



In the Shadow of Nuremberg: Pursuing War Criminals in the Former Yugoslavia and Rwanda

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Following an unsuccessful attempt to prosecute war criminals at the end of World War 1, an International Military Tribunal was convened in Nuremberg, Germany in 1945 to ensure that war crimes during World War 11 would not go unpunished. Testimony at the trials revealed the extent to which Nazi physicians were involved in human experimentation, torture, and mass killings. The impact of Nuremberg on medical ethics was profound. A second tribunal in Tokyo, however, was less successful and failed to prosecute Japanese military doctors who had been engaged in medical atrocities related to germ warfare research. The Nuremberg model has influenced the conduct of contemporary trials of human rights violators in emerging democracies and is being put to the test in the former Yugoslavia and Rwanda, where prosecutors must do their work in the midst of ongoing conflict and severe resource constraints. [M&GS 1995:140-147]

"We must never forget that the record on which we judge these defendants is the record on which history will judge us tomorrow. To pass these defendants a poisoned chalice is to put it to our lips as well. We must summon such detachment and intellectual integrity to our task that this trial will commend itself to posterity as fulfilling humanity's aspirations to do justice."

-- Justice Robert Jackson's opening statement to the Nuremberg Tribunal, November 20, 1945

A half a century after the Allied powers established an International Military Tribunal to punish major Nazi war criminals, the United Nations has breathed new life into the law enforced at

Nuremberg. Building on the foundation of Nuremberg law and the later Tokyo war crimes tribunal, the UN Security Council created two bodies: a Commission of Experts [1] in October 1992 to investigate war crimes in the former Yugoslavia and an international tribunal [2] in May 1993 to prosecute them. After a Hutu-led slaughter claimed the lives of hundreds of thousands of people between April and July 1994 in Rwanda [3], the Security Council set up a second tribunal to prosecute war crimes and acts of genocide in that country [4,5].

The world's first attempt at a war crimes prosecution, in Leipzig in 1921, was a debacle. The Commission on the Responsibility of the Authors of the War and the Enforcement of Penalties, established in January 1919, recommended prosecuting the former Emperor of Germany, Kaiser Wilhelm II, for "a supreme offence against international morality and the sanctity of treaties" and 896 of his officers "for having committed acts in viola-

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tion of the laws and customs of war" [6]. But fearful that the search for impartial justice would look like victor's revenge and shatter Germany's chances of making an orderly post-war transition to democracy, the Allies never created the tribunal. In the end, only a few suspects were tried in German courts.

In 1943, in the midst of World War II, the Allies established a 14-member commission to investigate war crimes committed by German, Italian, and Japanese troops. The United Nations War Crimes Commission (UNWCC), organized in London, comprised the nine governments-in-exile, the United Kingdom, the United States, China, Australia, and India. The UNWCC, however, had little money, a small staff, and no investigators [7]. Even as the commission was being organized in November 1943, there came a pronouncement from a meeting of the Ministers of Britain, the U.S., and the Soviet Union in Moscow that effectively removed the principal Nazi leaders from the jurisdiction of the UNWCC. The ministers had decided that the fate of these "major criminals" would be decided solely by a joint decision of the Allied governments.

The UNWCC spent most of its time arguing about the politics of the law and not gathering actual evidence of war crimes. Commission members considered at length such questions as whether launching an aggressive war should be considered a crime of international law; whether an atrocity committed by a government against its own citizens, frequently described as "crime against humanity," should be regarded as an international crime; and whether an international tribunal should be created for the prosecution of war criminals. In its final report, the commission presented only a handful of cases that could reasonably be regarded as "atrocities" and had no hard evidence of the massacre of Jews in Poland -- even though such proof was already in the hands of the British government.

The Nuremberg Trials

The International Military Tribunal, which convened in Nuremberg, Germany on November 14, 1945, largely passed over the commission's fragmentary documentation and dispatched military lawyers seconded from the Allied Forces to gather evidence. Unlike the commission, the Nuremberg prosecution team -- with a staff of 2,000 and more than 100 prosecutors -- had a clear advantage: the war was over. This meant the tribunal could rely on the Allied armies to capture suspects and retrieve evidence from virtually any building previously under the control of the Third Reich.

For nearly a year, the trial chambers in

Nuremberg became a collecting place for the suffering and loss of millions of people. Thirty three witnesses for the prosecution took to the stand to testify about atrocities, while prosecutors marshalled documentary evidence to corroborate their accounts. Among the 22 high ranking Nazis who stood trial were Hitler's "heir-apparents" Hermann Goering and Rudolf Hess and his foreign minister Joachim von Ribbentrop. Three defendants were acquitted; seven were sentenced from ten years to life imprisonment; an twelve were sentenced to hang.

