

**Human Rights  
in Political  
Transitions:  
Gettysburg  
to Bosnia**



ZONE BOOKS

**Human Rights  
in Political  
Transitions:  
Gettysburg  
to Bosnia**

Edited by Carla Hesse & Robert Post

ZONE BOOKS • NEW YORK • 1999

© 1999 Carla Hesse and Robert Post  
ZONE BOOKS  
611 Broadway, Suite 608  
New York, NY 10012

All rights reserved.

No part of this book may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, including electronic, mechanical, photocopying, microfilming, recording, or otherwise (except for that copying permitted by Sections 107 and 108 of the U.S. Copyright Law and except by reviewers for the public press) without written permission from the Publisher.

Printed in the United States of America.

Distributed by The MIT Press,  
Cambridge, Massachusetts, and London, England

Library of Congress Cataloging-in-Publication Data

Human rights in political transitions : Gettysburg to Bosnia /  
Carla Hesse and Robert Post, editors.

p. cm.

Includes bibliographical references.

ISBN 1-890951-01-3 ISBN 1-890951-00-5 (pbk.)

1. Human rights. I. Hesse, Carla Alison. II. Post, Robert,

1947- .

JC571.H769526 1999

323 - dc21

98-40737

CIP

The authors wish to thank Herb and Marion Sandler,  
who generously endowed the lecture series  
that was the origin of this book.  
They are true and steadfast champions of the  
cause of human rights.

Cover images: The Hague Tribunal building exterior, courtesy ANP Digital  
Documentary Center; and Gerardo Dell'Orto, *The Mothers March with  
Silhouettes of the Disappeared* (1988), from Marguerite Guzman Bouvard,  
*Revolutionary Motherhood: The Mothers of the Plaza de Mayo* (1994).

## Contents

<b>Preface</b>	9	<b>The Need for Moral Reconstruction</b>	195
Richard Goldstone		<b>In the Wake of Past Human Rights Violations: An Interview with José Zalaquett</b>	Naomi Roht-Arriaza
<b>Introduction</b>	13		
Carla Hesse and Robert Post			
<b>PART ONE: PUNISHMENT</b>		<b>PART THREE: CREATING A CULTURE OF LAW</b>	
<b>Rethinking Truth, Justice, and Guilt after Bosnia and Rwanda</b>	39	<b>Making Public Memory, Publicly</b>	217
Aryeh Neier		Mark J. Osiel	
<b>Beyond Nuremberg: Individual Responsibility for War Crimes</b>	53	<b>Human Rights as Social Ideals</b>	263
David Cohen		Owen Fiss	
<b>Human Rights in the Haitian Transition to Democracy</b>	93	<b>The Difficulty of Imagining Other Persons</b>	277
Kenneth Roth		Elaine Scarry	
<b>PART TWO: RECONCILIATION</b>		<b>AFTERWORDS: HUMAN RIGHTS IN TRANSITION</b>	
<b>Forgiving and Forgetting: Lincoln and the Politics of National Recovery</b>	135	<b>Human Rights</b>	313
Robert Meister		Michael Ignatieff	
<b>Bringing the Messiah Through the Law</b>	177	<b>Terms of Reconciliation</b>	325
Ruti Teitel		Michel Feher	
		<b>Millennial Visions: Human Rights at Century's End</b>	339
		Ruti Teitel	
		<b>Contributors</b>	343

## Bringing the Messiah Through the Law

Ruti Teitel

The International Criminal Tribunal for the former Yugoslavia (ICTY) was convened in 1993 in The Hague to prosecute war crimes committed in the course of the conflict in the Balkans.<sup>1</sup> It is the first international legal body authorized to adjudicate war crimes since the court in Nuremberg about a half-century ago.

Although the tribunal in The Hague was consciously patterned after Nuremberg, it was created in utterly distinct political circumstances. The trials after World War II represented "victors' justice." They were conducted after peace had been achieved, and they sought to give legal expression to the victors' outrage at Germany's initiation of an unjust war.

The ICTY, by contrast, was convened in the midst of a bloody conflict. Its mandate was not to shape the meaning of a peace that had already been achieved, but instead to bring individuals responsible for atrocities to justice in an effort to establish peace.

The ICTY, therefore, prods us to investigate the connection between international criminal justice and peace. The mandate handed by international law to the ICTY — to impose justice before peace and as a means to achieve peace — has no precedent. How can justice in a courtroom wrapped in tempered glass in The Hague, isolated from a raging conflict on the ground in war-torn Yugoslavia, contribute to peace?

