War Tribunals Explained Along With Their Strengths & Weaknesses
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Phnom Penh, Cambodia.Sachenhausen Concentration camp, memorial in Stained Glass to victims,

For many decades war tribunals have performed a critical humanitarian role in assuming jurisdiction over war crimes and atrocities. As pointed out earlier the advantage of a war crimes tribunal (WCT) is that it can be established by multijurisdictional or intergovernmental agreement to bring justice to bear in matters of universal humanitarian import. When a crime has been committed against humanity, it is not just a crime against one country`s citizens or one tribe, it is a crime that is considered to be repugnant to the human race. A war crimes tribunal performs a critical function in that it is not restrained by sovereign jurisprudence.

"International war crimes tribunals are courts of law established to try individuals accused of war crimes against humanity."[1]

"International or domestic war crimes tribunals and domestic war crimes trials investigate and prosecute war crimes and genocide where massive violations of human rights have been perpetrated, usually by military, Para-military and political organizations associated with a government, often having incited civilians to participate in the violations."[2]

It is also worthwhile citing a definition of war crimes to provide insight into the nature of work that is traversed by a WCT. "War Crimes are serious violations of laws applicable in armed conflict (also known as international humanitarian law) giving rise to individual criminal responsibility. Examples of such conduct include "murder, the ill-treatment or deportation of civilian residents of an occupied territory to slave labour camps.' "The murder or ill-treatment of prisoners of war", the killing of prisoners, "the wanton destruction of cities, towns and villages, and any devastation by military, or civilian necessity."[3]

A seminal difference between a war tribunal and other tribunals or courts of law is that depending upon a WCT`s particular permutation, a war tribunal is increasingly not solely punitive as WCT`s are concerning themselves with broader social holistics. WCT`s are developing a broader agenda which is sometimes to "offer victims and their families the

[1] McMorran C, 2003 '*International War Crimes Tribunals'*, p. 1.
[2] Tool Category F: Judicial/Legal Measures 23. War Crimes Tribunals/Truth Commissions (Commissions of Inquiry) p. 1 < http://www.creativeassociatesinternational.com/CAIIStaff/Dashboard_GIROAdminCAIIStaff/Dashboard_CAIIAdminDatabase/resources/ghai/toolbox23.htm> Viewed on 30 October 2012.
[3] Wikipedia, the free encyclopaedia, *'War Crime'* <http://en.wikipedia.org/wiki/War_crimes> viewed 30 October 2012, this dictionary also quoted from Gary D. Solish (2010) '*The Law of Armed Conflict: International Humanitarian Law in War'*, Cambridge University Press.

opportunity to confront those responsible for what happened to them, and hopefully to put the horrors of war behind them. A tribunal can be a forum for honouring the memory of those lost, as well as punishing those responsible."[4]

"War crimes tribunals and truth commissions contribute to reconciliation after particularly abusive and violent periods by recognizing the victims and what happened and reinforcing rule of law and deterrence of future violations. When combined with judicial reform—a necessary precondition—a truth commission can help break cycles of impunity and provide a public forum for discussion regarding the fate of the guilty. A properly functioning judicial process is needed to contain counter-violence and revenge killings, including returning refugees, in the aftermath of widespread atrocities. Violent collective vengeance threatens the international assistance that a new government needs to rebuild the country, impedes the return of refugees and can plunge the country into a new round of general violence. Prompt prosecution demonstrates that people need not take personal vengeance, a key element in preventing renewed conflict."[5]

Madoka Futamura in his book War Crimes Tribunals and transitional Justice provides some useful insights that distinguish WCT`s raison d`etre from other types of tribunals and courts of law.

"The creation of the UN ad hoc international criminal tribunals was "set against a backdrop of developing approaches to international justice, where it was believed that lasting peace could be fostered by judicial means. Peace through justice was the theme...The contemporary ICTs ultimate aim is not war crimes prosecution per se they are judicial bodies created by the UN Security Council as an enforcement measure to respond to threats to international peace, and their strategic purpose is to restore and maintain international peace…The ICTs were given a mission to contribute to the critical transition from war to peace, where peace should not only be the restored, but also maintained, once it had been established justice was expected to consolidate fragile peace by promoting transformation of societies that have experienced mass atrocities."[6]

"Based on the experiences of Nuremberg and the post-conflict German society, promoters of the ICTs believed strongly in the positive impact of international war crimes tribunals on post-conflict societies, especially in terms of social transformation and reconciliation in the context of the former Yugoslavia, Rwanda and other post-conflict societies."[7]

The author suggest that WCT`s seem to have a mandate to aid with the transition and social transition of fractured societies. Their punitive role is part of the mandate but there also seems to be an element of reconciliation, not in the sense of there being

[4] McMorran C, 2003 '*International War Crimes Tribunals'*, p. 1.
[5] Tool Category F: Judicial/Legal Measures 23. War Crimes Tribunals/Truth Commissions (Commissions of Inquiry, p. 1.
[6] Futamura M 2008, *'War Crimes Tribunals and transitional Justice',* Routledge, New York, p. 144.
[7] *Ibid*. p. 145.

reconciliation between perpetrators and victims; rather through the opportunity for victims to participate, recount and to engage with perpetrators by dialogue & exchange.

