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Peace-building by the rule of law: An examination of intervention in the form of international tribunals*

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Introduction

The rule of law is key to coordinating peace operations, or peace-building activities in particular, in post-conflict regions.[1] Its application describes a situation in which people respect the fundamental rights of others, offering greater stability to the society as a whole. The rule of law is normally understood to be an ideal that provides both justice and order as well as individual freedom and social stability. Usually, fundamental rules and institutions of the rule of law are specified in constitutional law, or otherwise, authoritatively interpreted according to constitutional procedures. The rule of law dictates that all persons obey the constitutional procedures and solve conflicts in accordance with law.

Given this function of what we call the rule of law, it is natural and indeed appropriate to see it as a guiding principle of peace-building activities. In doing so, however, we realize that there is a fundamental predicament regarding its application in war-torn society. In a disrupted society, it is rare and unrealistic to find a constitutional framework functioning authoritatively as a guiding principle. The lack of constitutional rules and institutions does not merely mean that the restoration of constitutional law is needed. Peace operations take place where more or less any constitutional settings lack authority, failing to function as the foundation of the "culture of the rule of law."

The International Criminal Tribunal for the Former Yugoslavia (ICTY)[2] and the International Criminal Court for Rwanda (ICTR)[3] were established to represent a link between conflict resolution and the rule of law. They are expected to contribute to making, keeping or building peace in law-broken societies by implementing an international legal standard. They are historic experiments of peace operation through the institution of law-enforcement. They are derived from the belief that "international justice" contributes to "international peace." Along the same line, the International Criminal Court (ICC) is ready to be established when it receives the requisite number of ratification. The ICC is also expected to function in the context of post-conflict disrupted societies. It will not work exclusively for peace-building purposes, but it certainly inherits the function that the ICTY and the ICTR are fulfilling.

The aim of this essay is to examine the international tribunals from the perspective of peace operations. This is not a purely legal analysis of the tribunals; the questions posed in the essay are rather political in nature. In what sense are they said to contribute to peace? Are they really necessary and useful institutions for maintaining peace? Is it always the case that pursuing justice solidifies peace? What kind of peace is the establishment of the rule of law intended to achieve? The essay seeks to answer these questions by placing international criminal tribunals in the context of peace operations.

It should be noted that the rule of law in the context of international criminal tribunals does not mean the establishment of domestic legal structures. It principally means the prosecution and punishment of war criminals under international rules. The purpose of such an attempt is to impose accountability in war-torn societies and replace the "culture of impunity" with that of the rule of law. It is an intrinsically external and even interventionary attempt. International criminal tribunals do not fall into the category of what is usually understood as

humanitarian intervention, because they are non-military interventions. However, this essay claims that they are interventionary in the sense that they dictatorially intervene in domestic jurisdiction, and humanitarian in the sense that they work to contribute to implementing humanitarian values, or more specifically, international humanitarian law.

The first section looks at the past, present and future types of tribunals, and identifies the tendency and task of tribunals in current international society. The second presents three perceptions of the nexus between peace and justice, which determine the philosophical foundation of international criminal tribunals. The third considers the strategies of international criminal tribunals as "judicial intervention" in the context of peace operations. The fourth section examines the problems of tribunals by drawing attention to the nature of peace, the aim of international criminal tribunals. The concluding remarks try to highlight the positive as well as negative aspects of the tribunals.

Typology: Past, Present and Future Tribunals

In order to identify the implications of international tribunals in the context of peace-building, it is instructive to look at their past, present and future examples. While war crimes tribunals are always somehow related to military conflicts, their association with international peace operations is rather new. The precedents of the Nuremberg and the Tokyo International Military Tribunals are quite often referred to when the historical background of ICTY and ICTR is discussed. They established the so-called Nuremberg principles and provided individual criminal responsibility for the first time in history. However, while the Nuremberg and Tokyo Military Tribunals were certainly "international," they were not maintained by the international community as a whole. The critics of the Military Tribunals called them "the victor's justice," imposed by the Allied powers, especially the United States, on the Axis enemies. They were the tribunals for the victors to punish its defeated enemies, which was some kind of extension of warfare among nations.

By contrast, it is often claimed that the ICTY and ICTR dispense "victim's justice." (Watson, 2000, p. 719) It is worth pointing out that while American, British, French and Russian chief prosecutors composed respective national groups of prosecutors at the time of Nuremberg, the case of ICTY "demonstrates the first time in history that there has been an international prosecutor's office investigating international war crimes." (Goldstone, 1997, p. 5)[4] It would be fair to say that in comparison with the ICTY and ICTR, the Nuremberg and Tokyo Military Tribunals were also ad hoc, but more limited in their scope. They were limited not only because the victors alone organized the Military Tribunals, but also because the Tribunals had no formal authority beyond war participants. The parties to the Tribunal were parties to the war. The precedents represented what I may call "ad hoc compulsory multilateralism," which punished criminals by means of the power of the victors.