In this essay, I shall explore the relationship between the messy and political business of peacemaking and the assertion of law in a distant and antiseptic vacuum. The essential mission of the ICTY is to transform the conflict in the Balkans to one of individual crimes answerable to the rule of law, and so to achieve peace and reconciliation. But the efforts of the ICTY to accomplish this mission serve primarily to underscore the dependence of the rule of

law on a supporting matrix of a national and international politics. Stripped of this matrix, deprived of political authority and constituency, the transformative potential of the ICTY must rely on the proffer of a thin and inadequate image of liberal identity.

### *Punishment, Truth, and Peace*

The mission of the ICTY must be understood in the context of its origins in the Balkans conflict. In the spring of 1992, Bosnian Serbs, with the assistance of the Yugoslavia army, began a drive to "ethnically cleanse" all non-Serb inhabitants from large stretches of Bosnia. Their tactics included widespread and systematic persecution, torture, murder, rape, beatings, harassments, discrimination, and forced displacements. With the fall of the U.N. safe havens of Srebrenica and Zepa in April and July 1995, Bosnian Serb forces virtually completed the "ethnic cleansing" of eastern Bosnia. It is estimated that their campaign of terror killed close to a quarter of a million persons; it produced tens of thousands of refugees.

Almost three years before, however, in the fall of 1992, the U.N. Security Council had received reports of mass expulsion, civilian deportations, mass killings, torture, imprisonment, and atrocities in detention camps.<sup>2</sup> It therefore set up a commission to investigate atrocities committed in the region. It was the first such commission created since World War II, and it was modeled on the 1943 Allied War Crimes Commission. By February 1993, the "Commission of Experts" had concluded that there had been willful killing, organized massacres, torture, rape, pillage, and destruction of civilian property,<sup>3</sup> all in a campaign of "ethnic cleansing" to "render an area ethnically homogeneous using force and intimidation to remove persons of given groups from the area."<sup>4</sup> In eastern Bosnia, ethnic cleansing appeared to constitute part of a much larger attempt by Bosnian Serb forces to commit genocide against Bosnian Muslims and other non-Serbs.<sup>5</sup>

By early spring 1993, the United Nations was confronted with the question of how to respond. Though ethnic cleansing and other violations of humanitarian law in the Balkans were declared to threaten "international peace and security," allied humanitarian intervention was not marshaled to stop the atrocities. Instead, operating under its Chapter 7 powers, the Security Council established the ICTY as "a measure to maintain or restore interna-

tional peace and security." According to prevailing conventions codified after the postwar period, the atrocities exposed in the Balkans could be punished as war crimes.<sup>6</sup> Bringing individuals to justice, the Security Council said, would contribute to the restoration and maintenance of the peace.

The international community did not respond to the terrible abuses in the Balkans by organizing military interventions forcefully to prevent further atrocities. It chose instead to create and empower a tribunal capable of enforcing the rule of law. The international community asserted that peace and proper governance could be restored to the region through the politics of punishment.

Historically, however, justice has followed war. Postwar trials have been used to establish the nature of an antecedent war, to determine whether it had been an "unjust" or a "just" war.<sup>7</sup> The Treaty of Versailles, for example, was an example of "victors' justice," avenging Germany's unjust war. And again, after World War II, the Allies attempted to punish Germany for waging aggressive war. Unlike Nuremberg, however, the ICTY was no postwar tribunal. The ICTY would attempt to dispense justice before peace and without the clarification of military victory. It would therefore lack the authority and power of traditional victors' justice. The difference was plainly visible in the ICTY's frustrating inability to seize custody of defendants or to command access to evidence.

The difficulties of the ICTY were compounded by its double mission. The tribunal was created not merely to dispense justice, but also to achieve reconciliation in the region. It was explicitly established by the Security Council as a "peacemaking" measure.<sup>8</sup> No doubt this political mission was grafted onto the ICTY in part to compensate for the glaring failure of the international community to take the political and military steps necessary to stop the slaughter. But there are rather obvious tensions between criminal law and peacemaking.

So, for example, when the tribunal declared its intention to indict Bosnian Serb leaders Radovan Karadzic and General Ratko Mladic, the indictments themselves appeared to endanger the peace. Although the parties to the Dayton Peace Accords had pledged full cooperation with the tribunal,<sup>9</sup> and although the accords obligated signatories to support the tribunal and to hand

over suspected war criminals, these obligations lacked explicit enforcement mechanisms.<sup>10</sup> There was no unambiguous assignment of responsibility for the apprehension and arrest of indicted war criminals, and in fact these powers were said to lie outside the mandate of the NATO peace implementation force, the IFOR. Tension caused by the refusal of the Bosnian Serbs to honor persistent calls for the arrests of Radovan Karadzic and Ratko Mladic has certainly proved a thorn in the side of the peace process.

