European Review, Vol. 14, No. 4, 415–419 (2006) © Academia Europaea, Printed in the United Kingdom

Focus: Crimes against Humanitarian Law: International Trials in Perspective

Introduction

JOHN HORNE

Department of History, Trinity College, Dublin, Ireland.
E-mail: jhorne@tcd.ie

International trials of war crimes, crimes against humanity and genocide are currently a matter of considerable interest – legal, political and human. The work of the International Criminal Tribunals for the former Yugoslavia and for Rwanda (ICTY and ICTR), set up respectively in 1993 and 1994, and the establishment of the International Criminal Court (ICC) at the Hague in 2002, have focused attention on the practice and value of such juridical processes both as forms of law and in terms of the events they address. The unexpected death of Slobodan Milosevic during his trial at the ICTY has only intensified the controversy aroused by such proceedings. Politics, history, memory, mourning, reparation and even reconciliation are inescapably part of the legal process, often in an explicit and even formal manner. This means that scholars in disciplines other than legal science and people from many backgrounds are interested in the work of such international tribunals and in the types of 'truth' that they seek to establish.

Such trials are not new. The idea stems directly from the intersection of military violence and humanitarian impulses in the 19th century. Geneva law, emanating from the International Red Cross (founded after the main war of Italian unification), dealt with the humane treatment of wounded and prisoners. Hague law, which codified the conduct of belligerents towards non-combatants, grew from the Lieber Code devised by the Union during the American Civil War and from the attempts by European powers to regulate military conduct after the Franco-Prussian War, culminating in the Hague conferences of 1899 and 1907. Together, Geneva and Hague Law provided the basis for the prosecution of war crimes. The first, unsuccessful, attempts to conduct war crimes trials were held in Istanbul in 1920 and in Leipzig in 1921 in response respectively to the Ottoman

massacres of the Armenians and to German war crimes during the First World War. This strand of legislation has been revised continuously, most notably in the Geneva Conventions of 1949 and the Additional Protocols of 1977.

That the violence of war might result in crimes of deliberately collective brutality was an idea already present in the Hague debates, and the concept of 'crimes against humanity' was first formulated in the Allied note to the Ottoman Empire in May 1915 in response to what many now consider to have been the genocide of the Ottoman Armenians. But it was only in 1945 that 'crimes against humanity' were given legal status in the UN Statute establishing the International Military Tribunal that sat at Nuremberg in 1945–46, where, along with war crimes, they served as the principal head under which Nazi crimes were prosecuted. Simultaneously, the specificity of the Nazi attempt to exterminate European Jews, only indirectly addressed at Nuremberg, was conceptualized in 1944 by the American scholar, Raphael Lemkin (himself deeply influenced by the Armenian precedent), and led to the 1948 UN Convention on Genocide, which focused on crimes that sought to destroy an entire ethnic, national, religious or racial group. The International Military Tribunal for the Far East (or Tokyo Tribunal) was also established under international law by the Allies in order to prosecute Japanese war criminals.

The Cold War polarized the UN and limited the development of international juridical proceedings on these three strands of international law – which, taken together, have been termed 'international humanitarian law' – although a symptomatic exception was the surrogate International Peoples' Tribunal established by Bertrand Russell. However, the end of the Cold War and the re-emergence of the United Nations as a weak but genuine supra-national authority allowed international criminal proceedings to be initiated in response to crimes against humanity and war crimes in the former Yugoslavia (1992–95 and 1999) and to the genocide of the Tutsi population of Rwanda (1994).

This new phase has reinforced two processes already long in evidence. The first is the extension of humanitarian law from situations of international war to civil war and to peacetime. Allowed in principle by the Charter establishing Nuremberg, crimes against humanity committed before the war were excluded in practice by the tribunal. However, genocide was made independent of war and peace in the 1948 Convention, and the ICTR has been dealing with a genocide conducted in a society ostensibly not at war. The second process has been the translation of international into national law. This was already evident in response to what, in Allied eyes, was the fiasco of the Leipzig war crimes trials in 1921, when French and Belgian military courts went on to try the accused in absentia. After 1945, various countries prosecuted war criminals under international law, perhaps most famously Adolf Eichmann in Israel (1961) and Klaus Barbie, Paul Touvier and Maurice Papon in France in the 1980s and 1990s. Instituting national

proceedings under international humanitarian law on the basis of a universal jurisdiction has been taken furthest in Belgium, but the tendency has been more general.

It seems timely to reflect on the question of international trials of crimes against humanitarian law in a broader perspective for a number of reasons. Since the initial attempts to instigate such proceedings in 1919–21, it is possible to discern a sharply uneven development whose rhythm has been driven by responses to the two world wars and the upsurge of violence after the ending of the Cold War. Of course, war is not the only phenomenon that produces extreme forms of violence, as indicated by the internal history of revolution in the USSR and China or the genocide in Rwanda – although war informed the model of Soviet and Chinese revolutionary mobilization and it could be argued that the genocide in Rwanda was, in effect, a civil war of the most lethal kind. But the new forms of violence that were central to the two world wars resulted in the comprehensive transgression of existing norms for the conduct of war, so that during and – above all after – the conflicts, it became essential to redefine the norms of acceptable behaviour in order to conceptualize and stigmatize the new types of violence. Humanitarian law redefined the norms while international trials applied them retrospectively to those accused of the most heinous transgressions. Events in the former Yugoslavia and Rwanda did not produce new crimes so much as resurrect levels and types of violence against civilians which many imagined had become impossible after the end of the World Wars and the Cold War (notably 'ethnic cleansing' and genocide). Over a period of 85 years, therefore, the shock of war has triggered new developments in international humanitarian law that have then been tested in international trials. The overall nature of that history seems worth examining, not least because it provides indispensable lessons for future developments.

