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London School of Economics and Political Science

JUSTICE AS POLICY AND STRATEGY: A STUDY OF THE TENSION
BETWEEN POLITICAL AND JURIDICAL RESPONSES TO
VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW

Thesis submitted to the University of London in fulfillment of the
requirements for the degree of Doctor of Philosophy in International
Relations

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ABSTRACT

In the decade of the 1990s international criminal justice and the international tribunals that enforce it emerged in international society as a major dimension of international relations. This has led to a widely held belief -- further strengthened by the establishment of the permanent International Criminal Court -- that genocide, crimes against humanity and war crimes will now consistently be punished by a legal sanction that was previously lacking. The literature in the field has overwhelmingly fostered this impression. But international criminal tribunals are created by sovereign states. Despite the rhetoric that drove this surge in the 1990s, because international justice is part of international relations, it is subject to the strategic imperatives of states, civil society and other actors, and these frequently clash. Thus it is argued that international justice can be most accurately explicated from the perspective not solely of legal rules of international humanitarian law, but from that of the theories and practice of international relations. The Nuremberg trials generated precedents in international law that have given impetus to the movement for individual criminal accountability. But to stress this fact alone is a selective reading of history, for the trials were essentially a case far more of justice as strategy than justice as policy. The nature of the international society means that the relationship between justice and the order that sustains that society is largely, though not completely, one of tension and contradiction. This thesis examines these tensions and contradictions and how they are resolved. It shows that the (anarchical) international society, and not the much talked about "international community" is the dominant context of how international justice actually works. The ad hoc tribunals do not represent the enthronement of justice as policy, but rather are political responses to crimes in selected, narrow geographies in which the society of states chose not to exercise political options that would have led to preventive action. The International Criminal Court does not represent "the end of history" in international justice. Efforts by liberal internationalism to universalize international justice through universal jurisdiction have been largely unsuccessful. So have the attempted prosecutions of persons who are seen as guardians of particular national, regional or international orders. And efforts to give the jurisdiction of the ICC primacy over that of sovereign states and limit the scope of action of some great powers have been robustly resisted. These cases demonstrate that, for as long as states remain the predominant organizing unit of international society, these tensions will remain. The international justice we see is conditional -- one that is selective, inconsistent, and either serves strategic ends or is only a product of political compromises at convenient moments.

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Minor Corrections to the Thesis – 443-445

Preface

This thesis attempts to examine the concept and phenomenon of international criminal justice from a political and strategic perspective. It analyzes the place of legal justice for violations of international humanitarian law by war crimes tribunals in international relations, the rise of these kinds of courts and their limits in a world of states, and the tensions between the political responses to international justice and the aspirations of “legalism” to neutrality, consistency and universality.

The working hypothesis of this inquiry is that the relationship between international justice and sovereign states, portrayed through the perspective of “order”, is a complex one, and that the assertion that globalization or cosmopolitanism has become the defining character of international justice is overstated and overrated. I attempt to demonstrate this hypothesis from a conceptual perspective (positing that the “international society” perspective of the “English School” of International Relations, not the “international community” approach, is still the dominant influence in international justice), a case study of the International Criminal Tribunal for Rwanda, and a concluding examination of the International Criminal Court.

The thesis has its origins in my association with international justice as a legal and policy adviser in the ICTR for five years, my career in the United Nations in general over the past 13 years, and a long-held desire to reflect in-depth on a topic of international law and politics and attempt to make a contribution to knowledge on the subject matter through a PhD thesis.

Not surprisingly, researching and writing this thesis has been a most fulfilling task despite the “distraction” of having to work full time on a day job while doing this. And it

has been possible only because of the support of individuals whom I acknowledge here with heartfelt gratitude. I was fortunate to have been supervised by Dr. Peter Wilson, Senior Lecturer in the IR Department at LSE. He introduced me to the English School and the influential work of Hedley Bull, and that introduction helped sharpen the line of inquiry I followed in this thesis – one that I believe is more original and provocative than the lines of “conventional wisdom” I might otherwise have followed. Of course I take full responsibility for any shortcomings. I am grateful to Dr. Wilson for his guidance.

I am also grateful to Professor William Wallace (Lord Wallace of Saltaire), former Director of the Doctoral Program in IR, whose decision to admit me to the program gave me such a great opportunity to explore new ideas. Angeline Djampou, Chief Librarian at the ICTR, gave me wonderful support through the online research assistance she so consistently provided. This thesis would have been so much poorer without her help.

The love and companionship of my wife Maryanne made this work possible, and I cannot measure that gift. She provided the supportive environment without which this would have been a much harder task. My children Tobenna, Sochi, Yagazie and Chidera, who initially wondered why Daddy was “always writing” but later got used to it all, also deserve my thanks and gratitude for their family time that this project severely ate into. I hope that as they grow older and read this work, they will understand.

I am eternally thankful to my parents Isaac (now deceased) and Vidah Moghalu for their love and nurturing, encouraging my aspiration to undertake a task such as this in my education. My father is not alive to hold this in his hands, but the seed he planted bore fruit.

Finally, I thank God Almighty for the inspiration, and for making it all possible.

PART I
THE CONTEXT

Chapter 1

Introduction: War Crimes Justice in International Relations

In the spring of 2005, as countries seeking permanent seats in an enlarged United Nations Security Council crisscrossed the globe lobbying for their favored outcome in the context of proposals to reform the organization,¹ Japan's bid for a permanent seat ran into a significant obstacle. Twenty-two million private Chinese citizens, with apparently tacit approval of their government, signed a petition seeking to have the Chinese government use its veto power in the Council to block Japan's bid for admission to the most elite club in world politics, one entrusted with the responsibility for the maintenance of international peace and security. The campaign was soon followed by angry demonstrations in Beijing and other Chinese cities including Chengdu, Shenzhen and Guangzhou in which Japanese shops were vandalized and its embassy pelted with stones and eggs.² China's angst was fed by simmering tensions over war crimes committed by Japanese forces in China during World War II, for which Japan had declined to apologize and stood accused of historical revisionism.

As tensions rose in East Asia, some commentators argued that Japan, which has long sought increased political clout to match its economic one, had to come to terms with its past in the region if it wanted the region's cooperation in its quest for a permanent seat at the Security Council. A newspaper editorial in the Gulf state of the United Arab Emirates put the demand starkly:

Having mastered economics and technology, Japan is still having trouble with history.

Admittedly, it is in a neighborhood where history is held hostage to the present. The

North Koreans treat it as party propaganda, while the Chinese are extremely selective about what they teach schoolchildren.

The trouble for Japan is that its inability to come up with a history syllabus that acknowledges the brutality it inflicted on its neighbors during the Second World War is tarnishing its future prospects. The latest attempt to rewrite its history textbooks brought a chorus of condemnation from both China and South Korea. That's bad enough but this is a pivotal year for Tokyo as it tries to press its case for a permanent United Nations Security Council seat. Its prospects of sitting at the highest table in world diplomacy are lessened by its constant refusal to teach its young about dark deeds that occurred generations ago. For Japan to secure its future, it must come to terms with its history.³

Others argued that enlarging the Security Council without Japan (other states such as Germany, India, Brazil, Nigeria, South Africa and Egypt have sought permanent membership on the strength of a case for a broad-based decision making body) would “make nonsense of the whole exercise” and that Japan’s membership was necessary to check China’s rising influence in the region.⁴ If anyone needed any demonstration of how war crimes – and questions of justice for them – affect world order, this was it. A reform proposal for a modification of the architecture of multilateral diplomacy in the 21st century had run into unresolved tensions with roots in violations of international humanitarian law committed early in the 20th.

This thesis seeks to establish the political nature of legal justice for violations of international humanitarian law by analyzing *why* and *how* such justice is affected by political considerations. To that end I will undertake a novel application of an existing theoretical perspective in international relations to international justice for war crimes.

There are few ideals that capture the popular imagination as the concept of justice. That crimes or violations of the rights of individuals and groups should be punished or otherwise rectified, and that wrongdoers get their just desserts. That is why trials for mass atrocities such as genocide, crimes against humanity and war crimes are such flashpoints in national and international society. These crimes are often committed by powerful political leaders and armed forces and target groups of people by reason of their ethnic, political or religious affiliation, or in the case of war crimes, target military personnel and civilians in ways not permitted by the laws and customs of war. Collectively, these crimes, whether committed in times of war or peace, constitute violations of international humanitarian law.

International Humanitarian Law

International humanitarian law has for several centuries referred to a set of standards to be observed by parties in armed conflict, and so has historically been largely applicable to soldiers. It was aimed at humanizing war – an oxymoron⁵ -- by protecting wounded and sick soldiers and prisoners of war, and delineating what methods and means may or may not be used in combat.⁶ Following U.S. President Abraham Lincoln's promulgation of the "Lieber Code" (*Instructions for the Government of the United States Armies in Field*) that codified the customary law of war on land during the American Civil War, these humanitarian standards were codified in the Geneva Conventions of 1864, 1929 and 1949, and the two sets of treaties signed at The Hague in 1899 and 1907, widely known as the Hague Conventions. The Geneva Conventions aim to provide legal protection for

victims of war, while the Hague Conventions regulate *how* and with what means war can be legitimately fought.

The instruments of international humanitarian law were initially applicable only in international armed conflicts, and then only to soldiers and not civilians. But through the Geneva Conventions of 1929 and 1949 they were respectively extended to civilians and the non-international conflicts that have constituted the bulk of contemporary wars. Within the wider framework of the protection of human rights, international humanitarian law has also become increasingly applicable in times of “peace” in which there may be no easily definable conflict between two or more parties. Thus genocide and crimes against humanity do not require a war in order to be committed; they can be perpetrated against civilians in peacetime for purely political or at least non-military reasons. The nature of acts that constitute violations of international humanitarian law remains in constant evolution. With the establishment of a permanent International Criminal Court, the ambit of these crimes has expanded to include attacks against United Nations peacekeepers. In the war against terrorism, the status of captured terrorists under the Geneva Conventions has become a matter of legal and policy debate⁷.

International humanitarian law has long been part of mankind’s recorded history, but became codified only as from the 19th century. As Yves Beigbeder has observed, moral, philosophical and religious considerations led to the setting of unilateral and bilateral agreements seeking to contain and limit the cruelty of war⁸. In *The Art of War*, the acclaimed Chinese classic on war and military strategy written by Sun Tzu in 500 BC, Tzu laid down the limits of what was permissible in war: the need to avoid excessive violence and a ban on the complete destruction of enemies⁹. In India, the Hindu code of

Manu, developed around 200 BC, contained references to, and prohibitions of war crimes such as the killing of an enemy with a concealed weapon, attacking a combatant who has surrendered, and attacking a wounded or fleeing enemy.¹⁰ These standards were progressively adopted in Europe between the fourth and 15th centuries A.D., including the issuance by the Swedish King Gustave II Adolphus of the *Articles of War* decree in 1621 in which rape in war was to be met with capital punishment. Although violations of international humanitarian law are punishable under international law – and in some cases in national jurisdictions – there have been very few instances of enforcement of these prohibitions despite the historically loud abhorrence of such crimes expressed by political and military leaders. This is a central challenge that international humanitarian law continues to face, for reasons that are precisely the subject of this inquiry.

Justice – Some Definitions

The popular fixation with the idea of justice actually springs from a certain duality in human nature. There is a strong instinct towards injustice because unjust acts frequently procure some advantage for the person who is unjust. But the evil that the victim of injustice suffers far outweighs the temporary benefits injustice confers on the person who commits it, and the instinct to be unjust has come to be checked by law and by moral precepts¹¹. There is thus a certain tendency to see war crimes trials, somewhat romantically, as mechanisms for neutral, impartial justice meted out to the really nasty fellows who commit egregious violations of human rights – “ethnic cleansing”, raping and pillaging war victims, and so on. That is undoubtedly the case. But it is an incomplete picture. This is so because war crimes justice is framed and carried on in a

political context of sovereign states. War crimes tribunals are created by political bodies and processes, be they decisions of the United Nations Security Council in the case of the ad hoc international criminal tribunals for the Former Yugoslavia and Rwanda, agreements between sovereign states and international organizations such as the U.N. in the case of the Special Court for Sierra Leone, domestic war crimes tribunals such as the Iraq Special Tribunal, or a multilateral treaty in the case of the permanent International Criminal Court. The political and strategic considerations of states are thus frequently factored into decisions and negotiations on the formation of international criminal tribunals.

There are several kinds of “justice” in international affairs. I use the term not in the general sense in which it is conflated with morality, but rather in a number of related senses. The first is justice as equality of rights and privileges, “equality in the distribution or in the application of rights as between the strong and the weak, the large and the small, the rich and the poor, the black and the white, the nuclear and the non-nuclear, or the victors and the vanquished”¹². The second is justice in the specific context of the equality of such rights and privileges before the law, referred to as formal justice¹³.

This study, then, explores the term in an institutional legal sense, one in which duly constituted courts mete out retribution and restitution for actions defined and accepted as crimes in international humanitarian law. One author has termed this “legalism”¹⁴. My main object of examination is international criminal justice, but national legal processes that have -- or claim -- jurisdiction to hand down justice for international crimes will be reviewed where appropriate. Just as national jurisdictions may in some instances assert a role for themselves in international criminal justice, the

distinction between the international and the strictly national has been further blurred by a sharp rise in civil wars within states in which international humanitarian law issues are directly relevant, as opposed to conflicts between sovereign states that characterized war prior to the second half of the 20th century. Indeed, “war” and “war crimes” are very limited concepts that are part of a wider spectrum of international humanitarian law that juridical interventions may seek to address. I nevertheless use the phrases “war crimes”, “war crimes tribunals” and “war crimes justice” in a general sense for simplicity, without prejudice to the specific discussions of war crimes in their technical sense.

In discussing war crimes justice and tribunals, another distinction is necessary for the sake of clarity. That distinction, aptly captured by Hedley Bull, is one between what he calls “international or interstate justice”, “individual or human justice” and “cosmopolitan or world justice”. International justice deals with the rights and duties of sovereign states in international relations on the basis of sovereign equality; individual justice encompasses the rights and duties of individuals as subjects, not just objects, of international law; and cosmopolitan justice embodies a radical *transnational* extension of individual justice. Regarding the third leg of this conceptual tripod, Bull expounds:

These are ideas which seek to spell out what is right or good for the world as a whole, for an imagined *civitas maxima* or cosmopolitan society to which all individuals belong and to which their interests should be subordinate. This notion of justice as the promotion of the world common good is different from that of the assertion of the rights and duties of individual human beings all over the globe for it posits the idea that these individuals form or should form a society or community whose common interests or common good must qualify or even determine what their individual rights and duties are, just as the rights and duties of individuals within the state have in the past been qualified or

determined by notions such as the good of the state, the greatest happiness of the greatest number of citizens, or the general will...¹⁵

These distinctions generate certain tensions, with each form of justice seeking dominance through various agencies, be it governments, transnational civil society, or other actors.

