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# The Utility of International Criminal Courts

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THE UTILITY OF INTERNATIONAL CRIMINAL  
COURTS

*by Mark W. Janis\**

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*Preface - the Hartford Conference*

In 1625, appalled by the slaughter of the Thirty Years War, Hugo Grotius explained why he chose to write *De Jure Belli Ac Pacis* (*The Law of War and Peace*), the work commonly acknowledged as inaugurating the modern law of nations:

Throughout the Christian world I observed a lack of restraint in relation to war, such as even barbarous races should be ashamed of. I observed that men rush to arms for slight causes or no causes at all, and that when arms have once been taken up there is no longer any respect for law, divine or human; it is as if, in accordance with a general decree, frenzy had openly been let loose for the committing of all crimes.<sup>1</sup>

For centuries thereafter, diplomats, jurists, soldiers, philosophers, and ordinary citizens have struggled with Grotius' central question. Can international law, its rules or its processes, play any useful role in moderating the excesses of war? A famous effort to answer this question in the affirmative was made at Nuremberg in 1946, when accused Nazi war criminals were brought before an international military tribunal for prosecution and judgment.<sup>2</sup> Now, fifty years later, another international criminal court is sitting in the Hague to try those accused of war crimes in the former Yugoslavia.<sup>3</sup>

On October 18 and 19, 1996, the University of Connecticut and its Law School concluded a year of programs in observance of the 50th anniversary of the Nuremberg Trials and in honor of the University's new Thomas J. Dodd Center for Human Rights, an institution founded in memory of Connecticut's former U.S. Senator Thomas J. Dodd, one of the Nuremberg prosecutors. A distinguished international panel of judges statesmen and jurists came together in Hartford to consider Grotius' centuries-old question about the role of law and courts in curbing the excesses of war and protecting human rights in the light of the work of the International Criminal Tribunal for the Former Yugoslavia. The success of the Hartford conference owed much to many, including Senator Thomas Dodd's son, U.S. Senator Christopher Dodd; the Dean of the Con-

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1. HUGO GROTIUS, *DE JURE BELLI AC PACIS LIBRI TRES* 20 (Kelsey trans. 1913).

2. The Judgment of the International Military Tribunal at Nuremberg, 6 F.R.D. 69, 119 (1946).

3. On the establishment of the Tribunal by the United Nations Security Council in 1993, see James C. O'Brien, *The International Tribunal for Violations of International Humanitarian Law in the Former Yugoslavia*, 87 AM. J. INT'L L. 639 (1993); and V. MORRIS AND M.P. SCHARF, *AN INSIDER'S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA*.

necticut Law School, Hugh Macgill; the members of the *Connecticut Journal of International Law*, especially Nancy Kase O'Brasky and Jennifer Iannantuoni; the conference administrator, Blanche Capilos; and, of course, the participants themselves, whose articles follow this essay.

The purpose of this brief introduction is to set the Hartford conference into an intellectual context, specifically the framework posed by Grotius. What exactly is the utility of international criminal courts? The three international criminal courts mostly considered below are Nuremberg itself, the International Criminal Tribunal for the Former Yugoslavia, and the proposed permanent International Criminal Court. Two other international criminal tribunals, the Tokyo War Crimes Tribunal and the International Criminal Tribunal for Rwanda are not treated in depth.

Although the theoretical justifications advanced at Hartford for the utility of international criminal courts are many and varied, it seems possible to divide and contain them in four principal analytical categories; (1) justice and punishment, (2) deterrence, (3) record keeping, and (4) the progressive development of international law. What did we learn from the Hartford conference about the theory and practice of international criminal courts?

## I. JUSTICE AND PUNISHMENT

First, and probably most instinctual among the justifications for international criminal courts, is simply the sentiment that those who have been murdered, tortured, raped, and ethnically "cleansed" in times of war deserve justice and that those who have done or ordered the murdering, torturing, raping, and ethnic "cleansing" deserve to be punished. Since it may well be unlikely that municipal law or national courts will mete out appropriate justice or punishment, it seems right as a matter of principle and of policy that international law and an international criminal court try to do so.<sup>4</sup>

The argument for justice and punishment in the former Yugoslavia was made most poignantly at the Hartford conference by Omer Ibrahimagic of Bosnia, the President of the Constitutional Court of the Federation of Bosnia-Herzegovina. Justice Ibrahimagic's printed words in the *Journal* are in fact only a pale reflection of the personal anguish that he shared with us in Connecticut. "In Bosnia and Herzegovina, all humanity