However, societies try to come to terms with the transgression of norms and with new forms of violence by many means other than the law and legal proceedings. Adjusting to the previously unthinkable, finding ways to represent and explain it in the self-understandings of nations and their histories, and ensuring that the moral and ideological compass is reoriented so as to both register and outlaw the transgressions concerned is central to how societies exit from wars and other situations of extreme violence. History, education, the media, politics and many other activities engage in this process. Consequently, legal innovation and criminal trials, where they occur, do so in the context of multiple attempts to make moral judgments on the recent past, which may result in similar or very different explanations and verdicts. Yet since criminal trials, and especially international trials, occupy a central place in this process, usually attracting enormous attention and expectations, they cannot escape didactic and historical functions and indeed usually embrace them.

The consequent 'didactic legalism' raises fundamental issues. Is it possible to capture in a legal process the enormity of the collective crimes for which individuals are being prosecuted? Are the 'truths' arrived at compatible with those that others – historians, theologians, philosophers and politicians – might derive from analysis of the same events? Until the creation of ICTY, ICTR and the ICC, did the inevitably one-sided nature of 'victor's justice' undermine the integrity of the legal proceedings? If the trials are to function didactically, in a moral and educational sense, how are they to be publicized? Do they in fact function as intended when they take place and over time in the societies concerned?

These are just some of the questions that the articles that follow seek to address. Without wishing to pre-empt any conclusions the reader might draw, several points emerge very clearly concerning the intense activity in this area in the last decade and a half. First, the lawyers and judges staffing the various tribunals and courts have been anything but the routine instruments of the United Nations or other bodies. They have been intensely creative in expanding human rights jurisprudence and constructing the legal mechanisms by which a universal jurisdiction brings the perpetrators of gross abuse to individual account. This has entailed grappling with the collective dimension that distinguishes crimes against humanity and genocide. The problems are redoubtable, and not least that of getting to those who conceive and oversee such crimes but do not physically perpetrate them. Forging new categories of incrimination, such as a 'joint criminal enterprise' (whereby knowledge of the outcome of such collective crimes suffices to establish full complicity) may not be the most appropriate solution, but the problem remains as a challenge to juridical theory and practice.

Judicial elaboration of the crimes concerned is theoretically independent of the broader political context in which international (and national) trials under humanitarian law are held. Yet it is hard to ignore, and many would argue that it is right to recognize, the larger public function that such trials have in societies that are struggling to cope with the repercussions of being victims or perpetrators of mass crimes. There are clearly dangers in explicitly using them as a means of establishing larger historical and moral truths. The latter are often muddier and more complex than the trial can convey, and there are inevitable issues of selectivity that may bring the whole exercise into disrepute. For example, why these crimes, committed by those who can now be brought to justice, and not others whose perpetrators may be protected by the powerful? Moreover, how a trial is perceived, at the time and subsequently, is impossible to predict and entirely beyond the control of the legal process. All this sounds like an argument for more modest goals, focusing on the cases that a tribunal is in a position to process rather than engaging in political and legal engineering.

Yet there is no reason why the legal process in cases of gross breaches of human rights cannot work alongside other means of establishing historical and moral

'truths', such as 'truth and reconciliation' commissions (where these are practicable) or international commissions of inquiry. In addition, the creation of the ICC makes it harder to sustain the charge of arbitrary inculpation. No one can reasonably expect the legitimacy that ultimately underpins the acceptance of any legal system to be built overnight in a complex world riven with conflicts. But the progress in a short period has been remarkable. Even in relation to the 'second wave' of tribunals – Nuremberg and Tokyo – it is by no means clear that their effects were negative in the longer term, especially when all the parties concerned (the 'victim' as well as the 'perpetrator' societies) are taken into account. And the counter-factual question has to be asked: would the world be a better place had the trials of leading Nazi and Japanese military and political figures not taken place, with all their imperfections; or had there been no juridical response to crimes against humanity in the former Yugoslavia and to genocide in Rwanda?

It seems inconceivable that a development that has marked most of the 20th century and recently taken on an extraordinary new lease of life will not intensify in the near future. The 'globalization' that affects so much of contemporary life faces one of its most basic challenges in envisaging an international humanitarian law on the basis of a universal jurisdiction. It is important to broaden current debates on 'globalization' from the economic sphere to questions such as these.

The articles in this issue of the *European Review* were first presented as papers to a conference in the Institute for International Integration Studies in Trinity College Dublin, which is dedicated to studying the different dimensions of globalization. The authors are historians and legal scientists from a number of countries, and one intention of the meeting was to promote a dialogue between these two disciplines, although there was no presumption that they would take opposite sides on the different matters concerned. I am grateful for the opportunity to publish the proceedings in the journal of the *Academia Europaea.* This seems appropriate since the Academy fosters debate on vital questions at a European level. Certainly, the world is larger than Europe but creating a genuinely European public sphere that enables Europeans to go beyond parallel national debates is an important step in building a transnational community. Indeed, constructing something akin to a global public opinion, with all the differences and debate that such a development implies, is probably the best guarantee that international humanitarian jurisprudence and legal practice will be able to realize something of the promise that recent developments have demonstrated.