Inherent Tensions

This central purpose of this work, then, is to explore the tensions between political and strategic responses to violations of international humanitarian law, on the one hand, and legalist responses, on the other. The sponsors of judicial interventions often present war crimes tribunals as designed to build or maintain international peace by bringing justice to bear on situations where its absence is a major cause of conflict. In this sense law is brought into the service of what is essentially a political goal. A description of war crimes justice as “political justice” is thus a very apt one¹⁶. It has been defined as “the use of legal institutions and processes to create, sustain and a legitimate a particular order...”¹⁷ But the assumed logic inherent in formal justice (that no one or interest above the law, and that justice is completely neutral) frequently clashes with political considerations that are not so pure; and tensions develop between justice and these other interests. Judicial approaches to conflict resolution can also be either a fig leaf for political inaction, or part of a larger strategy that is not always altruistic, with “justice” serving as a means to that end.

The above-mentioned tensions operate at three levels. The first tension is the internal and external selectivity of international criminal justice. Internal selectivity applies to the definition of what is a crime in international humanitarian law. Genocide,

crimes against humanity and violations of the laws and customs of war are all grave crimes. But what about high-altitude “precision” bombing that produces immense collateral damage during warfare, or the targeting of electrical grids or other objects or spaces used by civilians? As well, the legal status of the threat or use of nuclear weapons in international humanitarian law remains hazy¹⁸. This internal selectivity is one of the more endogenous characteristics of international criminal law. These contradictions exist because, for example, the states most likely to engage in high-altitude bombing are the powerful states in the international society, which have the technology to fight air wars that expose their soldiers to an absolute minimum of risk. The external selectivity is that which delimits where and to whom accountability for violations of international humanitarian law can apply. Thus there are international criminal tribunals for Rwanda and the former Yugoslavia, but not for Liberia, Sri Lanka or Indonesia, among the many conflicts in which mass atrocities have been committed.

The second level of tension is the occasional clash between cosmopolitan conceptions of justice and domestic order in its most basic form -- stability. This tension is real because, although justice is a constitutive principle of order, it does not follow that the two are never in tension. That tension is at its most glaring in the context of transitional justice in domestic societies emerging from conflicts. Here there are situations when insisting on legal justice for violations of international humanitarian law may threaten or hamper societal stability, as was the case in South Africa’s transition out of Apartheid. This tension is discussed in Chapter 4.

A third level of tension is one between cosmopolitan notions of international justice and that of international order, defined by Hedley Bull as “a pattern of activity that

sustains the elementary or primary goals of the society of states, or international society”¹⁹. This tension is largely due to the sovereignty that asserts the primacy of states within their territories except when they give it up of their own volition, for example in a bilateral or multilateral treaty. This tension is best reflected in the controversy over “universal jurisdiction” -- justice *sans* frontiers for mass atrocities – by national or international courts. I treat this tension in Chapter 5.

A related goal of the study is to ascertain the sociological impact of judicial intervention as a tool of conflict resolution. How effective are criminal trials for mass atrocities? Do trials – as often argued by their proponents – contribute to healing the wounds of fractured societies, or do they in fact work against this goal? Is deterring impunity enough, or must we go further to achieve reconciliation in the sense of forgiveness? This aspect of the inquiry is also linked to the order/justice tension in so far as some policy approaches to conflict resolution recommend not trials (seen from this perspective as potentially disruptive of order), but pardons or other forms of non-legal or quasi-judicial processes that favor the primacy of political approaches. In so doing, the goal is to preserve a strategic balance of power between the state and the rights of the individual. From the perspective of order, that balance requires that while the rights of individuals are certainly to be respected, to accord individual rights supremacy over the collective interests of the state may create disruptions that are harmful to the interests of both the state and the individual.

Theoretical Traditions in International Relations: The Link to International War Crimes Justice

Examining international criminal law and justice and the tribunals that are created to enforce these concepts from the perspective of international relations and theories about them might seem odd to those who believe that these tribunals are purely legal institutions. The question arises: is it necessary to write about war crimes justice and tribunals against the background of international relations theory? Can the story of war crimes tribunals not be told directly as one of legal institutions in international law? Doubtless it can, and has. But as noted earlier, the political/strategic contexts (and the tensions that flow from them) are real. Undertaking such an inquiry is thus appropriate and desirable, because international law (including international humanitarian law) does not exist in isolation of other aspects of international relations. International law facilitates, and is partly a creation of, international relations – although the latter is a much more recent term. International relations in turn rest partially on international law as a major plank of its constitutional structure²⁰. As Kenneth Abbott has persuasively argued, “[International Relations] helps us describe legal institutions richly, incorporating the political factors that shape the law; the interests, power, and governance structures of states and other actors; the information, ideas, and understandings on which they operate; [and] the institutions within which they interact.”²¹

The discussion would not seem so odd to an international relations scholar, although very few such scholars have in fact entered into such a conversation on the subject, and this inquiry will be one of the very few book-length works to do so²².

Moreover, the few attempts that have been made in academic journals in recent years have tended to hitch the nature of international criminal justice either to the liberal agenda or to the realist paradigm²³, with no middle ground in between.

That gap exists perhaps because after the war crimes trials at Nuremberg and Tokyo, there were no *international* tribunals for war crimes until the 1990s. The hunt for Nazi war criminals continued for several decades after World War II, but it was undertaken by *national* jurisdictions. International humanitarian law was thus left to the province of idealistic lawyers who kept alive the hope for the creation of a standing international penal tribunal to adjudicate genocide, crimes against humanity and war crimes, the jurisdiction of which would override that of states. It is increasingly understood by several international lawyers and international relations scholars that this gap ought to be closed, or at least bridged, in order to attain a fuller understanding of the phenomenon that is international criminal justice²⁴.

The point having been made, I hasten to add that theories of international relations are sophisticated and complex. To combine them with an examination of international criminal law and institutions is even harder, as one must choose, within the constraints of space and priorities, between extended theoretical explications and the establishment of empirical knowledge about how politics and strategy affects the actual operation of these processes and institutions. The aim of this work is thus not to do justice to theories of international relations, but only to utilize them as an introductory context for situating war crimes tribunals as political and legal institutions. As such, while attempting to position the subject against a theoretical backdrop, empirical analysis of the politics of international criminal justice, not grand theory, is my objective.

In that context it is important to review briefly the most relevant theories of international relations that explain policy and strategy towards war crimes justice. There are several distinct theoretical traditions that could form a basis for understanding and interpreting the politics of justice for violations of international humanitarian law. These include realism, liberalism and the rationalist-pluralism of the “English School” of international relations. Terry Nardin and David Mapel discuss the first two and several others in their joint work on theories of international relations²⁵. But they do not discuss the third, which is my preferred approach for reasons I will explain below. These traditions, in particular realism and liberalism, have several offshoots or successor theories such as neo-realism (as distinguished from classical realism), neo-liberalism, the declaratory tradition, and social constructivism.

Classical Realism

Classical realism’s most dominant characteristic is its skepticism about the role of morality in foreign policy: states must act of necessity to survive, protect their interest, and expand their power in a hostile environment. From this perspective, international criminal justice is not a preferred approach from the standpoint of a classical realist paradigm, for realists favor political and military solutions to the kinds of problems that international criminal tribunals address. To the extent that realist states enter into treaties, they do so not by reason of any attachment to legalism or international cooperation for its own sake, but rather from self-interest. Generally speaking, realists tend to have a more bilateral than multilateral approach to international relations, although it has been argued that this logic is not borne out by the proliferation of multilateral institutions promoted by

the United States after World War II²⁶. To this it can be said in response that a major factor in attitudes to multilateralism is the domestic political leaning of the government of a strong state such as the United States, as well as the unique context of post World War II.

Classical realism holds that not only is the international realm anarchical, but states that act on the basis of morality or good faith endanger their very survival. Necessity thus precludes being swayed by moral arguments in world politics, even as realists recognize the need to acknowledge morality as a factor in the domestic sphere. The Florentine political theorist Niccolo Machiavelli remains the archetypical advocate of classic realism. He was a strong proponent of territorial expansion and pre-emptive war to thwart perceived security threats, so much so that the Romans have been described, in Machiavellian logic, as having “conquered the world out of self defense”²⁷. But degrees of difference exist in realism. The Greek historian Thucydides exhibited a more sophisticated kind of realism that acknowledged the role and place of ethics in international politics, and the tension between the latter and realism. Thucydides’ *History*, an account of the Peloponnesian war between Athens and Sparta, dealt with this tension. In that account, the commencement by Sparta of a war with Athens in breach of a treaty because the former was threatened by the latter’s imperial expansion, the dialogues that accompanied the ebb and flow of war, and the subsequent massacres of the citizens of the island of Melos by Athenian forces after the failed Melian Dialogue, go to establish that in international politics, there can be no justice between states of unequal power²⁸.

Other classical realists include Thomas Hobbes, Benedict de Spinoza, and Jean-Jacques Rosseau. Hobbes, who founded the “social contract” school of the realist

tradition, believed that man existed in “a state of nature” characterized by war, and that this state of affairs led to the formation of society as an organizing unit. Spinoza’s thought did not acknowledge any notions of international justice, though he recognized the value of alliances and treaties. He believed, however, that treaties were instruments of convenience from which a party could opt out if circumstances changed. Significantly for the purposes of this discussion, he believed that a state’s obligations were solely towards its subjects, and abiding with treaties and international agreements that were unfavorable from that perspective was a violation of this trust. Latter day realists such as Hans Morgenthau also subscribe to this view of the linear relationship between a state, its citizens and international obligations. As we shall see in subsequent chapters, there are parallels between contemporary interpretations of international law and international justice by some states, such as the United States, and Spinoza’s political philosophy.

Rousseau subscribed to a somewhat milder version of realism than Hobbes and Spinoza. Of relevance to our subject, he believed that justice inhered only in the “general will”, and as such is what a political community wills for itself. In Rousseau’s framework, this political community did not extend into the international realm. He opposed the view, popular in his day and now, that inter-state trade and interdependence were disincentives to conflict, arguing that state interests were more fundamental than commerce.²⁹ Rousseau believed that only a European federation with enforcement powers could prevent and end the state of war he believed Europe to be experiencing in his day, but was skeptical that this would ever happen because states guarded their sovereignty jealously.³⁰

Classical realism has been criticized for its exaggeration of the concept of anarchy. Its critics would have it that anarchy is the exception, not the norm in world politics. These critics point to the great volume of cooperation that occurs in international affairs and note that interdependence is a stabilizing influence. Neo-realists are skeptical about the impact of institutions or “regimes” on state behavior, and assert that the nature of cooperation, when it does occur, is shaped by the distribution of power. Realists rest their case on a cynical view of human nature that necessitates eschewing faith in morality. They do not attach great importance to human rights as a component of foreign policy, and on the occasions they may do so, it could only be as a means to an end and not as an end in itself. Clearly, war crimes tribunals sometimes perform this function for realists.

The Liberal Tradition

Liberalism is directly opposed to realism. Where realism is cynical, liberalism is predicated on ideals and a moral view of world politics. This tradition has its roots in the existential and political philosophy of Immanuel Kant (1724 – 1804). Kant believed that all action must be guided by an understanding of reality that is *a priori*, which is to say, innate, and prior to experience. This moral philosophy led Kant to postulate the “categorical imperative” that requires us to treat our fellow human beings as having intrinsic value.³¹ This, to Kant, was what reason demanded.

Kant’s philosophy, as applied to international relations was a “cosmopolitan doctrine that treats all human beings, by virtue of their shared rationality, as citizens of a single moral order”.³² Three guiding concepts emerge from Kant’s “Metaphysical

Elements of Justice” in *his Metaphysics of Morals and Perpetual Peace*. First, he believed that the state is a moral person. Secondly, he argued for the original and common ownership of the earth and its resources by all its inhabitants. Thirdly, he postulated an imperative to achieve perpetual peace based on the abolition of standing armies, democratically elected governments, and the non-interference by force by states in each other’s constitution or government³³.

Liberalism, then, is Kant’s philosophical legacy. It is wedded to the notion of individual liberty, its protection and expansion. The states that were built on respect for these individual liberties, or claim to be so, and have democratic governments, are referred to in this work as “liberal states”. Historical experience in international politics has not been kind to the liberal tradition, though the tradition has gained adherence in the domestic sphere in the Western world and other places. In other words, liberalism has done far better in domestic contexts than it has internationally. According to Stanley Hoffman, “international affairs have been the nemesis of liberalism”.³⁴ Many of the cynicisms of the realists – the urge for survival and power, and savage wars -- have remained a conspicuous patch on the canvass of international relations. Building on Kant’s philosophy, liberals cling to their faith that reason and the more benign side of human nature will triumph over the statecraft of expediency. They are enthusiastic supporters of the promise of international law and institutions, and champion cosmopolitan human interests rather than narrow national interest. Realists respond that we are doomed to the limitations of the darker sides of our human natures.

Neo-liberals do not deny the anarchical nature of the international realm, the self interest that drives states, and the role of power. But they believe that international

institutions influence state action, and that the cooperative forum they provide is superior to what states, acting alone, can achieve.³⁵ Participation in international institutions is not, however, a liberal preserve. Realists also advocate participation actively in such institutions, but more selectively and not as an article of faith but rather by reason of rational calculations of self interest.

An important variant of liberalism, one that has contributed significantly to the tensions between order and the cosmopolitan view of international criminal justice in a world of sovereign states, is what has been described as the “declaratory tradition” of international law. Espoused by progressive academic international lawyers such as Richard Falk and international relations scholars such as Dorothy Jones, this tradition asserts what law *ought* to be, predicating such assertions on legally non-binding declarations of states and the writings of progressive publicists in international law³⁶. It is a quintessentially Kantian tradition because it does not ask the question: what *is* international law? Rather its point of departure is: what ought the law of nations to be? What would be a *just* law of nations?³⁷ Several states ask these questions in the conduct of their international relations or make statements that emphasize them. But the declarations of states, while sometimes genuine, are more often window-dressing. It cannot be taken for granted that such declarations are backed up by any intent to fulfill them. The implications of the declaratory tradition – and the tensions it creates – will be examined in Chapter 5 where I discuss the concept of “universal jurisdiction”. In a contradiction that will be examined in Chapter 2, these declarations have nevertheless raised thresholds of internal and interstate behavior.

