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## Peace With Justice

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# EDITOR'S MESSAGE:

## PEACE WITH JUSTICE

*Susan Tiefenbrun\**

On September 17, 1997 the Hofstra University School of Law held its second international symposium entitled War Crimes and War Crimes Tribunals: Past, Present and Future. The first war crimes symposium was held in Nice, France, at the University of Nice School of Law on July 17, 1996. This volume of the Law and Policy Symposium journal represents some of the papers presented and inspired by these two symposia.

Telford Taylor, chief prosecutor of Nazi war criminals, whose judgments at Nuremberg and whose writings have served as a constant source of inspiration for both symposia, honored us with his presence at the second Hofstra war crimes symposium. Ill health prevented Mr. Taylor from attending the first war crimes symposium, although he very much hoped to participate and was, in fact, in the south of France in July, 1996. Accompanied by Jonathan Bush, his good friend and respected colleague, Telford Taylor spent the full day at the second Hofstra war crimes symposium listening attentively and seeing old friends again—former prosecutors, reporters, lawyers—people who played active roles at the Nuremberg trial or at other war crimes tribunals.

Telford Taylor, who graciously agreed to write a preface to this volume, died on May 23, 1998. His presence at the war crimes symposium at Hofstra was one of the last public appearances that he made before he died. In addition, he participated in a television interview immediately following the symposium. Unfortunately,

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Telford Taylor's untimely death prevented him from completing his preface to this volume, but his presence and participation at the symposium are a lasting inspiration to us all. This volume of the Law and Policy Symposium journal is dedicated to his memory.

The term "war crimes," as it is used in the title of the symposia, is meant, in the broadest sense, to include crimes against humanity, genocide, and even rape. In his coeditor's message, Professor Leon Friedman discusses some of the problems associated with the definition of war crimes and their use in the International Criminal Tribunal for the Former Yugoslavia.

The Hofstra war crimes symposia brought together leaders in the field of humanitarian law: eye witness reporters, prosecutors, judges, and trial attorneys of Nuremberg, Dachau, national courts in Germany, and the International Criminal Tribunals for the Former Yugoslavia and for Rwanda, reporters then covering events in Bosnia, Pale, and Banja Luka, members of the United States Department of State, and the Assistant Secretary of State for Democracy, Human Rights and Labor. As Director of both these war crimes symposia, I was privileged to be part of a truly historic moment. Leaders of international human rights law convened in order to take a closer look at the adjudication of war crimes in the past and present with the hope of avoiding such crimes in the future.

During the course of the war crimes symposia the audience, as well as the speakers, were asked to think about relationships of the past, present, and future in order to focus on recurring human rights law issues. Prevention of human rights offenses links the past, present, and future and constitutes the essence of the keynote address delivered by Assistant Secretary of State John Shattuck. Encouraging us to look optimistically but cautiously at the post-Cold War world, Mr. Shattuck reminds us that the lessons of history promise a future of sunshine and freedom but not without clouds of genocide. Although the totalitarian monolith has collapsed in Eurasia and military dictatorships using force have been replaced by civilian governments permitting free elections, forces of disintegration are, nonetheless, at work in the modern world. A new and more modern genocide occurred in Bosnia and Rwanda in contrast to the genocide of World War II and Armenia, to name but a few in the not too distant past; ethnic and religious conflicts which inflict unspeakable human suffering threaten to occur in other parts of the

world in the near future. Mr. Shattuck advises early warning, preventive diplomacy, mediation, and media intervention in order to forestall human rights abuses which rise to the level of genocide or crimes against humanity. If early warning and prevention fail, active, global intervention may become necessary, and cooperation by the international community will be required to implement peace with justice. Adjudication of war crimes is part of the peacemakers' plan for prevention.

The future lies in the success or failure of the Dayton Accords, and John Shattuck discusses the role of the Dayton Accords in the peace process. The Dayton Accords are an important breakthrough in modern diplomacy since they integrate policies that promote justice and respect for human rights with the effort to bring peace to the wartorn region of Bosnia. If the Dayton Accords succeed, they may serve as a model for ending future conflicts.

About the past—Nuremberg looms large! George J. Annas and Michael Grodin discuss medical war crimes practiced during World War II (and to a lesser degree in Bosnia) and the importance of the Code of Medical Ethics which was established as a legacy of Nuremberg. Dr. Jonathan Tiefenbrun presents and discusses evidence of non-consensual Nazi experimentation conducted in the past and its eradication in the present due, in part, to the positive effects of the Nuremberg Code of Medical Ethics and the active role of the medical community.

