Feature: Making Sense of the Hague Tribunal

Introduction

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Judicial institutions are political tools. They achieve their effect, however, by appearing to be other than political. This is the paradox of judicial power. Though political, it is effective only when appearing to have nothing to do with politics at all.

One year after the accord at Dayton, we collect in these essays three perspectives on the most prominent international example of a judicial institution being used for political ends, the UN's Tribunal at The Hague. Judges from many nations sit to hear charges of war crimes, and crimes against humanity, brought against individuals within the warring factions that make up the former Yugoslavia. They do so to bring about a peace to what has been the bloodiest conflict in Europe since WWII. And they do so with a ceremony and attitude that makes it seem as if the extraordinary court sits to hear international crimes all the time.

For international human rights lawyers, this is an event of great promise. For the first time since Nuremberg, they argue, the international community has been able to agree on a tribunal to adjudicate international criminal acts. That the international community should so act, they believe, is unquestioned: There is injustice here; the remedy for injustice is a court, and that a court has been established as a remedy shows the great promise of international law.

There's a beauty, and simplicity, in arguments like this. There is also something quite misleading. They speak as if the judicial power that they invoke already, or uncontestedly, exists. And they imagine that invoking it in the international context is to invoke it for just these judicial—read justice—ends. But unquestioned international judicial power does not yet exist, and the use of what power there is is not for justice ends alone. Law, like war, is politics by other means, and the justification for its use turns on the many and complex ends that it may help realize.

This complexity is the focus of the three articles below. The complexity within international law itself is David Cohen's theme. For the Tribunal's charge is not obvious, or apparent, in light of the Nuremberg precedent. This tribunal is different, not only temporally (as Cohen and Ruti Teitel both note, it precedes the peace as a means to peace; Nuremberg followed the peace, as a gesture towards justice), but also substantively: The crimes, and the context, that this Tribunal confront are different from those faced at Nuremberg. The Tribunal is making, not following, the law Nuremberg made, even though it declares itself to be simply executing the rule Nuremberg recognized.

That is the end to which international law *makers* use the Tribunal—as an opportunity not simply to invoke the past of Nuremberg, but also to make international law something more. Of course to pursue this constructive end, the construction must be hidden. Judges, and jurists, must

speak as if the principle and the precedent were already at hand, providing authority for this tribunal, as it would for any war crime tribunal. Though of course there have been many cases since WWII where these principles had application, but no tribunal was established. Thus the Tribunal is used not only to achieve justice, but also to make law for future justice.

Ruti Teitel suggests another use, more troubling still. If international law were really the test, then from the perspective of international law, there are other crimes here as well. Recall that it was the UN which set up the safe havens to which Moslems and Croats fled, with the promise of UN protection; and recall as well that it was then the UN that stood back as the inhabitants of these camps were slaughtered. This, as Teitel puts it, might be thought to be crime by omission. But the Tribunal draws our attention away from this sort of crime. By painting the conflict as perpetual and unavoidable—because ethnic—the Tribunal gives face to the claim that the UN's non-intervention was the right international act. For to be judges, the UN must stand neutral, and non-intervention is a means to neutrality. Being judges thus gives reason and principle to the UN's weakness and indecision.

As all our authors note, the Tribunal was to be a means to peace. Its technique was to be Nuremberg's: By making individuals responsible for the war crimes charged, the Tribunal was to break a collective mentality. If crime is individual, then individuals choose to cooperate in these crimes. And if responsibility is individual, then perhaps they will choose not to cooperate.

But if this is the aim, then it is our third essay by Vojin Dimitrijevic that is most chilling. Written from the perspective of a Yugoslav, it suggests why, in even this most elemental sense, the Tribunal has failed—how in its execution, the Tribunal has fueled, rather than broken, collective thinking. For despite its charter, the order of prosecution (initially against Serbs alone) has allowed the Tribunal to be painted as the tool of anti-Serb forces. This bias in turn has fed collective resistance, not broken it. Individual responsibility in an ongoing struggle has reinforced, not broken, a collective attitude.

