Crimes against Humanitarian Law. International Trials in Perspective

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As the media worldwide covered the Serbian General Mladic's impending arrest, the Institute for International Integration Studies in Trinity College Dublin hosted a conference on the 24th of February whose theme could not have been more topical: *Crimes against Humanitarian Law – International trials in perspective*.[1] Both historians and lawyers were invited by convenor John Horne (Department of History, Trinity College Dublin) to discuss the historicity and didactic function of international tribunals. The coming together of different methodological approaches applied by social scientists on the one hand and lawyers on the other, as well as the confrontation of disparate priorities set in legal practice and the subsequent academic analyses proved to be highly interesting and thought-provoking on many levels.

A key issue that recurred throughout the conference was how far truth, guilt, and notions of responsibility can be reconciled with the nature of judicial proceedings. A goal that was – if for different reasons – as difficult to achieve during the first wave of modern war crime trials in Constantinople (1919-20) and Leipzig (1921) as demonstrated by Alan Kramer (Department of History, Trinity College Dublin), as it was during the more recent wave of the ICTY (International Criminal Tribunal for the former Yugoslavia) proceedings. Other speakers dealt with the Nuremberg and Tokyo trials and the ICTR (International Criminal Tribunal for Rwanda) and raised the question of how these trials should be evaluated from legal and historical perspectives. Should the only objective of war tribunals be to render justice and punish crimes and atrocities? Or should priority be given to promoting the 'healing effect' ascribed to the trials that restore values in post-conflict societies? How successful have previous tribunals and military courts been in accomplishing the one or the other? What effect can trials realistically achieve? And what is the future direction not only of the legal practice of international law but also of the related academic research?

Establishing Truth

Despite the early start of discussing procedures to establish legal concepts for the prosecution of war crimes in 1915, when the Allies issued a note charging the Ottoman Empire with 'Crimes committed against Humanity and Civilisation', the actual enforcement of judicial proceedings in Constantinople proved to be a failure. Similarly, the legal prosecution of atrocities committed during the German war of attrition from 1914-1918 at trials held in Leipzig, descended into farce. In both cases lower rank army officials were chosen to stand trial, and verdicts remained modest. In defiance of eyewitness-accounts and written documentation, the successive political leaders in Turkey were able to present the deportation and killing of the Armenian minority as security measures for their own protection. In a similar fashion, the Leipzig court maintained the fiction that the German army faced severe partisan warfare in Belgium during their advance in 1914, and its actions against civilians were a 'military necessity'. Yet, despite the international expressions of outrage and the severity of the crimes committed, Allied economic interest in Turkish resources and political concern regarding German instability restrained the implementation of both truth and trials. Both cases represent the rejection of war crimes and atrocities, and in both cases this denial reverberated with long-term effects by allowing the misrepresentation of the actual events.[2]

The problematic relationship between legal action and historical truth has by no means been resolved in international humanitarian law today, as argued by Bob de Graaff (Centre for War Studies, University of Utrecht). While his personal experience in compiling an expert report for the ICTY on Milosevic and Srebrenica discloses a clear increase in the power and influence of war tribunals, it raises concerns about compromising 'truth' in order to fulfil legal requirements.[3] Bob de Graaff's research in the former Yugoslavia did not uncover direct evidence of Milosevic's involvement in the massacre at Srebrenica. In legal terms, however, it is sufficient to prove that the accused had reasonable knowledge of intent and failed to exercise his authority to prevent atrocities from being commit-

[1] For further details about the conference see: http://www.tcd.ie/iiis/pages/events/crimesconference.php

[2] John Horne and Alan Kramer, German atrocities, 1914. A history of denial, New Haven 2001.

[3] Bob de Graaff: http://srebrenica.nl

ted. For the empirically driven social sciences, de Graaff maintained, the claim of the ICTY to establish a historical record is too ambitious when the conviction, not the evidence becomes the 'truth'. The inherent danger is that this may compromise the integrity of the legal process and provide fuel for the 'David Irvings of Serbia' and possibly detract from crimes for which empirical evidence exists.

The discomfort felt by historians may be related to research practices in the discipline, as became clear during a lively discussion that followed Bob de Graaff's presentation. What the historians present understood as compromising the truth, represented for the lawyers the enforcement of a simple judicial principle. Convictions under the JCE (Joined Criminal Enterprise) charge, which represents a major principle of international humanitarian law, is also a very controversial, as explained by William A. Schabas (Director, Irish Centre for Human Rights, National University of Ireland Galway), yet it offers a 'Capone' solution. (Al Capone was famously tried for tax evasion in the absence of hard evidence for racketeering.) The JCE principle allows law to be applied where the documentary record has been destroyed and it is specifically designed to be applicable to both active and passive offenders.

