

SWAPPING AMNESTY FOR PEACE AND THE DUTY TO PROSECUTE HUMAN RIGHTS CRIMES

Diane F. Orentlicher *

I am fortunate to have as a foundation for my remarks Professor Roht-Arriaza's lucid presentation of the principal sources of international law bearing on amnesties for gross violations of human rights. My own remarks will address the policy dimension of such amnesties, focusing on their implications for peace in countries that are tenuously emerging from brutal conflict.

First, however, I would like to note that, in respect of Bosnia-Herzegovina, there is an additional source of legal obligation bearing on the question of punishment beyond those found in general international law. The Security Council resolution establishing the International Criminal Tribunal for the former Yugoslavia requires all states that are members of the United Nations to cooperate fully with the Tribunal, including its orders of arrest and requests for assistance. That obligation was reiterated in the Dayton peace agreement with respect to the parties to that accord.

Turning to the subject of my remarks: "Do amnesties represent sound policy?" The answer can only be, "It depends." Those who claim to have a universally relevant answer to this question surely overreach the limits of human knowledge. Still, I would offer several general observations respecting the wisdom of amnesties for gross violations of human rights.

First, one ought to be skeptical of claims that a wholesale amnesty is the approach most likely to facilitate national reconciliation, even while being open to persuasion on this point. All too often, the term "reconciliation" has been used as a code-word for impunity when invoked as a justification for amnesties. In fact, however, punishment may be an essential foundation for reconciliation, as Hannah Arendt suggested when she wrote: Men cannot forgive what they cannot punish.

More generally, when the decision is too easily made in the direction of overlooking crimes of the past in the service of national reconciliation, the costs, both morally and socially, are high.

* Professor of Law and Director of the War Crimes Research Office at the Washington College of Law, American University in Washington, D.C.

Finally, I believe that we would do well to resist the tendency to address the wisdom of amnesties in terms of stark dichotomies, such as “punish or pardon” and “amnesty or accountability”. These dichotomies present unduly narrow options, detracting from more constructive efforts to balance the demands of justice against those of reconciliation and, ultimately, to promote reconciliation within a framework of accountability.

A model of such an approach is that which has been undertaken by the government of South Africa. Under that country’s law, individuals must confess fully to their crimes in order to receive an amnesty. Even then, an amnesty committee may deny the petitioner’s request if the committee deems his crime disproportionate to its political objective. Although it remains to be seen how this approach will play out, it may well have the effect of fostering a fuller accounting of the truth behind apartheid’s grim litany of crimes, as well as a more robust record of prosecution, than has been possible in other countries that have endured crimes against the human condition.

The possibility of receiving an amnesty provides an inducement for those who participated in apartheid-era depredations to disclose information about those crimes, thereby facilitating full disclosure of the truth. These disclosures may, in turn, facilitate successful prosecutions of persons implicated by the confessors. In this respect, the South African approach establishes a dynamic relationship between the truth — and justice — seeking dimensions of accountability, while breaking out of the sterile dichotomy (“punish or pardon”) that has too long framed international debate about how nations should address their legacies of brutal governance.

I will devote the rest of my remarks to another country — Bosnia and Herzegovina — because decisions made in the months ahead will have truly critical implications there. Further, policy determinations respecting the crimes that raged across Bosnia during its recent conflict have been, and will continue to be, almost peculiarly the province of the international community.

That policy is one of professed commitment to accountability but, for the most part, has emerged in the past year as a policy of *de facto* impunity.

The official policy is embodied in the Security Council’s establishment of the first international criminal tribunal since Nuremberg and Tokyo. The Hague Tribunal was created to prosecute those responsible for serious violations of humanitarian law committed during the conflict in the former Yugoslavia. As I noted earlier, the Security Council resolution establishing the Tribunal imposes an obligation on all states that are members of the United Nations to cooperate with the

Tribunal. Further, the governments of Yugoslavia, Bosnia, and Croatia reiterated their commitment to cooperate fully with the Tribunal when they ratified the Dayton peace agreement. The Dayton accords also authorize, but do not require, the NATO Implementation Force (IFOR) to arrest suspects indicted by the Tribunal.

The very establishment of the Tribunal speaks volumes about the subject of this panel. Above all, this measure was a powerful tribute to the role of justice in securing peace. Notably, the Tribunal was established as a peace enforcement measure under Chapter VII of the United Nations Charter. The Council determined that the work of the Tribunal would help ensure an end to the crimes known as “ethnic cleansing”, *and* would “contribute to the restoration and maintenance of peace” in the war-ravaged territory of the former Yugoslavia.

Notably, too, the provisions in the Dayton accords requiring parties to cooperate with the Tribunal upended the conventional wisdom about the need and desirability of “swapping amnesty for peace.” It had been widely predicted that such a deal would be inevitable if the parties to the Balkan conflict were to reach a peace agreement. Instead, the accords affirmed the important role that the Tribunal would play in assuring lasting peace in Bosnia.