The pivotal question posed by the ICTY, therefore, is how the dispensation of international criminal justice can be joined to the establishment of peace. Deterrence might be one such connection. Holding war crimes trials during conflict might be said sometimes to deter crimes. French trials of German soldiers during World War I,<sup>11</sup> and Allied threats of punishment issued during World War II, were both predicated on the notion that they would discourage the commission of further atrocities.<sup>12</sup> But the prosecutions of the ICTY have been far too sparse and ineffectual to hold much promise of actual deterrence, and indeed massacres continued well after the tribunal's establishment.

The blunt and unpleasant fact is that the ICTY has been forced to seek criminal punishment within a political vacuum. In contrast to the victors' justice confidently meted out at Nuremberg over a vanquished enemy, the ICTY is fragile. Seated in the Netherlands, far from the Balkans, it lacks both custody over the accused and control of the evidence necessary to establish individual wrongdoing. Most of those responsible for war crimes remain at large.

More to the point, the ICTY is without the political resources to remedy these gross inadequacies. In a speech to the United Nations General Assembly, the tribunal's president, Antonio Cassese, compared the ICTY to "a giant who has no arms and no legs. To walk and work, he needs artificial limbs. These artificial limbs are the State authorities; without their help the Tribunal can not operate."<sup>13</sup> Like Gulliver among the Lilliputians, the ICTY has been paralyzed by the international community.

The ICTY has responded to these limitations by seeking justice largely within the framework of judicial processes of inquiry and indictment. Because the ICTY had sought to differentiate itself from Nuremberg by forbidding trials and convictions in absentia, the tribunal has to date been forced to focus on indicting those

whom the ICTY is powerless to apprehend to stand trial. ICTY indictments, so-called "superindictments," have consequently become elaborate proceedings, involving both recitation of offenses and presentation of evidence. The proceedings are public and even televised; Court TV covered the Karadzic and Mladic indictments "live." The proceedings offer the drama and testimony of living witnesses.<sup>14</sup> In outward form they are similar to trials in absentia, although there can be no judgment in the absence of the accused.<sup>15</sup>

These superindictment proceedings are like "show trials." This is not because their results are foreordained, but because their main purpose is to tell a story. It is largely through the proceedings of these public indictments that the ICTY establishes and condemns wrongdoing. Following the indictments, an international warrant of arrest is issued, the evidence published, and the accused publicly branded as an international fugitive from justice. These indictments and the resulting stigmatization will often be the tribunal's only sanction.

From this we may conclude that the ICTY's mission of achieving a peaceful reconciliation in the region is less dependent on the actual infliction of punishment than on the use of superindictment proceedings to construct truthful narratives of past abuses. It has almost become dogma in contemporary foreign policy that establishing the "truth" about a state's repressive past can lay the foundation for national reconciliation. National truth commissions in Argentina, Chile, and South Africa have been touted as prerequisite for successful political transitions. In advocating the establishment of the ICTY, Madeline Albright asserted before the U.N. Security Council that "the only victor that will prevail in this endeavor will be the truth."

The promise of such a reconciliation-based-in-truth was symbolized by the ICTY's appointment of Chief Prosecutor Richard Goldstone, known for his leadership in South Africa's peaceful transition from apartheid. Indeed, at the first superindictment proceeding Goldstone likened public indictments to national truth commissions, declaring that the "public record will assist in attributing guilt to individuals and be an important tool in avoiding the attribution of collective guilt to any nation or ethnic group."<sup>16</sup>

There can be no doubt that through its indictments the ICTY has helped to make known the terrible atrocities perpetrated in

the Balkans, and that public knowledge of these facts may well have contributed toward shaping the peace. At Dayton, for example, ICTY indictments of Serbian leaders Radovan Karadzic and General Ratko Mladic for genocide, murder, rape, and other offenses significantly affected resolution of the question of political representation in the region. The peace accords banned indicted war criminals from holding future political office.<sup>17</sup>

Nevertheless, there remains a rather large gap between these contributions and the achievement of that reconciliation to which Goldstone and the founders of the ICTY aspired. Even indicted perpetrators of genocide remain free and continue to wield political power. Although Bosnian Serb leader Radovan Karadzic may have been forced after his indictment to resign as head of his political party, he does not seem also to have been deprived of his considerable political influence.

ICTY indictments are thus not functionally equivalent to convictions and imprisonments. The difference emphasizes the distinction between institutions that seek to establish the truth after a transfer of power and shift in regimes, as in South Africa, and institutions like the ICTY that hope to use a new collective truth as a basis to establish reconciliation. Ordinarily, official truth investigations are convened to secure a peace that has already been achieved through military and political means. Their narratives carry the full retrospective authority of victors' justice. But the ICTY must attempt to uncover an historical "truth" so abstractly convincing as to be itself capable of establishing a peace. In the absence of a Bosnian political constituency, it is not clear what such a "truth" might be.