The English School

In what is really the first attempt I know of to situate war crimes trials and tribunals in international relations theory, Gary Jonathan Bass has adopted the liberal paradigm in his study of such tribunals, arguing that the chief impetus for their creation is the urge to export to the international plane the liberal ideals of liberal states, in particular due process and the rule of law, or what he terms “due process across borders”³⁸. In this work I set out to establish that, appearances notwithstanding, liberalism is *not* the dominant motivation for the establishment or support of international war crimes tribunals by states, liberal or illiberal. I will offer an alternative conceptual framework for what I believe would be a more accurate understanding of international criminal justice and its institutions. That paradigm is that of an anarchical international society advanced by the English School of international relations, rather than an “international community” that is presupposed in the liberal ethical tradition or the cosmopolitan worldview.

But first, what are the English School and the international society? The two terms constitute a phenomenological and historical perspective of international relations that runs through the writings of a distinct group of scholars of international relations that originally came together as the British Committee for the Theory of International Politics, founded in 1958 with a grant from the Ford Foundation. The Committee was a group of scholars with close professional and personal ties that included Herbert Butterfield, Hedley Bull, Adam Watson, Alan James, Martin Wight, C.A.W. Manning, and R.J. Vincent among others. They are known mostly for their rationalist, or Grotian approach to international relations³⁹. Bull, the intellectual leading light of the English School in his

lifetime – and, I would argue, even in death – posited that the international order comprises a society of states that has established institutions of cooperation as a result of shared values but remains anarchical because there is no overall sovereign and states remain primarily self-interested⁴⁰. It is this divergence of interest, the unpredictability of actors in the international realm that stems from primordial self-interest that is defined as “anarchy”. This anarchy co-exists uncomfortably with the notions of cooperation in the international society. I will discuss the nature of the international society and critical perspectives on Bull in Chapter 3.

I adopt the international society approach of the English School to this study of international war crimes justice for three main reasons. First, it embodies a pluralist approach to the study of world politics. To adopt Robert H. Jackson’s definition of pluralism, the term means that “human conduct, taken as a whole, discloses divergent and even contradictory ideas, values, and beliefs which must be recognized by our theories, and assimilated by them, if they are to be faithful to reality.”⁴¹ The international society approach is sensitive to the voices of disparate political and legal theorists such as Hugo Grotius (rationalist), Machiavelli (realist) and Kant (cosmopolitan/revolutionary)⁴². As will become clearer in the chapters that follow, elements of all three voices will be heard in the politics of international justice for war crimes. Thus I recognize the influence of liberal assumptions, for example in demanding political action -- humanitarian intervention or legal accountability for violations of international humanitarian law, for example -- but question the assertion that those assumptions are a dominant factor when states actually create international criminal tribunals⁴³.

Second, for this reason, I posit that the international society approach is the most accurate prism from which to examine the phenomenon that is international criminal justice. It is a detached scholarly perspective that is not laden with a social or political agenda, such as the activist agendas of liberalism, the arguably static or inordinately self-engrossed world view of realism, or the radical cosmopolitanism of critical theory. There is a linkage between the two reasons above and my personal professional experience in international war crimes justice. As a practitioner for several years, I was motivated by a *cause* – that of justice. With the current benefit of a more distanced view of international criminal tribunals and an intellectual encounter with Bull’s *The Anarchical Society*, I see more clearly patterns that I saw then, but did not adequately analyze because I was attached to the perspective of cosmopolitan international justice that was inherent in my work at the time. This being an *intellectual* inquiry, I have chosen, while still basically sympathetic to the role of international criminal accountability even with its many imperfections, to follow the “evidence” to its logical conclusions.

The third reason for the choice of international society theory is that Bull’s *Anarchical Society* engages directly with the relationship between Order and Justice, which is an important theme of this work. While Bull has had his share of criticism regarding what has been described as the insufficient sophistication of his thinking in this area, I posit in the more detailed discussion of international society that he is not as far off the mark as some of his critics would have us believe⁴⁴.

In the context of the international society approach I also examine, mostly implicitly but sometimes explicitly, norms in their sociological, positivist meaning as how people (or states) usually behave, and norms in the moral sense as ethical standards

of human or state activity. Jackson notes this distinction but errs, in my view, when he refers to the latter sense of norms as “moral and legal”⁴⁵. For, as I demonstrate in Chapters 3 and 5, law and morality is not always the same thing in international relations. It is precisely for this reason that there exists in the field of international law, positive law (“hard law”) that is legally binding because it has been made by a body with the requisite authority, and progressivist attempts to expand morality or ethics into the status of law (declaratory law) that is in reality “soft law”⁴⁶. Resolutions of the United Nations Security Council, or treaties entered into by states on the basis of mutual consent, are examples of the former, while General Assembly resolutions and declarations are examples of the latter.

Bass sets out five propositions to support his thesis of liberalism as a driving force in the creation of war crimes tribunals. First, it is only liberal states that support war crimes tribunals. Second, even liberal states will be reticent to press for war crimes tribunals if that course of action increases the risk to their own soldiers. Third, liberal states are more likely to be outraged by war crimes against their own citizens than by war crimes against foreigners. Fourth, such states are heavily influenced in their support for war crimes tribunals by domestic opinion. And fifth, non-governmental organization (NGO) pressure groups frequently shame liberal states into action.

It is already apparent from a number of contradictions in Bass’s five points that the motivations of liberal states, acting in international affairs on the question of war crimes justice is not all that liberal. First, it is not the case that it is only liberal states that create war crimes tribunals or that even that where illiberal states support such trials, they are necessarily show trials, and that the motives of liberal states are purer. As is well

known, Russia supported and participated in the International Military Tribunal at Nuremberg, when it was not a “liberal” state and indeed was itself implicated in violations of international humanitarian law⁴⁷. British Prime Minister Winston Churchill, the leader of a liberal state, argued strongly (together with Joseph Stalin) in favor of summary justice at Nuremberg. And, as I argue in Chapter 2, the motives of the Allied Powers at Nuremberg were not altruistic. Moreover, Ethiopia, the “liberal” credentials of which are debatable, has conducted national trials for genocide and crimes against humanity since 1994, with its former head of state Mengistu Haile Mariam (who is in exile in Zimbabwe) and several of the defendants tried in absentia – just as France had argued that the German Kaiser Wilhelm II be tried in absentia after World War I.⁴⁸ The fact is that states, liberal or illiberal, can support international war crimes tribunals for any number of reasons, most of them more of political expediency than long-term policy.

Second, it has been the case that Western liberal states have supported war crimes trials precisely as an *alternative* to putting their soldiers at risk through military intervention. This is the “send in the lawyers” syndrome. It was the case in Bosnia, Rwanda, and arguably, will be in Sudan. Thus, as one scholar has noted, “some political interest remarkably short of liberal benevolence is an indispensable element in creating international criminal trials”⁴⁹.

Third, in citing the propensity of liberal states to be more interested in war crimes trials for offenses against their own soldiers rather than foreigners, Bass is in fact pointing to a realist, or at least international society tendency rather than a true solidarist legalism⁵⁰. Fourth, if liberal states are moved to push for war crimes trials by domestic legal opinion, then the (realist) arguments of Spinoza and Rosseau about the interest of

the domestic political community being paramount is actually brought into play, and so the motivation, again, is not that liberal-internationalist at all. The same could be said of pressure from NGOs as a motivating factor. It is clear, then, that “in terms of sheer causality, liberalism hardly works wonders”⁵¹ in this sphere of international relations. It has further been observed, critiquing Bass, that “if liberalism is just a predisposition ...and it is crucially in the conjunction of that predisposition and a realist interest that makes the creation of international criminal justice likely, then Bass seems to have heaped up so many qualifications on his hypothesis that it no longer stands”⁵²

Bass agrees that liberal states also commit atrocities, not at home but abroad, and that this hypocrisy does pose a considerable moral dilemma⁵³. While he treats this matter as a footnote, the exclusion of the crimes of powerful states from the sphere of international justice is actually one of its central features. It is not just an unfortunate sideshow to liberalism’s claim to export its values abroad. Thus it is not the exception; it is the rule. If this is the case, it follows that the liberal paradigm is not the best one into which to fit war crimes tribunals. The better perspective from which to examine war crimes justice is that of a pluralist international society in which the self-interest of states, the frequent use of international criminal tribunals to construct particular kinds of order in international relations, and some liberal ethics, combine.

If liberalism was the dominant factor in the establishment in the establishment of war crimes tribunals, there would have been many more such tribunals, established systematically and as a matter of course, to address the numerous conflicts for which the option of war crimes trials has been foregone by the great powers.

War Crimes Justice as Hegemony

Some other scholars have similarly noted that liberalism is not the dominating factor in the creation and work of such tribunals, but have ascribed the motivations of states in this context to realism. Thus the position has been advanced that “although liberal humanitarian ideas have created the demand for political action, the process of dealing with brutality in war has been dominated by *realpolitik* -- that is, the furthering the interests of the most powerful states”⁵⁴. Realism may be too extreme an ethic with which to define the creation of war crimes tribunals, although some elements of it undoubtedly play a role. Realism -- at least in its classical sense -- encompasses the use of violence where necessary. Moreover, hardcore realists do not believe that international war crimes tribunals established by international institutions are relevant, necessary or desirable as part of conflict resolution. The international society approach that mediates the extreme self interest of states with the element of cooperation that attempts to manage anarchy through consciously designed institutions, producing an ever-present tension, is more apposite. This is so despite constructivism -- a variant of liberalism that posits that anarchy in the international society is not immutable and that states can construct regimes that are less self-interested than realism’s constant harping on material power⁵⁵. Constructivism is, in my view, a possible alternative to English School theory in explaining international criminal tribunals -- and indeed the possibilities for much of international relations in general. But it does not accurately explain the international society, including the application of international criminal justice, as it currently operates. It only holds out the promise of what could be -- what *can* be constructed but in point of fact has not.

As a result of its nature, be it interpreted from the realist, liberal or international society perspective, international criminal justice is also hegemonic. Adam Watson, one of the founding members of the English School, has defined hegemony as “the material condition that enables one great power, or a group of powers, or the great powers in a system acting collectively, to bring such great pressures and inducements to bear that most other states lose some of their freedom of action de facto, though not de jure⁵⁶. Watson notes the two senses in which hegemony tend to be used in international relations. In the first, it refers to power relations and distribution -- military, technological, financial. In the second it is “the dominance of a particular idea or set of assumptions, such as economic liberalism and globalization”. While Watson aligns his definition of hegemony to the first sense of the word, I would apply it to international criminal justice in both its senses, with the second even more directly applicable to war crimes tribunals – seen as the latter are as “liberalism”. In fact, the first serves as the path-breaker for the second, for it is as a result of the military, technological and financial prowess of the great powers that their ideas and assumptions – including ideas about justice -- have become global. Importantly, Watson also notes that the concept of a hegemonic system is not restricted to governments, but as well to the activities of transnational civil society. This was clearly the case in the formation of the International Criminal Court, in which Western dominated “global” civil society, with their agendas set far more in New York than in Bamako or Brasilia, played an influential role in the emergence of a standing international court to judge war crimes⁵⁷. All of this is not to say that international criminal justice is good or bad, only that for a more complete understanding it is necessary to go beyond epiphenomena to examine its underlying

currents. It is only when we understand its nature and the context in which it operates that we can make a more informed judgment about its benefits and drawbacks.

Because the politics around international criminal tribunals are often expressed in the form of ideas, this process has resulted in such institutions being at the forefront of what has been described as “norm entrepreneurship”. In this sense international criminal tribunals or domestic tribunals articulate and enforce certain norms of state conduct and pressure states into adopting those norms in order to be seen as law-abiding members of international society⁵⁸. This is one role that international criminal tribunals play in the construction of international and domestic order.

But there are others who see this phenomenon as “façade legitimation”⁵⁹, with norms providing “the kinder, gentler face of naked power considerations in the pursuit of state interests”⁶⁰. Thus it is that one man’s norm entrepreneur may be another’s hegemon, for where the norms in question are not applied equally across the board, but rather selectively, it is a selective norm and may be seen as a form of ideological hegemony. In this sense, legalism as a response to mass atrocity is a Western ideal that those countries have sought to impose on countries of other political or historical cultures. It advances the power and influence of the states that project the norms and are keen to universalize them while retaining the freedom to deviate from the same norms for self-serving reasons. It does not matter that the norm may be objectively defensible or even desirable. One example is the Japanese reaction to the Tokyo war crimes trials as Western racism and imperialism (notwithstanding the fact -- conveniently forgotten at the time -- that Japan was a militarily expansionist state that attacked the United States and dragged it into World War II). Allied troops did not face trials for war crimes, which were

undoubtedly committed in the Allied bombings of cities with numerous civilian casualties. What right, then, an appraisal of norm entrepreneurship might ask, do powerful states have to impose their concept of war crimes trials on, say, African or Asian societies that may have other historically preferred notions of justice, or none at all in the case of war crimes?

The United Nations diplomat Shashi Tharoor has given an apt example of the hegemony of thought that is found in international criminal trials:

When the United Nations helped reconstruct East Timor from the devastation that accompanied the Indonesian withdrawal, we had to rebuild an entire society, and that meant, in some cases, creating institutions that had never existed before. One of them was a judicial system of international standards, which in practice meant Western standards, complete with the adversarial system of justice in which a prosecutor and defence attorney attempt to demolish each other's arguments in the pursuit of truth. The UN experts had to train the Timorese in this system. But they discovered that there was one flaw. In Timorese culture, the expected practice for the accused was to confess his crimes and justice to be meted out compassionately. In order to promote the culture of the not guilty plea required by the Western court systems, the UN experts had to train the Timorese to lie. Their mental processes -- their imagination -- had now been truly globalized.⁶¹

These, then, are the political and strategic issues this inquiry will examine. It will seek to establish that significant shifts in favor of human rights in international law notwithstanding, the perspective of a pluralist international society remains on the whole the more relevant in the activities of international criminal tribunals. The strategic

interests of states remain the most important factor in international relations, trumping justice or using it where necessary. While the normative shift has been created by a metamorphosis of the concept of sovereignty and the rise of the rights and duties of individuals in international law independent of the policy and strategy of states, it is tempered by the continuing influence of power and selectivity in the timing and scope of international judicial intervention.