"War crimes trials and other methods of reckoning for war-time offenses provide victims of atrocities with "a sense of justice and catharsis," and a feeling that their grievances and pain are heard by their government and community as well as the international community. They establish that abusers and oppressors will be held accountable in the future. Perhaps most critical to long-term reconciliation, they clarify that specific individuals—not entire religious, political or ethnic groups—committed crimes for which they must be held accountable. This subverts collective blame, guilt, retribution and continued or re-awakened hostility."[8]

There is also an emerging resolve on the part of WCT`S to deal with post traumatic impacts on individuals and communities. There is recognition that war crimes such as genocide "rip" societies apart and have a tendency to leave long term wounds, which if not permitted to heal can provide fertile environments for ongoing cultural, ethnic schism and worst case scenario the resurrection of separatist malevolence.

"There is also reason to suspect that for many afflicted populations justice may mean something quite different than the narrow retributive justice following from criminal trials. [this should lead to] international legal interventions to adumbrate a multilayered notion of justice that actively contemplates restorative, indigenous, truth seeking, and restorative methodologies…there is evidence that the international community is moving toward this pluralistic direction, both in terms of the work that the ICTR and also the construction of recent justice initiatives that are more polycentric in focus".[9]

War Tribunals are free of the constraints of Sovereign jurisdiction and local rule of law

Most courts operate in a sovereign jurisdiction which in certain jurisdictions may culminate in an introspective view and in extreme instances a political and jurisprudential myopia. It is not unknown for a sovereign jurisdiction pursuant to the rule of law to apply a concept of justice that repudiates universal humanitarian imperatives and it can find some provincial justification by following the local and codified rule of law.

The apartheid regime in South Africa was one such regime that enshrined highly discriminatory practises in codified acts of parliament. Nazi Germany likewise promulgated barbaric regulations that were enforced by the judiciary on the basis that the Bench was doing no more than enforcing the rule of law. The fact that this made the majority of the Bench complicit in the aiding and abetting of malevolence was considered immaterial to members of the Nazi Bench who when called to account for

[8] Tool Category F: Judicial/Legal Measures 23. War Crimes Tribunals/Truth Commissions (Commissions of Inquiry) p. 1.
[9] "International Criminal Tribunal for Rwanda." Genocide and Crimes Against Humanity. Ed. Dinah L. Shelton. Vol. 2. Gale Cengage, 2005 p 9. eNotes.com. 30 Oct, 2012 <http://www.enotes.com/international-criminal-tribunal-rwanda-reference/>

their actions argued that their failure to apply a barbaric act would have been tantamount to judicial treachery and a repudiation of the sovereign rule of law.

Auschwitz-Birkenau concentration camp.

Nuremberg The Nuremberg Trials held in Nuremberg after the Second World War established the launching platform for WCT`s. Nuremberg introduced legal mechanisms to investigate and bring to account sovereign regimes along with actors who were prime movers or complicit in the aiding and abetting of malevolent regime operation. Nuremberg gave voice and expression to the concept of universal humanitarian imperatives assuming precedence over the local rule of law in circumstances where evidence could be brought to bear to substantiate a repudiation of such imperatives and grave breaches of international law. WCT`s to date and continuing have regard to the tenets established at Nuremberg. Other germane instruments are the 1948 Genocide Convention, the Geneva Conventions and the 1984 Torture Convention.

Yugoslavia. On the 25th of May,1993, the UN Security Council created 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." The Tribunal is domiciled in The Hague and is multinational in terms of the composition of its jurists as 11 judges from 11 countries preside. It comprises two trial tiers one of which has appellate jurisdiction. The tribunal heralds a proactive innovation where the UN endeavours to try perpetrators of war crimes absent military victory.

Sarajevo, Bosina: Italian army troops, in Bosina as part of the United Nation's UNPROFOR, help an injured woman to safety in Sarajevo, Bosina, on Monday, March 18, 1996.

The Nazi Judges at Nuremberg. Justice Franz Schlegelberger, one of the judges tried at Nuremburg endeavoured in a roundabout fashion to invoke the rule of law as a defence to some of his reprehensible rulings. He argued that it was incumbent upon him as a member of the Bench to follow Hitler's directives. The judges that presided over the Nuremberg War Crimes Tribunal were not sufficiently impressed by this argument, an argument that became known as the Nuremberg or the "just following orders defence" and Schlegelberger was found guilty of crimes against humanity

Interestingly there was at the time a misapprehension that the Nazi judges just followed the rule of law in Nazi Germany rather than harbouring a disposition that empathised with Nazi ideology. "Ingo Muller suggests that most German judges "were ultraconservative nationalists who were largely sympathetic to Nazi goals. The Nazification of German law occurred with the willing and enthusiastic help of the judges…many of the judges appointed before the Nazi rise to power—because of the economic and social circles that judges were drawn from—had views that were quite compatible with the Nazi party"[10] …"Most German officers over identified with the Nazi Regime. They came to see themselves as fighters on the internal battlefront, with the responsibility to punish the enemy within".[11]

It begs the question whether the eagerness by the Bench to embrace extreme fascism is corralled to the 1930s and 1940s Teutonic Bench. Most likely not, the apartheid regime of South Africa for instance did indeed have a functioning judiciary that operated for the duration it`s tenure. Implicit within its modus operandi was the enforcement of racialistic and segregational Acts of parliament.

