´Operation: Last Chance´: Dilemmas of Justice and Lessons for International Criminal Tribunals

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By Sergey Vasiliev*

In late July 2013, The Guardian reported that the Simon Wiesenthal Centre had launched a poster campaign in three German cities—Berlin, Hamburg, and Cologne—requesting the public to assist in identifying and bringing to justice the last surviving alleged perpetrators of crimes of the Nazi regime. No less than two thousand posters were hung in the streets, featuring an authentic sinister black-and-white image of the most horrific dead-end the modern-era humankind has seen: the snow-covered rail tracks approaching the gate of the Auschwitz II-Birkenau extermination camp. The inscription underneath the photo reads, in German:

> 'Late but not too late. Millions of innocents were murdered by Nazi war criminals. Some of the perpetrators are free and alive! Help us take them to court.'

A monetary reward of up to €25,000 is promised for valuable information leading to indictment (€5,000), conviction (€5,000), and detention for the period up to 150 days (with a tariff of €100 per day). The poster appeal implements the Centre's initiative 'Operation: Last Chance II', the sequel to the campaign which kicked off in Germany in 2005 and, a few years earlier, in Austria, Baltic countries, and

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throughout Central Europe. Funded through small private donations, the Operation is meant to ensure that no Nazi fugitive still living at large—whether openly or under a false identity—dies unprosecuted.

In our information age, news about the German poster campaign was quickly overflown by the deluge of stirring updates from the hectic world of international criminal justice, preoccupied with events far more recent than the Nazi crimes. But the campaign should give us a reason for retrospection. International criminal law (ICL) enforcement finds itself at the turn of institutional generations and in the throes of a 'mid-life crisis'. Twenty years into the project's renaissance, the international and hybrid criminal tribunals continue to experience the daunting reality in which the accomplishment of their mandate to achieve (limited) accountability for (some) international crimes is held hostage to the vagaries of politics, which demarcate the playing field. To an even greater extent than its UNSC-sponsored predecessors, the International Criminal Court (ICC) depends on the *bona fide* cooperation of states for evidence and arrests. This cooperation is in many situations faltering or not forthcoming for exactly the same reasons why the Court becomes seized with a matter in the first place: inaction by states or their unwillingness or inability to genuinely investigate and prosecute crimes themselves. In Kenya and elsewhere, the Court is struggling to do its job amid a sharp decline in political support and clamorous accusations of being an illegitimate neo-colonial imposition. Other courts—the Extraordinary Chambers in the Courts of Cambodia (ECCC) and the Special Tribunal for Lebanon—are facing their own challenges. Anything but unique, those difficulties are manifestations of the familiar problem of a deficit of support from key political actors. This state of affairs does not project bright prospects for the effectiveness and viability of the international criminal justice system, and its less patient proponents may soon be pushed to feel disillusioned, cynical, or even demoralized.

Given the difference in contexts, there seems to be little in common between the strenuous life-long efforts by individuals and entities such as the Simon Wiesenthal's Centre, to bring suspected Nazi perpetrators to justice in the wake of the WW II, on the one hand, and modern international criminal justice institutions, on the other. However, there are a number of striking similarities in respect of the practical hurdles and conceptual questions the two enterprises have faced. How is one to measure success on the winding road to accountability? What can the unwavering commitment to justice accomplish in the long term or, perhaps more importantly, what can it *not* in the short term? The movement towards ensuring justice for the crimes of the Nazi regime offers an instructive moral story for the ICC and other courts.

Pathway to justice is unpaved and not strewn with roses

The Simon Wiesenthal Centre, founded in 1977, is a Jewish NGO based in Los Angeles and maintaining offices across the globe. It pursues the mission of confronting anti-Semitism everywhere and keeping the memory of Holocaust alive. The Centre is named after a concentration camp survivor turned 'Nazi-hunter' after the war, who dedicated his life to exposing the alleged culprits of atrocities committed against the Jewish population in Europe under the Third Reich. The work of Wiesenthal and other 'Nazi-hunters' – Serge and Beate Klarsfeld, Tuviah Friedman, Elliot Welles, Efraim Zuroff, and Yaron Svoray among them – made a huge difference in cases too numerous to list here. They located whereabouts, collected testimonials of camp survivors, and provided investigative leads and other assistance to national law-enforcement agencies. They uncompromisingly called for prosecution and trials when the political will and capacity to deal with these cases in a devastated Europe, divided by the Iron Curtain, were at their lowest. The road towards accountability for the Nazi atrocities has been a thorny one.