This dissertation has four parts. The first is contextual and historical. In this chapter I have situated international criminal justice in international relations theory, examined and critiqued the (mostly implicit) dominant theoretical framework of much scholarship in international criminal justice – that of liberal internationalism – and indicated clearly the theoretical framework that is the dissertation’s point of departure: the international society as expounded by the English School. In the second chapter of the first part of the dissertation I examine the Nuremberg trials as a watershed in establishing international criminal justice as a practical possibility in the 20th century and the historical context for the subject.

In Part II I look at the conceptual framework, with illustrations of the dilemma posed by the interplay of political and strategic factors with those of legalistic responses to violations of international humanitarian law. I examine the nature of the international society in greater detail and relate that nature to how it defines and affects justice for violations of international humanitarian law. I then examine the tensions that demonstrate the strength of the international society approach to this kind of justice at a conceptual level, chiefly the tension between justice and order (or more popularly described as that between “peace” (in this sense stability) and justice, and the doctrine of

universal jurisdiction. Against this background, Part III (the empirical part) explores the quest for justice and accountability in response to the genocide and other violations of international humanitarian law in Rwanda in 1994 as the case study of this dissertation. There is no existing work of scholarship that has studied in dissertation or book-length detail the tension between order and the quest for justice in the work of the International Criminal Tribunal for Rwanda. As such the major empirical case study is one of pristine originality. Part IV looks to the contemporary and future evolution of justice for war crimes by examining the interplay of the clashing concepts of order and a cosmopolitan international community in the establishment of the International Criminal Court.

¹ See “In Larger Freedom: Towards Development, Security and Human Rights for All”, Report of the

Secretary-General, United Nations Document A/59/2005, 21 March 2005, 41-43.

² “A Collision in East Asia”, *The Economist*, 16 April 2005.

³ “Japan Must Come Clean on Its Past”, *Gulf News*, 7 April 2005.

⁴ “A Collision in East Asia”.

⁵ See Michael Walzer, *Just and Unjust Wars* (New York: Basic Books, 1977).

⁶ The status of nuclear weapons in international humanitarian law remains ambiguous. See the Advisory Opinion of the International Court of Justice on the Legality of Threat or Use of Nuclear Weapons, 8 July 1996, www.icj.org.

⁷ See Human Rights Watch, “Making Sense of the Guantanamo Bay Tribunals”, 16 August 2004, www.hrw.org.

⁸ Yves Beigbeder, *Judging War Criminals: The Politics of International Justice* (Basingstoke and London: Macmillan Press, 1999), 4.

⁹ Ibid.

¹⁰ Ibid.

¹¹ See Plato, *Republic* (Hertfordshire: Wordsworth, 1997), 38. This is part of an extended argument between the philosophers Glaucon, Thrasymachus, and Socrates on the nature and origin of justice.

¹² Hedley Bull, *The Anarchical Society: A Study of Order in World Politics* (Basingstoke and New York: Palgrave, 1977), 76.

¹³ Ibid.

¹⁴ Gary Jonathan Bass, *Stay The Hand of Vengeance: The Politics of International War Crimes Tribunals*, (Princeton and Oxford: Princeton University Press, 2000), 7.

¹⁵ Bull, *Anarchical Society*, 80.

¹⁶ Shane Brighton, “Milosevic on Trial: The Dilemmas of Political Justice”, www.bbc.co.uk/history/war/milosevic_trial.

¹⁷ Ibid.

¹⁸ Supra Note 6.

¹⁹ Bull, *Anarchical Society*, 8.

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- ²⁰ See Christian Reus-Smit, “The Constitutional Structure of International Society and the Nature of Fundamental Institutions”, *International Organization* 51:4, Autumn 1997, 555-589.
- ²¹ Kenneth Abbott, “International Relations Theory, International Law, and the Regime Governing Atrocities in Internal Conflicts”, 93 *American Journal of International Law* 361, 1999.
- ²² See Erik K. Leonard, “International Relations Theory and the International Criminal Court: Understanding Global Justice” (PhD dissertation, University of Delaware, 2001). See also Frédéric Mégret, “The Politics of International Criminal Justice” (Review Essay), *European Journal of International Law* 13:5, 2002.
- ²³ See, for example Christopher Rudolf, “Constructing an Atrocities Regime: The Politics of War Crimes Tribunals”, *International Organization* 55: 3, Summer 2001, 655 – 691. Rudolf asserts that “realist factors have dominated the politics of war crimes adjudication, but the atrocities regime is still in its infancy”.
- ²⁴ See Anne Marie Slaughter-Burley, “International Law and International Relations Theory: A Dual Agenda”, 87 *American Journal of International Law* (1993).
- ²⁵ Terry Nardin and David R. Mapel, eds., *Traditions of International Ethics* (Cambridge and New York: Cambridge University Press, 1992).
- ²⁶ Christian Reus-Smit, “The Constitutional Structure of International Society and the Nature of Fundamental Institutions”, 559. This interpretation assumes that U.S. foreign policy, especially post-1945, has been mainly realist.
- ²⁷ Steven Forde, “Classical Realism” in Nardin and Mapel, *Traditions of International Ethics*.
- ²⁸ Ibid.
- ²⁹ Ibid.
- ³⁰ Ibid.
- ³¹ See Thomas Donaldson, “Kant’s Global Rationalism”, in Nardin and Mapel, *Traditions of International Ethics*, 136-155.
- ³² Ibid, 143 – 144.
- ³³ Ibid, 145. See also Pierre Laberge, “Kant on Justice and the Law of Nations” in David R. Mapel and Terry Nardin, *International Society: Diverse Ethical Perspectives* (Princeton: Princeton University Press, 1998), 90-91.

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- ³⁴ Michael Joseph Smith, "Liberalism and International Reform" in Nadin and Mapel, 201.
- ³⁵ Reus-Smit, "The Constitutional Structure of International Society", 560.
- ³⁶ See Dorothy V. Jones, "The Declaratory Tradition in Modern International Law", Nadine and Mapel,, 42-60.
- ³⁷ Pierre Laberge, "Kant on Justice and the Law of Nations", in Maple and Nadin, *International Society*, 97.
- ³⁸ Bass, *Stay the Hand of Vengeance*, 16-36.
- ³⁹ Hidemi Suganami, "Alexander Wendt and the English School", *Journal of International Affairs and Development* 4 :4, 2001, 403 – 423.
- ⁴⁰ Bull, *The Anarchical Society*.
- ⁴¹ Robert H. Jackson, *The Global Covenant: Human Conduct in a World of States* (Oxford and New York: Oxford University Press, 2000), 83.
- ⁴² Ibid.
- ⁴³ See also Rudolph, "Constructing an Atrocities Regime", 656.
- ⁴⁴ See, for example Ian Harris, "Order and Justice in 'The Anarchical Society' ", *International Affairs* 69: 4, 1993, 725 – 741. See also Edward Keene, *Beyond the Anarchical Society: Grotius, Colonialism and Order in World Politics* (Cambridge and New York: Cambridge University Press, 2002).
- ⁴⁵ Jackson, *The Global Covenant*, 78.
- ⁴⁶ See Kenneth W. Abbott and Duncan Snidal, "Hard and Soft Law in International Governance", *International Organization* 54:3, Summer 2000, 421 – 456.
- ⁴⁷ See Michael P. Scharf and William A. Schabas, *Slobodan Milosevic on Trial: A Companion* (New York and London: Continuum, 2002), 44.
- ⁴⁸ See Bass, *Stay The Hand of Vengeance*, 87, for a discussion of the differences of view between France and Great Britain on this matter – French law allowed it; British law did not.
- ⁴⁹ Frédéric Mégret, "The Politics of International Criminal Justice".
- ⁵⁰ Ibid.
- ⁵¹ Ibid.
- ⁵² Ibid.
- ⁵³ Bass, Introduction, Note 108.

⁵⁴ Rudolph, "Constructing an Atrocities Regime", 656.

⁵⁵ Alexander Wendt, "Anarchy is What States Make of It: The Social Construction of Power Politics", *International Organization* 46:2, Spring 1992.

⁵⁶ Adam Watson, "International Relations and the Practice of Hegemony", Lecture at the University of Westminster, 5 June 2002.

⁵⁷ See Abram Chayes and Anne-Marie Slaughter, "The ICC and the Future of the Global Legal System" in Sarah B. Sewall and Carl Kaysen, *The United States and the International Criminal Court: National Security and International Law* (Lanham: Rowman & Littlefield, 2000), 242.

⁵⁸ Rudolph, "Constructing an Atrocities Regime", 681. See also John Hagan, *Justice in the Balkans: Prosecuting War Crimes in The Hague Tribunal* (Chicago and London: University of Chicago Press, 2003), 106.

⁵⁹ A phrase used by Martti Koskeniemi, "The Place of Law in Collective Security", *Michigan Journal of International Law*, Vol. 17, 471, quoted by George J. Andreopoulos, "Violations of Human Rights and Humanitarian Law and Threats to International Peace and Security", in Ramesh Thakur and Peter Malcontent, *From Sovereign Impunity to International Accountability: The Search for Justice in a World of States* (Tokyo, New York and Paris: United Nations University Press, 2004), 80.

⁶⁰ Andreopoulos, *ibid.*

⁶¹ Shashi Tharoor, "Globalization and the Human Imagination", *World Policy Journal*, Vol. XXI: 1, Summer 2004.

Chapter 2

Nuremberg's Legacy

You'll get a fair trial...and then I'm gonna hang you

Sheriff Dad Longworth to Marlon Brando in the movie *One-Eyed Jacks* (1961)

In the early 1990s, following the end of the Cold War between the United States and the Soviet Union, the wars that accompanied the disintegration of the Former Yugoslavia and the civil war in Rwanda led to the establishment of ad hoc international criminal tribunals to try individuals for violations of international humanitarian law for the first time since the Nuremberg and Tokyo trials after World War II. The Security Council of the United Nations established these Tribunals as part of its peace-enforcement powers under Chapter VII of the UN Charter, and these courts are subsidiary organs of the Security Council. That this is a major development in international relations is self-evident. That these tribunals are also inherently interventionist, intruding as they do on sovereignty, is obvious. International criminal justice is now a dimension in world politics in its own right, and judicial intervention has been established as one policy and strategic option for “the international community” in resolving conflicts. The work of the two United Nations-created ad hoc international tribunals provided the momentum for the eventual establishment of a permanent International Criminal Court.

The idea that states acting collectively can establish courts to adjudicate genocide and other serious violations of international humanitarian law has not happened in a vacuum. It has developed in the context of world politics. In that world the main players – sovereign states – are not disinterested parties. The realization of that idea is in fact a

product of world politics, inasmuch as such courts and tribunals have been established either by coalitions of governments victorious in war, as in the Nuremberg and Tokyo Tribunals, or through the instrument of the United Nations as a universal international organization. The International Criminal Tribunal for the Former Yugoslavia (ICTY) at The Hague, Netherlands, the International Criminal Tribunal for Rwanda (ICTR) at Arusha, Tanzania and the Special Court for Sierra Leone are examples of the latter approach.

Certainly, increasingly influential non-state actors in contemporary international relations such as non-governmental organizations and the media have played a significant role in these processes, chiefly through direct pressure on governments to “do something” in the face of genocide, crimes against humanity and war crimes, or indirect pressure through the mobilization of public opinion. But good intentions alone would not have created the instruments of intervention. It took political will and *decisions* by states as the dominant actors in world politics.

That states play such a critical role in international justice is not to say that there are no contradictions between the nature of world politics – and the interests of states therein – and the avowedly objective aims of international justice. And yet we live with the reality that, through the vehicle of human rights and international and national criminal tribunals, individuals have become important subjects of international law alongside sovereign states. The relationship between individual or human justice and rights, and that between justice and law, serve as an important context for peace and security: many of the order-disrupting conflicts that judicial intervention seeks to address spring from violations of human rights.

The two realities of order and justice, their common origins in states as the main organizing units of international relations, and the tension between the two concepts, present an important contradiction. Like much else in life, between black and white there are shades of grey. To understand the contradiction it is essential to understand the historical context of the development of international justice in the 20th century.

The history of the 20th century has been one of an active effort to make individual justice an active element in international politics. The rights and duties of individuals in armed conflict, negotiated and then codified at the Hague Peace Conference in 1899, out of which emerged, among three conventions, the Hague Convention with Respect to the Laws and Customs of War on Land, was the main catalyst for this development.¹ The motivation for the meeting was not as lofty as its title: it was, as one commentator has put it, “a disarmament conference initiated by the Tsar of Russia who found himself in a financially unbearable arms race” and had delegates from 26 self-styled “civilized states”.² Neither did the conference presage to a casual observer that it would spawn an effective body of law in the absence of an enforcement mechanism. The Conference and the Convention were essentially aspiratory, and the delegates, who were predominantly representatives of sovereign states, expected that it would be incorporated into national laws. A follow-up Second Hague Conference was held in 1907 and updated the texts of the original conference, even if not with significant differences. There was no intention amongst participants to make radical changes to the international legal order, and indeed the German Kaiser Wilhelm II is reported to have privately made clear his reluctance in participating in the Second Hague Conference, noting that he would in practice not abide by its resolutions and remained confident in his “God and sharp sword”.³ Nonetheless

two important principles emerged from The Hague Peace Conference: First, that individuals have rights that deserve protection even in times of war, a principle necessary to protect prisoners and civilian populations in wartime and limit the scope of action of occupying powers. Second, certain international laws and customs were inviolable and could not be changed even by treaty.⁴ Moreover, the Hague Convention was significantly relied upon for the prosecution of German war criminals at the Nuremberg trials.