There is considerable tension, moreover, between the ICTY's efforts to construct truthful narratives to achieve reconciliation and the ICTY's fundamental obligation to dispense criminal justice. Although criminal proceedings may well establish some sense of truth about individual wrongdoing, as Hannah Arendt observed of the Eichmann trial, historical inquiry implies a broader lens than that of individual trials.<sup>18</sup> This observation has particular application to the Balkans, where a truthful account would require working through the region's history of complex and conflictual politics.

Conversely, by conflating the production of historical narratives with criminal processes, fundamental norms of due process

may be endangered. The prime focus of a criminal proceeding is to ascribe individual responsibility for past wrongdoing. This is the foundation of the presumption of innocence, whose significance is that criminal judgments should not be used merely as a means to other ends, even to the end of truth. Although indictments are not convictions, they do have important legal consequences, and it would be improper to use indictments in a merely instrumental fashion.

#### *From Communal Conflict to International Justice*

If the ICTY's lack of political authority undermines its efforts to achieve pacification through deterrence and to accomplish reconciliation through the creation of historical narratives, perhaps the relationship of the ICTY to peace might be conceptualized along different lines. Those who created the ICTY spoke feelingly of the expectation that international criminal justice would establish a form of individual accountability that would break "old cycles of ethnic retribution" and thus advance ethnic "reconciliation." They propounded a traditional account of liberal legalism, in which the punishment of the law would hold individuals responsible so as to limit and displace private vengeance.<sup>19</sup> This was a central justification advanced for prosecuting atrocities associated with the conflict. "Absolving nations of collective guilt through the attribution of individual responsibility is an essential means of countering the misinformation and indoctrination which breeds ethnic and religious hatred."<sup>20</sup>

In the eyes of the international community, the conflict in the Balkans became defined by its "ethnic cleansing." Responding to ethnic persecution became the crux of the project of international criminal justice. The ICTY reaffirmed Nuremberg's central principle that responsibility for war crimes should be borne by individuals, and it sought to highlight individual responsibility for ethnic persecutions. It chose to prosecute ethnic cleansing — the purposeful policy by one group to purge by terror the civilian population of another ethnic group from defined geographic areas — as a series of "crimes against humanity," as "inhumane acts" discrete but nevertheless "widespread and systematic," "perpetrated on any civilian population, on an ethnic basis."<sup>21</sup>

At The Hague, for the first time since the trials of World War II, ethnic persecution would also be prosecuted as "genocide." By



the spring of 1992, the Final Report of the Commission of Experts had concluded that mass murder, torture, and rape committed in the area of Opstina Prijedor in northwestern Bosnia against civilians both in and out of detention camps unquestionably constituted crimes against humanity and that a court of law would find it to be genocide.<sup>22</sup> The distinctive patterns of Bosnian Serb ethnic cleansing, massacres, and systematic rapes displayed a genocidal intent to destroy ethnic and religious groups. The ICTY found that "the Muslim population of the enclave of Srebrenica [previously designated a U.N. "safe area"] virtually was eliminated by Bosnian Serb Military personnel . . . under the command and control of Radovan Karadzic and Ratko Mladic," so that there was prima facie evidence that the facts "disclose above all, the commission of genocide."

The ICTY actually expands the scope of international criminal jurisdiction. Whereas the Nuremberg tribunal's jurisdiction over atrocities was ultimately tied to the conduct of an unjust war,<sup>23</sup> the jurisdiction of the ICTY was extended to crimes against humanity committed in the course of an armed conflict, whether or not international. Ethnic persecution is prosecuted as an "international" offense even if it occurs wholly within a state.<sup>24</sup>

This represents a major expansion of traditional international justice, from wrongs committed by foreign occupiers to wrongs committed by states against their own citizens. Underlying the expansion is the notion that victims of ethnic persecution, even if citizens, are rendered "aliens" and pariahs within their own homeland. They are protected by neither state nor law. International criminal justice is for them. State persecution of its citizens will never again rest immune within national boundaries, but will potentially be accountable to the international community.

The creators of the ICTY hoped that this vision of international law and accountability would create the foundation of a lasting peace in the Balkans. The vision evokes the twinned ideas of individual responsibility and the rule of law, yet it fails to fully capture the nature and political purpose of the violence in the region.