The ICTY and ICTR are different from the ICC as well, not simply because the latter will be permanent. The ICC is a creature of multilateral treaty making and does not have overriding power over states. It is true that a person may be prosecuted if the state where crimes occurred is a party to the Statute of Rome,

even if his or her home country is not. (The Rome Statute of 1998, 1999, Article 12) That is why the United States vigorously opposed the Statute of Rome and still has no serious possibility of joining the ICC. Nevertheless, the ICC will basically have no binding authority over non state parties. Even after its establishment, a majority of states will remain outside the jurisdiction of the ICC for a considerable period. I shall call this nature of the ICC "permanent voluntary multilateralism," although it is possible that it might exert different kinds of functions.

The ICTY and ICTR have a different nature. They are not permanent tribunals; instead they are ad hoc tribunals that focus on specific conflicts in specific regions. However, they are more powerful than the ICC. The Security Council acting under Chapter VII of the UN Charter established the tribunals, and the enforcement power of the Security Council always reside behind their activities. The orders of the Tribunals have the authority of Chapter VII and theoretically no UN member state can challenge them. The ad hoc tribunals are concerned with specific criminals, but exercise almost universally binding power. The power is not perfectly universal, since some states are not recognized as members of the United Nations yet. Still, cooperation with the ICTY and ICTR is obligatory for most states in the world. I may therefore assert that in comparison with the ICC's permanent multilateralism, the scope of the ICTY and ICTR is "ad hoc compulsory universalism."[5]

The reason why Chapter VII and the Security Council seem almost omnipotent lies in the imminent necessity of measures for "international peace and security." Achieving international peace recognized as the foremost and imperative purpose in the UN Charter enables the Security Council to resort to enforcement power. The reason why the ICTY and ICTR hold such universally compulsory power is that they are established for the aim of achieving "international peace and security." It is because the Security Council recognized the situations in the territories of the Former Yugoslavia and Rwanda in 1993 and 1994 respectively as "threats to international peace and security" and established the ICTY and the ICTR, hoping that "the prosecution of persons responsible for serious violations of international humanitarian law" would "contribute to the restoration and maintenance of peace" in the Former Yugoslavia and "to the process of national reconciliation and to the restoration and maintenance of peace" in Rwanda. (United Nations, 1993; United Nations, 1994) This indicates that the two ad hoc tribunals were located in the context of ongoing international peace operations, which was lacking in the Military Tribunals after the Second World War.[6]

The ICC seems to be more inclined to be a genuinely judicial organ than the ad hoc tribunals in the sense that it is not explicitly linked to "peace." However, the critical power of the Security Council provided in the Statute of Rome to initiate investigations and suspend them suggests that it could use the ICC as a tool for peace operations, and as a substitute for ad hoc tribunals. (The Rome Statute of 1998, 1999, Articles 13, 16) This means that when the ICC is somehow linked to peace operations in conflict-ridden areas, it will act as a Chapter VII enforcement organ like the ICTY and ICTR. The trend of "new interventionism" since the end of the Cold War determines the aspects of the ICC which are linked to peace operations. It is these aspects of the international criminal tribunals that this essay focuses on and further examines in the next section.

Philosophy: Three Perceptions of Tribunals

There has been a massive collection of studies on the nature, achievements and problems of international criminal tribunals. The ICTY and ICTR have made some major developments in the field of international law by articulating the power of the Security Council to create ad hoc tribunals, applying the rules in Article 3 common to the 1949 Geneva Conventions to internal warfare, recognizing rape as a crime of genocide, and so on. However, despite such prominent records in international humanitarian law, the overall implications of the two tribunals in a wider context of peace operations have been rather controversial. The *raison d'être* of the ad hoc tribunals is their expected contributions to maintaining peace in the Former Yugoslavia and Rwanda, but this reason for their existence is sometimes called into question. The ad hoc tribunals are judicial organs and deliver justice in the first instance. Since they are concerned more about justice than peace, their foundation in "international peace and security" might collide with purely judicial needs. Many fear that the same will apply to the ICC.

The ambiguous nature of the ad hoc tribunals indicates deep philosophical issues concerning the nexus between peace and justice. Does justice really contribute to peace? Should we reject unjust peace even in post-conflict regions? Is it not true that the idea of natural harmony of peace and justice is a groundless and even dangerous assumption in international relations, as E. H. Carr pointed out in the middle of the last century? (Carr, 1939) This essay finds that there may be three positions toward the ad hoc tribunals as well as the ICC in terms of the nexus between peace and justice. I call them "harmonious," "adversarial" and "conditional" positions.