Not even the Nuremberg and Tokyo trials, however, were the first attempts at international justice for war crimes. Several attempts had been made, without success, even in the 20th century⁵. Indeed, the trial of Peter Hagenbach, governor of the Austrian town of Breisach in 1474 (pre-dating even the system of sovereign states that was symbolized by the Treaty of Westphalia in 1648) is indicative of the long history of this idea. Hagenbach was put on trial, following a popular revolt, for what today would qualify as war crimes and crimes against humanity. More than five centuries ago, in what is considered the first war crimes trial in recorded western history, the prosecutor indicted the accused as having “trampled under foot the laws of God and man.”⁶ Von Hagenbach, who acted on the instructions of his master, Charles of Burgundy, in seeking to subjugate Breisach, was accused of engaging with his henchmen in acts of extreme brutality: murder, rape and pillage among others. “No conceivable evil”, wrote a contemporary historian, “was beyond him”⁷. The accused’s defense of superior orders did not avail him, and a court of 28 judges found von Hagenbach guilty and sentenced him to death.

But it was certainly the precedent of the Nuremberg trials that captured the world's imagination and established international criminal justice as policy and strategy. As is well-known, Adolf Hitler's rise to power in Germany in 1933 provided the vehicle for his pursuit of expansionist dreams, inspired by theories of racial superiority, which culminated in World War II. Beginning inside Germany and continuing outward through aggression and conquest in Europe, it is estimated that 30 million people were killed during the 12 years of Hitler's dictatorship –on the battlefields of his wars, in forced labor camps, and in gas chambers.⁸

Violations of the human rights of minorities and crimes against humanity were transparently part of the official policies of Hitler's Nazi government. Widespread outrage at the atrocities of the Nazi regime among Allied nations that united to repel the aggression by Hitler and other Axis powers led to a determination to punish the Nazi leaders at the end of the war. Thus was the International Military Tribunal (IMT) at Nuremberg established in 1945 to try the political leadership and officer corps of the German Government and military High Command.⁹ The four Allied Powers appointed the Tribunal's judges, one from each country (with each backed up by an alternate). The United States appointed Francis Biddle, a former Attorney-General of the country whom President Harry Truman had dismissed in an act of political vengeance but now wanted to placate¹⁰. France appointed Henri Donnedieu de Vabres, a scholar of international law and a former law professor at the University of Paris who was one of the early visionaries of a permanent international criminal court. The Soviet Union's Nuremberg judge was Ion Nikitchenko, Vice-Chairman of the Soviet Supreme Court and one-time lecturer in criminal law at the Academy of Military Jurisprudence in Moscow. And the British judge

was Sir Geoffrey Lawrence, a law lord on the appeals bench in the House of Lords, who was later elected president of the IMT thanks to American-led internal intrigues (the American chief prosecutor had not wanted Biddle, who nursed ambitions for the presidency of the Tribunal, in the position, arguing that it would make the United States too dominant in the proceedings¹¹).

Nuremberg was a prosecutor's court, in the sense that the prosecution was far more dominant than the judges in the proceedings. The prosecution was composed of four national teams from the four victorious Allied Powers. United States Supreme Court Justice Robert Jackson, a respected lawyer who had become a lawyer without going to law school, was appointed chief American prosecutor by President Truman. Sir Hartley Shawcross, the British Attorney-General, headed the British prosecution team, although he did not effectively vacate his duties in London and so his deputy, Sir David Maxwell-Fyfe was the de facto leader of the British prosecution. Roman Rudenko, the Procurator of Ukraine was the Soviet prosecutor, and Francois de Menthon was the French prosecutor.

The road from Nazi crimes to their punishment was by no means a straightforward one. In between, a gamut of first instincts, approaches and positions were evident. There was sheer laziness, bureaucratic incompetence, a fear of venturing into unknown territory, conflicting legal approaches amongst the Allies and, most prominently, Winston Churchill's (and, by extension, his Government's) advocacy for summary executions of Nazi leaders as retribution.¹² Josef Stalin, while in favor of summary executions in off-the-cuff remarks to fellow Allied leaders, officially supported a trial of Nazi leaders. In the words of the historians Ann Tusa and John Tusa, "Stalin

wanted Nazi leaders put to death, but only after a trial".¹³ The strong instinct for rough justice was predicated on a belief that the guilt of Nazi leaders and the scope of their crimes were so obvious as to be undeserving of an effort to discharge the burden of proof. For the proponents of summary executions, the St. James Declaration of 1942 that announced the intention of the Allies to bring to justice the direct perpetrators and political authors of Nazi atrocities were all but forgotten.¹⁴

In the United States, a similar policy battle raged between Henry Morgenthau, the influential Secretary of the Treasury who favored summary executions and the destruction of Germany's industrial economy, and Henry Stimson, the Secretary of War who argued for a war crimes trial, reflecting America's internal value of due process. The resolution of that in-fighting by President Roosevelt in Stimson's favor, after Morgenthau's draconian proposals became public and generated a furious public reaction, was the deciding factor that provided the impetus and blueprint for a trial designed to provide basic safeguards of due process to the Nazi leadership.¹⁵ The IMT tried 22 members of the Nazi leadership in a 315-day trial that opened on 20 November 1945.¹⁶

The defendants were¹⁷:

- Martin Bormann, the powerful Nazi party apparatchik who was Hitler's private secretary. Borman was present at Hitler's suicide and signed the Fuhrer's last will and testament. Although indicted, he was not present at the trial and was tried in absentia.

- Karl Dönitz, Supreme Commander of the German Navy from 1943 to 1945. He was named Hitler's successor in the latter's will, and, following Hitler's death, led the rump Nazi government in the last days of the war.
- Hans Frank, Governor-General of Poland during World War II, known as "the butcher of Krakow".
- Wilhelm Frick, the former Minister of the Interior who promulgated the discriminatory, anti-Jewish Nuremberg Laws that deprived German Jews of their citizenship, forbade them to own property, and outlawed intermarriage and sexual relations between Jews and Gentiles.
- Hans Fritzsche, radio journalist and Nazi propagandist.
- Walther Funk, financial journalist, Hitler's economic adviser and president of the Reichsbank.
- Herman Göring, commander-in-chief of the German Air Force, originally designated by Hitler as his successor, but dismissed by the Führer for treachery when he attempted to take over the leadership in April 1945.
- Rudolf Hess, Hitler's former private secretary, was arrested in Britain when he made an unauthorized flight to Scotland with the hope of meeting the Duke of Hamilton and convincing the British Government of Hitler's *bona fides*.
- Alfred Jodl, Major-General and Chief of the German Armed Forces Operations Staff. Jodl signed Germany's unconditional surrender to the Allied Powers on 7 May 1945.

- Ernst Kaltenbrunner, Austrian lawyer and head of the feared Gestapo, administered the gas chambers and the extermination program.
- Wilhelm Keitel, Field Marshal and Chief of Staff of the High Command of the Armed Forces.
- Constantin von Neurath, Hitler's first Foreign Minister.
- Franz von Papen, Hitler's predecessor as Chancellor of Germany who later became Hitler's Ambassador to Austria and Turkey.
- Reich Raeder, Grand Admiral and commander-in-chief of the Navy who resigned in 1943.
- Joachim von Ribbentrop, Foreign Minister of Nazi Germany from 1938 to 1945; negotiated the Molotov-Ribbentrop Pact with the Soviet Union that facilitated Hitler's invasion of Poland.
- Alfred Rosenberg, Minister of the Occupied Eastern Territories from 1941 to 1945; Nazi philosopher.
- Fritz Sauckel – Plenipotentiary for Labor Mobilization.
- Hjalmar Schacht, banker and three-time president of the Reichsbank.
- Baldur von Schirach, Governor of Vienna.
- Arthur Seyss-Inquart, Austrian lawyer, Reich Commissioner in the Netherlands.
- Albert Speer, Minister for Armaments and War Production.
- Julius Streicher, Nazi propagandist and wealthy newspaper proprietor.

The defendants were charged with crimes against peace (conspiracy to wage aggressive war and waging aggressive war), crimes against humanity (which included the

persecution and mass extermination of Jews and other ethnic minorities and civilians in other countries), and war crimes (violations of the laws and customs of war). Eighteen of them were convicted on various counts on their indictments and given sentences ranging from 10 years imprisonment to death by hanging¹⁸. Defendants Frank, Frick, Goering, Jodl, Kaltenbrunner, Keitel, Rosenberg, Sauckel, Seyss-Inquart, Streicher and von Ribbentrop were sentenced to hang. Funk, Hess, and Raeder were sentenced to life in prison, while Doenitz was sentenced to 10 years in prison, Speer was sentenced to 20 years, von Neurath to 15, and von Schirach to 20 years. Three defendants (Fritzsche, Schacht, and von Papen) were acquitted. In a major blow to the whole effort to bring the Nazi leadership to justice (especially as Hitler, Heinrich Himmler and Bormann were already dead) Goering committed suicide with a cyanide pill before his execution by hanging. Based on a modified version of the Nuremberg Charter (Control Council Law No. 10) 12 other war crimes trials were subsequently held under the prosecutorial direction of the American lawyer Telford Taylor.

Nuremberg's Progeny

The Nuremberg trials and the international tribunals for Rwanda and the Former Yugoslavia have often been erroneously and simplistically viewed as if they are one straight line in a continuum. The reality is much more nuanced. While the Nuremberg and Tokyo trials were the first modern international criminal tribunals, there are important differences between them and the United Nations tribunals that illustrate attempts -- not altogether successful, as will be seen -- to reduce the influence of subjective political interests in international criminal justice.

First, the very nature of the two sets of tribunals is different: the Nuremberg and Tokyo tribunals were established by victorious powers of World War II. The Rwanda and Yugoslavia tribunals, by contrast, are the first international criminal tribunals to be established by the international community independently of the victorious powers of a conflict. The United Nations tribunals were created by an international organization reflecting a wide political cross-section of the international community. The ICTY was established in 1993, while the Balkan conflict was still raging, and there was ultimately no clear “victor” since it was stopped by later intervention by the forces of the North Atlantic Treaty Organization (NATO). The intervention, however, was targeted at the Serbs who initiated the military conflict and had enjoyed the upper hand until the NATO action. This has induced a sense of “victor’s justice” at the hand of a Tribunal that Serbs view as an instrument of Western policy. Notwithstanding that all sides in that conflict – the Serbs, the Croats and the Bosnian Muslims – have been prosecuted by the Hague Tribunal, this feeling is essentially accurate. But it is the price of a failed Serbian policy of militarily-enforced ethnic cleansing. In Rwanda, the Rwandan Patriotic Front (RPF) was the ultimate victor, having ousted the previous government in a military conflict and formed a new government for Rwanda. Although the ICTR was established by the United Nations, there was a clear victor in this war. Whether or not this amounts to victor’s justice will be examined in later chapters of this work.

It is necessary to qualify the contrast between the vehicles through which the United Nations ad hoc tribunals and those at Nuremberg and Tokyo were established. To be sure, the Nuremberg and Tokyo tribunals were creatures of victorious powers in war, separating victory and defeat in war as the *raison d’être* of war crimes tribunals in the

first half of the 20th century, from subsequent developments as represented by The Hague and Arusha tribunals. To that extent, Nuremberg and Tokyo were the justice of the victor (Hermann Goering, upon receiving a copy of his indictment by the Nuremberg Tribunal wrote on it: “The victor will always be the judge and the vanquished the accused”¹⁹). But to that two things may be noted. One is that it does not necessarily diminish the gravity of the crimes committed by the Nazi German and the Japanese governments and their military forces. The distinction is perhaps simply a reflection of the evolution of the international society and the use that has been made of the United Nations, as opposed to its predecessor the League of Nations. It is noteworthy in this context that the United Nations General Assembly unanimously affirmed the Nuremberg Principles and Judgment in 1946.

As the Nuremberg judgment argued:

The making of the [Nuremberg] Charter was the exercise of the sovereign legislative power by the countries to which the German Reich unconditionally surrendered, and the undoubted right of these countries to legislate for the occupied territories has been recognized by the civilized world. The Charter is not an arbitrary exercise of power on the part of the victorious nations, but in the view of the Tribunal, ...it is the expression of international law existing at the time of its creation; and to that extent is itself a contribution to international law ... for it is not to be doubted that any nation has the right to set up special courts to administer law. With regard to the constitution of the court, all that the defendants are entitled to ask is to receive a fair trial on the facts and the law.²⁰

It was of course perfectly legitimate, in the historical context of the time, where a state has waged aggressive war and lost, for the prerogatives of victory to go to the victor. This is all the more so where international order is undermined in such a fundamental

manner as by Hitler's Third Reich. It was justified, and indeed remarkable in the context of the time, that the victorious powers embraced justice as a strategy. That strategy, in this case, was to ensure, through accountability and the stigmatization that accompanied the historical documentation of Nazi crimes, the permanent defenestration of Nazi ideology and leadership -- that Germany would never again threaten international order after provoking two world wars within a quarter-century. The path to future cooperation between Germany and the Allied Powers was to be paved by severing the delinquent state's troubled past from its postwar future.

The American chief prosecutor Robert Jackson foresaw that the Tribunal's credibility would be attacked with the tag of "victor's justice". His famous response during his opening address at the trial showed a keen appreciation of the judgment of history: "That four great nations flushed with victory and stung by injury, stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of the law is one of the most significant tributes that Power ever paid to Reason"²¹. The influence of liberal views in some states that were part of the Allied Powers ultimately ensured a form of justice that the Nazi Government, had its military aggressions been successful, would hardly have afforded its enemies.

The other qualification to the difference between the Nuremberg process and the UN Tribunals is that of just who comprises the "international community" that the UN represents, and how representative we can consider the UN Security Council that set up The Hague and Arusha Tribunals. The question of whether there is, in fact an international community will be considered in the next chapter. But I will use the term here simply for purposes of argument. While the international community in the context

of a universal organization like the United Nations can be said to consist of its 191 member states, the term is somewhat fictional in this context because the major decisions are made by a far smaller group of states. These are the heavy lifters, states that have capacity or other strategic advantage -- economic, military, diplomatic, geographic or demographic -- to influence policy and turn agreed policies into reality on the ground. This reality flows from the fact that the Security Council, which established the UN Tribunals in the 1990s in the exercise of the organization's peace enforcement powers, is based practically on the same power quartet that created the Nuremberg Tribunal. Together with China, these states are veto-wielding permanent members of the 15-member Security Council. Their legitimacy as being representative of a broad-based international community in a world with new and rising economic and demographic powers is increasingly questionable²².