Further, it is widely acknowledged that the Dayton peace accords would not even have been possible had the Tribunal not already indicted two men who bear principal responsibility for “ethnic cleansing”: General Ratko Mladic and Radovan Karadzic. Before his indictment, when Karadzic headed the Bosnian Serb delegation to United Nations-sponsored peace conferences, no success was possible. Far from hindering peace prospects, then, the Tribunal played a central part in clearing the way to Dayton.

But if Dayton avows that legal process is a keystone of lasting peace in Bosnia, implementation efforts have thus far defied Dayton’s clarion call for justice. Among the authorities in the former Yugoslavia in a position to arrest war criminals, only the Bosnian government has complied fully with this obligation (though it too may have breached its duty to cooperate fully with the Tribunal by allegedly putting forth false testimony, thereby forcing prosecutors in The Hague to retract the testimony of one witness in the trial of Dusko Tadic). Of seventy-four suspects indicted by the Tribunal, only seven are in its custody.

Dario Kordic, the most senior Croat official indicted by the Tribunal, reportedly lives in a government-owned apartment in Zagreb. Since his indictment, he has been seen sitting in the row behind Croatian President Franjo Tudjman at a public concert. Another Croat indicted by

the Tribunal, Ivica Rajic, reportedly lived for almost a year in a hotel owned by the Croatian Defense Ministry.

This week, it was reported that four Bosnian Serbs indicted by the Tribunal have been working openly as police officers in Prijedor and Omarska, cities indelibly linked with images of "ethnic cleansing". Yesterday, the *Boston Globe* reported that two other Bosnian Serbs indicted by the Tribunal were working as public officials in Bosanski Samac, one as the highest-ranking municipal official, and the other in the local office of Bosnian Serb state security.

For its part IFOR has made a shameful mockery of its professed policy to arrest suspects indicted by the Hague Tribunal if they are "encountered". One United States commander asserted that his troops would arrest suspects like Radovan Karadzic only if they literally stumble into an IFOR checkpoint. In fact, the record suggests that IFOR would not even arrest indicted suspects under these circumstances. In August, when IFOR inspectors learned that General Ratko Mladic was inside a bunker they had planned to inspect, they rescheduled their visit rather than confront the indicted war criminal within.

Two days before the September elections in Bosnia, the United States Commander of IFOR, Admiral Joseph Lopez, met with Serb officials in the headquarters of Radovan Karadzic, who, according to Serb sources, was almost certainly inside the building. And in a virtuoso display of IFOR's talent for not "stumbling into" Mladic or Karadzic, none of the 53,000 IFOR troops deployed to provide security on election day in mid-September had an arrest-worthy encounter with these men, although both reportedly turned out to vote.

The costs of this policy have been evident in each grim dateline from Bosnia, and the principal casualty has been the Dayton peace process. Emboldened by IFOR's repeatedly avowed resolve not to arrest him, Bosnian Serb leader Radovan Karadzic has undermined virtually every major non-military provision of the Dayton accords. The first significant test came last February, when Serb-held neighborhoods in Sarajevo were transferred to the authority of the Bosnian Government. Coming in the early months of the peace, this transfer could have been a harbinger of reconciliation in the best spirit of Dayton. Instead, heeding the calls of Karadzic, Serbs abandoned these neighborhoods rather than live with returning Muslims—and torched their homes as they left.

More recently, negotiated out of public office but not political influence, Karadzic derailed the possibility of a credible voter registration process, a fact that led to the postponement of municipal elections that had been slated to be held in mid-September, but not to the postponement of national elections. Humanitarian aid programs administered in Serb-held

areas of Bosnia by Karadzic's wife, for example, were flagrantly manipulated to secure a Serb victory that would ratify the results of ethnic cleansing. To qualify for aid packages, displaced Serbs reportedly had to agree to register in certain key locations. In this setting, the elections effectively ratified ethnic cleansing, bringing into office hard-line nationalists who openly oppose inter-ethnic cooperation.

Above all, Srebrenica, where thousands of Muslims were slaughtered by Serb forces last summer, stands as a tragic monument to the folly of letting Mladic and Karadzic remain at large. The largest massacre in Europe since World War II, this happened under the supervision of men who had *already* been indicted by the Tribunal. That it occurred before the Dayton accords were signed does not affect the grim reality that if any semblance of the rule of law had been enforceable only last year, an odious crime could have been avoided.

Finally, the costs of this de facto impunity include an intangible, but potentially serious, erosion of the Hague Tribunal's authority. Just as the craven acquiescence in "ethnic cleansing" by the United Nations Protection Force (UNPROFOR) in Bosnia deeply compromised the credibility of the United Nations, a continuing failure to secure the arrest of suspects indicted by the Hague Tribunal will surely diminish its hard-earned credibility and its ability to advance national healing in Bosnia.

Yesterday, Carl Bildt, the civilian High Representative for implementation of the Dayton peace plan, said through a spokesman that he would like NATO to reconsider its current policy respecting the arrest of war criminals. Significantly, Mr. Bildt suggested that a reversal of IFOR's policy of de facto impunity would "stimulate the peace process in Bosnia-Herzegovina to go in a normal direction." It is time, past time, to change course.