At the Nuremberg medical trials, testimony revealed that Nazi physicians had conducted hideous, often fatal, experiments on concentration camp inmates. Among the so-called "tests" were placing prisoners in low pressure tanks simulating high altitude, immersing them in near-freezing water, or injecting them with live typhus organisms. Although only 23 physicians were charged with medical crimes at Nuremberg, the evidence suggested that hundreds of physicians participated in these "experiments."

The Nazi physicians presented themselves at the trials as scientists whose research was intended to benefit medicine. Most of them had studied eugenics, a body of pseudo-biological theory that regarded persons such as the feeble-minded, the mentally diseased, and the deformed as inimical to the human race. Eugenicians held that physicians should destroy "life devoid of value," so as to "purify" the Aryan race. This "life unworthy of life" theory had led to Hitler's compulsory sterilization laws, enacted in July 1933, which empowered physicians to sterilize patients suffering from disorders such as schizophrenia, chorea minor, manic depression, and hereditary blindness. Hitler later used the theory to justify "mercy" killing for the supposedly incurably insane and for the mass extermination of Gypsies, homosexuals, and Jews.

Impact on Medical Ethics

There is little question that Nuremberg had a profound effect on the development of medical ethics. Disclosures of medical atrocities during the trials prompted the creation of the World Medical Association (WMA) in 1947. Among the first institutional acts of the WMA was the revision of the Hippocratic Oath in 1948 to preclude a repetition of Auschwitz and Buchenwald: "I will not permit consideration of race, religion, nationality, party politics, or social standing to intervene between my duty and my patient." The following year, the WMA adopted the International Code of Medical Ethics, which contains the precept "Under no circumstances is a doctor permitted to do anything that would weaken the physical or mental

resistance of a human being except from strictly therapeutic or prophylactic indications imposed in the interests of his patients." And in 1964, the WMA adopted the Declaration of Helsinki, which instructs the physician to remain "the protector of the life and health" of human subjects of research and the investigator to respect the right of research subjects to safeguard their personal integrity [8].

Impact on International Law

The Nuremberg trial sought to lay down several legal principles. Until then, international law, with few and limited exceptions, had not previously addressed a state's treatment of its own citizens, much less imposed criminal sanctions for such conduct. Nuremberg introduced the concept of "crimes against humanity" and ruled that such crimes, by their nature, offended humanity itself and should fall within the jurisdiction of an international court. Article 6 of the London Charter of the Nuremberg Tribunal defined these crimes as murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial, or religious grounds [9]. In effect, a person who committed crimes against humanity was, like the pirate or slave trader before him, *hostis humani generis*, an enemy of all humankind -- over whom any state could hold criminal jurisdiction.

One function of a postwar trial of government leaders is to differentiate between the criminal leaders of a nation and its deceived people. Thus Nuremberg introduced the concept that individuals -- and not society as a whole -- should be held accountable for crimes committed in war [10]. "Crimes against international law," the Nuremberg tribunal said in its judgment, "are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provision of international law be enforced." The notion struck down the argument that personal responsibility for crimes committed during war were pardonable if the accused was "following orders." It also removed the stigma of war crimes and other atrocities from the German people and placed it on Nazi leaders and the Schutzstaffel (SS).

The most controversial concept instituted by the Nuremberg trials was what U.S. prosecutor Telford Taylor called "the criminalization of initiating an aggressive war," or the "crime against peace." According to the framers of the Nuremberg charter, wars of conquest were illegal (as opposed to the right

of self defense against armed attack) and those who conducted wars of aggression should be held criminally accountable. Critics of the Nuremberg trials have maintained that the aggressive war argument violates the basic legal principle that "there is no crime without law." At the time of the Nuremberg trials, there was no absolute prohibition of war, no legal definition of aggression, nor a total ban on the first use of violence, and thus the tribunal appeared to be applying *ex post facto* justice: the prosecution of people for crimes that were not crimes when committed.

The Nuremberg tribunal also upheld the principle of "command responsibility." This principle held that a superior officer or government official was responsible for war crimes if he knew or had reason to know a subordinate was about to commit such acts or had done so, and the superior failed to take the necessary and reasonable measures to prevent such acts.

After the trial of the major Nazi defendants, each of the occupying powers conducted additional war crimes trials in its zone. U.S. military courts tried twelve cases against 185 defendants, including members of the *Einsatzgruppen* death squads, doctors who experimented on concentration camp inmates, and Nazi judges and industrialists who participated in the looting of occupied countries and the forced-labor program. Twenty-five defendants were given death sentences, and 120 others received prison sentences. Thirty-five of the accused were acquitted, while the others committed suicide or were ruled unable to stand trial.