The concept of individual responsibility that emerges from the ICTY is complex and merits close attention. Historically, postwar trials have posited limits to state sovereignty, but they have not displaced it. The ICTY, however, stands entirely apart

from national institutions, and it seeks to enforce a strange deracinated form of individual accountability that is answerable to a global order. In its landmark decision affirming jurisdiction under the U.N. Charter, the tribunal justified its dominion over the crimes at issue by asserting that they "cannot be considered political offenses, as they do not harm a political interest of a particular state," and that the "norms prohibiting them have a universal character." In this way the tribunal figured ethnic persecution as a profound and apolitical offense against the entire international community, indeed, against humanity itself. The ICTY embraces a project of transformative justice that will enforce these universal human norms.

But prosecuting ethnic persecution this way — stripped of its political context and purpose — poses a real challenge. For this use of law seemed perhaps unwittingly only to support the notion that the conflict in the Balkans is a story of ancient and intractable ethnic enmity.<sup>25</sup> Pursuant to this characterization of the violence in the region, popular in media representations as well as in the diplomatic community, contemporary atrocities in the Balkans are only the latest round of a violence portrayed as inevitable and natural to the region. Insofar as the ICTY merely counterposes a portrait of ahistorical atrocities, committed by atomized individuals within a political vacuum, it risks confirming the notion that these atrocities were inevitable, a fate foretold. But this representation undermines the project of individual accountability and even appears to justify international neglect.

The tribunal risks using the law to construct a lesson about eternal atrocities, without victors or heroes. The abstract tales of individualized horror produced by the ICTY may efface questions about political responsibility — both national and international responsibility — for the crimes perpetuated in the Balkans. A more historical and political understanding of atrocities in the region would question the role of the United Nations and the international community at the time when the atrocities were being committed. It was the United Nations that created the "safe areas" that drew Muslims and Croats into the concentrated enclaves for protection. It was the passivity of the United Nations and of the international community that allowed the massacres. After Nuremberg, international criminal responsibility extends even to acts of omission by those with political authority.

Arguably, the United Nations had such authority over its "safe" areas.

The United Nations and the entire international community thus have deep self-regarding interests in constructing a narrative of the massacres that stresses individual responsibility rather than policy and political will. So it is that the absence from the courtroom of defendants who were leaders and policy makers, and especially the continued apparent disinterest among NATO allies in their arrest, serves to affirm a craven international neutrality. The very neutrality thought to render the proceedings at The Hague superior to past war crimes trials, and impervious to charges of "victors' justice," can itself be seen to raise grave issues of international moral responsibility and, by association, of the tribunal's own authority.

The challenge of "tu quoque," of "unclean hands," was also leveled at Nuremberg, loudly with respect to the Soviet judges; but the bold new jurisdictional initiatives of the ICTY paradoxically make this challenge particularly apt to the proceedings in The Hague. There is considerable tension in the attempt to condemn atrocities in the Balkans as international injustice and yet simultaneously to seek to cabin ICTY indictments so as not also to inculcate the international community that allowed the atrocities to be perpetuated. Precisely to the extent that the ICTY seeks to internationalize "crimes against humanity," to subject them to universal jurisdiction, those who claim power after the fact to punish such crimes become potentially implicated in the crimes themselves. For there is a sense in which there are victims here of a broader international injustice. The ICTY claims that ethnic persecution and genocide give rise to a universal jurisdiction that transcends national borders. And why, we may ask, should international responsibility to respond to persecution be triggered only *after* the massacres?

The concept of individual responsibility advanced by the ICTY also bears a complex relationship to the question of identity at play in the Balkans. Indeed, the very offenses prosecuted by the ICTY — "genocide" and "crimes against humanity" — embody a highly nuanced relationship between individual and group identity. Both offenses connect individuals to group identities through the element of motive; i.e., through the persecutory policy.<sup>26</sup> The offense of persecution implies at the very least a motive against a

backdrop of state action,<sup>27</sup> and often the offense is accomplished in part through mechanisms of state policy. This means that responsibility is best conceptualized in ways that bridge and connect individuals and collectivities.

More fundamentally, however, the offenses spring from the supposed understanding that what has transpired involves terrible ethnic persecution, so that the project of ascribing individual responsibility must somehow be reconciled with these contemporary constructions of ethnic identity. The strain of this reconciliation is apparent in the prosecution's strategy, which is affirmatively ethnoconscious in order to achieve its conciliatory purpose of diffusing ethnic tension in the region. The ICTY takes note of ethnicity ostensibly in order to transcend it.