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4. One of the earliest proponents of the International Criminal Tribunal for the Former Yugoslavia, Professor Bassiouni, contended that the goal of the ad hoc court should be "dispensing justice and punishing war criminals." M. Cherif Bassiouni, *The Former Yugoslavia: Investigating Violations of International Humanitarian Law and Establishing an International Criminal Tribunal*, 18 *FORDHAM INT'L L. J.* 1191, 1201 (1995).

was devalued and left senseless. . .mankind itself had been brought to absurdity.”<sup>5</sup>

A concern for justice and punishment was echoed by Bola Ajibola of Nigeria, formerly a Judge on the International Court of Justice and presently an international member of the Constitutional Court of the Federation of Bosnia-Herzegovina. Judge Ajibola wrote that there has been “a most pitiful theatre of civil strife, which has since enveloped the entire region in gloom.”<sup>6</sup> He argued that for “re-activating the Bosnian identity and spirit” it is vital that justice be done and “that just punishment should be apportioned to those who violate rights without regard to innocent lives.”<sup>7</sup>

Senator Christopher Dodd added his voice to the plea for justice and punishment. “War crimes tribunals are essential for silencing the voices of retribution and revenge and removing the burden of collective guilt from entire communities.”<sup>8</sup> “[No] process of reconciliation can begin if justice is not delivered to those who are guilty, and in turn, exoneration for those who are innocent.”<sup>9</sup>

However much it might be sought that justice be done and that punishment be meted out, the participants at the Hartford conference expressed considerable pessimism about the eventual success of prosecutions with respect to the former Yugoslavia. In his address, Richard Goldstone, a member of the South African Constitutional Court who at the time of the conference had just retired as the first Prosecutor of the International Criminal Tribunal for the Former Yugoslavia, admits that “ultimately the tribunal will be judged on the basis” of whether or not it had carried out “its assigned mandate, i.e., that of prosecuting war criminals.”<sup>10</sup> However, since at the time of the Hartford conference, only 7 of the 74 individuals indicted had been bound over to the Hague Tribunal, Justice Goldstone shared the discouragement of many meeting at Hartford that there was insufficient political will to do more to capture more of the accused.<sup>11</sup>

The failure of the international community to act was accentuated by Antonio Cassese of Italy, the President of the International Criminal

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5. Omer Ibrahimagic, *The Aggression Upon Bosnia and the Judicial Protection of Human Rights*, 12 CONN. J. INT'L L. 172 (1997).

6. Bola Ajibola, *Human rights in the Federation of Bosnia-Herzegovina*, 12 CONN. J. INT'L L. 189 (1997).

7. *Id.* at 195-96.

8. Christopher J. Dodd, *The Legacy of Nuremberg*, 12 CONN. J. INT'L L. 199 (1997).

9. *Id.*

10. Richard Goldstone, *The U.N. War Crimes Tribunals - An Assessment*, 12 CONN. J. INT'L L. 235 (1997).

11. *Id.* at 236.

Tribunal for the Former Yugoslavia. Professor Cassese detailed the continuing and largely futile efforts made by the Tribunal to induce the United Nations and its member states to seize those indicted at the Hague and emphasized "the huge disappointment of us in the Hague."<sup>12</sup>

That "the leaders of the Bosnian Serbs are not available for punishment" was highlighted by Louis B. Sohn, Bemis Professor of International Law Emeritus of Harvard University, as "one of the most important differences between 1945 and 1995."<sup>13</sup> The plain fact, argued Professor Sohn, is that Bosnia, unlike Germany and Japan, has not been defeated and that it should be no surprise that it will be much more difficult to bring accused individuals to trial.<sup>14</sup>

Ellen Peters, formerly Chief Justice and current Senior Justice of the Connecticut Supreme Court and former Southmayd Professor of Law at Yale University, saw an interesting domestic parallel to this example of the non-enforcement of the law. In bitter labor disputes, the law, she explained, may be broken, "[but] once the union and management negotiate a mutually acceptable agreement, the price of labor peace often includes a stipulation that neither the union nor any union member will suffer any adverse consequences for misconduct associated with the labor dispute."<sup>15</sup>