The Tokyo Trials

In Tokyo, the International Military Tribunal for the Far East held war crimes trials against 28 Japanese military and civilian leaders between May and November 1946. The tribunal charter was influenced by the London Charter and the Nuremberg Tribunal. But there were significant differences. While judges from only the four major Allied powers sat on the Nuremberg Tribunal, judges from 13 nations (the nine nations that signed the Instrument of Surrender of Japan on September 15, 1945, as well as India and the Philippines) sat on the Far East Tribunal. Unlike the Nuremberg Tribunal, the judges in Tokyo were sharply divided over sentencing, especially that of the seven defendants who were sentenced to hang. The votes on the death sentences were 6-5 in one case and 7-4 in the other. The Dutch and Australian judges voiced doubts about the death sentences, especially because Emperor Hirohito had escaped prosecution

entirely. In the view of one of the judges, the principle of command responsibility led to an unjust verdict, namely, a death sentence for Japan's wartime prime minister Hirota Koki. Hirota Koki's sentence of death by hanging rested largely on the charge that he shared responsibility for the massacres committed by Japanese troops in the then Chinese capital of Nanjing (Nanking) in December 1937 [11]. The tribunal held Hirota Koki accountable for his failure to act effectively in preventing war crimes, although it was not at all clear that he had enough authority and power to change the attitude of the military.

The prestige of the Tokyo trial has also been severely damaged because it failed to prosecute Japanese military doctors who had performed horrific experiments in a secret germ warfare factory on the Manchurian Plain Doctors at the facility injected captured Chinese and Korean soldiers with bubonic plague, cholera, syphilis, and other deadly germs to compare the resistance of various nationalities and races to disease [12,13]. Hundreds of prisoners of war died as a result of the experiments and hundreds more were (killed when the Japanese fled the laboratory). The existence of the facility could have provided a case, rare at the Tokyo trial, of a centrally organized war crime of massive proportions. But the incident never made it before the court. American military authorities intent on keeping the information for themselves and eager to prevent it from falling into the hands of the Soviets promised immunity to the Japanese involved in these crimes in exchange for the information. Some of the officers were captured by Soviet troops and were later tried in Khabarovsk in December 1949, after the verdicts in the Tokyo trial had been announced [14].

Turning a Blind Eye

In the wake of World War II, one would have thought that governments had an interest in suppressing massive violations of human rights because they threatened world peace. In a world largely divided into communist and noncommunist camps, however, the Soviet, Chinese, and U.S. governments, claiming national and regional security interests promoted and maintained authoritarian governments no matter how abusive they were of their own citizens. Furthermore, as superpower hegemony undermined the Nuremberg precedent, international politics ensured that no human slaughter -- not even the killing fields of Cambodia where more than a million people were murdered by the Khmer Rouge from 1975 to 1978 -- would be brought before an international court.

Dictators and Democrats

By the mid 1980s, as the Cold War began to thaw, entrenched authoritarian regimes began to relinquish power to elected civilian governments [15]. The trend first swept through the Americas and Asia and then spread to Africa and Eastern Europe. Most of these civilian governments had emerged from years of repressive rule where military and, in some cases, civilian leaders had been responsible for systematic human rights abuses. Forced disappearances, mass killings, and torture had been inflicted wholesale and with impunity.

These emerging democracies faced the urgent and agonizing dilemma of whether to prosecute those responsible for past abuses [16]. In some instances, security forces managed to fend off investigations by retaining substantial power; in others, the military passed de facto amnesties absolving themselves of past crimes. In Brazil, for instance, the military granted themselves amnesty in 1979 before permitting the civilian government to be restored in 1985. In several countries, however, the new civilian leaders either could not ignore the demands for justice of victims' relatives or were themselves committed, despite the risks of military coups, to obtain at least some form of accountability.

The Sabato Commission

One of the most ambitious government efforts to deal with the abuses of the past took place in Argentina [17]. Immediately upon assuming office in December 1983, President Raul Alfonsin retired dozens of generals and, after persuading congress to nullify the military's self-amnesty law, ordered the prosecution of the nine generals and admirals who made up the three successive juntas that ruled Argentina after the 1976 coup. He also created a blue-ribbon panel of prominent Argentines, chaired by the novelist Ernesto Sabato, to probe the fate of thousands of persons who had disappeared during the seven years of military rule.

