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SUDSKA POLITIKA I RATOVI NA BALKANU

Šta razlikuje legitimne vojne akcije od ratnih zločina? Na ovo pitanje nema lakog odgovora. Činjenica da su ubijani civili nije, sama po sebi, dovoljna. Svaki rat uključuje smrt nevinih ljudi. Da li je bitno koliko civila pogine? U operaciji Oluja, zajedničkoj hrvatsko-američkoj vojnoj akciji usmerenoj ka proterivanju čitavog srpskog stanovništva Krajine u avgustu 1995. godine, ubijeno je do 2,000 ljudi (ne postoje tačne cifre). Da li je ovo bio gubitak života koji ima opravdanje, imajući u vidu vojne ciljeve čitave akcije? U svojoj presudi od 16. novembra 2012. godine, Apelaciono veće Međunarodnog krivičnog tribunala za bivšu Jugoslaviju (MKTBJ) presudilo je upravo tako. Ožalošćene porodice mrtvih moraju naći utehu u činjenici da je ubistvo njihovih članova porodice i rođaka bilo uzgredna posledica adekvatne vojne akcije i da se kao takvo treba tolerisati.

Procesuiranje ratnih zločina nije samo stvar brojanja mrtvih. Goran Jelišić, nazvan „Srpski Adolf", odgovoran za egzekucije ratnih zarobljenika u severnom bosanskom gradu Brčku, je osuđen od strane MKTBJ na 40 godina zatvora i pored toga što je ubio nekoliko desetina ljudi. Kontrasta radi, sudijsko veće je osudilo hrvatske vojne komandante odgovorne za Oluju, Ante Gotovinu i Mladena Markača, na svega 24 i 18 godina zatvora ponaosob. Jelišić je vršio ubistva iz neposredne blizine; Gotovina i Markač su nadgledali kampanju nemilosrdnog granatiranja koja je rezultovala ubistvima stotina ljudi sa razdaljina jednakih dometu minobacača.

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Ispaljivanje granata koje brutalno ubijaju žene i decu u njihovim domovima je izgleda značajno manje ozbiljno od pucanja u glavu iz blizine, iako je broj ljudi koji ginu kao rezultat granatiranja nekoliko redova veličina veći. A sada je Apelaciono veće presudilo, posle dodatnog razmišljanja, da kasapljenje minobacačima zapravo uopšte i nije kriminalni akt. Gotovina i Markač nisu krivi nizašta. Nalaze se kod kuće u Hrvatskoj, slobodni da se kandiduju na visoke političke položaje kao ratni heroji.

Logika kojom je Tribunal stigao do svog zaključka je intrigantna. Svi gradovi podvrgnuti bezobzirnoj artiljerijskoj vatri bili su, sudije su presudile, legitimne vojne mete. Činjenica da su granate padale u dvorišta civila nije od značaja. Prvostepeno sudsko veće je presudilo da bilo koja meta koja je 200 metara udaljena od srpskog vojnog položaja ukazuje na neproporcionalni manjak brige za civile. Pravilo o 200 metara (zašto ne 150? ili 300?) je bilo na svoj način arbitrarno, ali je odslikavalo intuiciju sa određenom moralnom podlogom. Bezobzirno granatiranje grada punog civila će dovesti do smrti mnoštva ljudi, i te smrti ne mogu biti opravdane tako što će se prosto reći da u tom gradu takođe igrom slučaja postoje i srpske policijske stanice ili kasarne. Ako se puca na mete koje su značajno udaljene od vojnih postrojenja, onda to u najmanju ruku ukazuje na bezobzirni nemar prema životima nevinih ljudi.

Apelaciono veće usmerilo se na arbitrarnu prirodu pravila o 200 metara, ali je odbilo da ga zameni bilo čim drugim. Zato što je bilo arbitrarno, svi zaključci o krivici stoga moraju biti poništeni. Otuda nije moglo biti presuđeno da je bilo bezobzirnog ciljanja civila i stoga takođe nije bilo ni „udruženog zločinačkog poduhvata" da civili budu ciljani. Na taj način je otpala čitava optužnica i optuženi su oslobođeni.