## II. DETERRENCE

If, in theory, the Hartford participants agreed that the pursuit of justice and punishment is perhaps the most important goal for international criminal tribunals, but, in practice it seems unlikely that much justice will be done or much punishment will be meted out at the Hague, what are the implications for the second justificatory category, deterrence? Deterrence itself can logically be broken down into two sub-categories; local deterrence (deterring crimes in the specific conflict) and general deterrence (deterring crimes elsewhere and in the future).<sup>16</sup> When the United Nations Security Council debated the ever-worsening situation in the former Yugoslavia between 1991 and 1993, it had been hoped that the

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12. Antonio Cassese, *Remarks Given at the Old State House, Hartford, CT, October 18, 1996* 12 CONN. J. INT'L L. 206 (1997).

13. Louis B. Sohn, *From Nazi Germany and Japan to Yugoslavia and Rwanda: Similarities and Differences*, 12 CONN. J. INT'L L. 211 (1997).

14. *Id.*

15. Ellen A. Peters, *The Capacity of Judicial Institutions to Play an Affirmative Role in the International Protection of Human Rights; Implications for and from Domestic Law*, 12 CONN. J. INT'L L. 224 (1997).

16. Professor Meron has maintained that "Reaffirming the Nuremberg tenets and the principle of accountability should deter those in Yugoslavia and elsewhere who envisage 'final solutions' to their conflicts with ethnic and religious minorities." Meron, *The Case for War Crimes Trials in Yugoslavia*, 72 FOREIGN AFF., Summer 1993, at 122, 123.

very creation of the Tribunal would put potential war criminals on notice and hence discourage abuses.<sup>17</sup>

This would have partly remedied what Justice Goldstone saw as the "failure since Nuremberg to enforce international humanitarian law."<sup>18</sup> "[T]he experience and benefits learned from the International Military Tribunals were never given practical implementation."<sup>19</sup> Senator Dodd shared a similar sentiment. "Unfortunately, while my father left Nuremberg with a greater fervor to work for freedom and human dignity around the globe, the international community largely ignored the lessons of Nuremberg. . . . Thomas Dodd and others envisioned a world in which future tyrants would be deterred by the rule of law, where international jurists would mete out fair, yet swift punishment to those who would commit crimes against humanity."<sup>20</sup>

Sadly, the sense of the Hartford conference was that it may well be that the International Criminal Tribunal for the Former Yugoslavia will leave an even more discouraging message about deterrence. At least Nuremberg was seen to have tried and punished many important war criminals. The speaker perhaps the most despondent about the future of deterrence at the Hartford conference was Justice Ibrahimagic. "Without the international community's prosecution of the criminal acts committed by Bosnian citizens and officials, it is impossible to stop the potential inspirers of a war of apocalypse."<sup>21</sup> Professor Sohn also lamented that the "leaders of this [Yugoslavian] aggression are going to join the leaders of Iraq who also were not being punished for aggression against Kuwait."<sup>22</sup> Without sufficient political support, the prospects for seizing and trying the accused were, in the words of the panel commentary of John Brittain, Professor of Law at the University of Connecticut, "grim and gloomy."

### III. RECORD KEEPING

Not until we reach the third possible justification for the utility of international criminal courts, record keeping, did we begin to hear in Connecticut a more hopeful story about the International Criminal Tribunal for the Former Yugoslavia. The idea behind record keeping is that an international criminal court should ensure that what has shocked the con-

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17. O'Brien, *supra* note 3, at 641.

18. Goldstone, *supra* note 10, at 229.

19. *Id.*

20. Dodd, *supra* note 8, at 198.

21. Ibrahimagic, *supra* note 5, at 186.

22. Sohn, *supra* note 13, at 217.

science of humanity should be remembered for all time.<sup>23</sup> Justice Goldstone explained that “collective amnesia doesn’t work. Where there have been violent, systematic human rights abuses a society simply cannot forget. Such atrocities cannot be swept under the rug.”<sup>24</sup> The International Criminal Tribunal for the Former Yugoslavia has ensured, in Justice Goldstone’s words, that “for the first time international humanitarian law has become an internationally debated subject.”<sup>25</sup>

