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The Hague: Contravening the Principles of Nuremberg

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The concept the new world order dates from 09.11. because it was on the 11th of September 1990 that the elder President Bush proclaimed it. He proclaimed a new world order just after Iraq occupied Kuwait and thus the Warsaw Pact and the Soviet Union were collapsing. And when he proclaimed it, what he meant was, that the world would no longer be divided into two halves as it had been since 1945 and also that henceforth, because of the end of the division, international law could be used in a radically new way. And in particular it could be used in a criminalizing way and in order to punish states who disobeyed it.

The first implementation of that new understanding of international law was of course the war against Iraq and while one could argue that the attempt to repel Iraqi troops from Kuwait fitted into the old system of international relations in the sense that Iraq had committed a violation of national sovereignty – I will leave aside for the purpose of this discussion facts, which I'm sure, many of you are aware concerning the role of the Americans in the original invasion and indeed of course Iraq's own offer to withdraw before the war started. But for the purposes of this judicial discussion we could perhaps say that the action taken of the proclamation of the new world order fitted into the old system of international relations whereby the primary rule was the protection of national sovereignty. However, as we know, that rapidly became something totally different, in particular after the Iraq war, the notion of crimes against humanity, ethnic cleansing, was invoked for the first time after Kurds fled to the mountains in Turkey to justify the regime of punitive sanctions under which Iraq suffered for the next decade. And of course, legally speaking, it was – if we can use the word legally in the context of the Iraq war of 2003 – it was those resolutions voted at the time of the proclamation of the new world order which the allegedly provided the legal justification for the attack in 2003. In other words, the key point about the new world order from a judicial point of view is that it criminalizes international relations. It turns international law from a contractual arrangement between sovereign states with no superior enforcement powers into something which is effectively indistinguishable from the criminal procedure of a domestic state. And that is what he has meant, that is what President George Bush senior meant when he proclaimed a new world order. And we can see the effects of that very clearly.

Everybody knows about Guantanamo Bay. What is shocking about Guantanamo Bay – again, I'm leaving aside as much as it's possible a certain number of factual consideration – but what is shocking from a legal point of view, from an international law point of view is that the prisoners in Guantanamo Bay are considered to be criminals. This is a radical departure from the traditional laws of war. The traditional laws of war do not consider that a soldier fighting in a hostile army is by definition a criminal. On the countrary, the Geneva

Conventions which provide for the treatment of prisoners of war, clearly came into existence precisely because people held in detention as prisoners of war are not considered to be criminals as such. Again, they may have done things which are bad but the mere fact of being soldiers does not make them criminal. However, in the war on terror they are.

The 'war on terror' as an expression illustrates perfectly this radical reform of international relations which occurred in 1990. Why does it illustrate that? Because terror by definition is a criminal activity and war is by definition an interstate activity. So by proclaiming the war on terror, George Bush junior has given perfect expression to this complete confusion between international relations – in other words, the relations between states – and the criminal procedure of a state. Or to put it in another way, he has proclaimed a new international system which treats the entire world as if it were the part of the domestic jurisdiction of the United States of America. And that's why anybody who fights in whatever capacity and indeed in whatever country is regarded as a criminal.

Now, it's obvious that the international criminal tribunal for the former Yugoslavia comes directly out of this logic, it comes directly out of this transformation of the free association between states which used to constitute international law into something resembling the criminal procedures of a state.

And the justification for this criminalization of international relations is usually held to be the trials at Nuremberg held in 1945 after the defeat of Nazi Germany. In fact, it's difficult to exaggerate the role which the Nuremberg jurisprudence plays in the ICTY trials. The masses of references to Nuremberg in the various judgments, the name of the tribunal 'International' and 'Tribunal' is obviously taken from the International Military Tribunal which is the name of the court that tried the Nazi leaders.

People associated with the Holocaust have put their penny worth into the various hearings – Eli Wiesel for example, appeared, disembodied anyway, on a video linked during the sentencing of Mrs. Plavsic.

And indeed, one could say frankly that of all the many perversities of the Milosevic trial none is perhaps more striking than this extraordinary charge that he was pursuing a 'Greater Serbia'. I can only think for my own part, that this does indeed come from the attempt to impose the Nuremberg jurisprudence on what happened in Yugoslavia in the 1990s. It's almost like putting a non-fitting suit too large to suit on a small man or the other way round.

Obviously, the Nazis were accused and convicted of creating a Greater Germany and so it almost seems as if the people in The Hague have simply taken the people in the Nuremberg tribunal, the Nuremberg jurisprudence off the peg and tried to fit it on the events of 60 years later.