First, one may insist that we should put priority on justice. Or more accurately, we should not understand justice as opposed to peace; rather we need to identify their strong interrelationship. This is the "harmonious" view of justice and peace. Lawyers tend to have the "justice first, then peace follows" attitude. The first Prosecutor of the ad hoc tribunals, Richard Goldstone, is fully conscious of political doubts about the international criminal tribunals, but unequivocally against politics. He remarks that "we have had illustrated the political approach which subscribes to the view that peace is more important and should be achieved if necessary at the cost of justice, and, on the other hand, we have had the approach from the perspective of the victim. In my opinion, it is the victim who is too often and too frequently left out of the equation and left out of account." He strongly criticized the failure of IFOR (the Implementation Force in Bosnia) to have a policy of arresting indicted war criminals and said that "it is their job to go out and make the arrest." (Goldstone, 1997, pp. 7-8) The Prosecutor strongly rejected the notion of peace perceived by IFOR or political leaders in the West, and advocated the "justice first" approach. Of course, he would not say that peace has no value. But he emphasizes the direct link between justice and peace and asserts that "justice can be a useful tool for peacekeeping or peace building." (Goldstone, 1996, p. 501) According to him, there will not be an enduring peace without attempts to bring justice. He points out that the function of justice, which includes exposure of the truth by avoiding the imposition of collective guilt, public and official

acknowledgment to the victims, accurate and faithful recording of history, curbing criminal conduct by implementing efficient criminal justice, and revealing a systematic pattern of gross human rights violations, would help to consolidate peace. (Goldstone, 1996, pp. 488-490; Akhavan, 1998; Akhavan, 2001)

The second "adversarial" view does not recognize such a positive link between peace and justice. Far from that, excessive pursuit of justice in an unstable society risks undermining opportunities of peace. Priority of politics over law might explain this standpoint. This widely prevailing political opinion was recently expressed by a prominent political scientist, Stephen Krasner, who responded to former US President Clinton's signing the Statute of Rome. He identifies the ICC as "the wrong instrument for dealing with large-scale war, devastation, destruction and crimes against humanity" and emphasized that "developing stable democratic societies and limiting the loss of human life require prudent political calculations, not judicial findings." He sees no direct link between peace and justice, as "Judgments about individual guilt can point in one direction, and judgments about political order and the promotion of peace and democracy can point in another." Krasner acknowledges the effective contribution of judicial processes "if they are conducted through national, not international, tribunals, and if they are designed to elicit the truth, as South Africa's was." However, when "criminal prosecution is pressed without consideration of political realities, the search for justice could hinder democratic rebuilding in war torn nations." (Krasner, 2001)

The third view would be located between the pros and cons. What I call the "conditional" view pursues further development of international tribunals, but still warns against inappropriate implementation of legality that ignores political considerations. There are many variations in this camp, since the critical matter is how you take political factors into consideration. But interesting examples would include David Scheffer, former US Ambassador-at-large for war crimes, who strongly supported the two ad hoc tribunals and the setting up of an international criminal court, but eventually opposed the Statute of Rome. He is now rather known for his strong opposition to the Statute of Rome at the time of the ICC conference in 1998. In his article published in 1996, however, he advocated a powerful international criminal court. He urged the Security Council to make efforts to strengthen a future international criminal court, which will be more cost-effective but could be weaker than the ad hoc tribunals. Scheffer observed that "The ad hoc war crimes tribunals and the proposal for a permanent international criminal court are significant steps toward creating the capacity for international judicial intervention." (Scheffer, 1996, p. 51; Tocker, 1994; Kerr, 2000) Then we are tempted to ask why the same person voted against the Statute of Rome in 1998. He insisted in vain on the exclusive power of the Security Council in commencing investigations. Fearing that "U.S. senior officials, commanders, and soldiers face an international investigation and even prosecution," at the final moment of the conference Scheffer proposed an amendment to require acceptance of both the territorial state and the state of nationality of the accused for exercising the ICC's jurisdiction. He lost in a lopsided vote of 113 against, 17 for, and 25 abstentions. (Weschler, 2000, p. 107) Scheffer later criticized the Statute of Rome by saying that the ICC should be able to prosecute tyrants, "while at the same time not inhibiting states from contributing to efforts to help protect international peace and security."

(Scheffer, 2000, p. 116)

These three views reflect the opposition between law-oriented and politics-oriented approaches or idealist and realist approaches, and they also signify the ways to understand the values of peace and justice in international society. As Hedley Bull demonstrated the opposition between order and justice in his *The Anarchical Society*, (Bull, 1977, Chapter 4) peace in its negative connotation as the absence of war leads to a different value system from what justice demands. In Bull's terms, the Hobbesian or realist sees international relations as the place for incessant struggles among states. On the contrary, the Kantian or revolutionist conceives of it as a unified world of cosmopolitan human beings. The former prioritizes political dimensions of the world of power struggles, while the latter believes in the validity of universal justice. For the Hobbesian, order is the first value to be achieved, because immature quest for universal justice without a central international government would only cause further confusion.[7] For the Kantian, justice is the solid way to peace because unjust world order remains unstable. The famous Kantian theme revitalized by Michael Doyle is that perpetual peace is well secured only among democracies; a doctrine the hard-core realist denies. To put it simply, the Hobbesian takes the "adversarial" view and the Kantian eschews the "harmonious" view of peace and justice.