Kao stvar pravne logike ovo je van razuma i uvredljivo, što su pokazala i oštro kritikujuća odvojena mišljenja dvojice od pet sudija Apelacionog veća. Logika je slična kao kada bi se reklo da zato što je Sarajevo imalo vojne mete tokom rata u Bosni bezobzirno granatiranje i ubijanje snajperom civila u njemu je zapravo opravdano kao kolateralna šteta. Nema sumnje da će se gospoda Karadžić i Mladić sada osloniti na ovakvu logiku u svojim odbranama; i prateći precedent Gotovine, teško je objasniti zašto i ne bi mogli tako da učine.

U domenu poznavanja istorije, zaključak Apelacionog veća je takođe u neskladu sa utvrđenim strateškim ratnim ciljevima. Granatiranje Knina i drugih gradova u srpskoj Krajini nije bilo samo bezobzirno. Bilo

je namerno, preduzeto sa ciljem eliminacije čitave srpske populacije regiona, i bilo je u tome uspešno. To je jedan od najjasnijih i najuspešnijih primera etničkog čišćenja u svim ratovima na prostoru bivše Jugoslavije. Oko 250.000 srpskih civila bilo je prinuđeno da napusti ova područja u svega četiri dana. Na humanitarnom nivou, operacija Oluja je bila moralna katastrofa i ljudska tragedija.

Zašto je onda Apelaciono veće došlo do tako odbojne presude, suprotno dokazima i zdravom razumu? Jasno je da na to nisu bili primorani pravnim rezonom; petoro sudija (tri u sudskom veću i dvoje nesaglasnih u Apelacionom) došli su do suprotnih zaključaka. Jurisprudencija MKTBJ je uvek bila kreirana *ad hoc,* i iz tog razloga sudije raspolažu ogromnom moći diskrecionog odlučivanja. Pojam „udruženog zločinačkog poduhvata" izmišljen je kao novi koncept kako bi ljudi bili osuđeni za ratne zločine u slučajevima kada su dokazi njihovog direktnog učešća u ubistvima ili drugim aktima nečovečnosti bili tanki.

U magli rata često je nemoguće utvrditi ko je ubio koga, kada, da li je to učinjeno po naredbi pretpostavljenih ili koji su pretpostavljeni znali šta se uopšte događa. Ovo je još teže u pogledu ratova u bivšoj Jugoslaviji, gde je nasilje bilo krvavo, sve strane su sprovodile operacije putem paravojnih milicija, komandne strukture su bile nejasne a pisane naredbe retke. Način otkrivanja činjenica karakterističan za domaće sudove i slučajeve običnih krivičnih dela nije bio dostupan MKTBJ. Uprkos tome, Tribunal nije mogao osloboditi svakog ko bi došao pred njega. To bi izazvalo podsmeh a njegovi međunarodni donatori bi da ubrzo napustili. Stoga je udruženi zločinački poduhvat stvoren kao sveobuhvatna pravna teorija za osuđivanje optuženih bez dokaza koji bi bili potrebni za domaće krivičnopravne standarde.

Civili su stradali i stanovništvo je nasilno premeštano. Konkretan optuženi je bio deo grupe ljudi koja je na jedan ili drugi način učestvovala u događajima. Stoga je optuženi kriv nezavisno od toga šta je znao, želeo, uradio ili nameravao. Takva je bila logika jurisprudencije MKTBJ do skora, i ovakav *ratio* za masovne osude se savršeno uklapao u činjenice slučaja Gotovine i Markača.

Otuda odluka Apelacionog veća predstavlja (možda jedinstven) slučaj napuštanja najjačeg oružja MKTBJ za obezbeđivanje presuda. Razlog zašto je Apelaciono veće usvojilo ovakav pravac delovanja u pogledu operacije Oluja je politički. Hrvatska je pred vratima EU. Gotovina

je hrvatski ratni heroj. Uživa tako masovnu popularnost da je hrvatska Vlada morala da bude viđena kako intenzivno lobira u njegovu korist. U ovome su im pomogle SAD, koje su nezvaničnim putevima isticale nezadovoljstvo njegovom osudom. Američka vlada je planirala i obezbedila materijalnu podršku Oluji, kroz aktivnosti CIA i Ministarstva odbrane. Nikada se ne bi dogodila bez odobrenja SAD. Ričard Holbruk odlučio je da izdejstvuje kontroverznu vojnu operaciju zato što je smatrao da je sveobuhvatan srpski vojni poraz bio suštinski važan da bi se bosanski Srbi doveli za pregovarački sto u cilju postizanja rešenja za rat u Bosni.