The crimes against the European Jewry and other groups featured prominently in the factual basis of the indictment against the 24 major Nazi defendants and in the Nuremberg Tribunal's judgment, which recently celebrated 67 years. The nature and scale of those crimes transpired vividly from the moving accounts of the few witnesses called by the Soviet and French prosecutors to testify about conditions in the camps and the persecution of Jews in the occupied territories (see IMT Blue Series, vols VI and VIII). The trial preceded signature of the Genocide Convention, and the IMT did not give the 'crime of crimes' a distinct qualification. Moreover, it found that to constitute a crime against humanity, the persecution must have been committed in the execution of, or in connection with, any other crimes within its jurisdiction (Art 6.c IMT Charter). Only conduct after the outbreak of the war in 1939 fell under the definition, leaving a large segment of Holocaust crimes without a name. Some historians and victims' advocates have critiqued the Nuremberg process for having misrepresented the Final Solution as a mere aspect of the Nazi conspiracy towards military domination through aggressive war. In this light, any subsequent proceedings were bound to be measured by improvement they could deliver on that legacy.

The true milestone in placing the Holocaust at the centre of proceedings was the 1961 trial and conviction by the Jerusalem District Court of Adolf Eichmann for crimes against humanity, war crimes, crimes against Jewish people, and membership of criminal organizations (SS, SD, and Gestapo). Eichmann was a notorious Nazi functionary who held the dubious honour of being mentioned in the IMT Judgment for his role in the logistics of the Final Solution and who had been hiding in Buenos Aires, Argentina, since 1952. The significance of Simon Wiesenthal's personal contribution to the Mossad's successful capture and abduction of Eichmann is a subject of controversy. But it is known that Wiesenthal was on Eichmann's trail for a long time and played a role in preparing the groundwork for the 'operation'. Subsequently, it transpired from declassified CIA documents that the information about Eichmann's whereabouts and his alias had already been known to both the CIA and the West German Intelligence Service (BND) but had not been acted upon. The risk that the Nazi past of some high-ranking public servants in the FRG (most notably, that of Adenauer's associate Hans Globke) would be brought up in this connection was unaffordable. In the midst of the Cold War and in the face of the Communist threat, bringing former Nazis to justice was a priority only to the extent it would not interfere with their possible use as sources of intelligence or other assistance, including silence on various 'sensitive' matters.

Eichmann was followed by a series of widely publicized proceedings in Germany which dealt with Holocaust crimes, including the major Auschwitz trial (Frankfurt, 1963-65), two Treblinka Trials (Düsseldorf, 1964-65 and 1970), and the third Majdanek trial (Düsseldorf, 1975-1981). Those trials featured multiple defendants from among SS-officers, kapos, and other camp staff. The proceedings were unusually lengthy and resource-intensive. They nevertheless served an important 'educative' function. Thus the population could be confronted with the truth and moral guilt of connivance. The proceedings may have also helped deflect denial and revisionism and raise awareness about mass murders and deportations of Jews among the younger generation of Germans (at the same time driving some of them into the open arms of the Red Army Fraction). In France, owing to the efforts of Klarsfelds, a number of Nazi members/collaborators and Vichy officials were convicted in the 1980s and 90s for persecutions of Jews. The defendants were the Gestapo chief in Lyon Klaus Barbie (1987), his one-time subordinate Paul Touvier (1994), and Maurice Papon (1998) who had served as a Bordeaux police chief under Vichy and bossed 'Jewish affairs' in that capacity. The French cases were legally complex to the extreme and boasted a convoluted procedural history. To some extent, this was because those proceedings posed a political embarrassment to the French state as they effectively challenged the Gaullist ideology of *résistance.*

The efforts of 'Nazi-hunters' to track down the alleged Nazi criminals and collaborators continued well into the first decennia of the 20th century and, despite the late stage, proved to be (partially) successful. In May 2011, the Munich court convicted 91-year old John (Ivan) Demjanjuk for complicity to the murder of about 28,000 detainees at Sobibór where he had served as a guard. The conviction was preceded by a decades-long legal wrangle. In 1986 he was extradited to Israel by the US, where he had settled after the war, in order for him to be tried for crimes against humanity; an Israeli court convicted and sentenced him to death in 1988. In 1993 the verdict was overturned by the Israeli Supreme Court which found that Demjanjuk had been mistakenly identified as the infamous Treblinka camp guard nicknamed Ivan the Terrible for his exceptional sadism in treating the prisoners. He was allowed to return to the US which, upon finding that the Department of Justice's Office of Special Investigations (OSI) had suppressed evidence material to the extradition order, had restored his citizenship, only to revoke it again in 2004 after new immigration proceedings were instituted in connection with his service in the death camps. Upon unsuccessful challenges against his deportation from the US, Demjanjuk was extradited to Germany in 2009 to stand trial on multiple counts of complicity to murder, resulting in a conviction and the imposition of a sentence of 5 years' imprisonment. Because he passed away less than a year after his conviction, the *Revision* could not be completed in his case and the trial verdict was annulled by the appellate court, although the precedent led the German Central Prosecution Office to declare its intention to open about 30 new Auschwitz-related cases comparable—in both legal and forensic terms—to that of Ivan Demjanjuk. Finally, in 2012, the Wiesenthal Centre added to its 'most wanted' list the name of László Csatáry – a senior-aged resident of Budapest who had allegedly participated in the deportation of 16,000 Jews from Kosice in Slovakia to Auschwitz and who had been convicted *in absentia* in Czechoslovakia back in 1948. In June 2013, 98-year old Csatáry was charged by Hungarian prosecutors for war crimes but he was never tried due to his death two months after.

