graves in Croatia reportedly containing Croats and Serbs.

On 6 May 1993, Security Council Resolution 808 promulgated a draft statute for the tribunal, a document which took into account the recommendations of 31 nations and several organizations. The Security Council has the authority under Chapter VII to take measures necessary to maintain international peace and security. Although the final resolution was adopted unanimously, the Chinese representative to the Security Council asserted that China's vote in favor of the resolution should not be construed as an endorsement of the legal approach involved. The Brazilian representative expressed similar reservations.

On 20 August 1993, the Security Council unanimously adopted Resolution 857 which elected 23 candidates to serve as judges to the tribunal. On 17 September 1993, the 11 finalists were identified, including one U.S. citizen, Ms. Gabrielle Kirk McDonald. After some difficulties, the Security Council selected Mr. Ramon Escovar-Salom of Venezuela as prosecutor.

The inaugural meeting of the tribunal was held on 17 November 1993 at The Hague; its first session lasted through December 1993. Sessions are scheduled through 1994, with the fourth and last to take place from September through November 1994. The budget of the new international tribunal was set at $31.2 million for the first full year of operation. This sum covers a staff of 373 persons.

There have been extensive legal analyses done on the international court by private and public legal entities. The American Bar Association created a task force on the new tribunal for the purpose of examining the structure of the court. This analysis was proffered by lawyers who for years were intensely involved

in the evolution of international law and who have traced the widespread aspiration to have a world tribunal where the most detestable acts of despotic governments could be punished. This task force and comparable units throughout the world will be watching the progress of the first international criminal tribunal created by the United Nations.

The ramifications of the new tribunal's performance are formidable. Indeed, if the tribunal in the former Yugoslavia spends millions of dollars and ultimately shows few results, the very concept of an international criminal court may be tarnished for another 50 years.

The logistical difficulties confronting the tribunal are also considerable. Even the drafting of rules for the new international tribunal poses a daunting task. Should proof "beyond a reasonable doubt" be required? Or should a lesser standard more consistent with practices in civil law nations be permitted? Should the rule regarding hearsay follow the strict rules applied in U.S. courts, or one that is more relaxed? In anticipation of the likelihood that numerous offenses of rape will be prosecuted by the international tribunal, should the prosecutor be permitted to introduce evidence to show command responsibility for mass rape? Or should the defense be able to introduce evidence of past sexual behavior?

The American Bar Association task force has made scores of recommendations on these and similar complex issues of procedure. The points raised sometimes seem arcane and unimportant in view of the urgency of starting the massive investigatory work that will be required if anyone is to be brought to trial in the new international tribunal. But the credibility of the tribunal will rest on its acceptance by the international legal community as a court that operates in accordance with generally accepted rules of fairness.

Even if the procedural rules are generally acceptable, the tribunal will nevertheless face inevitable divisions and difficult dilemmas. Composed of 11 judges from different nations, the tribunal is divided into two trial chambers and an appeals chamber. The judges are charged with the task of interpreting both the law and the facts, and deciding when in the judgment of the civilized world a person has violated international humanitarian law. This task is much more complicated than the responsibility of the Nuremberg judges. There, the judges had Nazis in the dock whose attitudes and activities constituted almost *per se* violations of fundamental decency. In Yugoslavia, the actors are motivated by more complicated passions and prejudices than the anti-Semitic obsessions that drove the Nazis.

Conclusions

The dream of a permanent Nuremberg has won the endorsement of many jurists and activists over the past 40 years. Even those who support the concept, however, acknowledge the enormity of the task of creating such a permanent tribunal, and grapple with the questions posed by its first incarnation. Was this really the time and the occasion to create the first international criminal court

in the history of humanity? Would it have been better to postpone the actualization of the dream which in theory sounded so promising?

These questions are now academic. No further thought about a world criminal court will be entertained until the 1993 version of the world court becomes operational and succeeds or fails.

The brutal attempt to create a new Serbia without Muslims or Croats directly affects at least four million people; as many as 200,000 are already dead or missing. Serbian leaders, Bosnian Serbs, Bosnian Croats, and breakaway leaders of the Bosnian Muslims have admitted to the heinous nature of their conduct. In a declaration released on 22 October 1993, they affirmed that they will try their own people for war crimes.

Yet the question keeps recurring: What can a highly sophisticated international criminal court based at The Hague do about such an awful and incomprehensible slaughter that has been impelled by passion, violence, and hatred?