The middle ground position in Bull's conceptual map is called the Grotian or rationalist, who admits the necessity of power politics among states, but still identifies a certain set of rules and norms which bind states and other actors in international society. The Grotian does not overemphasize inevitability of power struggles, but never fully propagates universal justice either. The position is to take hold of fundamental values and principles of international society and observe them to solidify the normative pillars of international society. However, he proceeds with special care in order not to jeopardize political order. The "conditional" support for international tribunals somehow falls in this category. It is undeniable that the implementation of justice points to a more desirable world. Yet, international society of sovereign states would not keep pace with a rapid development of international criminal justice. The Grotian "conditional" approach is summarized as follows: Let's do it, but only gradually and cautiously.

It would be fair to say that the mainstream international community more or less takes the Grotian standpoint. It advocates the implementation of the international rule of law by creating international tribunals. It believes that the rule of law promotes peace processes. Nevertheless, it continues to take great care of maintaining the existing international order. A historical example of the divide between the Grotian and Kantian is the League of Nations, which Scheffer implicitly mentioned when he criticized the Statute of Rome. (Scheffer, 2000, p. 116) Any major innovative attempt in line with the Kantian preference which fails to get the US involved could be dangerous or at least insufficient for the overall Grotian purpose of keeping international order.

The rule of law for the Grotian symbolizes an ideal of realizing the two goals: advancing global values and keeping stable order. The concept of the rule of law has nothing revolutionary to international order, because it is intended to maintain order by resorting to the established rules and principles. It aims to advance the rules and principles globally, but only gradually. The supporters of

current international order cooperate with international tribunals as long as they advance international rules and principles. They hope that the realization of the rule of law is key to international peace operations. When international tribunals turn around to threaten order itself, however, they need to be very cautious and even antagonistic. The strategies of peace-building by the rule of law derive from this standpoint.

Strategy: Judicial Intervention

Despite the foundation of "international peace and security" for the ad hoc tribunals, the strategies for peace-building have not been explicitly articulated. An official of the ICTR whom the present writer interviewed in Arusha emphasized that the ICTR only *contributes* to peace, implying it does not take principal responsibility of making, keeping and building peace. But then we may ask why international criminal tribunals are not just useless, or time- and money-consuming chimeras. It is a matter of course that criminal justice should be implemented. However, why do we need *international* criminal tribunals that may override the jurisdiction of national courts?[8] In this section I shall point out some "strategies" for peace operations which the tribunals are expected to fulfill prior to national counterparts: international legitimacy and international indictments.

Before highlighting the strategies of international criminal tribunals, it is instructive to contemplate the difference between the international tribunals and "truth commissions," in order to identify the *international* necessity of criminal tribunals. The Truth and Reconciliation Commission in South Africa and similar predecessors in Argentina, Chile, El Salvador, Honduras, Haiti, and Guatemala are not judiciary organs in the strict sense. They did not prosecute and punish criminals but uncovered "truths" of crimes in order to achieve national reconciliation. The significant feature is that all the countries that established truth commissions in Latin America were dominantly Catholic. It is naturally assumed that truth commissions took shape in accordance with Catholic values like confession and forgiveness. The Truth and Reconciliation Commission in South Africa seemed to have a similar orientation, since it aimed at disclosing atrocities during the apartheid era, but it never meted out punishments or compensation

The principal aim of truth commissions is national reconciliation. In order to facilitate the reconciliatory process, they make hidden crimes public. The philosophy behind such attempts is that truth, not punishment, contributes to reconciliation. Criminals must be penitent and victims should be encouraged to forgive them in order to construct a new society together. This is a spiritual intercourse between criminals and victims to renew a disrupted society as one. There is no role for outsiders except supporting their spiritual efforts toward reconciliation behind the scene. The third party as a mediator must also be a member of the same society. The parties and stakeholders of conflicts organize truth commissions with the aim of national reconciliation.

By contrast, the ICTY and ICTR are a form of intervention by outside actors in internal affairs of conflict-torn-areas, while the term "internal" connotes ambiguity. (Tocker, 1994; Scheffer, 1996; Kerr, 2000) Obviously, the form of intervention is not military; but it is dictatorial in nature, which satisfies the

condition of intervention.[9] It is not a "humanitarian intervention" which aims to stop violence or save victims of conflicts directly. However, the overall purpose of the tribunals coincides with other forms of humanitarian intervention with respect to humanitarian concern for victims in conflict-ridden-areas. The ICTY's relationship with peacekeeping forces in Bosnia-Herzegovina during the Bosnian war indicates a critical juncture of judicial organs with military forces.[10]