Digressing a little, the author remembers vividly his childhood in Africa when he visited Johannesburg in the sixties. There is nothing in life like first-hand witness. As the author then 10 years of age wandered down the road with his late father the late Dr Malcolm Lovegrove and his mother during a visit to Johannesburg, he observed lifts, staircases, toilets and the like for "blacks", for "whites" and for "coloureds" and "woe be tied" anyone who used the wrong colour demarcated public facility or amenity. Life would have been very challenging if the author had visited "johburg" as an adult with his Ethiopian wife and Ethiopian son and 3 month old half Ethiopian, half Australian baby in the sixties; the law would have required the four family members to use different amenities. One would have had the extraordinary situation where father and husband would be taking different lifts if they were intent upon being law abiding citizens. Further as our baby girl is very white in colour, issue could well have been taken if my wife escorted the little girl to an amenity for blacks.

To illustrate the diabolical banality of the law further, the author`s family would not have been able to sit together in places of public entertainment. Needless to say if members of the author's family had transgressed, they could have been prosecuted and members of the, then South African Bench, would have upheld the laws. If called upon to defend the application of racist laws the defenders would have no doubt invoked the "Nuremberg defence", just following orders folks or to put it another way just applying the rule of law.

Such laws were of course consistent with the apartheid and anti-Semitic laws that burgeoned in Nazi Germany. Furthermore such reflections give the author heightened empathy with the plight of the Semites and other minority groups who were vilified and

[10] Linder D, 2000 ' A Commentary on the Justice Case' p 5 < http://law2.umkc.edu/faculty/projects/ftrials/nuremberg/alstoetter.htm#Commentary> viewed 30 October 2012.
[11] *Id.*

demonised in Germany and the excruciating fury and bewilderment they must have been privy to. For it is one thing to be a sympathetic observer or voyeur from afar, be it by book, the web or by film, it is another thing to actually to be brushed by institutionalised evil.

Needless to say there have been many examples of sovereign acts of parliaments that have created laws that offend universal humanistic or moral imperatives. Furthermore sovereign courts or tribunals, for that matter, from time to time have showcased serious limitations and have proved to be the antithesis of ideal theatres for enforcing universal morally enlightened imperatives.

Little wonder that War Crimes Tribunals tend to be multinational in terms of the composition of the Bench and the signatories to the instruments that creates them. The tribunal members are sometimes seconded onto these tribunals from their own sovereign tribunals or Courts or they may comprise senior lawyers with prosecutorial or investigative expertise and experience on point. The multinational composition is deliberate to ensure that - that which is regarded as being internationally repugnant can best be determined by cross jurisdictional consideration. It is an implied term of their judicial retainers that they are not "ultra conservative nationalists" nor are they predisposed to extreme "repressionist" and discriminatory ideals.

Fence surrounding Auschwitz / Birkenau camp.

Furthermore War Crimes Tribunals apply a strain of international law that is "the product of multipartite treaties, conventions, judicial decisions and customs which have received international acceptance and acquiescence".[12] Linder (at page 7) goes on to provide insight into the basis upon which a defendant can be found guilty of a war crime within the context of the international jurisprudential paradigm. "As a principle of justice and fair play, the rule in question will be given full effect. As applied in the field of international law that principal requires proof before conviction that the accused knew or should have known that in matters of international concern he was guilty of participating in a nationally organised system of injustice and persecution shocking in the moral sense to mankind, and that he knew or should have known that he would be subject to punishment if caught…. Linder adds that "notice of intention to punish was repeatedly given by the only means available in international affairs, namely, the solemn warning of the governments of the States at war with Germany."[13]

[12] Linder D, 2000 ' A Commentary on the Justice Case' p 7 < http://law2.umkc.edu/faculty/projects/ftrials/nuremberg/alstoetter.htm#Commentary> viewed 30 October 2012.
[13] *Id.*

Probably one of the most powerful and important elements of war tribunals is that they adhere to a rule of law that is humanitarian and universally utilitarian. This may seem a naively simplistic or axiomatic observation; but it is not as the wedding of sovereign courts with barbaric legislation and evil regimes makes for a malevolent jurisprudential theatre.

In contradistinction WCT's seem to have a particular fondness for the good and the alleviation of sadism and cruelty. These elements are central to the fabric of the type of law that is practised and followed. This being the case jurists can operate in an environment where they are not morally tested, where the giving of expression to the good, is both revered and consistent with the apposite rule of law. Such jurists are therefore relieved of serious internal moral challenge and they do not have to test their moral resolve.