Even here a cautionary note was sounded by Professor Sohn. He noted that Germany and Japan kept much better record of their atrocities than did the former Yugoslavia and Rwanda. “No useful record of the plots were found in either Bosnia or Rwanda, and the prosecutors have to build their cases piece by piece, collecting evidence, interviewing potential witnesses and exhuming bodies of thousands of victims. Many witnesses do not dare to testify as gangs of assassins may be hired to make them or their families disappear.”<sup>26</sup>

However, setting out as much of the record as possible has been, it was concluded, one of the most important contributions of the International Criminal Tribunal for the Former Yugoslavia. This point was eloquently made by John Shattuck of the United States, the Assistant U.S. Secretary of State for Human Rights in an address not reproduced below. The transcript gives this version of some of his remarks: “Like an international truth commission, the Tribunal has discredited all claims, and there are many, both in the region and elsewhere, that the parties and the international community have exaggerated what happened in the former Yugoslavia.”<sup>27</sup>

#### IV. THE PROGRESSIVE DEVELOPMENT OF INTERNATIONAL LAW

Fourth, and finally, it was suggested at the Hartford conference that the creation and employment of international criminal courts can result in the progressive development of international law. International criminal courts have made, in the words of Justice Goldstone, important contributions over time “to the development of both substantive and procedural

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23. Madeline Albright, now U.S. Secretary of State, put it well when she was U.S. Ambassador to the United Nations, saying that a purpose of the International Criminal Tribunal for the Former Yugoslavia is “to establish the historical record, before the guilty can re-invent the truth,” Albright, quoted in MORRIS AND SCHARF, *supra* note 3, at 334.

24. Goldstone, *supra* note 10, at 230.

25. *Id.* at 232.

26. Sohn, *supra* note 13, at 214.

27. John Shattuck, Transcript of Speech Delivered on October 18, 1996, on file with the author and CONN. J. INT’L L.

international humanitarian law."<sup>28</sup> Professor Cassesse detailed the careful and laborious work the International Criminal Tribunal for the Former Yugoslavia has done for the development of the law about the investigation and prosecution of war crimes.<sup>29</sup>

Of course, the example of the international criminal courts can promote the development of regional international human rights law. It was the example of the Nuremberg Tribunal that inspired the institution in 1950 of the European human rights legal system.<sup>30</sup> At the Hartford conference, Rudolph Bernhardt of Germany, the Vice President of the European Court of Human Rights in Strasbourg, discussed the way the European Convention for the Protection of Human Rights and Fundamental Freedoms may help shape the peace process in the former Yugoslavia.<sup>31</sup> This may occur even before Bosnia-Herzegovina joins the Council of Europe since the European Human Rights Convention "forms an integral part of the internal legal order" of that state.<sup>32</sup>

As Richard Kay, William J. Brennan Professor of Law at the University of Connecticut, explained in introductory remarks to the panel on October 19, 1996, the progressive development of international law inspired by the international criminal courts may affect not only regional international human rights law but also domestic law. Chief Justice Peters recounted how the experience of Justice Robert H. Jackson as a Prosecutor at Nuremberg deeply affected him when he returned to his place on the U.S. Supreme Court. Nuremberg heightened in Jackson a "profound skepticism about the capacity of the judiciary to determine the proper balance between the constitutional rights of individuals and the social needs of the larger community," a conclusion directly contrary to that reached by many outside observers of the Nuremberg proceedings.<sup>33</sup>

Jon Newman, former Chief Judge of the U.S. Court of Appeals for the Second Circuit and currently Senior Judge, explained that the progressive development of international human rights law has led to the development of an important U.S. domestic case law protecting aliens from

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28. Goldstone, *supra* note 10, at 228.

29. Cassesse, *supra* note 12, at 205.

30. There had been some hope that a permanent international criminal court established under the aegis of the United Nations would issue in the immediate post-War years, but when it became plain that the divisions wrought by the Cold War made that impossible, advocates of international human rights courts turned their sights in 1949 to the creation of a regional human rights court as part of the new Council of Europe. See M. W. JANIS, R.S. KAY & A.W. BRADLEY, *EUROPEAN HUMAN RIGHTS LAW* 18-19 (2d ed. 1995).

31. Rudolph Bernhardt, *Address Given at the University of Connecticut School of Law, October 18, 1996*, 12 CONN. J. INT'L L. 242 (1997).