It is true that one of the specified objectives of the ICTR is national reconciliation. It is worth pointing out that the ICTR is the first international tribunal established for national reconciliation in history. Yet, the Security Council did not unequivocally address a logical link between international peace and national reconciliation through such a compulsory tribunal.[11] The relevant questions were raised by the representative of Rwanda in the Security Council when he voted against the Resolution 955 to establish the ICTR.[12] If the approach of truth commissions is internal and introverted, that of the ICTY and ICTR is rather external and interventionary. Goldstone praises the Truth and Reconciliation Commission and expects similar measures to be achieved on the international scene. (Goldstone, 1996, pp. 492-496) However, against such a Kantian assumption, Krasner sees a fundamental difference between international criminal tribunals and national courts. For him, national attempts are supposed to facilitate national reconciliation, but international interventions are not. (Krasner, 2001)

It seems that the effect of national reconciliation by an international tribunal is rather limited. If international tribunals are needed, it is because national courts cannot discharge their proper functions or international tribunals have the mission which national court do not fulfill. International tribunals work where and when national courts cannot work properly. The credential of judicial intervention is that there are usually no appropriate judicial systems or no sufficiently legitimate organs in post-conflict disrupted societies.[13] In the Former Yugoslavia and Rwanda, the government and perpetrators are military opponents. That applies to future ad hoc international tribunals in Sierra Leone, Cambodia and East Timor. (Chandrasekaran, 2000) In post-conflict situations, there is a need for the third party to intervene in order to establish a transcendental point of view for judicial judgements. The authority of universal rules embodied in international humanitarian law and international human rights places a foundation of the rule of law in domestic society upon which national reconciliation could be enhanced. The existence of fundamental rules that were not subject to regional conflicts is expected to be contributory to pinning the ethical standard of conflict-ridden areas. International criminal tribunals are not therefore obliged to give judgements to each perpetrator; it demonstrates that internationally recognized justice directly applies to conflict-saturated domestic society. The rule-of-law strategy intends to secure the legitimacy of the international judicial process, while never seriously violating national mechanisms.

The major difference between international tribunals and truth commissions that the latter abstain from punishments for the purpose of reconciliation reveals the strategy of punishments or indictments for the former.[14] Of course, normal national courts make judgements, but the effect of prosecutions is limited when it comes to crimes between warring parties. The function of issuing internationally valid indictments of major political figures, even when there is a

little prospect of arresting them, is a significant strategy for peace operations. Judicial intervention functions as a peacemaking organ by indicting war leaders and giving a ground for their arrest and detention. Even when intervention does not result in the detention of prosecuted perpetrators, indictments theoretically work to deter further atrocities. It could also work as a bargaining chip. (Schuett, 1997, p. 101)[15]

Physical detentions may become a politically significant factor, once a well-trained international police force is established. There were opportunities for the ICTY to back police actions during the wars in Bosnia and Kosovo. The Prosecutor issued indictments of principal war leaders like Mladic and Karadzic, who have not been arrested due to the lack of political will and practical difficulties. However, if proper police forces with requisite authority had existed to implement the indictments, the international tribunal might have taken on the role of strategically targeting war crimes leaders to eliminate them as destabilizing factors in a peace operation in post-conflict situations, if not during a war. The Dayton Agreement in particular made the arrest of criminals a matter of political discretion. (Gaeta, 1998; Jones, 1996) Even in case international forces chose not to arrest criminals for political reasons, they still keep options to resort to police actions, which would widen their discretional scope. (Schuett, 1997, p. 100)

As regards the ICTR, which was established after the termination of the genocide and the civil war, the function of peacemaking and peacekeeping is less clear. Still, given the unstable political situation in Rwanda and hostilities toward the Rwandan government by the leaders of the genocidal regime living outside Rwanda, the indictments and detentions of criminals were not insignificant from the perspective of peacekeeping. In fact, the most successful story of the ICTR is extradition of a number of high ranking officials and politicians responsible for the genocide, who were arrested in numerous countries. It could be argued that restraints on the freedom of movement of war-crimes leaders are important in order to prevent conflicts from expanding.[16]

Many insist that indictments serve mostly to hamper peace processes, because they discourage those who control military forces from compromising on peace deals. (Krasner, 2001; Olonisakin, 1997, pp. 832-833) It is true that the Prosecutor often shows a tendency to pursue justice without political considerations. After visiting Belgrade and meeting with the new Serb President, Vojislav Kostunica, in January 2001, the incumbent Prosecutor, Carla Del Ponte, pointed out that there were such concerns in Belgrade as “Cooperation would add another element of destabilization” or “Those prosecuted by the UN would become heroes.” But all these did not interest the Prosecutor. (Del Ponte, 2001)

Still, one may argue that the indictment of Milosevic was politically calculated. The timing of the issuance of the indictment could be interpreted as the time that Western leaders no longer regarded Milosevic as a peace-accord-broker.[17] He became a direct enemy of “the international community” represented by Western countries during the Kosovo war in 1999 (Shinoda, 2000) like Saddam Hussein of Iraq has been regarded as a “rogue” to be eliminated. “Go” sign was politically plausible in 1999 from the perspective of the mainstream international community, but it is not clear whether the sign is still valid after the takeover of power by Kostunica.