Ako je Knin pao sa otvorenom podrškom SAD, Banja Luka bi mogla biti sledeća. Krajina je bila otvoreno upozorenje bosanskim Srbima da pristanu na dogovor u Dejtonu ili će biti temeljno uništeni. Takva je bila realpolitika ratova u bivšoj Jugoslaviji, i američka administracija u to vreme je prihvatila stav da neminovni gubitak civilnih života koji prati operaciju Oluja predstavlja prihvatljivu cenu za postizanje strateškog cilja obezbeđivanja nepovredivih granica Hrvatske i dugotrajno regionalno primirje kroz mir u Dejtonu. Gotovina i Markač su bili izvršioci Amerike u ovom kontroverznom projektu, i presude njima od strane MKTBJ alarmirale su mnoge u Vašingtonu u pogledu sopstvenog učešća u događajima.

Otuda i naočigled čudni poništaj ranije presude od strane Apelacionog veća može biti uverljivo shvaćen ne kao neobjašnjivo pravno dešavanje, već kao rezultat intenzivnog političkog lobiranja. Predsednik veća je Amerikanac, i dvojica sudija koja su glasala kao i on su državljani američkih saveznika, Turske i Jamajke. Nasuprot tome, sudije koje se nisu slagale bile su iz Italije i sa Malte. Veće koje je jednosglasno osudilo optužene bilo je sastavljeno od sudija iz neutralnijih zemalja, Letonije, Holandije i Zimbabvea. U velikom prelazu MKTBJ jurisprudencije od osuđujuće presude do oslobađanja vidimo povećanu dominaciju političkog uticaja SAD u suđenju Gotovini, da bi se opravdao ratni akt u kome je vlada SAD igrala suštinsku ulogu.

Nekome se može ne sviđati da razmišlja o sudovima kao subjektima političkih igara ili organima politike velikih sila. Kroz prizmu politike, lako je videti presudu MKTBJ kao sramotu. Ali to ne bi bilo potpuno predstavljeno činjenično stanje. MKTBJ, sud rođen iz političke potrebe, bio je i sam proizvod sramote, konkretno neaktivnosti međunarodne zajednice suočene sa otvoreno činjenim zločinima tokom ratova u bivšoj Jugoslaviji. Da bi ubedile svet da nešto čine, Ujedinjene nacije stvorile

su sud za počinioce ratnih zločina. To nije sprečilo dalje zločine; samo je stvorilo glomaznu birokratiju koja još uvek procesuira svoj skromni broj predmeta osamnaest godina pošto su poslednji meci ispaljeni u Oluji. (Gotovina i Markač su čekali preko sedam godina na razrešenje svojih slučajeva, blizu rekorda u neefikasnosti krivičnog prava.)

Tribunal je jasno shvatio svoj mandat: osuđivati ljude, i tako demonstrirati da međunarodna zajednica neće tolerisati ekscese građanskog rata. Ovo je bila rezervna opcija; niko izvan regiona nije bio spreman da iskoristi vojnu silu da bi intervenisao i sprečio krvoproliće. Od tog doba je MKTBJ evoluirao u nesputanog Behemota, narušavajući tek početi razvoj koherentnog i nepristrasnog režima međunarodnog krivičnog prava i pozicionirajući se kao kvazi-sud podložan političkom uticaju: otuda i daleko veći broj optužnica , presuda i dužine kazni usmerenih ka optuženima iz nekih nacija nego drugih. U isto vreme Tribunal je apsorbovao preko 1,5 milijarde dolara finansiranja, učinivši ga najskupljom sudskom institucijom u istoriji kada se gleda prema broju slučajeva. Prezir sa kojim se gleda na Tribunal u regionu govori takođe sam za sebe. Ako je navodni cilj tribunala međunacionalno pomirenje, očigledan je promašaj.