One suspects that some of the Nazi judges may not have started out as being inherently or innately evil, but with the passage of time lost their moral compass and their empathy for mankind at large. In so doing they degenerated into an evil malaise that enabled them to assist with lubrication of the liquidation regime and the "Final Solution". They operated in an environment that was most unlike that of a WCT judicial community, an environment that could shake many a man`s moral foundations.

Linder in the above paper states that "only a handful of the non - Jewish judges demonstrated real courage in the face of Nazi persecution"[14] He cites the case of only one judge who found that which he was expected to do in the discharge of his office repugnant, one Lothar Kressig, who ultimately resigned because he refused to "tow the party line", so to speak.

Linder in making further observations about the Nazi judges tried at Nuremberg makes mention of the predilections of two of the other defendant jurists. Schlegelberger it would appear encountered a measure of moral turpitude when called upon to apply the law. This man contended that he followed the Fuerher`s lawyers "reluctantly…and the Tribunal concluded that Schlegelberger loathed the evil that he did"[15].

At the opposite end of the predilectional barometer of evil was the quintessentially pure "sadistic and evil man"[16] Oswald Rothaug, who "enthusiastically supported the Nazi pattern of human rights abuses"[17]

The disturbing truth is that the Kressigs of the then world were the exception and the more common jurisprudential disposition would have been jurists who vacillated somewhere between Schlegelberger and Rothaug. So one again asks the question

[14] *Id.*
[15] Linder D, 2000 ' A Commentary on the Justice Case' p 3 < http://law2.umkc.edu/faculty/projects/ftrials/nuremberg/alstoetter.htm#Commentary> viewed 30 October 2012.
[16] *Id.*
[17] *Id*.

would the moral compass of jurists going about their business in other non - democratic jurisdictions err towards the dark or the enlightened side?

The beauty of cross jurisdictional tribunals is that they adhere to universal tenets of the greater good and humanism and they create a jurisprudential environment where a decision maker, is a member of a community of like-minded jurists.

The likes of the Schlegelbergers, are not deserving of any defence, but one nevertheless may well harbour an inkling that Schlegelberger was probably not an unusual man. This was probably a jurist who lacked courage and to this extent may well exemplify the character of a great many human beings who when subjected to powerfully sinister influences, dressed up with the opiates of power and venerability, and a determination to maintain a vocational and life style status quo, may well be found malleable. The fact that Linder uses the word courage when he described Kressig suggests that it may only be the brave men that can withstand the most malevolent of forces in circumstances where the going about of their day to day business occurs against a backdrop of absolute and intrusive power.

In another paper written by Doug Linder, he introduces the paper by stating that "no trial provides a better basis for understanding the nature and causes of evil than do the Nuremberg trials from 1945 to 1949. Those who come to the trials expecting to find sadistic monster are generally disappointed. What is shocking about Nuremberg is the ordinariness of the defendants: men who may be good fathers, kind to animals, even unassuming—yet who committed unspeakable crimes…they over identified with an ideological cause and suffered from a lack of imagination and empathy: they couldn`t fully appreciate the human consequences of their career – motivated decisions."[18]

Where a jurisdiction experiences a paradigm shift, a shift from democracy to tyranny or malevolent dictatorship, either incrementally or suddenly, the tyrant will be ill-disposed to those that who do not embrace the new ideology. Members of any powerful and established status quo regardless of whether they are executive or jurist will have to decide whether to embrace the new ideology and the new rules. Linder suggests that the career with some may well come first and there may well be a strong desire to embrace a new ideology, if it enhances one`s career, for in so far as the defendants were "garden variety and ordinary men", they would just as readily be ambitious as they would be good fathers. After all it is pretty well accepted that a good father has to be a good provider and if the compromising of one`s higher ideals for the sake of ambition is conducive to being a better provider then these "ordinary unassuming folk" seemed to have been able to accommodate wickedness as being something "that simply came with the territory".

It appears that there are those that will adapt because they find it difficult to give up the trappings of higher office or even mundane office, for that matter, because they may be

[18] Linder D, 2000 'The Nuremberg Trials' http://law2.umkc.edu/faculty/projects/ftrials/nuremberg/alstoetter.htm#Commentary viewed 30 October 2012.

scared of the consequences of not “towing the party line.” Others like Kressig will resist and then resign for fear of forsaking higher ideals.

In a rapidly changing world like the one that we are currently domiciled within, extreme elements will come to the fore and severe individuals will surface and gain ascension as in challenging times such people appeal to those driven by the baser instincts. (On point, shortly before finishing this manuscript I visited Paris as my Ethiopian wife wanted to visit her sister. Her sister volunteered that she had recently provided temporary domicile to some Ethiopians who had fled Greece on account of the escalation of racial and African targeted violence. They felt that it was no longer safe for them to live there, such was the escalation of ill-disposition being perpetrated by the fascists towards Africans).

The role of humanitarian tribunals of the likes of war tribunals that embrace higher ideals will therefore become even more important as the people that preside within these jurisprudential environments are immune from the influences that may test the resolve of men and women who are not necessarily inherently evil but lack the courage of men like Schlegelberger.