The tribunal's transformative mandate is to express the message that individuals bear responsibility for persecution. The idea is therefore to construct a plausible account of persecution in the region,<sup>28</sup> and this has been thought to require an "exemplary cases" strategy.<sup>29</sup> Thus the ICTY has attempted to prosecute atrocities selected to include a representative sample of those committed against Muslims, Croats, and Serbs. Defendants are also expected to be ethnically representative.<sup>30</sup> Victims, even participating jurists, are identified by their ethnic origin.<sup>31</sup>

Gender also plays a complex role in ethnic cleansing. Most of those massacred were men; while the mass rapes were largely perpetrated against women. Although not separate charges at Nuremberg, sex crimes, such as rape, are at The Hague prosecutable as crimes against humanity.<sup>32</sup> In the Balkans, mass rape and forced pregnancies were tools of destruction and genocide lying at the interface of sex and ethnic persecution.

The strategy of prosecuting "exemplary cases" also has important implications for the ICTY's construction of the intersection between individual responsibility and corporate accountability. The strategy is evident in the indictments issued so far, ranging from those leveled against Karadzic and Mladic for genocide and crimes against humanity, to those issued against Bosnian Serb and Croat officials and civilians for atrocities committed in the camps. The ICTY's aim has apparently been to prosecute perpetrators at all levels of the power echelon — from the architects of the persecution policy to its lowest level agents, as well as to reach both the military and civilian sectors of society.<sup>33</sup>

The strategy of exemplary prosecutions appears to make practical sense, so much so that it is easy to miss just how deeply it challenges core principles of the rule of law. Fundamental to the rule of law is the notion that the law applies with equal force and obligation to all. Thus the Nuremberg trials were merely the first of thousands of subsequent prosecutions.<sup>34</sup> By contrast, the highly selective prosecutions of the ICTY seem to circumscribe the very rule of law that they are designed to instantiate. The policy of selective prosecutions thus underscores the elusive quality of the transformative project of the ICTY, a project that gestures toward a liberal rule of law which the project can bring itself at most merely to symbolize.

Symbols, however, have their uses. Created pursuant to international peace accords, the tribunal's mandate was ambitious, and, in the context of the ongoing commission of brutal atrocities in the region, nothing short of messianic. The Hague was assigned the mission of transforming the course of the conflicts in the region so as to lead to conciliation. In this context, the image of the rule of law, shimmering at the horizon, serves unambiguously positive purposes.

The Balkans have long brooded over an ever-present sense of terrible injustice. Although it is often thought that a primary function of human rights law is to expose and condemn heinous wrongs, such an apprehension of injustice already permeates the Balkans.<sup>35</sup> False allegations of preemptive genocide perversely appear to have sparked the most recent wave of horror. But a full understanding of the political causes of the ongoing injustice and its future direction remain elusive.

The ICTY symbolizes the possibility of change in the region. It offers the potential of moving from persecutory violence to the rule of law. Within the rule of law, past wrongs cannot serve to justify the ongoing perpetration of massacres and atrocities. By seeking to forestall revenge, the tribunal reaffirms its purpose as forward-looking rather than backward-looking. Its aims are less to offer retributive justice for past wrongs than to prepare the region for the perception of equal protection under the law. Yet, this message can only be limited and partial — when justice does not clarify the particular politics that derogate from the rule of law in the region. For there to be meaningful change in societies driven by racial, ethnic, and religious conflict, “identity politics”

should be exposed for what it is — political construction. Ethnicity politics has no place in the liberal state. What needs construction is the liberal response to injustice.

Because the ICTY cannot itself fully embody the rule of law, it must represent the rule of law in a transitional form, as an image of the possibility of liberal justice. But what is the point of such an image? As a practical matter, the tribunal's proceedings are located at a venue that is so remote and insulated from the Balkans that it is difficult to relate its trials and indictments to the actual conflict on the ground. In the international proceedings of the ICTY, defendants and victims are frequently absent, particularly women in the rape cases. For this reason, trials at The Hague commonly lack confrontation, an integral element of the catharsis and healing ordinarily offered by the criminal process. More fundamentally, the ICTY is foreign to Bosnia, so that its legal pronouncements, its enactment of the forms of liberal legalism, do not carry sufficient local political authority or weight.

These limitations serve to underscore the salient conditions and circumstances of meaningful reconciliation. Although international criminal justice offers some degree of individual accountability and hence affirms the liberal response to wrongdoing, it lacks the supportive national structures that are necessary for the true realization of reconciliation and the rule of law. And these limitations are also apparent at the level of the individual, for the risk of such justice is that persons may come to identify with the role of perpetrator or victim, rather than with that of citizen.