Guilt and Responsibility

With evidence presented and truth established at a trial, the question of who is guilty and who can be held responsible becomes the main focus. In post-conflict societies, the identification of individual perpetrators as well as accepted or rejected notions of collective responsibility are important for the formation of a renewed national identity. The Nuremberg trials, held in Germany in 1946, generally serve as a prime example of the successful contribution to the long-term demilitarisation and restoration of moral codes in a post war society. Donald Bloxham (School of History and Classics, University of Edinburgh) suggested however that the legal evidence presented at Nuremberg did not, in fact, change society and that the trials had been rejected by Germans at the time. It was not until the rise of the student movement in the late 1960s, according to Bloxham, that questions about collective guilt and the responsibility of the individual were raised.

The Tokyo trials of 1946, on the other hand, were accepted by the Japanese as the inevitable effect of defeat asserted Madoka Futamura (King's College London). The judgement that convicted wartime leaders was equally accepted, which is related to the way in which the trials were staged and evidence had been presented. While presenting a simplistic account of the war, it was revealed that war crimes had been hidden. This led to Japanese people feeling deceived by their wartime leaders and emphasised that Japanese people were actually victims of the war. The impact on national identity is considerable as the Japanese nation was collectively blamed internationally and has thus never been freed from a sense of shared guilt. Futumara's findings also appear to be relevant to the German context in that the Nuremberg trials left an equally uncomfortable legacy by publicly stating that the German population had been misled and that the leaders, not the nation, were on trial. This strategy may have been based on a lack of awareness of the extent of popular compliance or it might have been a political decision to assist post-war reconstruction, yet from a moral perspective it became very problematic for reconciliation within society, for victims, and for future generations.

In order to address this issue it is worth engaging with the judicial understanding of responsibility. Lawrence Douglas (Department of Law, Jurisprudence and Social Thought, Amherst College, MA) clarified that charging single perpetrators or political leaders does not necessarily exaggerate the role of individuals or turn them into scapegoat offenders. Rather, the responsibility for crimes that have been committed is 'not displaced but condensed on the individual.' It is therefore important to keep the symbolic function of such didactic trials in mind. Nations are collectively addressed by the moral lesson that is being taught while trials are conducted. Insofar as they add to the historical record, international war trials should be understood equally as socio-political and judicial undertakings.

Implications of Judicial Proceedings

The function of judicial proceedings thus goes far beyond simply rendering justice. The powers attributed to law, however, should be viewed in perspective. International trials, while not necessarily bringing about reconciliation in its transitory meaning, do contribute to 'reconciling a people with justice and moral codes,' which is the basis from which their success should be measured. This was the argument put forward by Lawrence Douglas. As a legal form, didactic trials are still evolving, and, Rosemary Byrne (School of Law, Tri-

nity College Dublin) pointed out, their objective of restoring peace and transforming societies are difficult to achieve in practice. Using the Longman Study that assessed the impact of International Trials in Rwanda, Byrne highlighted the fact that almost forty-five per cent of the Tutsi population believed that the Tribunal was there above all 'to hide the shame of foreigners', while almost one-third of those surveyed were not informed enough to state an opinion at all.[4] This calls for more robust scholarly research of how to measure the effect of trials and post-conflict societies.

The innovative approach of bringing the disciplines of history and law together made for an extremely stimulating conference. It is perhaps in interdisciplinary dialogue that the future for social scientific research and legal practice in relation to international humanitarian law lies. The possibility that the results of historical and empirical research could be used in legal practice in order to maximise the outcomes of didactic trials, or serve as guidelines for outreach programmes accompanying legal procedures, seems a highly relevant and practical undertaking with a humanitarian benefit that far exceeds academic merit.

Conference proceedings are going to be published as a special issue of the journal European Review.[5]

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[4] Timothy Longman et.al., Connecting Justice to human experience, in: Eric Stover and Harvey M. Weinstein eds.: My neighbor, my enemy. Justice and community in the aftermath of mass atrocity, Cambridge and New York 2004.

[5] Further details about the journal see: http://journals.cambridge.org/action/displayJournal?jid=ERW