The Sabato commission faced seemingly insurmountable problems when it began its search in early 1994. For nine months, it took testimony from military and police personnel, surviving detainees, and relatives of the disappeared. Investigators combed scanty military records for clues to the whereabouts of the missing. They discovered that the military and police had operated a network of 360 secret detention centers, where detainees were interrogated under torture. Most detainees were later executed without charge or trial; their bodies were dropped from military aircraft over the Atlantic or the estuary of La Plata River or were incinerated in cre-

matoria or open pits. In most cases, however, military or police squads delivered the bodies of their victims to municipal morgues. Officers ordered morgue workers not to perform autopsies and simply to register the bodies, designated "N.N." (i.e., "ningun nombre" -- "no name") in cemetery files, for burial in unmarked graves [18].

The Sabato commission gathered an impressive amount of evidence [19], which was handed over to the Federal Appeals Court of Buenos Aires. More than 800 people testified during the trial of the junta leaders. Many were survivors of secret detention centers. Others were relatives of people who never emerged from the camps.

American forensic anthropologist Clyde Snow and the author were among the few foreigners, including President Jimmy Carter's assistant secretary of state for human rights Patricia Derian, who testified at the trial soon after it commenced on April 22, 1985. At the time, we were working with a team of Argentine medical and archaeology students to exhume and identify the skeletal remains of the disappeared and determine how they had died. In court, we testified that most of the bodies we had examined exhibited single gunshot wounds to the head, suggesting that the victims had been executed by their captors.

For Argentines who had lived through an almost impenetrable secrecy during the seven years of military rule, the trial was high drama. Of the nine defendants, three were former presidents -- Jorge Rafael Videla, Roberto Eduardo Viola, and Leopoldo Galtieri. Never before in Latin America had a civilian government tried military leaders for past human rights abuses. A television camera was installed in the courtroom to record the proceedings. A newspaper was even created just for the trial. *El Diario del Juicio* appeared in newsstands around the country and for the duration of the five-month trial it became the country's best selling publication.

Argentina's pursuit of human rights violators, though flawed, invigorated the society's quest for justice. Quite apart from the prosecutions, huge numbers of Argentine citizens watched the junta trial and learned, some for the first time, what their military leaders had tried to keep secret. The federal court convicted and sentenced five of the nine generals for crimes ranging from homicide to robbery. Trials of lesser-ranking officers followed, but, by 1991, all of those convicted including the generals had received amnesties. When the judgments were brought, national polls showed overwhelming support for the court and the sentences it rendered.

War Crimes Trials in the Former Yugoslavia and Rwanda

The war in the former Yugoslavia may prove to be the acid test for attempts to prosecute war criminals while a war still rages. The international tribunal now has 1995 funding, though paltry, to support a 65-member prosecution team, led by a highly respected South African judge, Richard Goldstone. Its statute and rules of procedure are well written and contain basic due process and human rights protection for the accused. But trials require defendants and the tribunal has no police force; nor do UN forces have the power to make arrests.

The tribunal needs the cooperation of Serb, Muslim, and Croat authorities (some of whom could turn out to be potential suspects themselves) in handing over defendants to stand trial in The Hague. Croatian and Bosnian leaders have agreed to cooperate, but Serbian leaders have kept their distance, claiming the tribunal is biased. So far, the tribunal has indicted 46 people -- all Bosnian Serbs. Only one of them, Dusan Tadic, a Bosnian Serb guard who worked in the notorious Omarska camp, has been charged in court [20]. The other suspects are still at large, presumably in Serb-held territory.

Among the defendants are Radovan Karadzic, the leader of the Bosnian Serbs and General Ratko Mladic, who, until recently, was the commander of the Bosnian Serb army. In its indictment dated July 25, 1995 [21], the tribunal charged the two men with war crimes, crimes against humanity, and the most heinous of all the crimes in the court's statute, genocide.¹ It was an historic act. Never before had an international tribunal indicted top military and civilian leaders for acts of genocide. The indictments also placed diplomats trying to negotiate an end to the three-year-old war in a predicament. How could they now continue to negotiate with war criminals charged by an international court with the most egregious crime known to humankind?

If arrested, Karadzic and Mladic will

1. Article 11 of the "Convention on the Prevention and Punishment of the Crime of Genocide," adopted by the UN General Assembly on December 9, 1948, defines "genocide" as: [A]ny of the following acts committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intending to prevent births within the group; (e) Forcibly transferring children of the group to another group.

face charges of allowing or orchestrating a wide range of crimes, including rape, torture, "ethnic cleansing," and the deliberate shelling of cities and towns to kill and terrorize Bosnian Muslims and Croats. It is also likely that they will be charged in the future with command responsibility for the alleged execution of 2,000 to 2,700 Bosnian government soldiers who have been missing since the Bosnian Serbs seized Srebrenica in July 1995. In August 1995, the U.S. government released to the UN Security Council several spy satellite photographs showing large mounds of freshly dug earth on farm land near Srebrenica. The mounds had not been there when spy planes and satellites surveyed the sites just after Srebrenica was overrun on July 11, but showed up in photographs taken several days later [22].