Može se legitimno postaviti pitanje upotrebe bilo kakvog suda da ocenjuje pravičnosti i grehove u ratovima. Koja logika potkrepljuje pretpostavku da su sudije u boljem položaju od istoričara da procenjuju moralnu odgovornost za ratne aktivnosti? Skoro svaki zabeleženi ratni sukob rezultirao je šokantnim gubitkom nevinih života. Odlučivanje o etici u bilo kom ratu se nužno svodi na vaganje smrti i razaranja sa političkim ciljevima. Pravnici i sudije, čija je specijalnost uglavljivanje činjenica i dokaza u uske opisne kategorije pravne odgovornosti, nisu dobro obučeni za balansiranje takvog tipa. Sud istorije se može menjati, kako novi dokazi ugledaju svetlost dana ili se balans moći promeni. Sudovi ne bi trebalo da budu deo ovog procesa. Oni daju neodgovarajuću institucionalnu legitimnost određenim shvatanjima u političkim kontroverzama oko kojih ne može biti finalnih zaključaka.

Operacija Oluja je primer izvršenja masovnih ubistava i etničkog čišćenja. Ponašanje podstrekača i izvršilaca, hrvatskih i američkih, je za svaku osudu. Ali MKTBJ nije trebalo da im sudi, osudi niti oslobodi. Čitavo postupak je ispolitizovano montirano suđenje i parodija nepristrasnog deljenja pravde koje civilizovano društvo drži za svetinju. U osvit ove sudske katastrofe, dve tragedije opstaju. Prvo, prijatelji i porodice mrtvih nemaju utehe. Drugo, Pigmalion međunarodne pravde stvoren od strane

MKTBJ će izgleda imati za sudbinu da bude ponavljan. Slične političke slabosti već su se pojavile u jurisprudenciji naslednika, Međunarodnog krivičnog suda.

Konačno, dugotrajni animozitet Srba i Hrvata samo je pojačan zamršenom sagom suđenja Gotovini. Mučan i parcijalan proces sudske politike nije doprineo ništa cilju regionalnog pomirenja. Hrvati se osećaju pravedno, Srbi zgađeno, i stare emotivne rane su otvorene bez potrebe. Međunarodno krivično pravo nema nikakav zabeleženi uspeh u smirivanju etničkih neprijateljstava. Jedina grupa kojoj služi su međunarodni pravnici. Čerčil se zalagao za to da optuženi u Nirnbergu treba da budu streljani bez rasprave. Staljin je to sprečio; i on je želeo montirani proces za pokazivanje.

(Prevod: Velimir Živković)

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JUDICIAL POLITICS AND THE BALKANS WARS

What distinguishes legitimate military engagements from war crimes? This is not an easy question to answer. The mere fact that civilians are killed is not in itself sufficient. Every war involves the death of innocent people. Does it matter how many civilians die? In Operation Storm, the Croatian-American joint military action to expel the entire Serb population of Krajina in August 1995, up to 2,000 people were killed (no exact casualty figures exist). Was this a justified loss of life, given the military aims involved? In its judgment on 16 November 2012, the Appeals Chamber of the International Criminal Tribunal for Yugoslavia (ICTY) ruled

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that it was. The mourning families of the dead must find solace in the fact that the murder of their relatives was a tolerable incidental consequence of appropriate military action.

Assessing war crimes is not just a matter of counting the dead. Goran Jelisic, the "Serb Adolf" responsible for executing prisoners of war in the northern Bosnian town of Brcko, was condemned by the ICTY to 40 years' imprisonment despite having murdered only a few dozen people. By contrast the Trial Chamber had sentenced the Croatian military commanders held responsible for Operation Storm, Ante Gotovina and Mladen Markac, to a mere 24 and 18 years respectively. Jelisic had executed people at close quarters; Gotovina and Markac had merely overseen a campaign of relentless shelling that murdered hundreds of people from a distance equal to the range of a mortar. Firing shells that dismember women and children in their own homes is apparently substantially less serious than shooting somebody in the head at point blank range, even if the number of people who die as a result is several orders of magnitude higher. Now the Appeals Chamber has ruled that dismemberment by mortars was not, upon reflection, a criminal matter at all. Gotovina and Markac are guilty of nothing. They are home in Croatia, free to stand for high political office as war heroes.