The situation is differently complex in Rwanda. An incident over 1999 and 2000 concerning Jean-Bosco Barayagwiza indicates a subtle tension between legalism and the political mission of the ICTR. For the reason of the violation of rights as a result of the prolonged delay of the trial of the accused, Barayagwiza, who was arrested in Cameroon on 15 April 1996,[18] the Appeals Chamber ordered on 3 November 1999 that he be released and delivered to Cameroon. (ICTR, 1999) The government of Rwanda became furious because Barayagwiza was the policy director of the foreign ministry of the former government, and even announced suspension of cooperation with the ICTR. Given that the genocide took place within the Rwandan territory and the Prosecutor's office is located in Kigali, the termination of Rwandan cooperation would have meant a death blow to the ICTR. The Prosecutor made best efforts to reverse the decision of the Appeals Chamber, which eventually came true on 31 March 2000. Rwanda resumed its normal relationship with the ICTR. (Metcalfe, 2000a) Barayagwiza later declined to attend the trial and other detainees in Arusha went on general strike to support him. They not only complained about the ICTR as "the victor's justice," but also protested against the political pressure from Kigali. (Metcalfe, 2000b; ICTR, 2000c)

Another political controversy arose when a revelation was made by a Canadian paper *The National Post* in 2000 that a UN prosecution investigator once investigated the RPF (incumbent government) leaders' involvement in the attack upon the airplane that killed President Habyarimana in 1994. Because the clash triggered off the genocide and is generally understood as a plot of *Interahamwe* militias, the revelation caused a heavy impact upon the government of Rwanda. (Metcalfe, 2000c) Coincidentally, there appeared an allegation by a former Tutsi intelligence officer of RPF, Jean Pierre Mugabe living in the US that Paul Kagame, incumbent President of Rwanda, and other RPF leaders ordered shooting Habyarimana's airplane. Interestingly enough, the record of investigation into the RPF's involvement in the clash kept by the UN Secretary General was transferred to the President of the ICTR. The memorandum was put under seal (ICTR, 2000a) and the Prosecutor decided not to investigate the incident, (*Panafrican News Agency*, 2000; Kimani, 2000a) although the memorandum was later made available to some defense counsels. (ICTR, 2000b; Kimani, 2000b) All these show how difficult and political it is to issue indictments or even start investigations.

The "conditional" approach toward peace and justice would evaluate positive and negative factors of the process of issuing indictments. It demands discretion to say go and stop.[19] The ad hoc tribunals were granted judicial independence despite the fact that they were directly created by the Security Council under Chapter VII. The channels for such discretion are thus institutionally limited due to the tribunals' independence, but the Security Council can anytime decide to terminate the operation of the tribunals. In the future, the ICC will be subject to constant scrutiny by the Security Council. The Council's power to suspend investigations and prosecutions under the Statute of Rome will be resorted to as a channel of discretion to put political restraints on the actions of judicial intervention.[20]

Uncertainty: Reality and Fiction of Individual Guilt

In this section, I shall consider the way international criminal tribunals facilitate the "culture" of the rule of law in the long term. The characteristic effect of judicial intervention is increased focus upon individual responsibility; criminal justice dissolves collective guilt into individual crimes. The concept of punishing war crimes relies on the degree of individualization of international legal structures. It used to be understood that international law did not know individuals, but only states. However, it is nowadays widely recognized that recent changes in legal and normative structures of international society do not allow for such a simplistic state-centric view. By individualizing war crimes, we are on the way to a culture of the rule of law, which also illustrates positive and negative aspects of judicial intervention.

Judicial intervention makes a clear contrast with traditional approaches of military and political interventions. Military interventions for humanitarian purposes aim at collective criminal acts. This does not mean that the intervening forces are not concerned with individual leaders. However, the principal and foremost function of military intervention is to stop violence, whether perpetrators on the ground are legally responsible or not. Political efforts toward conflict resolution normally do not concern individual responsibility, while respecting the control of political organs by individual leaders. Whether certain leaders are criminal or not, peace negotiators deal with them as a means to resolve conflicts. The major political concern in complex emergencies is to terminate massive violence conducted by and imposed upon a large number of people. Judicial intervention could point to a different direction.

Judicial intervention accuses multiple individuals ranging from the highest authority to inferior soldiers of single criminal acts. However, this is not to make one person take collective responsibility for somebody else's sake, it is because criminal responsibility arises at each level in a different manner. Namely, judicial intervention contributes to peace by breaking down conflicts into individual crimes. It aims for peace not through group-oriented-approaches like negotiating peace accords and attacking brutal military forces, but through individualistic approaches like arrests, detentions and punishments. It pursues peace not by focusing on conflicts between groups, but criminal acts committed by individuals.