The prosecutors at Nuremberg were appointed by, and represented, their states, and the prosecutors of the ICTY and the ICTR are appointed by the Security Council of the United Nations. While the latter are, on the face of things, more independent than their predecessors at Nuremberg and are not outwardly beholden to national agendas, they are nonetheless subject to the political oversight of a political master -- the Security Council, to which they must submit periodic progress reports. The point, then, is that the first difference between the Nuremberg Tribunal and the UN Tribunals may be one more of form than substance.

Other contrasts are more substantive. The second, of key importance for the evolution of international law and relations, is that the Nuremberg and Tokyo prosecutions were for crimes committed in classic international wars between states. In a

fundamental contribution to the development of international humanitarian law, the International Criminal Tribunal for Rwanda is the first international criminal tribunal to adjudicate violations of humanitarian law committed in non-international armed conflict. This is a major advance because it strengthens the norm of individual criminal responsibility for crimes such as genocide, crimes against humanity and war crimes, but also because, in practice, most conflicts in the past 15 years, especially in Africa have been civil wars. This advance, from a point where international humanitarian law applied strictly to international wars, to that of an application of its standards to an internal conflict by a duly instituted international criminal tribunal, creates room for normative change within the international system, even if order and justice clash in the process – as they frequently have.

Third, while the Nuremberg Charter went beyond individual criminal responsibility to label certain organizations of the then German state “criminal organizations”²³, the UN Tribunals have limited themselves to the individual culpability or innocence of accused persons²⁴. This appears odd when juxtaposed with Jackson’s emphasis on individual responsibility in the Nuremberg trial, stating, as he did, that “The very idea that states commit crimes is fiction. Crimes are always committed only by persons”²⁵. One can only surmise that this contradiction owes itself to larger strategy of stigmatizing the Nazi political and military leadership beyond the courtroom, but utilizing the weight of judicial judgments to achieve that objective. A contemporary parallel, even if not in all respects, is the banning of Saddam Hussein’s Baath Party by the Coalition Provisional Authority, the United States–led occupying power in Iraq following the military defeat of Hussein’s armed forces and the fall of his government in 2003.

Fourth, the Nuremberg and Tokyo Tribunals had the power to hand out, and did mete out, the death penalty. Life imprisonment, however, was the maximum penalty provided in the statutes of the ICTR and the ICTY. This reflects a movement away from the death penalty in the evolution of international human rights standards established by the United Nations. Nuremberg prosecutor Jackson had strong personal misgivings about the death penalty in the American legal system, but swallowed his reservations in the context of a call to a historic duty and the larger purpose of the war crimes trial. Latin American states at the United Nations also opposed its inclusion in the Nuremberg Charter to no avail.²⁶

Fifth, the Nuremberg Tribunal had no appellate jurisdictions, while the UN Tribunals have appeals chambers. Although Nuremberg convicts could appeal, and did, to the Allied Control Council for clemency, that Council was a political and administrative authority and had no powers to review the legal basis of IMT decisions. It was thus not an appellate jurisdiction in any real sense. More than anything else, this fact weakens the Nuremberg Tribunal's assertions of a superior justice that "stayed the hand of vengeance". That the judgments of the Nuremberg Tribunal were not subject to the review of an appellate chamber was a poor standard of justice. It points to the role of the trials as a means for ensuring that the Nazi leaders had little chance of escaping their likely fate at the hands of the law, or postponing that outcome through appeal processes.

Finally, the two sets of international tribunals have different sets of material jurisdictions. The Nuremberg Tribunal's competence covered crimes against peace, war crimes and crimes against humanity. The Rwanda Tribunal's remit extends to genocide, crimes against humanity and serious violations of Article 3 Common to the Geneva

Conventions on the Protection of War Victims, adopted in 1949, and Additional Protocol II Thereto of 1977, while the Yugoslavia Tribunal's mandate includes genocide, crimes against humanity, and grave breaches of the laws and customs of war. Thus, the Rwanda Tribunal is one preoccupied with genocide, and relies far more on codified international humanitarian law than was the case at Nuremberg.

Nuremberg's Legacy

Notwithstanding the victor's justice it was, the Nuremberg Charter and the trials based on it have left an important legacy in international law and world politics. That legacy is decidedly mixed. Nevertheless, by demonstrating the moral and legal limits that there must be in the conduct of states, it was part of an important shift away from an international system to an international society that occurred in the first part of the 20th century and laid the foundation for advocacy for a further movement towards a cosmopolitan world society, distinctions that will be discussed in the next chapter.

Genocide.

A major legacy of Nuremberg was the codification of the crime of genocide that followed in its wake. While the extermination of the Jews and other minorities in the course of Hitler's wars of aggression (tried at Nuremberg as crimes against humanity) was undoubtedly genocidal, and the word genocide was used in the course of the trials, Nuremberg did not have a mandate to try the Nazi leaders for genocide because the term, coined by the Polish international lawyer Raphael Lemkin, was not technically a legal crime at the time. That offense was only legally codified as a crime in international law

by the Convention on the Prevention and Punishment of Genocide adopted by the United Nations General Assembly in 1948 (hereinafter the Genocide Convention). This is an important distinction, for the Genocide Convention opened up a markedly wider front in the quest for international justice. This legacy was extended through the attempts to develop international law by the International Law Commission of the United Nations. Although these efforts have tended to outpace positive international law and the actual practice of states in some instances, they have led inexorably to the establishment of a permanent International Criminal Court.

Crimes Against Humanity.

Similarly, the establishment of a rubric called “crimes against humanity” in international law ranks as one Nuremberg’s greatest achievements. Although that genre was defined in the context of the war for which the Nazi leaders were on trial, it has survived as a distinct category of crimes, whether committed in war or peace. When this is combined with the manner in which the nature of conflicts have changed in the past 50 years – becoming far more “internal” than international, although with undoubtedly international ramifications – the implication of this innovation becomes clear. It has become the legal Achilles heel of dictators, at least in theory if not always in practice. What “maximum rulers” and “Big Men” despots do within their borders has become fair game for external interest and even inquiry. But meddlesomeness has rarely led to intervention or other sanction owing to political considerations that will be discussed in the next chapter.

Individual responsibility.

Perhaps the most important legacy of Nuremberg was the expansion in judicial practice of the principle of individual criminal responsibility for violations of international humanitarian law. The Nuremberg tribunal rejected the argument that international law at the time governed the actions of sovereign states only and provided no punishment for individuals. It rejected as well an extension of this argument, namely that where an act is done by a state, those who did it are not personally responsible, but are protected by the state's sovereignty. The defense of superior orders, so frequently invoked as moral and legal justification of conduct that violates the laws of war and mass atrocities in times of war and peace, was also expressly curtailed. Predictably, many defendants at Nuremberg relied on that defense, but it did not avail them. Today, the Statutes of the ad hoc international criminal tribunals and the ICC make clear that superior orders provide no exemption from the culpability that flows from individual responsibility, but may only be an extenuating factor in punishment.

Command responsibility.

It is only a short step away from the principle of individual criminal responsibility to that of command responsibility, or the responsibility of military or political superiors for the acts of their subordinates when the superior knew, or should have known, that such persons were committing genocide, crimes against humanity, or war crimes. Again,

the Nuremberg trials paved the way to the firm establishment of this principle in positive law.

But the principle of command responsibility automatically calls into question that of sovereign immunity. If a sovereign has command responsibility for the acts of his subordinates is he or she then immune from the legal consequences of those acts? It is here that the normative impact of the Nuremberg trials confronts the nature of international order in terms so stark that it remains extremely controversial. Nuremberg's legacy is that heads of state and government can be tried for genocide, crimes against humanity and war crimes in certain circumstances for acts performed while in office. The Nuremberg Charter proclaims: "The official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment." The Statutes of the ICTY, ICTR and the ICC have similarly done away with substantive immunity for these crimes. But this should not be confused as being the general position in international law. The denial of that immunity is limited to cases where the victor or victors in a war become an occupying power, assume sovereignty over the vanquished, and try the leaders of the defeated party under special laws such as the Nuremberg Charter and Tokyo Charters. Sovereign immunity is also clearly suspended where an international tribunal with competent jurisdiction is established by the United Nations Security Council (e.g. the ICTY and the ICTR), or where an international criminal tribunal with competent jurisdiction is established by treaty, e.g. the ICC. Outside these circumstances, the substantive immunity of heads of state and government and other high officials of state (such as Ministers of Foreign Affairs) remain solid in customary

international law. Efforts to prosecute sovereigns outside these confines have been fraught with controversy and, so far, unsuccessful.

The rise and decline of international law and tribunals.

In another important legacy, the Nuremberg trials established the contemporary superiority of international law over domestic laws in legal responses to mass atrocities. This legacy was to be established in the “primacy” of the jurisdictions of the two international tribunals for Rwanda and the former Yugoslavia, in the former even more so.²⁷ Why was this so? First, in the era in which the Nuremberg trials took place, wars were almost always waged across national frontiers. Jurists and politicians therefore believed that judging violations of international humanitarian law would best be undertaken through a “law of nations” rather than domestic criminal law.

Second, the Nuremberg trials were framed by prosecutors such as Jackson as a contest between good and pure evil, with the law of the Nuremberg Charter having risen to the gallant defense of “civilization” or “civilized nations”. This (in the case of Nuremberg, self-interested) defense of the greater whole, which today is captured by the more politically correct phrase “humanity” was also more naturally handled through international law as a vehicle for the establishment of a post-World War II order.

International law’s supremacy in this arena, however, has come under threat. This new reality arises because the nature of conflict, as noted a moment ago, has changed dramatically in the past half-century, with civil wars *within* states replacing wars *between* states as the main source of carnage. With this has come a slow but sure re-

thinking, on the basis of assertions of national sovereignty, of the balance of jurisdictions between international and municipal laws. Thus, some states have incorporated international law into nationally legislated laws or expanded their criminal law to accommodate such concepts. To illustrate: even in the context of the permanent International Criminal Court, that Court's jurisdiction was made *complementary* to national jurisdiction, reversing the Nuremberg trend adopted in the creation of the ICTY and the ICTR whereby national jurisdictions were really seen in practice as poor cousins to international justice. Moreover, constrained by their nature as ad hoc tribunals and faced with the imperative of completing their work by the end of this decade, the international tribunals at Arusha and The Hague have begun looking to national courts for help with easing the burden of heavy caseloads.

International tribunals as a favored institutional means for rendering justice for international crimes have also suffered a certain decline, with the trend now more in favor of hybrid courts that combine national and international jurisdiction and judges, such as the Special Court for Sierra Leone and the Extraordinary Chambers of Cambodia.

Ex post facto law.

The issue of retroactive or *ex post facto* law is an important characteristic of Nuremberg that goes to the heart of the nature of the IMT and has cast a pall over its legitimacy ever since. The legal principle *nulla poena sine lege* (no punishment of a crime without pre-existing law on which punishment is based) has been a cardinal rule of criminal law in many countries for several centuries. It is now explicitly acknowledged in the statutes of

the international war crimes tribunals. But the Nuremberg trials violated this fundamental legal norm when they included “crimes against peace” (planning and waging aggressive war) as one of the crimes for which the Nazis were put on trial. Not prepared to allow the Allied Powers a monopoly to claims of defending civilization, the Nazi defendants challenged the very legitimacy of the IMT by arguing that retroactive punishment was anathema to the law of all civilized nations. Aggressive war was not a crime in positive international law at the time Hitler embarked on his irredentist military campaigns, at least not as defined in any statute. Nowhere had a penalty for waging such a war been stipulated, and there was no court created to try and punish offenders.

Even as they planned the Nuremberg trials, its architects, including Robert Jackson, had foreseen this conundrum. Yes, the Nazis committed despicable acts that infringed morality at its most basic, but had they broken any *laws* in invading their European neighbors?²⁸ Germany was one of 63 signatory nations to the General Treaty for the Renunciation of War, referred to as the Kellog-Briand Pact or the Pact of Paris, of 1928, which renounced war as an instrument of national policy. It was a signatory to the Hague Rules of Land Warfare of 1907 and the Geneva Conventions of 1929. Jackson constructed his response to these predictable arguments on the premise that the establishment of a court with punishment procedures (the IMT) filled in the previously blank space of enforcement of these treaties: “Let’s not be derailed by legal hair-splitters”, he argued. “Aren’t murder, torture, and enslavement crimes recognized by all civilized people? What we propose is to punish acts which have been regarded as criminal since the time of Cain and have been so written in every civilized code”.²⁹

The judgment of the Nuremberg Tribunal dismissed the *ex post facto* defense with an elegant, stretched disquisition that was based more on international morality than interpretations of positive international law. The Tribunal first sought to establish that the maxim *nullum crimen sine lege*, while a principle of justice, was not a limitation on the sovereignty of the Allied Powers.³⁰ It could not therefore become a valid excuse for violating treaties. “To assert that it is unjust to punish those who in defiance of treaties and assurances have attacked neighboring states without warning is obviously untrue, for in such circumstances the attacker must know that what he is doing is wrong, and so far from it being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished”.³¹

The IMT then analyzed the legal effect of the Kellogg-Briand Pact. In rejecting the Nazi defense that the pact lacked the force of positive law, the Tribunal recalled the preamble to the Pact and its first two provisions, in which the signatories, including the Axis Powers Germany, Italy and Japan had pronounced themselves:

“Deeply sensible of their solemn duty to promote the welfare
Of mankind; persuaded that the time has come when a frank
Renunciation of war as an instrument of national policy should
be made to the end that the peaceful and friendly relations
existing between their peoples should be perpetuated...all
changes in their relations should be sought only by pacific
means...thus uniting civilized nations of the world
in a common renunciation of war as an instrument of national
policy...

Article I: The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies and renounce it as an instrument of national policy in their relations to one another.

Article II: The High Contracting Parties agree that the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be, which may arise among them, shall never be sought except by pacific means”.

The Tribunal was of the opinion that “the solemn renunciation of war as an instrument of national policy necessarily involves the proposition that such a war is illegal in international law; and that those who plan and wage such a war, with its inevitable and terrible consequences, are committing a crime by doing so”. It likened the Kellogg-Briand Pact to the Hague Convention of 1907 that prohibited certain methods of warfare (inhumane treatment of prisoners, the use of poisoned weapons, and so on) without designating them criminal or stipulating sanctions, or establishing a court to try the offenders.