Nuremberg was not the only war crimes tribunal in the past, and Fritz Weinschenk discusses the effectiveness of bringing German war criminals to justice in German war courts. Jean-Olivier Viout, deputy chief prosecutor at the Klaus Barbie trial, examines the complexities of this French trial, in which a French citizen was tried for crimes against humanity committed in conformity with Vichy racial laws. Professor Richard Weisberg asks us to think more deeply about the racial laws passed in Germany and in Vichy which, with the complicity of the French and German legal communities, legitimized human suffering and fed the flames of the Holocaust. We are invited to consider whether, and to what degree, those laws are any different from the systematized ethnic cleansing practiced during the Balkan conflict and promulgated by Dr. Karadzic, a prominent member of the medical profession. It is noteworthy that Dr. Karadzic has not yet been tried for the war crimes and crimes against humanity which the noxious philosophy

of ethnic cleansing engineered. Beth Stephens, a lawyer who defended victims of the war in Bosnia, presents evidence of grand-scale rape committed for the purpose of ethnic cleansing and discusses the need to address adjudication of this "war crime".

And so the past becomes linked ineluctably to the present through similarity and difference, like a theme with variations. About the present—the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) are currently functioning to bring war criminals to justice. Louise Arbour is a prosecutor of both the ICTY and the ICTR and has the unique advantage of being able to compare and contrast the goals and accomplishments of these two tribunals. She not only discusses the status of the two tribunals but asks us to think about the differences among these modern *ad hoc* tribunals, the earlier Nuremberg tribunal, and the proposed permanent international criminal tribunal of the future. Robert F. Van Lierop discusses in detail the particular problems of the ICTR and proposes some possible solutions entertained by committees of the New York City Bar Association and memorialized in its Report on the International Criminal Tribunal for Rwanda. The Honorable Claude Jorda, the French judge who currently sits on the bench of the ICTY and who presided over the important Tadic trial, compares and contrasts the procedures developed at the ICTY with those followed at the Nuremberg trials and in other national war crimes tribunals. He discusses the problems these procedures raise, especially with regard to extradition of the main war criminals, and the prospects for future resolutions of these problems.

Hope for the establishment of a permanent international criminal court has become a reality. David Stoelting provides insight into the history and development of the proposal for a permanent international criminal tribunal. Major Marsha V. Mills discusses the impact of both the ICTY and the ICTR on the substance and procedure of future war crimes prosecution and on the establishment of a permanent international criminal court.

As we compare events of the past and present with a view toward the future, we can not help noticing the recurrence of painfully similar barbaric acts of inhumanity. Madeleine Albright could not have put it more poignantly when she remarked during her visit to the Middle East and to the Holocaust museum: "The history remembered here is at odds with all we would like to believe about

ourselves and about our world. It is a history of unbearable sadness, unrelieved suffering, and unbelievable cruelty.”<sup>1</sup>

It is a sad but true fact that history repeats itself. In 1992 the world was shocked by the discovery of concentration camps in Bosnia-Herzegovina, reminiscent of the Nazi concentration camps, work camps, detention camps, and torture chambers. Radio listeners all over the world were stunned by horrifying accounts of a campaign of ethnic cleansing, similar to the philosophy of eugenics promulgated in Nazi Germany and which justified non-consensual medical experimentation and extermination.

In 1992 we received reports of atrocities on all sides by Croats, Muslims and Serbs. Reports mounted of mass destruction, indiscriminate shelling of major Bosnian population centers, carnage caused by mortar shells fired into Sarajevo’s downtown outdoor market during midday, organized massacres, and the destruction of whole towns that left people speechless and stunned. The sixteenth-century Ottoman bridge in Mostar was destroyed, the medieval city of Dubrovnik was set ablaze. One and a half million rare manuscripts and papers from the national library in Sarajevo were destroyed forever. In the Balkans, over 250,000 civilians were reportedly killed, 50,000 allegedly raped, tens of thousands allegedly tortured in detention centers, and more than two million were forced to leave their homes.

In Rwanda, the numbers of men, women, and children massacred were reported to be over 500,000. Many were forced to flee, and refugees were detained, tortured, and lured back by false hopes only to be shot by firing squads upon their return, not unlike the safe-havens of Srebrenica that became massive coffins for tens of thousands of victims.

The deliberate human terrorization and atrocities which took place during the wars in the Balkans and in Africa, and which continue on a much smaller scale even today in times of peace, are all too familiar to those of us who lived through World War II, Korea, Vietnam, and Cambodia.

After a period of non-intervention by the international community, and in response to mounting pressure, the United Nations Security Council, pursuant to Resolution 827, established on May

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1. Steven Erlanger, *Albright at Shrine to Victims of Nazis*, N.Y. TIMES, Sept. 11, 1997, at A12.

25, 1993 an *ad hoc* court—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, currently referred to as the ICTY. The prosecutor of this tribunal is Justice Louise Arbour of Canada, successor to Justice Richard Goldstone of South Africa, who left office on October 1, 1996. This tribunal is limited in its subject matter jurisdiction, temporal jurisdiction, geographic jurisdiction, and personal jurisdiction. Nevertheless, it is the first instance since the Allies created the Nuremberg and Tokyo military tribunals following World War II that an international court was established to prosecute persons responsible for such heinous international crimes.