The proceedings in The Hague fall short because they cannot offer the thick form of reconciliation necessary for reconstructing a community inhabited by citizens. But the foreign status and international authority of the ICTY does offer one singular advantage. By intervening unambiguously from outside the region, the ICTY operates beyond the political circumstances that trap participants within the Balkans. Although the ICTY can offer to substitute for this context only a thin and procedural symbol of the rule of law, it is nevertheless a symbol full of potential. As a symbol, the tribunal points to a conceivable future. It thus represents a form of justice that is distinctly associated with transitional periods,<sup>36</sup> it offers an instance of transitional justice

associated with extraordinary political circumstances — when the full rule of law is unavailable. In such transitional circumstances, perhaps the best that can be brought into view is the image, rather than the reality, of the liberal state.

#### NOTES

This essay's title is inspired by an essay by the late Robert M. Cover of a similar title in "Religion, Morality, and the Law," *Nomos* 30 (eds. J. Roland Pennock, John W. Chapman, 1988). Portions of this essay were first delivered as a talk sponsored by the Orville Schell International Human Rights Center, Yale Law School (Oct. 19, 1995). A prior shorter version of this essay was published in the *East European Constitutional Review* 5.4 (Fall 1996).

1. United Nations, Security Council, *United Nations Security Council Resolution 827 on Establishing An International Military Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law in the Territory of the Former Yugoslavia Since 1991*, S/Res/827 (1993).
2. See United Nations, Security Council, *Resolution 764*, S/Res/764, 1992, reprinted in 31 I.L.M. at 1465 (1992); United Nations, Security Council, *Resolution 771*, S/Res/771, 1992, reprinted in 31 I.L.M. at 1470 (1992).
3. See United Nations, Secretary-General, *Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780* (1994); Available in *Letter Dated 24 May 1994 From the Secretary-General to the President of the Security Council*, Annex I, S/1994/674. (Hereafter referred to as *Final Report of the Commission of Experts*.)
4. See United Nations, Secretary-General, S/25274 at 16, para. 55 (1993).
5. *Ibid.* at para. 55-56.
6. This was true under the post-World War II Geneva and Genocide Conventions.
7. On this distinction, see Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (New York: Basic Books, 1977).
8. United Nations, Secretary-General, *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808* (1993), S/25704, 1993, reprinted in 31 I.L.M. 1159 (1993). (Hereafter referred to as *Report of Secretary-General*.)
9. *Bosnia and Herzegovina-Croatia-Yugoslavia: General Framework Agreement for Peace in Bosnia and Herzegovina*, Art. 9, reprinted in 35 I.L.M. 89, 90 (1996). (Hereafter referred to as *Dayton Accords*.)
10. *Ibid.* at Art. 9, 10. See also *ibid.* at Annex 4 referring to Article II (8) of

the new Bosnia and Herzegovina Constitution which provides: "All competent authorities in Bosnia and Herzegovina shall cooperate with and provide unrestricted access to... the International Tribunal for the former Yugoslavia." The constitution also provides that states commit "to fully complying with orders issued pursuant to Art. 29 of the statute of the Tribunal." The statute contemplates cooperation with the tribunal in investigation and prosecution, which would include tribunal orders concerning the production of evidence or the surrendering of those accused.

11. See Jacques Dumas, *Les Sanctions penales des crimes allemands* (Paris: Librairie Arthur Rousseau, 1916).

12. See *Declaration of German Atrocities*, Nov. 1, 1943, 3 Bevans 816, 834, Dep't St. Bull., Nov. 6, 1943, at 310-11.

13. See *Address of Antonio Cassese, President of the International Criminal Tribunal for the Former Yugoslavia, to the General Assembly of the United Nations*, Nov. 7, 1995, p. 4.

14. United Nations, International Military Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law in the Territory of the Former Yugoslavia Since 1991, *Rules of Procedure and Evidence*, Art. 61, reprinted in 33 I.L.M. 484, 519 (1994).

15. We can expect the public recitatives of these "superindictments" to continue, for as of September 29, 1998, there were twenty-six suspects in custody out of the eighty pending indictments. For Tribunal updates, see International Criminal Tribunal for the Former Yugoslavia, Bulletin No. 20, III (1998).

16. See "Opening Statement by Justice Goldstone," para. 12, Rule 61 Hearing (Oct. 9, 1995).

17. See *Dayton Accords*, at Annex 4, referring to constitution of Bosnia and Herzegovina, Art. 9: "1. No person who is serving a sentence imposed by the International Tribunal for the Former Yugoslavia, and no person who is under indictment by the Tribunal and who has failed to comply with an order to appear before the Tribunal, may stand as candidate or hold any appointive, elective, or other public office in the territory of Bosnia and Herzegovina."

18. See Hannah Arendt, *Eichmann in Jerusalem* (1964).

19. See Immanuel Kant, *The Metaphysics of Morals*, trans. Mary Gregor (Cambridge, UK: Cambridge University Press, 1991), 183.