Linder`s observations seem to suggest that corruption of many a man`s moral centre can be an incrementally insidious metamorphosis that depending on the individuals level of “porousness” inevitably germinates in the wrong environment. For fear of labouring the point those that are called upon to make decisions in war tribunals need not fear such osmosis as their makeup and pedigree is such that they tend to have an affinity with the higher ideals.

Some other examples of War Tribunals are below;

Butare, Rwanda – January 30: mass graves in Butare, Rwanda on January 2012. The Rwandan Genocide was the 1994 mass murder of an estimated 800,000 people.

The International Criminal Tribunal for Rwanda (ICTR)

The ICTR was established in November 1994. The following information was taken from the ICTA’s website –

“Recognizing that serious violations of humanitarian law were committed in Rwanda, and acting under Chapter VII of the United Nations Charter, the Security Council created the International Criminal Tribunal for Rwanda (ICTR) by resolution 955 of 8 November 1994. The purpose of this measure is to contribute to the process of national reconciliation in Rwanda and to the maintenance of peace in the region. The International Criminal Tribunal for Rwanda was established for the prosecution of persons responsible for genocide and

other serious violations of international humanitarian law committed in the territory of Rwanda between 1 January 1994 and 31 December 1994. It may also deal with the prosecution of Rwandan citizens responsible for genocide and other such violations of international law committed in the territory of neighbouring States during the same period.

The International Criminal Tribunal for Rwanda is governed by its Statute, which is annexed to Security Council Resolution 955. The Rules of Procedure and Evidence, which the Judges adopted in accordance with Article 14 of the Statute, establish the necessary framework for the functioning of the judicial system. The Tribunal consists of three organs: the Chambers and the Appeals Chamber; the Office of the Prosecutor, in charge of investigations and prosecutions; and the Registry, responsible for providing overall judicial and administrative support to the Chambers and the Prosecutor".[19]

What is particularly interesting about the ICTR is that it is multidimensional and "more polycentric in focus" than typical tribunals. This tribunal does not limit itself purely to punitive tasks as has been pointed out earlier; it is also concerned with social holistics and societal and community healing. It recognizes that such is the trauma and psychological pain of the apocalyptic aftermath, that is visited upon survivors of love one`s that have been lost, that mere punitive justice in itself, does not lend itself to any catharsis or reconciliation of any ethnic divide.

"The ICTR has, in conjunction with Rwanda nongovernmental organizations, launched a victim-oriented restitutionary justice program to provide psychological counseling, physical rehabilitation, reintegration assistance, and legal guidance to genocide survivors."[20] Such an initiative is atypical of the way in which tribunals and other dispute resolution theaters work as it recognizes that punishment in itself within a macro context does nothing to appease the dead and does very little to heal the survivors. Most tribunals and courts issue a determination and that concludes the task. WCT`s on the other hand are increasing working in collaboration with NGO`s to recalibrate the disaffected with something akin to normality. Hence the very important psychological counseling and reintegration.

The Khmer Rouge Tribunal in Cambodia was a response to the millions of lives lost in the genocide perpetrated by the Pol Pot Regime. The Tribunal is officially known as the Extraordinary Chambers in the Courts of Cambodia[21] and was established to try the

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[19]General Information International Crimes Tribunal for Rwanda http://www.unictr.org/AboutICTR/GeneralInformation/tabid/101/Default.aspx at 28 June 2011.

[20] "International Criminal Tribunal for Rwanda." Genocide and Crimes Against Humanity. Ed. Dinah L. Shelton. Vol. 2. Gale Cengage, 2005 p 9. eNotes.com. 30 Oct, 2012 <http://www.enotes.com/international-criminal-tribunal-rwanda-reference/>

[21] David Scheffer, Mayer Brown/Robert A. Helman Professor of Law Northwestern University School of Law Chicago, Illinois, '*The Extraordinary Chambers in the Courts of Cambodia*' Martinus Nijhoff Publishers, 2008 p.1 <http://www.cambodiatribunal.org/sites/default/files/resources/Cambodia_Scheffer_Abridged_Chapter_July_2007.pdf> Accessed on 30 April 2012.

most senior officials in the Pol Pot regime.[22] The tribunal is termed a hybrid as it was created by an agreement between the Royal Government of Cambodia and the United Nations. The tribunal is part of the national court system; however the bench includes both Cambodian and international judges.[23]

Skulls from a mass grave of Khmer Rouge victims in Choeung Ek aka the Killing Fields near

The International Crimes Tribunal for the former Yugoslavia (ICTY)

Kosovo Polje, 1 July 1999 – a dazed and injured ethnic Albanian woman is comforted by British NATO after an attack by Kosovar Serbs in this ethnically divided city.

"In May 1993, the Tribunal was established by the United Nations in response to mass atrocities then taking place in Croatia and Bosnia and Herzegovina. Reports depicting horrendous crimes, in which thousands of civilians were being killed and wounded, tortured and sexually abused in detention camps and hundreds of thousands expelled from their homes, caused outrage across the world and spurred the UN Security Council to act.