But in spite of this, constant invocation of Nuremberg as the justification for the criminalization of international law, what I would like to show this afternoon is, that in fact the Nuremberg tribunals did precisely the opposite. I referred a moment ago to the fact that prior to the proclamation of the new world order, you were not considered to be by definition a criminal if you fought, if you were a soldier in a foreign army. This in Latin is the concept of justice – hostis. An enemy is just in as much as he is an enemy, he is not a criminal in virtue of being an enemy. And this notion came from the juridical fact that the world is divided up into different jurisdictions and so jurisdictionally it was impossible to say if somebody from another jurisdiction was a criminal. Moreover, war was more or less

accepted as an inevitable part of international relations and there was no overriding authority which enable people to say, whether somebody was criminal or not. In other words, the law reflected the view that the world was made up of sovereign states. The Nuremberg jurisprudence, actually far from undermining that idea, far from undermining the idea that the world was divided up into sovereign states, in fact, based the whole of its jurisprudence on it. It based the whole of its jurisprudence on the idea that the world was divided into sovereign states. It did this because it did it for a reason and it did it in a way. The reason why it did it is that the Nazis themselves had of course radically questioned, both in their acts in their writings, the notion of states sovereignty.

The Nazis invoked overriding concerns to human rights when they issued the Ultimatum and when they ultimately occupied Czechoslovakia. Same thing for the proclamation of war on Poland. In both cases the justification was, that German minorities, which had been left outside the Reich after Versailles, would being abused by the states that now occupied those territories that now – sorry, not occupied, – but now were on that territory. In other words, the entire war effort, the entire Nazi war effort had at its starting point the doctrine of humanitarian intervention, perversely Jews of course, but this was the doctrine.

And as this has been said already by many speakers, the primary crime of which the Nazis were accused and convicted was of course crime against peace. A crime of planning and executing a war of aggression. And this is the central juridical fact of the Nuremberg trials. All the other aspect of the Nuremberg trials flow from it as logical deductions from the primary accusation of waging an aggressive war and thereby infringing states' sovereignty. One of the things that flows from it and was quite clearly discussed in the judgments and in the interpretations that were given of the Charta, even before the trials began, was that nothing which happened before the war started on the 1st of September 1939 could be adjudicated by the Nuremberg trials. The Nuremberg trials tried the laws of war and therefore no acts committed before the 1st of September 1939 were adjudicated by them, because since they were applying the laws of war clearly until a state of war occurred, no actions committed before that date fell under the tribunal's jurisdiction. And therefore, although the Nuremberg trials did of course try acts which were not covered by the existing laws of war – in particular of course crimes against humanity – the laws of war by the way, people talk about Nuremberg as being an innovatory tribunal, a. s. o., and laws of war are extremely ancient and when I say extremely ancient, I mean, you know, you can find 13th Century precedence for laws against pillage and other excesses that are committed by soldiers in wartime. But the fact is that the other crimes which were not covered by the laws of war that were prosecuted by Nuremberg, in particular, crimes against humanity, were only prosecuted to the extent that the judges in the prosecution considered that they formed part of the overall part to carry out an aggressive war.

In other words, people today, and I just want you to draw for a moment on this rather slightly Byzantine baroque reasoning because I think we have to say that the Nuremberg jurisprudence was, shall we say, imaginative, please draw for a moment on the fact that those who invoke the Nuremberg trials in justification of present trials for crimes against humanity are overlooking the fact that crimes against humanity were only tried at Nuremberg in a much as they were considered to have formed part of the overall plan to conduct and carry out, to plan and carry out an aggressive war. In other words, if there had not been this accusation at the center of the Nuremberg trials then crimes against humanity would not have been prosecuted.

This point came out very clearly in the Nuremberg trials themselves, in other words, in the trials of the 20 Nazi leaders, the trials which started in November 1945 and finished in, I think, May 1946. When in the going trial the tribunal rule is as follows: at court, insofar as the inhuman acts charged in the indictment and committed after the beginning of the war did not constitute war crimes, they were all committed in execution of or in connection with aggressive war and therefore constituted the crimes against humanity. Now, as we can see quite clearly in the rulings, the crimes against humanity were justifiable only to the extent that they constituted part of the overall plan to commit an aggressive war.