The logic by which the Court reached this conclusion was intriguing. All the towns subject to indiscriminate artillery shelling were, the Judges ruled, legitimate military targets. The fact that shells landed in civilians' back gardens did not matter. The Trial Chamber had ruled that any target more than 200 metres from a Serb military position indicated disproportionate lack of concern for civilians. The 200-metre rule (why not 150? Why not 300?) was in one sense arbitrary, but it reflected an intuition with some moral underpinning. Indiscriminate shelling of a town full of civilians is going to kill a lot of people, and those deaths cannot be justified simply by saying that the town just happens also to contain a Serb police station or a barracks. If you are firing at targets a significant distance from a military emplacement, then at the least this indicates reckless disregard for the lives of innocent people.

The Appeals Chamber fastened onto the arbitrary nature of the 200-metre rule, but declined to replace it with anything else. Because it was arbitrary, all conclusions of guilt relying upon it must be quashed. Therefore there could be no finding of indiscriminate targeting of civilians, and therefore there was no "joint criminal enterprise" to target ci-

vilians either. Hence the entire prosecution fell away and the defendants were acquitted.

As a matter of legal logic this was outlandish and offensive, as the excoriating dissenting opinions of two of the five judges in the Appeals Chamber made clear. It is akin to saying that because Sarajevo contained military targets in the Bosnian war, therefore the indiscriminate shelling and sniping of its civilians was justified as collateral damage. No doubt Messrs Karadzic and Mladic will now rely upon precisely this logic in their own defences; and following the Gotovina precedent, it is hard to explain why they ought not to be allowed to do so.

As a matter of historical record the Appeal Chamber's conclusion is also incongruous with the known strategic goals of the war. The shelling of Knin and other towns in Serb-occupied Krajina was not just indiscriminate. It was deliberate, undertaken with a view to expelling the entire Serb population of the region, and it was effective. It was one of the clearest and most successful instances of ethnic cleansing in all the Yugoslavian wars. Up to 250,000 Serb civilians were forced to flee the region in a mere four days. On a human scale, Operation Storm was a moral outrage and a human tragedy.

Why then did the Appeals Chamber reach so repellent a conclusion, contrary to all evidence and common sense? Clearly they were not compelled to do so as a matter of legal logic; five Judges (three in the Trial Chamber and the two dissenters on appeal) had drawn the reverse inference. The jurisprudence of the ICTY has always been created *ad hoc*, and hence its Judges wield massive discretion. The notion of a "joint criminal enterprise" (JCE) was invented from scratch to convict people of war crimes, where the evidence of their direct participation in murder or other acts of inhumanity was thin.

Amidst the fog of war it is often impossible to establish who killed whom, when they did so, whether they did so pursuant to orders of superiors, or which superiors knew what was happening at all. This was all the more the case in the Yugoslavian wars, where violence was internecine, all sides were operating through informal militias, command structures were ambiguous and written instructions were infrequent. The type of detailed fact-finding typical in domestic courts necessary to convict wartime participants of ordinary crimes was impossible for the ICTY. However the Court could not therefore acquit everyone who came before it. It would

have become a laughing stock, and its international donors would soon have abandoned it. Hence JCE was invented as a catch-all legal theory to convict defendants without evidence adequate to a domestic criminal standard.

Civilians died and populations were forcibly transferred. A given defendant was part of a group of people who participated in one way or another in the events. Therefore the defendant is guilty irrespective of what he or she knew, wanted, did or intended. Such has been the logic of the ICTY's jurisprudence to date, and this rationale for blanket convictions fitted the facts of the Gotovina and Markac cases impeccably.

Hence the Gotovina appeal judgment represents a (possibly singular) abdication of the ICTY's most powerful weapon to secure convictions. The reason the Appeals Chamber adopted this course over the Operation Storm convictions is political. Croatia is shortly to join the EU. Gotovina is a Croatian war hero. He is so massively popular that the Croatian government has had to be seen to lobby intensively in his support. In this they have been reinforced by the USA, which expressed private unease about his conviction. The US government planned and provided material support to Operation Storm, through both the CIA and the Department of Defense. It could never have occurred without US approval. Richard Holbrooke decided to push the controversial military operation because he considered a comprehensive Serb military defeat essential to force the Bosnian Serbs to the negotiating table in reaching a resolution to the Bosnian war.