One court, many purposes. One might well wonder whether any of these ends could be achieved on their own; one might better wonder whether all could be achieved by one institution. But what these three essays do best is enrich our understanding of the relationship between politics and justice. For in a limited way, this Rashamon effect—that the same institution is seen in these different ways—brings out a model of how justice is made when politics is hidden.

We can see the point by contrast. Justice Antonin Cassese, in a recent speech, said the great virtue of Dayton was that it set aside *realpolitik*, and sought justice instead. It chose not to offer amnesty to war criminals; it instead threatened war criminals with the justice of a court. Odd, from this perspective, that the accords did not then provide the means for executing the Tribunal's aim—a mechanism, for example, for arresting and bringing defendants to justice. But from Cassese's perspective, this was a detail; the virtue was its action of principle.

But the real lesson, I suggest, is how *realpolitik* is pursued through this show of principle, and how principle is advanced, *realpolitik* notwithstanding. Dayton could have done one of three things. It could have granted war criminals amnesty. On the 50th anniversary of Nuremberg, this denial of Nuremberg was unlikely. Or it could have instituted a court with the full powers of a victor's court, like the court at Nuremberg. But with a real war still on the ground, this too was unlikely, since its effect would have been to make peace impossible.

So Dayton chose a third way: it did neither, by doing both. It established a court in name, but without the power of a court in effect. It made it appear as if justice would be achieved, while leaving great room for pragmatism to be pursued. The world saw a statement of principle; the war makers saw a statement of little effect.

One might see such compromise as simple inconsistency. But I suggest it is something more. As Meir Dan-Cohen might put it, Dayton established an "acoustically separated" regime: to the international law community, the accord said one thing; to the warring factions, it said another. These two

statements, if effectively separated, achieve two different effects. For international law, the effect is a modest, but important, continuation of the promise that Nuremberg made. For peacemakers in Bosnia, the effect is to preserve a flexibility, by assuring that the rules of a court would not interfere with the necessities of making peace. So long as the message of the first is kept separate from the reality of the second, both might be achieved.

For those who thought that the Tribunal was just about principle, these essays should make one cynical. If one thought it was just about politics, then the life it has given to international human rights law should surprise in a hopeful way. But the Tribunal is neither politics nor principle alone: it is both pursued at the same time. And this technique shows how, in a small way, these two aims can be pursued simultaneously. Or at least how the inconsistency does not render both ineffective.

For the Tribunal *has* changed the nature of international law; and in this it has made an advance. But we should not ignore just how this advance has been realized. We can feel happy with our UN selves, and with the good that international law might bring. But we might wonder about the justice in using this pathetic state as means to such high ideals. We gave them justice, as a means to peace. What they wanted was peace.

The International Criminal Tribunal for the Former Yugoslavia and International Law

David Cohen

The establishment of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 has been widely hailed as the most important event for the development of international humanitarian law since WWII. Those who take an optimistic view of the Tribunal see it as renewing, and taking an important step towards realizing the promise of a new era of international law, which the Nuremberg and Tokyo tribunals briefly embodied. Critics, on the other hand, have argued that the new Tribunal never should have been established because it is doomed to fail and this failure will do irreparable harm to the cause of international law.

What exactly might the new International Tribunal accomplish that would have significance for the future development of international law? What risks does it encounter in pursuing the role assigned to it of bringing to justice those responsible for the suffering and atrocities visited on the population of the former Yugoslavia? What visions of international law underlie the many different diagnoses of the prospects for the Tribunal. I examine in broad strokes some ways of thinking about the significance of the Tribunal and its task. Although the primary focus will be on the International Tribunal for the former Yugoslavia, where appropriate, reference to some of the distinct and important questions of the International Tribunal for Rwanda are also raised. We should begin by distinguishing between the significance of the Tribunal itself and the particular doctrinal contributions that it will make. That is, the mere fact that an international criminal tribunal has been established under the auspices of the UN bears an importance independent of any of the verdicts it may reach or doctrinal questions that it may resolve.