This comparison to the Hague Convention was convenient, but is inapposite. As the IMT itself noted, the acts condemned in the Hague Convention had been prohibited under customary international law long before the Convention. The same cannot be said of planning and waging war, which was, and still is, one of the common currencies of international relations. Therein lies the essential difference between the Hague Convention and the Pact of Paris. In any event, there was a clear understanding during

the negotiation of the Hague Convention that national courts would enforce its principles, or at least bear them in mind when trying war criminals. There was nothing of the sort as a background to the Kellogg-Briand Pact. From the standpoint of objective legal analysis, the Nuremberg judges' attempts to establish a historical linkage between the Pact of Paris and a number of draft international treaties which preceded it and explicitly declared aggressive war an international crime³² is unpersuasive. Why did none of those hortatory declarations see the juridical light of day in the sense of ratification? States were, in the end, not prepared to criminalize war in itself. They balked.

It is quite arguable that the atrocities perpetuated by the Nazis could have been effectively tried and punished under the rubric of war crimes (violations of the laws and customs of war) and crimes against humanity. Fifty years after Nuremberg, Drexel Strecher, one of its surviving American prosecutors, presented an important insight into Jackson's frame of mind on the question of aggressive war: it was, to Jackson, the linchpin of the case against the Germans, for it was the conspiracy to wage the war (another controversial charge) and the waging of it that propelled all the other crimes.³³

The Nuremberg tribunal either believed it was interpreting the Kellogg-Briand Pact to establish the missing link of its signatories' intentions, as it asserted, or else -- and this is more likely -- imposed a stretched interpretation in order to achieve the political objectives of the Nuremberg Charter. "In interpreting the words of the Pact, it must be remembered that international law is not the product of an international legislature, and that such international agreements as the Pact have to deal with general principles of law, and not with administrative matters of procedure", the Tribunal ruled. "This law is not static, but by continual adaptation follows the needs of a changing world".

Meanwhile, evidence that the world had not changed very much at all lay in the more realistic provisions of the Charter of the United Nations adopted in 1945.⁴ That document remained true to the aspiration to a world free of war in its preamble: “We, the peoples of the United Nations, determined to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow ...” But it avoided the mistakes of the League of Nations – and that of the Kellogg-Briand Pact – when it recognized that the use of force is a hardy constant in international relations but sought to stipulate the circumstances in which it is lawful or unlawful. This debate continues today in the United Nations and has been thrown into sharper focus by the war in Iraq in 2003.

The Nuremberg judgment, insofar as it relates to aggressive war, can now be seen as an attempt to turn a policy or aspiratory declaration into the force of law, because the Allied Powers *could*. The question, then, is: If the Nuremberg Charter was retroactive law, was it by that reason injustice, or was it a bad law that made real justice possible? This is an important query, for it goes to the heart of the debate about the nature of war crimes justice. The Nazi defense of the *ex post facto* nature of the Nuremberg Charter was in itself an exercise in hypocrisy, for Nazi rule and its persecution of minorities was based squarely on a subversion of that very principle. An international meeting of criminologists hosted in Germany in 1935 provided stark indications of the Nazi agenda.

Addressing delegates in a speech titled “The Idea of Justice in German Penal Reform”, Franz Guertner, the Reich minister of justice informed his learned audience that Germany would no longer rely on the principle of *nulla poena sine lege*. Rather, it would now adopt the exactly opposite one of *nullum crimen sine poena* (no crime without punishment). “Everyone who commits an act deserving of punishment shall receive due

punishment regardless of the incompleteness of the law...National Socialism imposes a new and high task on criminal law, namely the realization of true justice".³⁴ Guerner explained, in his logic, that the advantage of this new approach was to free judges from the constraints of gaps in the law, whereby they could adjudicate only that which the legislature had defined as law.³⁵ The whole point, he stated, was to bridge the divide between morality and legality and so achieve "true justice". From this synthesis, criminal law would now benefit from "the valuable forces of ethics".³⁶ This discussion was taking place in the same period that the obnoxious Nuremberg laws were being formulated in the German Ministry of the Interior.

Thus it was that at Nuremberg the Nazi leaders got a taste of their own medicine – retroactive, instant-brew justice. This fact has been overlooked in many assessments of the trials. It is trite wisdom that two wrongs do not make a right, and it is helpful to bear in mind this whole aspect of the Nuremberg trials as we review its legacy and competing claims to the defense of civilization as a tool in the service of agendas that are essentially political. But the scope of Nazi crimes called for an equally decisive response, as Jackson made clear in his moving opening statement at the trial.

Coupled with the issue of victor's justice noted earlier, the whole framework of the Nuremberg trials, including ex post facto law, was established to exclude the crimes of the Allied Powers. Allied lawyers, including Jackson and Maxwell-Fyfe, anticipated the so-called "tu quoque", the "so-did-you" defense.³⁷ Both sides had committed war crimes during the war -- in the case of the Allies most famously the bombing of Dresden and other cities that claimed hundreds of thousands of civilian lives. Jackson's position was that it simply had to be an invalid defense -- and so, indeed, it was in the Nuremberg

Charter. He argued that the scale of Nazi crimes, committed in the course of wars started by Hitler, utterly dwarfed the crimes committed by Allied forces. Here the legacy of Nuremberg has been one of subsequent attempts to create a more equitable framework in the establishment of contemporary international criminal tribunals. As we shall see in later chapters, the problem has not gone away.

Anglo-Saxon Common Law.

The Nuremberg trials also established a legacy in which the adversarial, Anglo-Saxon common law trial system became the dominant procedure in trials proceedings in the UN – sponsored ad hoc war crimes tribunals, over the continental European system that is sometimes referred to as “inquisitorial”³⁸. There were political motives at play in this process, but let us first examine the “technical” ones. Both systems have their merits and demerits. The adversarial system tends to drag out trials because of direct examinations and cross-examinations of accused persons and witnesses, and would include an initial plea of “guilty” or “not guilty” by the defendant, but is seen as affording the accused a trial with full respect for his or her rights. The Nuremberg trial, however, was remarkable for its relative brevity – eight months for the trial 22 defendants for crimes committed in more than ten countries over several years, with a four-nation prosecution team.

The civil law system, on the other hand, is a heavily investigative process in which the judges are dominant, and lawyers – certainly defense lawyers, at any rate – and the accused have less scope for action. A criminal case that advances to the point of a docket has, in all probability, a high level of the burden of proof already discharged

through the investigative process. It has already been noted that the Nuremberg trial was a “prosecutor’s court”, and it is clear that Jackson and his fellow Anglo-Saxon lawyers wanted to shape the nature of the proceedings at Nuremberg to a far greater extent than the civil law system would have allowed. Logically, then, the judges at Nuremberg were not the dominant force at the trial. Historical accounts of the IMT bear out this proposition, for they are unquestionably dominated by accounts of the courtroom heroics and oratorical flair of the Anglo-Saxon prosecutors Jackson, Shawcross, Maxwell-Fyfe, and their colleagues. Moreover, the balance of military roles among the four Allies in ending the war fell heavily in favor of the United States, with the roles of the French and Russian forces considered relatively less decisive. And American forces had captured most of the high-profile Nazi defendants. The cards were stacked in Jackson’s favor.

As Joseph Persico recounts of the negotiations among the four Powers at a meeting to set the framework of the trial held in London in late June 1945, with the common law lawyers led by Jackson and Maxwell-Fyfe, and the continental lawyers led by the Soviet union’s Nikitchenko and the French delegation:

To the continental Europeans it seemed that the Anglo-Saxons were trying to ram an alien court system down their throats. Nikitchenko listened as Jackson and Maxwell-Fyfe explained adversarial law, with its opposing attorneys, direct examination, and cross-examination, before a judge who acted as an umpire. That was not how it was done in his country, he said. The French agreed. Their judges did not demean themselves by prying battling lawyers apart like a referee in a prize fight. Judges took evidence from witnesses, from the accused, from the police,

from the victims, sifted it, weighed it, and arrived at their decisions.

Lawyers were merely to help the accused prepare a defence.

They had little role in the court itself. Lawyers are not so

important, Nikitchenko concluded in a lecturing tone; judges

are important. And this matter of pleading guilty or not

guilty: Were they really going to allow a man like Ernst

Kaltenbrunner, responsible for the Gestapo and the concentration

Camps, to stand up in a court of law and declare himself Not

Guilty?³⁹

Moreover, there were almost certainly other political reasons, inspired by a mixture of national pride and strategic goals that contributed to the ultimately successful American and British effort to ensure the dominance of their national legal cultures at the Nuremberg trials. It would best facilitate the historical defeat of the Nazi ideology in Germany, backed up as the prosecution case was by damningly incriminating documents. Jackson fully appreciated the historical significance of the Nuremberg trials. And it should not be surprising that he sought to put a distinctly American stamp on the proceedings in light of the disturbing tensions that were already developing between the West and the Soviet Union despite their “shotgun marriage” at Nuremberg.⁴⁰

Nuremberg’s Legacy in Historical Context

Nuremberg’s legacy is interwoven into a number of important historical developments. First, the Nuremberg trials were perhaps the most important post-war factor that shaped a democratic and prosperous Germany (West Germany) that became a key member of the Western alliance during the Cold War that divide Germany between

East and West. By demonstrating so vividly the crimes committed by the Nazi Party, the trials effectively banished Nazi ideology from the domestic political sphere. The deep introspection it generated in subsequent years -- not very apparent during the trials themselves or even shortly afterwards -- helped make room for real democracy. Hitler and the Nazi era became a badge of shame to be lived down. Across the Atlantic, Stimson was proved right and Morgenthau wrong. Prophecies by Nazi defendants at the trial that they would go down in history as martyrs for the German nation -- Goering in his typical vainglory predicted that statues would be erected in his image years after the trials -- have remained a chimera. While this advantage from Nuremberg's legacy has accrued far more to Germany -- and Japan, courtesy of the Tokyo Tribunal -- than in any other theater of conflict in contemporary times, even in its limited impact it has had important implications for world politics and economics.

Second, the establishment of the permanent International Criminal Court, the hope of which Nuremberg so ardently inspired in human rights campaigners, is one of the most important legacies of the Nuremberg trials. To be sure, the ICC as it exists today is not quite what was sketched out in the visions of its prophets -- the Court came along half a century late as a result of the Cold War; even some liberal democracies were opposed to its creation; its jurisdiction is secondary to national prosecutions; and its future prospects and impact are decidedly debatable.

Third, at a more philosophical level, Nuremberg, romanticized as it has been in the mainstream liberal tradition, did not achieve its ultimate and unrealistic goal of deterring aggression with the specter of accountability. Between 1945 and 1992, just before the United Nations established its first ad hoc international tribunal the following

year, there were 24 wars between nations, at a cost of over six million lives.⁴¹ Another 93 civil wars took an additional 15 million lives.⁴² Millions more have died in the past decade, from Liberia to Sri Lanka, from Rwanda and the former Yugoslavia to Colombia and Sudan. No one can wish wars or evil away. Perspectives of international relations that reflect an international society propose only how wars can be made fewer and farther between.

The Nuremberg prosecution of “crimes against peace” thus seems likely to remain frozen in mists of history. It is apparent from even the most cursory look at contemporary events in a world now fundamentally altered by the “war against terrorism” and what Samuel Huntington famously called the “clash of civilizations”, the meaning of “aggression” depends on who is defining it. It does not look very much different from the dilemma that beset the members of the League of Nations when they were faced with drafts of the Treaty of Mutual Assistance in 1923 and the Geneva Protocol a year later.

Nevertheless, aspects of Nuremberg’s legacy became firmly established by the judgments handed down by the international tribunals established as a response to two contemporary tragedies – the genocides in Rwanda and Bosnia-Herzegovina in the early 1990s. The *Dusko Tadic* trial at the ICTY in 1994 became the first time an individual was judged and convicted for war crimes and crimes against humanity on the basis of individual criminal responsibility by an international tribunal since Nuremberg. But, if Nuremberg’s standards of political consequence were to be strictly applied, Tadic, being a lowly camp guard, would not have merited the judicial attention of a major international war crimes tribunal. The avowed goal of these institutions is to make examples of the powerful by bringing them to accountability. The *Tadic* trial

nevertheless served to reawaken the legacy of Nuremberg, and led the Hague Tribunal to more significant quests that resulted in the historic indictment in 1999 of Slobodan Milosevic, the first sitting head of state to be indicted by an international criminal tribunal.

As it relates to the ultimate crime of genocide, however, the nature of events in Rwanda in 1994, the uncontested fact and gravity of the worst genocide since the Holocaust, lent the International Criminal Tribunal for Rwanda the opportunity to become the first such tribunal to apply Nuremberg's legacy at a consistent level of political consequence – trying the ringleaders of a genocide.

Conclusion

This chapter has sought to point up the mixed legacy of the Nuremberg trials. The trial of the major Nazi war criminals at Nuremberg, warts and all, remains the defining war crimes trial of the 20th century. This is as much for what it teaches us about justice as policy as for the lessons it provides -- for those willing to see beyond its halo -- about the political and strategic context of war crimes justice. The legacy mentioned above is one that combines in itself the romantic view of international justice and more cynical motivations. What I have done is to show how that legacy has constituted an advance from where we were in the years before international criminal justice became a major dimension of international law and politics. When the legalist picture is mixed up with the “real world” of politics that provides a more complete context for assessing war crimes justice, a much more complex reality emerges. And it is to the factors that shape

that more complete reality – the nature of the international society – that we shall now turn.

¹ See Dorothy V. Jones, *Toward A Just World: The Critical Years in the Search for International Justice*, (Chicago and London: University of Chicago Press, 2002).

² Benjamin B. Ferencz, “The Evolution of International Criminal Law: A Bird’s-Eye View of the Past Century”, in *Humanitäres Völkerrecht* (Baden-Baden: Nomos Verlagsgesellschaft, 2001), 355.

³ Ibid.

⁴ Ibid, 9.

⁵ The unsuccessful attempts by the Allied States to prosecute the German Kaiser Wilhelm following World War I (see Chapter 3) , and similar attempts to prosecute the individuals believed to be responsible for the massacres of Armenians in Turkey in 1915 were the most notable examples.

⁶ George Schwarzenberger, *International Law As Applied by International Courts and Tribunals*, 465 no.10, 1968 (quoting John Knebel Capellini, Basil Diary 1473-1476).

⁷ Ibid.

⁸ See *The Judgement of Nuremberg, 1946: The International Military Tribunal for the Trial of German Major War Criminals* (London: The Stationery Office, 1999), xvii.