The ICTY was the first war crimes court created by the UN and the first international war crimes tribunal since the Nuremberg and Tokyo tribunals. It was established by the Security Council in accordance with Chapter VII of the UN Charter".[24]

It is a revealing insight into certain manifestations of the human condition that the sorts of heinous atrocities that were systemically evident in Nazi Germany have featured in subsequent historical chapters and ominously in recent times. Distant and recent history have shown that Genocide and war crimes cannot be regarded as something that is peculiar to a given century; in fact the twentieth century could lay claim to displaying by far the highest number of instances of ethnic and cultural genocide. The frequency of war crimes has virtually assumed a serial dimension.

[22] David Scheffer, Mayer Brown/Robert A. Helman Professor of Law Northwestern University School of Law Chicago, Illinois, '*The Extraordinary Chambers in the Courts of Cambodia*' Martinus Nijhoff Publishers, 2008 p.1

[23] *Id.*

[24] About the ICTY International Crimes Tribunal for the Former Yugoslavia <http://www.icty.org/sections/AbouttheICTY> at 28 June 2011

A common feature in regimes that have displayed systemic liquidation of racial and cultural groups is that genocide has been able to proliferate within the boundaries of a sovereign jurisdiction. This bears testimony to the inability of these sovereign courts of law to prevent genocide. Sovereign courts and tribunals within these jurisdictions have not displayed any facility for the arresting of the escalation of a malevolent mood. Whether this is because like Nazi Germany the judiciary has been complicit in the perpetration of crimes against humanity by the handing down of regime compliant decisions or maybe it is because the sovereign courts have been sidelined by regimes by the imposition of ad hoc military or martial law.

Regardless, the not infrequent inability of sovereign courts regimes to prevent crimes against humanity where the rule of law repudiates universal humanitarian imperatives reinforces the paramount role of War Tribunals. When an institution has a multinational composition of jurists, where a great many of the members come from advanced democracies then a collectively enlightened jurisprudential disposition tends to gain expression.

One limitation however is that war tribunals materialise well after the crimes have been committed and unlike conventional crimes the systemic magnitude and sheer number of crimes are in a different stratosphere. Although war tribunals are able to bring some perpetrators to account, albeit a few, the magnitude of evil occasioned prior to adjudication, makes the effect of punishment tokenistic. Not one to advocate capital punishment, but if one were of such persuasion, the idea that the execution of a monster provides some sort of 'retributional' justice or atonement for thousands that may have died because of the monster`s contribution to their oblivion, is absurd. This is why the more holistic trend that is being deployed by tribunals such as the Rwandan tribunal is "epiphanistic".

Kukes, Albania, 17 April 1999 – Kosovar Albanians line up for food between rows of tents at an Italian government-operated refugee camp in northern Albania.

Shortcomings

There may be some who harboured aspirations that Nuremberg would have established a precedent that would serve to disincentivise malevolent individuals from engaging in ethnic elimination in later generations. It did not. The censure of the perpetrators, in the overall scheme of things, did little to alleviate the diabolical travesties that they visited upon mankind.

It would have been progress if mankind had as a uniformly collective consciousness been able to learn from Nuremberg, but it appears that the malevolent forces that seem to well up every couple of decades in certain regimes are still able to assume currency. All it takes is an evil, charismatic leader that can enlist a critical mass of followers, and can infect them with a toxic mood, then the toxin has shown a tendency to spread and infect a sufficiently large amount of a population with a malignant preparedness to inflict barbarity on the disenfranchised.

The use of the word group is deliberate because crimes against humanity are not limited to crimes against ethnic groups. The burning of witches during the time of the Spanish inquisition involved the singling out of a gender and a perception albeit through nefarious criteria that some of that gender worshipped mephisto. The persecution and "sexuality cleansing" of homosexuals in Nazi Germany had nothing to do with ethnicity but everything to do with a minority group`s sexual predilection. The liquidation of gypsies was probably more about cultural cleansing than ethnic cleansing. So when reference is made to crimes against humanity and the mandate of war tribunals, their task is to punish those who have subjected "groups" or communities to diabolical violence.

A limitation with respect to war tribunals is that the given tribunal has a finite task and a finite tenure. The task is to censure those who have committed war crimes in a particular geographical or cultural theatre, be it the Germans, be it Rwanda or the former republic of Yugoslavia. After the task is concluded the tribunal invariably disbands. Along with the dispansion is the disaggregation of jurists that have developed specialist skills and insights into the war crime area of jurisprudence. Yet as pointed out earlier, the phenomena of crimes against humanity cannot be archived to history as history has shown that they have what is tantamount to a serial tendency to reoccur. It is thus a pity that jurists that have honed skills in this particular arena cannot deploy those skills in other similar theatres.

Another shortcoming is that it is only when the victor vanquishes the defeated that those in the ranks of the defeated are singled out and identified as avaricious and profligate killers. But if the malevolent victor remains victorious and his voracious appetite for butchery continues to know no bounds, thus inspiring an evil regime, then the war criminal may never be brought to account. War crimes tribunals seem to be dependent upon victory and regime change and so their ability to affect early and deterrent censure is very limited. Because it may take many years before a noble victorious regime emerges that is then intent on bringing justice to bear and within that period of time the number of victims tortured, raped and killed will have grown exponentially.

