

WAR CRIMES TRIBUNALS: THE RECORD AND THE PROSPECTS

CONFERENCE ADJOURNMENT

CLAUDIO GROSSMAN
ARYEH NEIER

* * *

ARYEH NEIER
PRESIDENT, OPEN SOCIETY INSTITUTE

Thank you very much. It has been a long day and I am not going to detain you long. I cannot do justice to the statements made during the course of the day, and, therefore, I am not going to try to summarize anything.

I think this is the most appropriate setting in which to hold this meeting. I believe that the Washington College of Law of the American University has been the outstanding institution in the country in the teaching and practice of human rights and international humanitarian law. I often get requests for advice from people who are interested in attending law school and working in the human rights field. I always suggest that they apply to the Washington College of Law.

I want to use this opportunity at the end of this meeting to comment on some of the things Tom Gjelten said because I found them very provocative. Although I disagree, I think there is an argument for the point of view that he expressed and the remarks about the role of Lawrence Eagleburger in espousing the creation of the tribunal.

If you recall, Eagleburger called for the creation of a tribunal in December 1992. That was about three weeks after President Bush, then already a lame duck, made the decision to intervene in Somalia. At that time, there were two great crises: Somalia and Bosnia. Ac-

cused of focusing on foreign affairs at the expense of domestic issues, President Bush did not do anything during the presidential campaign. He had to prove that he was focusing on domestic issues, so he did not intervene in either Somalia or Bosnia. He made the decision to go into Somalia after he was defeated. Once made, that decision left no possibility that the United States, under President Bush, would also do anything about Bosnia. A lame duck president could not intervene in two international disasters.

Eagleburger, once known as Lawrence of Yugoslavia for his role as Ambassador to Yugoslavia, was going to get the blame for the disaster in Bosnia. He, therefore, used the occasion to endorse the creation of a tribunal, and named ten persons who the tribunal ought to investigate. This was an example of supporting the tribunal rather than doing something that might actually have an impact on ethnic cleansing or genocide. Although Eagleburger espoused the tribunal opportunistically, by putting the United States on record in support of the tribunal, he nonetheless played a crucial role in the tribunal's creation.

It is worth remembering that the call for the tribunal also emanated from the international human rights movement. For a decade prior to the tribunal's creation, the question of accountability for great crimes was at the forefront of the concerns of the international human rights movement. It started at the time the Argentine military, in 1993, declared amnesty for themselves just before giving up power. From that moment, the issue of impunity for great crimes was at the top of the human rights movement's agenda. The call for a tribunal also reflected the fact that the war in Bosnia seemed to have the characteristics of an international armed conflict and, therefore, was subject to a different international legal regime from the internal armed conflict in which questions of accountability had arisen previously. In addition, ethnic cleansing reminded human rights advocates of the crimes of the Nazis and a tribunal seemed the appropriate response. The United States Secretary of State seized the international human rights movement's impulse to create a tribunal, and these two forces combined to create the tribunal.

I want to refer also to Tom's point about the need to individualize guilt and to avoid the problem of collective guilt. I agree strongly with that in the sense that criminal guilt can only be individual—it is

not collective. There were characteristics of the conflicts in the former-Yugoslavia and Rwanda that were very different from other conflicts, however, including those that resulted in the establishment of the Nuremberg and Tokyo tribunals. The distinguishing characteristic of Bosnia, and especially Rwanda, was the very large number of people participating in criminal activities—making individual criminality much harder to establish.

In Bosnia, many of the victims knew the persons who victimized them. That is not at all the case with the crimes of the Nazis. The Nazis assigned special groups, such as the *Einsatzgruppen*, to do the killing. Special death camps existed in Poland, out of sight of Germany itself, and the Nazis used sealed trains to transport the victims. That is unlike Bosnia, where the local citizenry was mobilized to commit crimes against other members of the citizenry—their next door neighbors. Journalist Ed Vulliamy refers to the “grotesque intimacy of Omarska,” where the victims and the people committing the most horrendous abuses knew each other. They lived, worked, drank, and played together in the same villages, and then suddenly one group transformed into killers and another group became victims.

Earlier today, Bernard Muna referred to the extraordinary number of people it took in Rwanda to commit the genocide that took place there. If there were half-a-million to a million people who died in Rwanda, it is conceivable that as many Rwandans took part in the killing as the number of people they killed. In Rwanda, there was no separation between the groups because the Hutus and Tutsis lived intermingled. Thus, the killers knew their victims very well.

The grotesque intimacy of the killers and their victims in Bosnia and Rwanda makes the question of collective guilt versus individual guilt a more troubling phenomenon than we have ever dealt with previously. At the same time, we must adhere to the idea that criminal guilt is only individual, and those persons accused of crimes must be found individually guilty if they are to be punished by the tribunals.