The United States has invested its prestige and credibility in establishing a tribunal for the former Yugoslavia. In October 1993, Mr. Conrad Harper, legal advisor to the State Department, speaking before the Sixth Committee of the United Nations, stated that the time had come for the United States to revisit its long-standing reluctance to support the concept of an international criminal court. The commitment of the United States to the new court was cautious but resolute. Moreover, the United States contributed a substantial amount of money for the first year of operation of the new tribunal.

It seems clear that the Clinton Administration pledged its support to the tribunal because of widespread criticisms of indecisiveness and inaction in the White House. History will decide whether the administration chose the correct posture or whether, in its desperation to appear to be engaged, it chose an unworkable option destined to end up as a failure.

Centuries will pass before history is able to judge whether the new tribunal, created to adjudicate crimes against humanity in the former Yugoslavia, ultimately advanced the prospects of a world tribunal. The evolution of international laws to punish criminal conduct by nations has never been an upward, linear progression. There have been peaks and valleys since the code of Hammurabi promulgated the idea that the purpose of law is to prevent the powerful from dominating the weak.

In spite of the slow pace of change, every newly announced ban on crime has some impact. New commandments defining and proscribing criminal conduct at least keep alive humanity's fundamental standards of decency. Likewise, the new war crimes tribunal will accomplish the goal of reinforcing once again Nuremberg's lesson that military and national leaders along with their assistants and acolytes will be punished for conduct that cannot be justified by the four Geneva Conventions of 1949.

The new war crimes tribunal will also demonstrate that the family of nations will go beyond the *punishment* of war crimes and act creatively to work for the *prevention* of war. The new tribunal simply has to investigate the major reasons why such savagery erupted in Yugoslavia and why Europe and the world

seemingly knew little of the deep-seeded animosities that erupted in "ethnic cleansing."

On 16 January 1994 the United States made clear that it is prepared to be stern in the prosecution of war crimes. The Clinton Administration turned over the first 1,000 pages of U.S.-collected testimony from 400 former war prisoners and refugees. The material contains the names of Serbian prison camp commanders and other officers and reveals the atrocities for which they are allegedly responsible. The White House also made it clear that it would consider interferences by any of the three warring Bosnian factions in the delivery of emergency food supplies to be a violation of international humanitarian law.

The dream of preventing war is as old as the history of the nation-state. But the dream has a better chance of being realized today than ever before. Could it be that the final report of the new tribunal will give us fresh insights into why ethnic, racial, and religious prejudices can explode into unbelievable violence? Might it also happen that the world will learn from the report of the new international criminal tribunal, about the origins and sources of the guns and arms that poured into Bosnia on every day of the years of slaughter? Or could the world possibly learn from the new tribunal how an effective world court *should* be organized? In any event, the procedures and results of the new international criminal tribunal will be examined by the world's jurists with the highest possible level of scrutiny.

Creating the new court at The Hague may be the only action the international community will take in response to the genocidal war in Bosnia. The international community has tried economic sanctions and imposed an arms embargo, reasoning that the introduction of any additional firepower would only add to the slaughter without any compensating advantages.

The new war crimes tribunal at The Hague is almost certain to hold the attention of the world as it describes the carnage which ends in the cemeteries of Sarajevo. Other wars have been forgotten, but the desecration of Yugoslavia, like the butchery of World War II, will be remembered in legal documents and juridical decisions that will last indefinitely. In the new world that is opening up with free trade, open borders, improved environmental standards, and enhanced human rights, the judgments of the war crimes tribunal will establish an elevated standard for judging and punishing the depravities of individuals and armies.

The first fruits of the war crimes tribunal were predicted in January 1994 with the announcement that the first trials of defendants accused of war crimes will probably take place in June 1994. The defendants will be Serbs, Croats, and Muslims; the expectation is that at least some of those indicted can be apprehended before June 1994.

It is impossible to know or predict what, if any, effect another declaration of the inviolability of human rights might have on history. Some years ago, the American Bar Association placed a plaque in Runnymede, England, thanking the authors of the Magna Carta. No one on 15 June 1215 could have possibly realized that the charter of rights granted on that occasion would be known as

the English Bill of Rights, as well as provide the principal source for the United States Constitution and the Universal Declaration of Human Rights.

Perhaps some day the jurists of the world will erect a monument for the work and the prophetic witness of the war crimes tribunal established in 1993.