There are some who consider that WCT`s are created for ulterior purposes, ie purposes that are not necessarily predicated by positive social transformation and reconciliation. Futamura M wrote that "the creation and operation of the Tokyo Trial served the

strategic purposes of the allies, really the United States, to demilitarize and democratize the vanquished nation; Japan...then considering Japanese attitudes towards the Second World War, was crimes and the issue of war responsibility, revealed in the present research, it is evident that the Tokyo Trial had little 'Visible' effect, or no 'positive' impact, on Japan. However, the silence of the Japanese is highly vocal in a sense….the Japanese view of the Tokyo Trial consists of a complex mixture of lack of interest cynicism, sense of 'collective guilt' or 'collective humiliation' and frustration."[25]

"Excessive collective responsibility is what the advocates of international criminal justice believe that a war crimes tribunal should help to avoid. It is ironic, therefore, that the Tokyo Trial not only failed to achieve this, but also came to be attacked by some as the source of an overarching collective guilt."[26]

The Tokyo Trial "played an important role in Japan's immediate demilitarization and democratization process, which was the allies, original strategic purpose for conducting the Tokyo Trial. However, from the perspective of social transformation and reconciliation, which are the perceived (or received) strategic purposes of current international war crimes tribunals, the impact of the Tokyo Trial on post-war Japan is rather problematic….The Tokyo Trial clouds Japanese reconciliation with their Asian neighbours, as well as with their own past."
[27]

"The experience of the Tokyo Trial and the post-war in Japan, as shown above demonstrates that the impact and effect of international war crimes tribunals and their two principle devices are not necessarily wholly positive, nor are they straight forward. They may not only be complex, subtle and multifaceted, but also counterproductive and harmful by distorting the perpetrator people's sense of responsibility, guilt and historical perception. Such an impact is not at all welcomed when the strategic purpose of an international war crimes tribunal is to promote the healthy social transformation and true reconciliation, which are vital for the achievement of long-lasting peace in post-conflict society." [28]

Futamura`s comments that WCT`s are preoccupied with reconciliation and social transformation may be over played. It would be naive to consider that WCT`s have vacated the punitive and retributional "space". Yes truth and reconciliation commissions have been established, but there is nothing to suggest that this is tantamount to the jettisoning of the punitive role of WCT`s. It would be remiss of one to form a view that WCT`s in future would see their role as primarily reconciliatory. It is more accurate to say that WCT`s will continue to punish where necessary and integrate with NGO`S to facilitate social transformation; but the central raison d'etre of a WCT jurist is not to be a social worker.

[25] Futamura M 2008, *'War Crimes Tribunals and transitional Justice',* Routledge, New York, p. 145.
[26] Futamura M 2008, *'War Crimes Tribunals and transitional Justice',* Routledge, New York, p. 149.
[27] *Id.*
[28] Futamura M 2008, *'War Crimes Tribunals and transitional Justice',* Routledge, New York, p. 151.

Furthermore the comment that “by distorting the perpetrator`s sense of responsibility, guilt and historical perception” is “counterproductive and harmful” may not be a universal sentiment and may well be at odds with the disposition of a given WCT set of jurists presiding over a given theatre of post-apocalyptic carnage. Nuremberg was everything to do with the trying, incarceration and in certain instances the capital punishment of people who had engaged in abominable deeds; it was a reckoning or a bringing into account. It was about very publicly stating that crimes against humanity will not be tolerated and will be demonised. In reading some of the prosecutorial transcript one gets very little inkling of desire for “true reconciliation”. The converse appeared to be the case.

The International Criminal Court

As stated above it has been identified that genocide and crimes against humanity have a tendency to reoccur. As they are not one off historical events there needs to be an institution with perpetual jurisprudential tenure to deal with this type of jurisprudence. The fact that an International Criminal Court was established rather than a tribunal lends credence to the view that courts are fashioned or designed for permanence whereas a characteristic of tribunals is that they often are created for a finite and specific purpose. The latter is definitely the case with war tribunals.

The ICT`s promulgation unfortunately bears a rather sinister testimony to the fact that international crimes such as genocide or ethnic cleansing are not one off scenarios. In the twenties many Armenians were liquidated by the Turks, the forties bore witness to the Final Solution and the Jewish genocide, not to forget the persecution of gypsies and homosexuals. In recent decades the world witnessed the genocides in the former republic of Yugoslavia and Rwanda.

As stated above what was evident was that some of the local sovereign Courts were either impotent in dealing with local atrocities or acquiesced in the perpetration of atrocities and this is an area where sovereign courts in some case have been found wanting.

*“*In the 1990s after the end of the Cold War, tribunals like the International Criminal Tribunal for the former Yugoslavia and for Rwanda were the result of consensus that impunity is unacceptable. However, because they were established to try crimes committed only within a specific time-frame and during a specific conflict, there was general agreement that an independent, permanent criminal court was needed.