The handful of cases mentioned speak for themselves: bringing alleged war criminals to justice is by no standard a simple undertaking. This task only becomes more complicated with the passage of time. The activities (and personalities) of 'Nazi-hunters' are fraught with controversy, not least because they have often gone against the tide and still continue to do so. As reported by the Wiesenthal Centre, some governments—e.g. Germany, Italy, and the US—have a better record while others are lukewarm or openly reluctant to deal with the crimes of distant past. There are several reasons for that. First, such cases invariably entail scrutiny of issues of political and legal responsibility of governments. As the proceedings in France against Barbie and Papon have amply demonstrated, even stable democracies may not be prepared to reopen embarrassing chapters of their history and allow an inquiry into circumstances which might upset consolatory myths or taint the 'national identity' of their people. Second, domestic legal obstacles to such cases remain legion – material and temporal jurisdiction constraints, non-retroactivity of penal laws, statutes of limitations, and defences (e.g. superior orders) which, even if formally unavailable, still inform prosecutorial choices. From a prosecutorial perspective, a limited prospect of obtaining a conviction may militate against spending scarce resources on a war crimes case which could rather be allocated to other cases (of which there are enough in overburdened criminal justice systems).

Next to that, even if it is decided to proceed, there are intractable practical hurdles associated with such cases. Their inhibiting effect on the prosecutions should not be underestimated. Inevitable difficulties with collecting authentic documents and reliable (eye)witness evidence dozens of years after the events in question are exacerbated by incentives of governments with vested interests in the case to withhold or fabricate evidence. The problems which coloured the initial stage of the Demjanjuk saga drive home this point. It must be recalled that the OSI had failed to disclose evidence in the first

extradition proceedings; the accused's ID card from the Trawniki concentration camp (where he had allegedly undergone his camp guard training) appeared to be a KGB forgery which, whether true or not, had been known to both German and Israeli authorities; and he was mistakenly identified by witnesses, including in open court! The risk of a show trial based on quasi-evidence is always in the wings of adjudication on politically and historically contentious events.

Nevertheless, it can be said that in the span of 70 years much has been accomplished to ensure that Holocaust crimes are paid for. Private initiative and advocacy deserve considerable credit for this success, partial as it were, for persistently urging the governments to effect legislative and policy changes necessary to remove the remaining obstacles, for conducting historical research and preserving information that would have otherwise been lost, and for raising public awareness about the painful past in the countries where the crimes had been committed. Despite best efforts to seize every 'last chance' that presents itself, total accountability has remained an impossible dream.

Justice and its dilemmas: Is there a point?

Last, over and above the obstacles just mentioned, there are subterranean but fundamental questions about the very point of justice and moral dilemmas which its uncompromising pursuit has to put up with. These dilemmas are relevant to the project of international criminal justice, although they are not often voiced in that context. We are leaving aside the disagreeable—and demeaning—sport and action-movie connotations of the words *operation* when used next to *justice* and *hunt* when referring to *human beings*, even those amongst them who are suspected of the worst atrocities imaginable. Suffice it to note that such misconceived manners of attracting attention to the problem of impunity have made their way into the ICL enterprise, which cannot do the project any good.

Other than that though, some observers may share a feeling of unease when contemplating the 'justice being done' to a 90-year old person in extremely poor health. A person who, despite having being found fit to stand trial, *sits or lies* through it in a wheelchair instead, being able endure no more than a couple of hours a day, until the moment he can't rise from the deathbed.