The tribunals also have an opportunity to deal with the larger collectivity that may not have criminal guilt, but bears political responsibility for what took place. Getting people to face up to the idea of political responsibility seems to me one of the most important—per-

haps *the* most important—aspects of the attempt to foster justice internationally.

Referring to Nuremberg, it is important to remember that there were quite a number of trials, but Nuremberg by itself was by no means the only factor that helped to produce political responsibility in Germany. A decade and a half after Nuremberg, the Eichmann trial in Jerusalem may have played an even a larger role in raising the consciousness of what took place in the Nazi era. The Eichmann trial created a sense of political responsibility in Germany and internationally.

Germany, however, differs completely from the Tokyo tribunal in Japan. Many thousands of trials took place in German courts and the courts of other countries involving Nazi crimes committed all over Europe. In fact, a trial in Italy just ended. Additionally, there was a case in England a year ago prosecuting an eighty-five-year-old man for crimes against humanity committed in Belarus fifty-four years earlier. Eventually, the case had to be dropped only because the defendant was no longer competent to stand trial.

The fact that trials started at Nuremberg and continued in the courts of Germany and other countries over a period of time has helped to develop a consciousness of Nazi crimes. Developing a sense of political responsibility for the crimes that took place is the most urgent requirement for preventing genocide.

It is fairly fashionable these days to talk about reconciliation. There was a Truth and Reconciliation Commission in Chile. The South African Truth Commission refers to itself as a truth and reconciliation commission. Frankly, I am less concerned about reconciliation. It is not crucial that Tutsis and Hutus embrace each other. It is not crucial that Bosnian Muslims and Serbs proclaim their friendship.

It is essential, however, that a sense of political responsibility develops in the former Yugoslavia and Rwanda for those who need to acknowledge responsibility, those who are prosecuted, and those who escape prosecution. In addition, all the others in the country, if they do not share in collective criminal guilt, nevertheless have collective political responsibility for crimes committed under the direction of the elected leadership. Moreover, the nations of the world that failed to act responsibly and effectively to stop genocide as it was

taking place in Bosnia and Rwanda must also accept political responsibility.

There was an aspect of President Clinton's statement at the Kigali Airport that was cheap and trivial. He traveled to Rwanda a few years after the conflict and said we did wrong then, that we did not act effectively. If something happens in another African country, I am not counting on President Clinton to lead an effort to intervene when it counts. Nonetheless, his statement, as relatively easy as it was, is one of the small steps that must be taken on the road to international political responsibility.

At some point in the future, the tribunals for the former-Yugoslavia and Rwanda will cease to exist. There will be opportunities, however, under the principle of universal jurisdiction to bring to justice those who were responsible for these crimes as far in the future as the amount of time that separates the recent trials in Europe from the crimes that were committed during World War II. Bringing to trial those who are individually guilty of great crimes is part of the process we need to go through to achieve a sense of collective political responsibility for allowing those crimes to take place.

Thank you very much.

* * *

CLAUDIO GROSSMAN

PROFESSOR OF LAW AND DEAN, WASHINGTON COLLEGE OF LAW

Let me start by saying that I was raised in Chile, and something offended me there when I was young that continues to offend me today. The name Walter Rauff was in the telephone directory of Chile, where everyone could see it. Walter Rauff, in Nazi Germany, was responsible for the extermination of over 300,000 people. When I took a bus in Chile, I often thought that perhaps Walter Rauff was there with me.

The Chilean Supreme Court rejected thousands of writs of habeas corpus on behalf of victims of political repression; but did not have any problem in protecting Rauff's "right" to stay in Chile, rejecting the request for extradition presented by the Federal Republic of Germany.

The same story can be told with different human beings, in different languages, and with different inflections of the voice, but the principle continues to be the same. In order to create space for the freedom and the development of individuals, we need justice, we need investigation, and we need punishment of the guilty. Until we succeed in creating that reality, Walter Rauff will continue to walk free on the streets of the planet, and with him, those responsible for the deaths of thousands of individuals. On behalf of the Washington College of Law, we are pleased and honored to receive you in our school. This school seeks to encourage values important to promoting human dignity. Passion and compassion continue to be important forces in a community committed to creating a better world, a world with dignity for all by using legal knowledge.

My colleague, Diane Orentlicher, exemplifies those values. Without her, this conference would not have been possible. Thanks Diane for your efforts on behalf of justice.

I would also like to recognize all of you, the panelists and the lawyers, who are here. We are living in a very exciting moment. The sheer fact that it is possible to discuss the creation of international accountability and responsibility for war crimes is something marvelous.

I can promise you that for our part, we will continue to contribute to these conferences. I want to thank all of you and invite you to continue to work together in this important endeavor.