On 17 July 1998, the international community reached an historic milestone when 120 States adopted the Rome Statute, the legal basis for establishing the permanent International Criminal Court.

The Rome Statute entered into force on 1 July 2002 after ratification by 60 countries”.[29]

[29] About The International Crimes Court <http://www.icc-cpi.int/Menus/ICC/About+the+Court/> at 28 June 2011

As the ICT is now a permanent international jurisprudential institution it is hoped that it can somehow play a more proactive role with respect to the alleviation of crimes against humanity. Where there is a material difference between the ICT and a war tribunal is its perpetuity.

With war tribunals the frustrating fact is that the tribunal is established after the atrocities. So the catalyst for its establishment in a good many instances is endemic and systemic slaughter, torture and rape. Further the tribunals are ordinarily established after a malevolent regime has been deposed and it is only then that some victors or emancipators may choose to bring to bear the resolve to establish a WCT. But to reiterate by then the carnage has occurred and history has shown that high profile hearings where monsters are brought to account provide little deterrent to future monsters. It appears that in certain conditions evil will not be constrained and the malevolent charismatic character is not in the least bit demotivated by instances of historical denouncement of those of like leaning.

With the ICT it would be cathartic if there could exist the potential for more "rapid response" and early intervention capability. If there was some way that ICT jurisdiction could be invoked at the earliest manifestation of genocidal metamorphosis, rather than at a more evolved juncture, there is the possibility that if the perpetrators can be brought to account at an early time then their capacity to escalate carnage could be contained. A classic case is Rwanda, UN peace keepers were horrified at their inability to intervene and the longer their lack of intervention gained tenure the more extensive the proliferation of whole sale slaughter. Needless to say, "for many Rwandan, the international community`s response to and effort in preventing the genocide is questionable at best. The international community was not willing to meaningfully invest in armed intervention that may have prevented, or at least mitigated, genocide in Rwanda in the first place. Various independent reports and studies have found the UN (as well as many states) responsible for failing to prevent or end the Rwandan genocide.[30]

Deportation wagon at Auschwitz – Birkenau concentration camp, Poland.

If the ICT had the power to by ex parte application to find a perpetrator guilty of crimes against humanity, then maybe that could provide a morally persuasive mandate for multi- lateral and benevolent military intervention.

A hypothetical illustration of how such a mandate could be used is as follows. It was known that the allies could have paralysed the holocaust machine in Europe if strategic bombing of train lines that transported human

[30] Linder D, 2000 ' A Commentary on the Justice Case' p 7 < http://law2.umkc.edu/faculty/projects/ftrials/nuremberg/alstoetter.htm#Commentary> viewed 30 October 2012.

beings to the gas chambers and death factories had been sanctioned. If there had been in existence an international war crimes institution that had the power by way of ex parte application to be satisfied evidentially that genocide was “on foot” then such finding could have been used as an imprimatur to justify benevolent military intervention. In this hypothetical scenario the finding could have been used by the likes of the “allies” to commit to strategic bombings of the train lines. As it transpired any bombing of such rail lines occurred too late, was largely infective and non-coordinated. It never became a multinational strategically coordinated imperative.

And in the case of the infamous rail way lines some of their human cargo may have enjoyed a very different destiny. If such powers were to be visited upon the ICT then this war crime jurisprudential theatre would be able to do more than engage in post carnage reflection and reaction in the future. The critically unique role that the ICT could perform is to play a role in the arresting and containment of the loss of human life. As war tribunals are becoming more multi-dimensional and are concerning themselves more with war crimes holistics then consideration could be given to stronger connectivity with bodies such as the UN and NATO to engineer earlier intervention that can serve to arrest a deteriorating macro dynamic. It should not be the case that a regime has to be defeated or a genocide be permitted to run its course before a tribunal can intervene. Rather once evidence can be brought to bear that persuades a body such as the ICT that there is evidence of genocide, then the ICT should be bestowed jurisdiction to make a finding that genocide or war crimes are indeed “on foot” and the determination should comprise a recommendation that the appropriate body sanctions proactive external military intervention. Without wishing to be an apologist for the UNs benign impotence in the case of Rwanda, the UN was not given any mandate to become militarily proactive. The ICT could potentially if there was a will on the part of its signatories generate a mechanism to provide such an imprimatur in the future.

There are conceptual precedents for quasi-judicial bodies being able to have an effect that is more than punitive by virtue of their ability to effect regime change. Royal Commissions are often created to investigate a systemic failure. The Royal Commission into police corruption in NSW Australia, in the nineties was one such initiative. A systemic problem of corruption identified was investigated with the effect that those that had engaged in corrupt conduct were censured. The macro effect however was a reengineering of a bureaucracy`s culture that emanated from its findings and more importantly its recommendations. This was an example of a quasi-judicial initiative going much further than the administration of punishment in that it engineered a legacy of a more regularised institution. In so doing a malaise was arrested, a systemically corrupt culture was destroyed and replaced by a culture that was far more ill-disposed to iniquity.

About the author

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