(Ivan Demjanjuk at the time of his 2011 trial in Munich)

Of course, age limitations are legally irrelevant. But as one watches the trial of the two surviving former Khmer Rouge leaders before the ECCC, Khieu Samphan (82) and Nuon Chea (87)—in the ECCC custody since 2007 and on trial since 2011—a disturbing and even blasphemous question arises: are we doing the right thing? Is it seemly 'to fire on hearses and those who are about to die' (a charge provocatively thrown at the ECCC bench by late Jacques Vergès)? The justice effort is racing against time, and the inevitability of the 'biological solution' invites one to rethink the limits of human judgment in trying to discern the point at which it should step back before human compassion. Although our competence to question Justice is bound to be challenged, it is still not clear whose compassion matters and in whom the 'moral imperative' of the ICL resides – victims, institutions, their mandate-sponsors, or perhaps in each of us? Whilst the legitimacy of the project could instinctively be drawn from the victim constituency, it is always tempting—and possible—to mold the supposed 'personal interests' and needs of victims into the constraints of the legal and institutional framework available, thus effectively turning such interests into a rhetorical fetish and object of manipulation.

Many of those who believe in retributive justice would agree that we are doing 'the right thing' by going to great lengths to put aged Nazi (or Khmer Rouge) cadres on trial: everyone who commits atrocities must pay for them, sooner or later. Still, this does not invalidate the question of whether we are doing the 'right thing' in the 'right way'. Where there is no visible prospect that the trial would be completed, the verdict rendered, and, in case of conviction, that a single day of the penalty would be served, we may in fact be justifying the prosecution effort by the special hardships it brings to the old men in the dock at their age. If so, the criminal process is being utilized as a tool of punishment – an 'advance payment' of sorts before the verdict which we don't believe will come. This conflicts not only with principles of retribution but also with the utilitarian and expressive rationales for punishing someone, as the practice inevitably raises doubts in the minds of those who are to benefit from the putative 'didactic effects' of justice. The determination to proceed in any event and in the way we are used to—simply because we don't know how else we could it—is an unpersuasive and debilitating justification which does not help legitimacy. Over and above fair and *a fortiori* expeditious proceedings, the cases of senior-aged accused may call for creative procedural solutions and flexible approaches. For instance, the ECCC's current framework may be ill-suited in this respect because confessions and agreements on facts are not apt to result in significantly shorter trials, let alone in trial-avoidance. By contrast, the cases of terminally ill defendants at the *ad hoc* tribunals (e.g. Milan Simić at the ICTY and Joseph Serugendo at the ICTR) were processed through (negotiated) guilty pleas and have arguably struck the fine balance between judgment and compassion. In the narrowest of circumstances, consensual or negotiated dispositions may be optimal for both moral and policy reasons, and such legal option should be provided. This is not a panacea but only underscores that doing justice is all about *how* one does it.

Another parallel with international criminal justice 'operations' conjured up by the Nazi-hunters' movement is that both are susceptible to the perennial selectivity objection. It goes like this: a class of alleged war criminals is pursued systematically and forever and the respective class of victims is vindicated. But other possible perpetrators of comparable atrocities are not 'hunted' down, or not to the same extent, only because their crimes happen to have been committed in the context of a humanitarian crisis which is deemed 'less relevant' or has been brought by those politically powerful enough to evade prosecution. This comment cannot do justice to the complexities of this challenge, which is arguably the principal question to which international criminal tribunals and their architects are yet to give a convincing response on a systemic level. However, this objection to the legitimacy of

pursuing justice in specific cases is difficult to accept. The inequality of enforcement flowing from its non-universality and derivative constraints, does not *per se* remove the righteousness of the claim to justice. If it is true that 'injustice anywhere is a threat to justice everywhere', then 'justice anywhere is a chance for justice everywhere' is the flipside of the same coin. The flowers of justice sprout in wicked places; suggesting that they should be uprooted because they have grown amid the weeds of injustice is an absurdity.

What can be learnt from longstanding efforts to achieve individual criminal accountability for the Holocaust in the past seven decades may be this: justice is always inconvenient, liable to denunciation, and susceptible to interference. As any human enterprise, it is a fragile affair and regardless of how strong the institutions, it hinges on insistence, perseverance, and frantic efforts by individuals and (international) civil society – and often on pure chance. The ebbs of misalignment and tides of endorsement by its tactical supporters should not make the ICC lose its sense of mission and its proponents their moral compass. Like with the post-WWII quest for accountability, they ought to accept the melancholy fact that the business of justice is never finished and seek comfort in doing whatever is possible and necessary. Ultimately, the point is in the process itself, in its fairness that falls to them to ensure, and in precedents and discourses it generates, not in specific outcomes such as could be measured by a number of cases, types of verdicts, or by the length of sentences that are handed down.