20. See "Prosecutor's Response to the Defense's Motions filed on 23 June 1995," at 23. Dusko Tadic Case No. IT-94-IT.

21. See *Final Report of the Commission of Experts*, at Annex 4, "The Policy of Ethnic 'Cleansing,'" at 21.

22. See *Final Report of the Commission of Experts*, para. 182, at 43.

23. See *Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Charter of the International Military Tribunal*, Aug. 8, 1945, Art. 6(c), 82 U.N.T.S. 279.

24. United Nations, Secretary-General, *Statute of the International Tribunal (For the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law in the Territory of the Former Yugoslavia)*, Art. 5, Annex to *Report of Secretary-General*. This point was illuminated when the Tribunal's mandate was expanded to include prosecution of those who masterminded the genocide of approximately one million Tutsis and Hutu moderates in Rwanda. Although this persecution was committed entirely in that country's internal conflict, it was nevertheless brought for the first time before an international forum. See United Nations, Security Council, *United Nations Security Council Resolution 955 Establishing the International Tribunal for Rwanda*, S/Res/955, 1994, reprinted in 33 I.L.M. 1598 (1994).

25. See Robert D. Kaplan, *Balkan Ghosts* (New York: St. Martin's Press, 1993); *Playing the Communal Card: Communal Violence and Human Rights* (Human Rights Watch, 1995) (discussing the role of the media, U.N. officials, and European and U.S.-government policy makers in framing the Bosnian conflict in these terms).

26. See *Convention on the Prevention and Punishment of the Crime of Genocide* (1948) entered into Force, January 12, 1951, 78 U.N.T.S. 277 (defining "genocide" in terms of acts committed "with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such"). Regarding the recognition of crimes against humanity, see *Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Charter of the International Military Tribunal*, Aug. 8, 1945, Art. 6(c), 82 U.N.T.S. 279.

27. In the 1987 prosecution of Klaus Barbie, a Nazi chief in occupied Lyon, France's High Court defined persecution as committed in a systematic manner in the name of a "[s]tate practicing a policy of ideological supremacy," *Federation Nationale Des Deportés Et Internes Résistants Et Patriotes And Others v. Barbie*, 78 I.L.R. 125, 128 (Fr. Court of Cassation [Criminal Chamber] 1985).

28. See International Criminal Tribunal of the former Yugoslavia, Office of the Prosecutor, press release, July 25, 1995 ("Full Picture of OTP's Strategy"), p. 3; See also, "Statement by Justice Richard Goldstone," April 24, 1995.

29. The abuses represented are to cover the entire time period, from 1991 through the fall of the safe havens in 1995, and to include the full spectrum of war crimes and crimes against humanity committed in the region, including the setting up and implementation of detention camps; Serb military takeover of towns; campaigns of terror; firing of rockets into cities; deportation of civilians; shelling of civilian gatherings; plunder of property; destruction of sacred sites;

sniping campaigns against civilians in Sarajevo; targeting of peacekeepers and their use as human shields.

30. It is a matter of public knowledge that, to date, the overwhelming number of the indicted are Serb nationals. See e.g., *Bulletin, International Criminal Tribunal for the Former Yugoslavia*, No. 15/16 10-III-1997 (referring to Celebici trial as the first where Bosnian Serbs are victims of crimes charged).

31. See, e.g., *Bulletin, International Criminal Tribunal for the former Yugoslavia*, No. 15/16 10-III-1997.

32. See United Nations, Secretary-General, *Statute of the International Tribunal (For the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law in the Territory of the Former Yugoslavia)*, Art. 5, Annex to *Report of Secretary-General*, Art. 5(g) citing "rape" as a "crime against humanity."

33. Because the ICTY has not been able to obtain custody of most defendants, those most responsible for the persecution policy have largely been absent from The Hague. Indeed the very first trial in 1996, for murder, torture, and sexual mutilation committed in the Omarska death camp, was of a civilian café owner, Duskan Tadic. Commencing international justice with the trial of a civilian has been challenged for its failure to capture the impetus and scope of the region's ethnic cleansing policy. To seek to demonstrate the fundamental proposition that ethnic cleansing was itself a deliberately executed policy without prosecuting the policy makers, seems impotent, perhaps even incoherent.

34. For an account, see Telford Taylor, *The Anatomy of the Nuremberg Trials* (New York: Knopf, 1992).

35. See Judith N. Shklar, *The Faces of Injustice* (New Haven, CT: Yale University Press, 1990), 93.

36. For discussion elaborating on this conception, see Ruti Teitel, "Transitional Jurisprudence: The Role of Law in Political Transformation," *Yale Law Journal* 106 (1997): 2009.