Now this leads to some very surprising conclusions. Surprising really only because we have forgotten in fact how intelligent the Nuremberg jurisdictional reasoning was. You see, today, the people who justify the proceedings in The Hague say, well, a lot of horrible things happened, somebody must be held to account for them. That is not a judicial reasoning, that is the reasoning at best of a vigilantism but we have had so much of this now that I think it is so refreshing to draw for a moment, on how judicially intelligent the Nuremberg rulings were. For example, in the 1947 trial of judges, because after the end of the Nuremberg trials the Americans in their sector carried on a number of other trials which went on for a couple of years after 1946. And one of them was of judges and members of the officials in the Ministry of Justice who were prosecuted for having passed various laws which it was alleged and they were convicted of course at many cases, had caused, had expressed, you know, had been the instrument of racial persecution a. s. o. This trial by the way, the one I'm talking about in 1947, is the one that the film was made with Spencer Tracy and Marlene Dietrich. Anyway, in the actual trial itself the judges made the following very interesting remarks about the relationship between the universality of a crime and the right of judicial organs to prosecute it. I quote "this universality and superiority of international law" – the judges said – "does not necessarily imply universality of its enforcement". And they went on "the law is a universal, but such a state reserves unto itself the exclusive power within its boundaries to apply or withhold sanctions". And they concluded as follows – and this is of direct relevance to the Hague tribunals issuing of an indictment against the sitting head of state – they concluded as follows "In Germany, an international body, the control council, has assumed and exercised the power to establish judicional machinery for the punishment of those who have violated the rules of common international law". A power which no international authority without consent could assume or exercise within a state having a national government presently in the exercise of its sovereign powers.

I just repeat that quotation, "In Germany, an international body has assumed and exercised the power to establish judicional machinery for the punishment of those who have violated the rules of common international law", that this power, in other words, the power to punish people is "a power which no international authority without consent could assume or exercise within a state having a national government presently in the exercise of its sovereign powers".

Nevertheless, this ruling of the 1947 Nuremberg trial clearly states that, however abhorrent the alleged crimes are, it is juridically not possible to prosecute them on a state (where it was obviously the case in Yugoslavia in 1999), where a state is in possession of a sovereign body. Now, these – the point is, of course, that in the Nuremberg case the allies simply said, that they were the holders of sovereign powers in Germany and indeed, what we must never forget in discussing the Nuremberg trial is, that prior to the end of the war or rather the end of the war came when Germany did something which no other state, as far as I know, has ever done ever in the entire history of international relations, maybe I'm wrong,

and that is, offered what is known as an unconditional surrender.

The unconditional surrender – bedingungslose Kapitulation – meant that there was literally no German government and so that is why of course when the allies arrived and took control of Germany, they considered that legally speaking, they were the holders, the temporary holders of sovereignty in Germany. This is completely unlike the normal rules of occupation in a state. Indeed the judges in Nuremberg drew the distinction between their presence in Germany after 1945 and say, the presence of German troops in Poland after 1939. In other words, without unconditional surrender it is simply juridically not possible to prosecute crimes against humanity.

Now, these points are not just a matter of ancient history. They continue to form international law, in other words, not what the Hague Tribunal administers, the ICTY, up right unto our very day. I'm sure, many of you in this room are familiar with the 1986 case, Nicaragua versus the United States of America of 1986, where Nicaragua took the United States to the International Court of Justice for the abuses committed by the Contras.

Now, that ruling is an extremely interesting one for two reasons, one of them has nothing to do with my own talk, but just I mention is because it is so relevant, particularly of course to the indictments for Croatia and Bosnia. As I'm sure you know, the court found that although the Contras had been entirely created and set-up by the United States and although by the way, even the United States refused to appear in the hearings and represent its own position, the court found, that the United States could not be held legally responsible for atrocities committed by the Contras. In other words, the threshold of command responsibility in existing international law is extremely high. Nobody doubted that the Contras have been created by the United States but it was nonetheless deemed by the judges that the control exercised over them was not sufficient to warrant command responsibility and that's of obvious relevance to the indictments for Bosnia and Croatia where obviously command responsibility in a foreign country between Yugoslavia and/or between Serbia and Croatia is at issue.

But I mentioned that earlier in passing, what I really want to say is, that this same judgment also concluded, that humanitarian intervention was completely incompatible with the existing rules of national sovereignty, this is 1986. And it found, like the court stated, that there is no rule in customary international law permitting another state to exercise the right of collective self-defense on the basis of its own assessment of the situation. Although the Americans didn't contest the case, nonetheless their arguments were discussed by the judges and so the judges found that even invoking self-defense was not enough, because of course the country, or at least that's what it said, could not be adjudge in its own course.

But then even more radically the same court concluded this, the court really found that that does not exist a new rule opening up a right to intervention by one state against another on the ground that the latter has opted for some particular ideology or political system. That alleged violation of human rights could not be taken as justification for the use of force, since the use of force could not be the appropriate method to monitor or ensure respect for human rights. In other words, this ruling from very recently, from 1986 totally rules out humanitarian intervention as being incompatible with the national sovereignty exactly as Nuremberg had done in 1945.