Protecting the Process in Rwanda

Although the Rwandan tribunal's prospects for actually trying the perpetrators of Rwanda's genocide appear more hopeful than in the former Yugoslavia, the investigators are in a race against time. Angered by a lack of international donor support, the Rwandan government has ordered the withdrawal of UN peacekeeping troops within a year; their departure will leave the tribunal's investigators without protection. Meanwhile, the Rwandan people have begun (understandably) to rebury their dead and, along with them, the physical evidence of genocide. To ensure that not all of this evidence is lost, Physicians for Human Rights (PHR) is sending forensic experts to Rwanda to record the location and size of mass graves.

Rwandan officials divide potential defendants into three groups. The first consists of the leaders -- close associates of the late President Juvenal Habyarimana, military and militia leaders, mayors, and officials of Radio de Milles Collines -- who planned and ordered the genocide. Numbering from 100 to 300 people, they would, in principle, be tried by the UN tribunal in Arusha, Tanzania. The second group, numbering in the tens of thousands, consists of lower level municipal and administrative officials who were not part of the core group of instigators but who used their authority to order mass killings. Many of these potential defendants are now held in jails throughout Rwanda. The third category is comprised of the small fry, who will probably never be tried. These are the people who were caught up in the fighting or were forced to kill or be killed.

When the author visited Rwanda in March 1995, Rwanda's justice system was in a state of near collapse. There were only three prosecutors for the entire country and fewer

than ten judges. The prosecutors' offices in Kigali and Ruhengeri had no telephones and only sporadic periods of electricity. More than 30,000 prisoners languished in horribly overcrowded jails where deaths from bacillary dysentery and dehydration often reached four to five a day. Health conditions in Rwanda's jails were, in the words of a Red Cross official in Kigali, "the worst my organization had seen in its entire history."

Tyranny Begins Where Law Ends

Besides the obvious goal of establishing justice, trials of war criminals and human rights abusers can contribute to the rehabilitation of victims of past abuses and of society itself. By laying bare the truth about past abuses and condemning them publicly, prosecutions can deter future offenders and prepare the public to withstand the temptation or pressures to comply with or acquiesce to state-sponsored violence. Trials often take place at a time when societies are examining their basic values and can have a cathartic effect on victims and society at large. Trials also help foster respect for democratic institutions by demonstrating that no individual -- whether a foot soldier or high government official -- is above the law.

Conversely, societies that fail to punish atrocious crimes committed by prior regimes run the risk of vitiating the authority of law itself. Society's respect for law will suffer if it is seen that civilian and military authorities can commit certain kinds of criminal conduct, whether carried out in the name of national security interests or counter-terrorism, with impunity. Moreover, if civilian governments fail to enforce the law through prosecutions of past military offenders they risk undermining the supremacy principle of military accountability to civilian institutions.

Nowhere in the world is the need to reaffirm the rule of law and restore justice more pressing than in the former Yugoslavia and Rwanda. In both countries, the cycle of ethnic violence and retribution is unlikely to end unless, at a minimum, trials can restore confidence that justice can be achieved in a lawful form. By establishing individual guilt, trials will help dispel the notion of collective blame for genocide and war crimes. In the former Yugoslavia, an international tribunal is preferable to ad hoc trials held sporadically in whatever countries within the region the accused happen to surface. Absent a change in regime, the several governments that have carried out atrocities in the former Yugoslavia can hardly be expected to prosecute vigorously those responsible. Under present circumstances, to encourage or sanction war crimes trials in any of the states that

are parties to the conflict would be the functional equivalent to granting widespread amnesty.

In Rwanda, trials of the perpetrators of genocide must take place nationally and internationally. But domestic trials will only be possible once international funding is made available for foreign judicial experts and prison administrators. In the meantime, the international tribunal must move swiftly to track down and prosecute the instigators of the genocide, many of whom are now living outside of the country. If justice is not seen to be done, the danger exists that the Rwandan people will increasingly take justice into their own hands.

The establishment of the international Yugoslav and Rwandan tribunals represents an historic step, a watershed in international law and policy. If successful, they will add new impetus to long-standing proposals for a permanent international criminal court. Equally important, the work of the tribunals will reaffirm a principle that the world community has allowed to erode since the Nuremberg and Tokyo trials: there must be accountability for genocide and crimes against humanity.

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