If Knin fell with overt US support, Banja Luka might be next. Krajina was an open warning to the Bosnian Serbs to reach a deal at Dayton or they would be comprehensively destroyed. Such was the *realpolitik* of the Yugoslavian wars, and the US administration at the time adopted the view that the inevitable loss of civilian life accompanying Operation Storm was a worthwhile price to achieve the strategic goal of securing inviolable borders for Croatia and a long-term regional armistice envisioned in the Dayton Peace Accords. Gotovina and Markac were America's handmaidens in this controversial project, and their convictions by the ICTY alarmed many in Washington themselves complicit in these events.

Hence the Appellate Chamber's apparently bizarre reversal of the Tribunal's prior judgment might plausibly be understood not as an inexplicable legal contortion but rather as the outcome of intensive political

lobbying. The President of the Appeal Chamber is an American, and the two judges who voted with him are nationals of US allies, Turkey and Jamaica. By contrast the dissenting Judges were Italian and Maltese. The lower tribunal that unanimously convicted the defendants at first instance was composed of Judges from more neutral countries, Latvia, Holland and Zimbabwe. In the shifting sands of ICTY jurisprudence from conviction to acquittal we see the increasing dominance of US political influence in the Gotovina trial, to vindicate an act of war in which the US government played the defining role.

One may not like to think of courts as subjects of political sway or organs of Great Power politics. Viewed through a political lens, it is easy to see the ICTY's judgment in this case as a disgrace. But that would be too incomplete a statement of the facts. The ICTY, a court born of political expediency, was the product of a disgrace, namely international community inaction in the face of open atrocities in the Yugoslavian wars. To persuade the world they were doing something, the United Nations created a court to try perpetrators of war crimes. This did not stop the war crimes; it just created an interminable bureaucracy that is still indulging its modest caseload almost eighteen years after the last shots were fired in Operation Storm. (Gotovina and Markac have each waited over seven years for their cases to be heard, close to a record in the inefficient administration of criminal justice.)

The Court understood clearly its mandate: to convict people, and thereby demonstrate that the international community would not tolerate the worst excesses of ethnic civil war. This was a second-best option; nobody outside the region was prepared to use military force to intervene and prevent the bloodshed. Since then the ICTY has evolved into an unrestrained behemoth, perverting the nascent development of a coherent and impartial regime of international criminal law and establishing itself as a kangaroo court subject to political influence: hence the far higher prosecution and conviction rates, and sentences, for defendants from some national groups than from others. At the same time it has absorbed over US$1.5 billion in funding, making it the most expensive court in history on a per-case basis. The scorn with which the court is regarded within the region speaks for itself. If the purported goal of the tribunal is inter-ethnic reconciliation, it has been an abject failure.

We might legitimately question the use of any court to adjudicate the rights and wrongs of wars. What is the logic underlying the assumption that Judges are better placed than historians to assess moral culpability for acts of warfare? Almost every war on record has resulted in shocking loss of innocent lives. Adjudicating the ethics of any war is an inevitable matter of weighing death and destruction against political goals. Lawyers and Judges, whose specialist skills are to fit facts and evidence into narrow descriptive categories of legal liability, are not well equipped for balancing exercises of this kind. Historical judgments may change, as more evidence comes to light or the balance of power shifts. Courts should not be part of this process. They lend improper institutional legitimacy to positions in political controversies over which there can be no final conclusions.

Operation Storm was an exercise in mass murder and ethnic cleansing. The conduct of its instigators, Croatian and American, was reprehensible. But the ICTY should never have tried them, should never have convicted them, and should never have acquitted them either. The exercise was a politicised show trial and a parody of the impartial administration of justice that civilised society holds so dear. In the wake of this judicial catastrophe, two tragedies persist. Firstly, the friends and relatives of the dead have no solace. Secondly, the Pygmalion of international justice the ICTY spawned now seems destined to be perpetuated. Similar political fragilities have already emerged in the jurisprudence of its replacement, the International Criminal Court.

Finally, longstanding animosities between Serbs and Croats have been exacerbated by the twisting saga of the Gotovina trial. This tortuous and partial process of judicial politics has contributed nothing to the goal of regional reconciliation. Croats feel vindicated, Serbs disgusted, and old emotional wounds are needlessly reopened. International criminal law has naught to its credit in assuaging ethnic hostilities. The sole constituency it serves is international lawyers. Churchill argued that the Nuremberg defendants should have been shot without debate. Stalin overruled him; he too wanted a show trial.