The positive aspects of the ad hoc tribunal approach includes clarification of the location and the degree of responsibility.[21] It distinguishes between political needs among conflicting groups and political responsibility of individuals. Not all Serbs have to take responsibility for the criminal acts in Bosnia-Herzegovina and Kosovo, while non-Serb criminals must be equally prosecuted and punished as individuals. Those who committed criminal acts are punishable regardless of political ranks, although the quality and degree of their crimes differ. The eradication of evil elements in a group by arresting criminal individuals would contribute to future peace by assisting the entire population to realize what constitutes evil in their political community. It is imperative in the Former Yugoslavia and Rwanda to alleviate the tensions between ethnic groups by indicating that the incessant ethnic conflicts were not inevitable, but politically contrived by certain criminal individuals. Accusation of individual guilt works to make atrocities look less ethnic and fatalistic. The ad hoc tribunals are expected to show the will of the international community to assert that conflict was not the

inevitable outcome of relations between incompatible ethnic groups, but the evil intention of certain individuals that caused the otherwise avoidable tragic incidents.

Negative aspects also derive from the individualist focus of the ad hoc tribunals. To punish individual criminals is based on the presupposition that individual efforts will achieve peace, although there are serious doubts about it. The *Erdemovic* judgement in November 1996 by the Trial Chamber of the ICTY was criticized because of flaws in legal procedures, but more fundamentally, because of the difficulty in punishing inferiors who had no freedom to resist orders from superiors. (Yee, 1997) Judicial intervention has to draw a clear boundary between criminals and innocent parties. However, ethnic conflicts in the Former Yugoslavia and Rwanda are not so simple as to be able to prosecute a handful of criminals and prove the innocence of others without political and practical considerations. The boundary might be highly arbitrary or ambiguous. In the case of the ICTY, the inability to arrest more senior officials would create a risk that the tribunal will punish only a tiny number of minor figures who happened to be detained by authorities despite many other potential criminals who are not arrested or even indicted. The ICTR has been more successful in bringing higher officials into court, but it cannot deal with more than 125,000 detainees in Rwandan prisons who might suffer more severe sentences, including the death penalty. In fact, the international community could not stop prosecutions in 1998 in a soccer stadium in Kigali where 10,000 people gathered. (Magnarella, 2000, pp. 80-81)

In essence, the conception of peace underlying in the ad hoc tribunals is different from that in traditional forms of peace operations. Judicial intervention aims at peace, presupposing that it is achievable by addressing individual acts, while political intervention pursues peace between certain groups. It is invalid in the twenty-first century to presuppose that states monopolize political or military power in armed conflicts. Many other groups and individuals may be politically responsible for conflicts, while there are passive state officials who might have been enforced to participate in atrocities. It is subtle and difficult to determine the appropriateness of accusing individuals who are faceless in conflicts, while assuming innocence of those involved in conflicts indirectly. Of course, what is desirable is to reconcile the judicial and political perceptions of peace and achieve a more peaceful state in post-conflict regions. Nevertheless, the tension between the two appears incessantly in diverse situations. So we need to ask which kind of peace has priority in each occasion and what kind of value the criminal tribunals maintain.

Concluding Remarks

This essay has examined what international criminal tribunals can accomplish with respect to peace operations. It has argued that the present and future types of international criminal tribunals indicate a strong link to peace operations. However, the essay then exemplifies three opposing views on the relationship between peace and justice. It suggests that the-rule-of-law approach is properly explained by the "conditional" Grotian standpoint. The essay has also examined the strategies involved in international criminal tribunals: providing international legitimacy and international indictments. The establishment of the culture of the rule of law is

beyond immediate strategies, but a final goal of the project of judicial intervention, in which reside positive and negative factors.

It should be observed that the new, non-military form of intervention by the international community, international criminal tribunals, has invisible but important implications for peace-building. The idea of the rule of law as valuable to securing peace and justice is key to constructing a stable post-conflict society. Of course, criminal tribunals are not the only method of the-rule-of-law approach to attain peace. However, they symbolize a subtle nexus between peace and justice in current international society. This essay is only a preliminary exercise to comprehend the role of international criminal tribunals in the framework of peace-building by the rule of law. But it suggests that while legal interest in the tribunals is doubtlessly important, further examinations in the context of peace operations are critically needed.

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[1] "Peace operations" is a phrase that is meant to include all international efforts to obtain peace such as peacemaking, peacekeeping and peace-building. As for the usage of the term in an official document, see the so-called "Brahimi Report." (United Nations, 2000)

[2] 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.

[3] The International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994 .

[4] Michael P. Scharf argues that the United Nations was involved in Bosnia-Herzegovina as a peacekeeping force and prejudiced against the Serbs. He questions the validity of the number of judges from Muslim countries (4 out of 11 in its initial stages) (Scharf, 1997, pp. 310-311) It may be relevant to point out the fact that a considerable majority of the ICTY's Prosecutor's Office is composed of British and American staff. By contrast, Karl Arthur. Hochkammer had argued in 1995 that the lack of effective control of the territory by the international community causes inability of the ICTY. (Hochkammer, 1995, p. 122)

[5] The Security Council decides that "all States shall cooperate fully with the International Tribunal and its organs in accordance with the present resolution and the Statute of the International Tribunal and that consequently all States shall take any measures necessary under their domestic law to implement the provisions of the present resolution and the Statute, including the obligation of States to comply

with requests for assistance or orders issued by a Trial Chamber under Article 29[28] of the Statute.". (United Nations, 1993, and United Nations, 1994)

[6] However, it can be claimed that the Allied powers' occupations of Germany and Japan were an act of peace-building and the Military Tribunals functioned as part of the effort.