The ICTR was established pursuant to United Nations Security Council Resolution 955 in November, 1994. Like the ICTY in the Hague, the ICTR in Arusha, Tanzania is an *ad hoc* tribunal with limited temporal and territorial jurisdiction empowered to prosecute persons responsible for serious violations of international law committed in and around Rwanda during the one-year period of January 1, 1994-December 3, 1994.

On November 21, 1995 the parties to the Balkan conflict initiated the Dayton Peace Accords, pledging to cooperate in the investigation and prosecution of war crimes and other violations of international humanitarian law. The Dayton Accords brought peace to the war-torn Balkans; but implementation of the agreement has been, and continues to be, a problem. The parties of the Dayton Accords have not successfully established functioning central institutions for the Bosnian unitary state; they have not adequately ensured freedom of movement, communication, and the press, and they have not cooperated fully in preparing for municipal elections. Most importantly, they have refused to extradite indicted war criminals, especially Dr. Karadzic, who was the governing force in Pale, in opposition to Biljan Plavsic, who is the head of Republika Srpska in Banja Luka. The Yugoslave President, Milosovic, who played an active role in the war, is now considered one of the chief obstacles to the implementation of the Dayton Accords. Both these leaders and former friends, one a biologist and the other a psychiatrist, played significant roles in masterminding the ethnic cleansing campaign which sought to justify racial discrimination in the name of pure science.

If these unspeakable atrocities took place after Nuremberg, what, if any, are the positive effects of war crimes tribunals? Did the Nuremberg Tribunal act as a model for the establishment of the ICTY and the ICTR? The differences between Nuremberg and the ICTY are noteworthy. The World War II trials punished crimes committed by Germany and Japan *after* the war ended. The My Lai massacre had its own peculiar war crimes military trial, and Jeanine M. Davanzo will discuss the intricacies of this trial with comparisons to other international military war crimes trials which punished crimes committed *after* the war ended. In the Hague, the tribunal was set up while the war still raged in an attempt to bring about peace through the judicial process. Unlike Nuremberg, the ICTY lacks the ability to gain custody of the accused and is incapable of gaining access to evidence. Antonio Cassese, President of the ICTY, compared it to “a giant who has no arms and no legs”. Unlike Nuremberg, the ICTY’s jurisdiction extends to crimes against humanity committed in armed conflict, whether international or not. Thus, ethnic cleansing and ethnic persecution, even if they occur wholly within a state, are an “international” war crime. Unlike Nuremberg which permitted trials *in absentia* (e.g. Martin Bormann), the ICTY strictly forbids trials *in absentia* because of the fear that such trials might become the norm.

International *ad hoc* tribunals are competent to deal with certain crimes committed in a certain area at a certain time. A permanent international criminal court, which would adjudicate war crimes committed anywhere in the world, would replace the law of force by the force of law. Those who express doubts about the utility of a permanent international tribunal claim that war crimes have been outlawed since early days, but punishment is only inflicted if the offender is the vanquished, rather than the victor.

The earliest recorded precedent for an international criminal tribunal dates back to the 1474 trial of the Burgundian Governor of Breisach, Peter von Hagenback. During his trial the court rejected the defense that Hagenback was “just following orders.” Five hundred years later at Nuremberg, another international criminal tribunal would be created and would grapple with the issues of the personal responsibility of individuals “just following orders”.

The Nuremberg Charter was annexed to the famous London Agreement establishing the international military tribunal. The Nuremberg Charter guaranteed certain minimum rights of the



accused to ensure a fair trial. It also defined the crimes of which the defendants were accused and over which the Nuremberg Tribunal had jurisdiction: crimes against peace, war crimes, and crimes against humanity. These definitions will be incorporated with some modifications into the Statute of the International Criminal Tribunal for the Former Yugoslavia. The Nuremberg Charter and judgment as well as the Nuremberg Code for Medical Ethics are among the most significant developments in international law. The jurisprudence of the Nuremberg Tribunal laid the foundation for over one thousand subsequent war crimes trials conducted in occupied zones in Germany and in liberated or Allied Nations. It set the stage for another international military tribunal for the Far East called the Tokyo Trial. It imposed individual accountability for the commission of atrocities. It defined persecution as a crime against humanity, which led to the adoption of a Genocide Convention in 1948.

The purpose of this volume is to investigate the beneficial effects, if any, of international and national tribunals like Dachau, Nuremberg, and Tokyo in order to prevent the commission of massive crimes. This collection of articles should inspire thought about the beneficial effects, if any, of the media in informing the public about wartime atrocities and the procedures of international and national tribunals designed to bring about a just peace. The lesson to be learned from history, and especially from the events of Bosnia and Rwanda, is the lesson which comes out of the two Hofstra war crimes symposia: Peace—real peace—is not possible without justice. As Telford Taylor stated prophetically in 1945: “Perpetrators of war crimes must be punished and the laws of war are not a one-way street.”