32. *Id.*

33. Peters, *supra* note 15, at 221.

abuses of human rights; for example, the Second Circuit's own precedent-setting case of 1980, *Filartiga v. Pena-Irala*.<sup>34</sup> Judge Newman himself wrote the opinion in the recent case, *Kadic v. Karadzic*, holding that one of those accused in the Hague, but not yet brought to trial, can be tried in the United States.<sup>35</sup> Although this kind of suit, based on the Alien Tort Statute of 1789, is yet to be tested before the U.S. Supreme Court, Judge Newman noted that the Second Circuit judges "have certainly said that the law of nations as we find it in the traditional sources of treaties, conventions, the work of scholars, the fundamental law of nations, and on this the Supreme Court has certainly agreed, is the law of the United States and will be enforced in the United States."<sup>36</sup>

Finally, and hopefully perhaps the most important contribution of the ad hoc international criminal courts will be the eventual establishment of a permanent international criminal court. Such a prospect was the focus of the concluding address at the Hartford conference by James Crawford of Australia, Whewell Professor of International Law at Cambridge University and a member of the United Nations International Law Commission.<sup>37</sup> Professor Crawford advocated a pragmatic role for the proposed court and defended the Draft Statute for the court advanced by the International Law Commission in 1994.<sup>38</sup>

This was the most optimistic general conclusion emerging from the Hartford conference. Besides gaining the support of Professor Crawford, the proposal for a permanent international criminal court was affirmed by Justice Goldstone who said that it was the first lesson to be learned from the operation of the International Criminal Tribunal for the Former Yugoslavia.<sup>39</sup> Senator Dodd maintained that "the ultimate legacy of [Senator Thomas Dodd's] efforts, fifty years ago in Nuremberg, and today in Bosnia and Rwanda," should be "the creation of a permanent international tribunal to bring suspected war criminals to justice."<sup>40</sup> Justice Ibrahimagic stressed that "a permanent court for crimes against international humanitarian law enforcing the criminal responsibility of a state is something that should be considered seriously."<sup>41</sup> Chief Judge Newman also supported the establishment of a permanent international criminal court but,

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34. Jon O. Newman, *Toward An International Civil War Claims Tribunal*, 12 CONN. J. INT'L L. 246 (1997).

35. *Id.* at 247.

36. *Id.* at 246.

37. James Crawford, *An International Criminal Court?*, 12 CONN. J. INT'L L. 255 (1997).

38. *Id.*

39. Goldstone, *supra* note 10, at 227.

40. Dodd, *supra* note 8, at 198.

41. Ibrahimagic, *supra* note 5, at 187.

looking at the history of judicial development in the United States, counseled advocates of such a court to be patient.<sup>42</sup>

#### CONCLUSION - THE HARTFORD BALANCE SHEET

Indeed, patience was probably the over-riding lesson of the Hartford conference. Despite the antiquity of Grotius' problem, almost four hundred years have brought us not all that much closer to a positive resolution for the role of law and courts in times of war. International law and international criminal courts, it was agreed in Connecticut, can have a role in moderating the excesses of war, but rarely have they. It is true that in the last fifty years a few international criminal courts have been ventured - at Nuremberg and Tokyo, for the former Yugoslavia and Rwanda - but, in general, their records are usually more discouraging than not.

Specifically, the International Criminal Tribunal for the Former Yugoslavia has been largely ineffective, for political reasons, in trying accused war criminals and dispensing justice and meting out punishment, its most significant role. This failure has had a most unfortunate result in that the Tribunal, instead of demonstrating a deterrent effect on potential war criminals, has seemed to indicate to many that the international community lacks the will to punish violators of international humanitarian law.

If it is to be said that the Hague tribunal has been useful in practice, then its utility has been first as a record keeper, compiling the evidence and telling the story of atrocities in the former Yugoslavia and making international humanitarian law better known. Second, it may be that the International Criminal Tribunal for the Former Yugoslavia has been and will be useful in its development of international law. It has already contributed to the development of the substantive and procedural rules of international humanitarian law. Moreover, like other international criminal courts, its precedents may be recognized and followed by regional international courts and domestic courts, such as those in Strasbourg and the United States. And, most significantly, the greatest reward of the effort made at the Hague may be the establishment of a permanent international criminal court. The balance sheet of the Hartford conference demonstrates that most of the gains made by the International Criminal Tribunal for the Former Yugoslavia may well be counted not in the short run but in the long.

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42. Newman, *supra* note 34, at 251.