Indeed, in 2002 the International Court of Justice ruled on a case between Congo and Belgium. Belgium, you may recall, decided that in a wonderful moment of imperial Belgian

hubris that its courts would have universal jurisdiction and that they would be able to rule on things over the entire planet. The Belgian judicial system more nearly grounded to a halt because everybody filed complaints about their favorite enemies. So complaints were filed against General Pinochet and Fidel Castro and Slobodan Milosevic and everybody. And more importantly, the American Administration told Belgium that if it pursued its indictments against Colin Powell and Donald Rumsfeld then NATO would be put in Warsaw or somewhere and Belgium would lose an important source of income.

So that way it came to an end, but before it came to an end, Belgium issued an arrest warrant against a man who at the time of the arrest warrant was the Foreign Minister of Congo, of the Democratic Republic of Congo and it ruled that this international arrest warrant was illegal and instructed Belgium to withdraw it and I quote "Belgium committed a violation in regard of the Democratic Republic of Congo on the rule of customary international law concerning the absolute inviolability and immunity from criminal process of incumbent foreign ministers and in so doing it, violated the principle of sovereign equality amongst states".

In other words, the principle of sovereign immunity which is of course another way of saying that the world is divided up into different jurisdictions, remains an active part of international law even in 2002. In other words, even a decade after the creation of the International Criminal Tribunal.

And part of the judgment is extremely again intelligent, I think, in explaining why immunity from prosecution does not mean impunity. People who advocate the Hague Tribunal and the other ad hoc tribunals always say, we can't allow people to commit atrocities with impunity. And because the two words sound the same, impunity, immunity, they behave as if they are the same thing. But they are not the same thing, they are not even the same word. And the judgment ruled on this are very sensibly, it said, I quote "the court emphasizes that the immunity from jurisdiction enjoyed by incumbent ministers for foreign affairs does not mean that they enjoy impunity in respect of any crimes they may have committed, they're respective of their gravity. Jurisdictional immunity may well bar prosecution for a certain period or for certain offences. It cannot exonerate a person to whom it applies from all criminal responsibility".

In other words, the problem with the Belgian arrest warrant was not that the gentlemen who was Foreign Minister of Congo may or may not have done horrible things for which he shouldn't get off lightly, but instead the Belgian quite simply did not have jurisdiction over Congo and that's how it had now right to issue such a warrant. And as I say, this is a judgment from 2002 and it shows that the issue is completely live in international law and that the Hague Tribunal is in that sense in breach of international law by continuing to behave as if it had been rescinded.

I'd like to conclude by saying that when people defend national sovereignty as I do, I make the point by the way that everything that I have said is so far is factual. I've simply told you what the law is as far as I understand it.

I'm now going to express an opinion on about why I think it's a good thing, but I make that distinction, because one of the many perversities of the Hague Tribunal is that it does not operate on what the law is but instead on what it would like the law to be. Some former behavior which is about a perfect expression of lawlessness as one can imagine.

When people talk about national sovereignty as Nuremberg did and as international law has done ever since, it does so, I think, for two extremely important and desirable reasons.

The first is, that by accepting in international law that the world is divided into different jurisdictions, in other words, that there are different states, which is in any case a fact, we give traditional credence, we leant credence to the idea that there is or could be a balance of power between states. Now, as we say, it is a good thing that power is diffused between different states exercising jurisdiction over different parts of the world.

I said at the beginning of my talk that the new world order began and was facilitated precisely when the counterbalance to American power collapsed in 1991. So, I think, generally speaking, it is a good thing that power be diffused. I'm less sanguined than some other speakers today about the desirability of the International Criminal Court operating, because I fear, that it will behave as badly as the ICTY, but also more generally, because I think, that the centralization of power can itself lead to greater abuses whereas if power is separated among different states then that potential is perhaps lessened.

But the second reason, and I think this really is in many ways the most frightening aspect of the attacks on sovereignty. When we talk about the sovereignty of a state, we do not mean, as the enemies of sovereignty say, simply the discretionary executive power of a state. When sovereignty is attacked, its enemies always say, ah, but sovereignty is nothing but a shield for human rights abuses. What they are talking about is the abusive use of executive power in a state. But state sovereignty does not refer simply to executive power, state sovereignty is being a characteristic of a state refers not only to its executive power, but much more importantly to the whole constitution of the state, including of course its judicial functions and so those people who say, that state sovereignty should be abolished which is effectively what the dialogues of the ICTY say, are saying that states should be abolished in their judicial existence as much as in their executive powers.

And that is why the powers wielded by the Hague Tribunal are so profoundly incompatible with law, because they are aimed at the destruction of states as embodiments of jurisdiction as much as of executive power. And that's why I conclude, I'd like to quote or rather misquote – I don't remember who invented the phrase – was it Madeleine Albright, Bill Clinton, I think the concept of rogue states which has informed so much of American foreign policy should in fact be applied here to the Hague Tribunal. Anybody who looks at international law, by that I mean the ICJ, customary international law and the facts of the world can see that this is a rogue Tribunal and therefore ought to be dissolved.

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