[7] Lucas W. Andrews finds a philosophical confusion in the ICTY or the idea of international criminal tribunals. He argues that the international community must "either…fully embrace and Austinian approach - and embark on a drive to create the power structures necessary for effective enforcement - or else it must adopt some alternative conception of its role and abandon enforcement efforts that are consistent only with Austinian thinking and a radical centralization of coercive power." (Andrews, 1997, p. 475, see also Mak, 1995)

[8] "[S]tates can look after themselves. There is no need to extend the application of the laws of war beyond their traditional scope of operation…States should prosecute individual criminals." (Mak, 1995, p. 558)

[9] According to Oppenheim's classical definition, "Intervention is dictatorial interference by a State in the affairs of another State for the purpose of maintaining or altering the actual condition of things." (Oppenheim, 1905, p. 181) According to Hedley Bull, intervention is "dictatorial or coercive interference, by an outside party or parties, in the spheres of jurisdiction of a sovereign state, or more broadly of an independent political community." (Bull, 1984, p. 1)

[10] However, it is worth pointing out that SFOR has arrested 20 war criminals since 1997.

[11] In the discussion on the establishment of the ICTR in the Security Concil, the representative of Czech Republic expressed the view that "it is hardly designed as a vehicle for reconciliation…Reconciliation is a much more complicated process." (Quoted in Howland and Calathes, 1998, p. 144)

[12] Rwanda proposed and supported the idea of establishing an international criminal tribunal for prosecuting criminals of the genocide in 1994. However, it was dissatisfied with the seat, the compositions of judges, among other things, of the ICTR. (Akhavan, 1996, pp. 506-7).

[13] Funmi Olonisakin points out that the debate between the dualist and the naturalist in terms of the validity of international judicial processes is "almost rendered irrelevant by the fact that in many of the civil wars raging in Africa, at different times, there have been no recognised central authorities, a situation that has described as state failure. Thus, debating whether the state or the international community has the legal authority to try war crimes in these conflicts is almost a futile effort." (Olonisakin, 1997, p. 830)

[14] *Gacaca* local community tribunal in Rwanda will decide on punishments for criminals, but will also give de fact amnesties to many detainees. (Republic of Rwanda, 1999).

[15]. Anthony D'Amato suspected in 1994 that the bargaining chip was being used secretly and also suggested that to waive a war crimes tribunal as a bargaining chip would achieve both peace and justice. However, his reasoning is problematically based on an analogy with domestic tort courts. He assumes that the victims may be effectively allowed to waive the state's right to prosecute once they receive higher compensations. But there is no super-state in international society. The power of the

international community to enforce law is itself often questioned. In addition, while the accused is a single individual in international tribunals as in domestic courts, warring parties are groups composed of multiple persons. There is always a possibility that the "bargaining chip" might simply divide internal factions of warring groups. It seems that to use the abolishment of the tribunal as a bargaining chip relies too much on the domestic analogy and therefore is too risky. (D'Amato, 1994)

[16] Madeline Albright, then US Ambassador to the UN, is quoted as saying although it may be difficult to bring suspects to trial, once the prosecutor issues indictments, these individuals would become "international pariahs." (Tocker, 1994, p. 555)

[17] Payam Akhavan, formerly legal advisor of the Office of the Prosecutor of the ICTY, remarked in a lecture at the Lauterpacht Research Centre for International Law of the University of Cambridge on May 4th, 2001 that the indictment of Milocevic was not politically contrived. Yet, he suggested that the timing had been a result of the fear in the Prosecutor's Office for his amnesty. However, in the present writer's opinion, there was a little prospect for amnesty once Milocevic became the "enemy" in a conflict against NATO led by the US. His amnesty would have meant a political defeat of NATO.

[18] The delay was in the first place a result of the peculiar practice of the ICTR, namely, issuing an indictment after arrest.

[19] Oliver Schuett observes that bringing peace through the Dayton Agreement and doing justice through the tribunal are contradictory, and the negotiators of the Agreement were war criminals. Schuett concluds that "the international community has to be content with a partial justice for the moment." (Schuett, 1997, p. 110.)

[20] Article 16 of the Statute of Rome says "No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions." This provision was a result of the "Singapore compromise" during the ICC conference. (Weschler, 2000, p. 93)

[21] ICTY's annual report in 1994 specifies that the tribunal is going to be "a tool for promoting reconciliation by working to attribute acts to individuals and thereby provide justice to individual victims to diminish group hatred and the need for revenge." "The Annual Report of 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." (Quoted in Howland and Calathes, 1998, p. 145)

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