⁹ See the London Charter of the International Military Tribunal at Nuremberg, Aug. 8, 1945. The London Charter was signed by the four Allied Powers. It was subsequently endorsed by 19 other governments: Greece, Denmark, Yugoslavia, the Netherlands, Czechoslovakia, Poland, Belgium, Ethiopia, Australia, Honduras, Norway, Panama, Luxembourg, Haiti, New Zealand, India, Venezuela, Uruguay, and Panama. The Charter for the International Military Tribunal for the Far East was subsequently issued by United States General Douglas MacArthur.

¹⁰ See Joseph E. Persico, *Nuremberg: Infamy on Trial* (New York: Penguin Books, 1994), 61-62.

¹¹ Ibid, 78.

¹² See Ann Tusa and John Tusa, *The Nuremberg Trial* (New York: Cooper Square Press, 1983), Chapter 2.

¹³ Ibid, 63.

¹⁴ Ibid, 21. The Declaration was adopted at St. James in London by the representatives of nine European countries that had been occupied by German forces. It stated: “international solidarity is necessary to avoid the repression of these acts of violence simply by acts of vengeance on the part of the general population and in order to satisfy the sense of justice of the civilized world”.

¹⁵ Ibid, Chapter 4.

¹⁶ *The Judgement of Nuremberg*, op. cit.

¹⁷ See Tusa, 494-503 for more detailed biographies of the Nazi defendants.

¹⁸ See Office of United States Chief of Counsel for Prosecution of Axis Criminality, *Nazi Conspiracy and Aggression: Opinion and Judgement*, (Washington: United States Government Printing Office, 1947), 189-190.

¹⁹ Persico, 83.

²⁰ *The Judgement of Nuremberg*, 80.

²¹ Quoted in Ann Tusa and John Tusa, 155.

²² Paradoxically, Germany and Japan are strong candidates for permanent membership of an expanded Security Council -- a major issue in discussions about reform of the Council that have gone on for the past decade without resolution.

²³ The London Charter did not precisely define the term, but the indictments of the 21 German major defendants requested that the Tribunal declare the following to be criminal organizations: the Leadership Corps of the Nazi Party, the Gestapo, the SD, the SS, the SA, the Reich Cabinet, and the General Staff and High Command of the German Armed Forces. The Tribunal declared the Leadership Corps, the Gestapo, the SD and the SS to be criminal organizations, based largely on the criminal activities undertaken by these organizations and the purposes for which they were created, but did not find the SA, the Reich Cabinet and the General Staff and High Command to be criminal organizations. See *Judgment of Nuremberg*, 143-176.

²⁴ Some of the persons indicted, tried and convicted by the ICTR were active members of, instructed or acted in collusion with the, *Interhamwe* ("those who work together") militia, a youth wing of the then ruling party in Rwanda that vigorously executed the genocide. See *Prosecutor v Georges Andersen Rutaganda*, Case No. ICTR-96-3: Judgment and Sentence by Trial Chamber I, 6 December 1999. See also *Prosecutor V Omar Serushago*, Case No. ICTR-98-39: Judgment and Sentence by Trial Chamber I, 5 February 1999.

²⁵ Tusa, 155.

²⁶ Tusa, 489.

²⁷ While the Rules of Procedure and Evidence of the ICTY allowed for a transfer of cases from that international tribunal to a national court in certain circumstances, that of the ICTR did not. This situation, which led to a clumsy situation with political dimensions in one of the cases handled by the ICTR, created a “one-way street” situation where the Tribunal had the first call on any suspect but had no discretionary room to hand such a suspect over to a national court should its prosecutor decide to drop charges. The Rules of Procedure of the Tribunal were later amended to rectify this anomaly.

²⁸ See Persico, 33.

²⁹ Ibid.

³⁰ *Judgment of Nuremberg*, 82.

³¹ Ibid.

³² The 1923 draft Treaty of Mutual Assistance sponsored by the League of Nations, and the preamble to the League of Nations 1924 Protocol for the Pacific Settlement of International Disputes (“Geneva Protocol”)

³³ Drexel Strecher, Interview with Court TV (United States) on the Nuremberg trials, 1995, www.courttv.com.

³⁴ Van der Aa, *Proceedings of the XIth International Penal and Penitentiary Congress*, quoted in Jones, *Toward a Just World*, 154-155.

³⁵ Ibid.

³⁶ Ibid.

³⁷ Persico, 35-36.

³⁸ There are several elements that reflect the continental civil law system in the statutes and Rules of Procedure of the ICTY and the ICTR, but these legal documents are essentially reflective of a common law approach. Moreover, it is no surprise that, given the influence of the United States in the Security Council, these statutes were drafted by, or with strong input from, lawyers in the U.S, Department of State.

³⁹ Persico, 34.

⁴⁰ Ibid.

⁴¹ Ibid., 442.

⁴² Ibid.

PART II
CONCEPTUAL TENSIONS

Chapter 3

The International Society

*Cain rose up against Abel his brother, and slew him.
And the Lord said unto Cain, Where is Abel thy brother?
And he said, I know not: Am I my brother's keeper?*

The Holy Bible, Genesis 4: 9

In Chapter 1 I took an introductory look at some ethical traditions in international relations, making the point that the English School theory of international society, not the liberal legalism to which several writers explicitly or implicitly attribute the development of international criminal tribunals in the 20th century, offers a better explanation of the nature of that activity in international relations. Chapter 2 took a backward look at Nuremberg as a historical example of justice as political strategy.

The aim of this chapter is to examine how the nature of the international society has impacted on the development of international criminal justice at a broad conceptual level in a contemporary context. It will situate the discussion in the context of the nature of international law in general and justice in international relations, and demonstrate that sovereignty, inequality and the role of power inherent in the international realm renders war crimes justice necessarily political -- frequently deployed unevenly and unequally, and in the service of political and strategic ends. At the same time the international society has come to closer agreement on certain values that are solidarist, but those values have lived more in declarations than in the actions of states, which contributes to the uneven quality of war crimes justice. Against this background the tensions between

the aspirations of cosmopolitan world justice and the current international and domestic orders will fall into view, to be elaborated upon in later chapters.

A Society of States

Hedley Bull, mainly through *The Anarchical Society*, has done much to illuminate the nature of social order in world politics and the conceptual tensions between order and justice. He argued that we live in a world made up of a society of states (the international society) in which this group of states sees themselves as bound by a common set of rules in relation to one another because they recognize their common interests and values and participate in common institutions.¹ This “society” is an advance on the international *system*. According to Bull, while there may be commercial, military or even diplomatic contact in an international system, it is the element of being bound together by a common set of rules, and sharing in the working of common institutions, that distinguishes the international society from an international system. These closer ties have fostered not only greater efficiencies, but the development of improved, shared moral standards of conduct as well. The Hague Peace Conferences of 1899 and 1907, and, more concretely, the formation of the League of Nations in 1919, facilitated the shift from an international system to an international society. That the League was an effort to make that transition is captured in the statement by Raymond Fosdick, Under Secretary-General of the organization: “The world has had far too little practice in international activity. To be sure we’ve had the Universal Postal Union and the International Bureau of Weights and Measures and the International Sugar Commission...but we never had a

systematic international approach to problems where everybody has everything to gain and nothing to lose".²

The Hague conference got somewhat ahead of itself when it claimed in its preamble a non-existent solidarity as the basis for inter-state relations, and as reflecting the actual state of international relations at the time. "Recognizing the solidarity uniting the members of the society of civilized nations" read the Convention³ -- a fiction that, as an international historian noted, "managed to ignore the recently fought Russo-Japanese War, the ongoing Anglo-German armaments race...and the determination of the United States to stay an ocean away from the bloodletting that so frequently masked the solidarity 'uniting' the civilized nations of Europe".⁴

An international system can exist without the element of society⁵. But even the international society that is an improvement on the international system is inherently anarchical because of the sovereignty and contending interests of its members. In the "elegant paradox" of Bull's phrase "anarchical society" we find that "society" implies a rule-governed environment, and yet we also have "anarchy", which means that an element of chaos, a frequent or occasional unpredictability and untrustworthiness of some of that society's members, is present.⁶ Questions have thus been raised about the "thickness" of the shared values of the international society, with some analysts using this as a basis for advocating a shift to a cosmopolitan "world society".⁷

By way of analogy, then, the international society is like a social or professional club. Members associate with each other within it, in accordance with mutually agreed rules. Membership of the club confers shared *benefits* on its members. But shared benefits do not always equate to shared values, though membership rules stipulate values

that members profess to share. But the members of the club must go home after their interactions within the society. And, in this case, “home” is the sovereign states with geographical boundaries to which members belong as a constitutive element of the international society. This is what makes an international society different from an “international community”, which is much spoken of, but remains, in reality, an aspiration.

In a real community the members live with one another in a shared space, the rules are far more internalized, applicable by virtue of collective sanction. In such a community, even where there are individual “homes”, untoward events in one’s neighbor’s house or malfeasance by members are *automatically* subject to intervention by other members because the *raison d’être* of the community is the abnegation of individual interest that accompanies it. Members subject the right to regulate their individual affairs to a higher collective or individual power, without exception.

With characteristic clarity, Bull clarifies three traditions of thought in world politics: “the Hobbesian or realist tradition, which views international politics as a state of war; the Kantian or universalist tradition, which sees at work in international politics a potential community of mankind; and the Grotian or internationalist tradition, which views international politics as taking place within an international society.”⁸

The question of whether or not we live in a tightly knit international community, or in a looser international society despite the phenomenon of globalization, is the key to understanding the real nature of justice for war crimes. On the answer to that question depends whether or not armed humanitarian intervention takes place to stop genocide and ethnic cleansing in Rwanda, Bosnia, Kosovo, Sudan or wherever else such atrocities may

erupt tomorrow. Or whether states essentially balk at the prospect of muscular action and instead attempt to bury such crimes in a torrent of (verbal) moral indignation and – in the rare event – establish accountability after it is all over. The answer explains the real motives of judicial intervention through war crimes tribunals. And it determines the framework for such intervention and how consistently, occasionally or evenhandedly war crimes are punished. In sum, it holds the key to understanding the politics of accountability for war crimes. “International society” is thus the essential conceptual framework for this study.

In taking this position I am fully aware of the popularity, perhaps even political correctness, of the term “international community”. In one sense, community and society are not at all in opposition, community being an advanced evolution of society. But to the extent that cosmopolitan notions of war crimes justice are supposedly based, in the liberal or cosmopolitan worldview, on an international community, the empirical evidence of international life points towards a different reality. It is either, then, that the terms “international community” and “international society” are frequently used interchangeably, with the former depicting the latter (and vice versa), or community is used in the knowledge that it is an aspiration rather than the prevailing reality, or, in an extreme but not exceptional case, the phrase “international community” is used as an expedient term or a subterfuge.

Even staunch advocates of the concept of international community such as United Nations Secretary-General Kofi Annan have admitted that “the idea of the international community is under perfectly legitimate attack because of its own frequent failings”⁹. But what does the phrase mean precisely? Edward Kwakwa in a fine essay advocating

the concept has admitted that it is now used with “reckless abandon”¹⁰. There are, as Kwakwa and others acknowledge, contending definitions of international community. In its restricted sense in which it is used by diplomats, the International Court of Justice¹¹ and treaties such as the 1969 Vienna Convention on the Law of Treaties¹², for example, it means what in classical international law was known as the “comity of nations”, defined by the Concise Oxford Dictionary as “an association of nations for their mutual benefit, the mutual recognition by nations of the laws and customs of others”. In a much wider and contemporary sense it is an all-inclusive tent under which states, international organizations, non-governmental organizations and even individuals huddle.

At another end of the spectrum of interpretations of international community, it is a language of inclusion and exclusion all at once, describing not just those who belong in it, but those who do not, and against whom this community is ranged¹³. These are the terrorist groups such as Al Qaeda that pose existential threats. Or they could include outlaw states, “rogue states” or “axis of evil” -- “bomb them”!¹⁴ Key actors in this group of non-members of the international community are prime candidates for war crimes trials. Closely related to this interpretation of international community is yet another that props up the concept of sovereign equality of states, but in fact glosses over the reality that that “community” is divisible into a few states that maintain the international order globally or regionally (the heavy lifters), the weaker states (jocosely dubbed the “axis of weasel”) and the outlaw states noted above.

Then there is the hegemony-defined “international community” in which the narrow interests of one or more powerful states are defined in universal terms -- a common feature of the history of Western civilization stretching back to the Roman

empire¹⁵. Thus it is that European colonialism has been explained away as having been motivated by, among other things, “the spread of liberal ideas”, with colonial administrators benignly seeking “to enlarge the circle of national justice to the necessities of the empire we have obtained”¹⁶. Colonialism, of course, was a cardinal means of the expansion of Western-dominated international society for thoroughly self-interested reasons, mainly economic, and not infrequently accompanied by mass atrocities against the colonized peoples. The Belgian King Leopold, who ruled Belgian Congo (today’s Democratic Republic of Congo) in the late 19th century as his private rubber plantation, ordered the massacres of nearly 10 million Congolese to quell resistance to forced labor in the colony – undoubtedly the first genocide in the Central Africa, pre-dating the 1994 genocide in Rwanda by a century. Similarly, thousands of Namibia’s Herero ethnic group was massacred by colonial German forces in the early 20th century. Martti Koskenniemi recounts how, following the 1885 Berlin West Africa Conference that carved up much of the continent among the European powers, the prestigious *Institute de droit International* echoed praise for King Leopold by one of its members: “It is without doubt thanks to the generosity and the political genius of King Leopold that the Congo State will have a regime in full conformity with the requirements of European culture”¹⁷.

Elements of community exist in the international realm, but they can be seen more in their “soft” or “thin” dimensions – humanitarian responses to earthquakes such as the tsunami that hit the Asian countries of Indonesia, Thailand and Sri Lanka and affected the African countries of Somalia and Kenya on the Indian Ocean in December 2004, and other acts of social solidarity that are more or less symbolic – than “hard” or “thick”. The latter kind of community would be achieved at real material costs such a truly effective

mobilization of resources to fight the HIV/AIDS pandemic ravaging Africa, Asia, Latin America and the Caribbean, and Eastern Europe, or total cancellations of the debts of poor countries to western creditors. In the area of war crimes justice, the thinness of community was demonstrated by the establishment of a standing International Criminal Court that is essentially predicated on the Westphalian model of state sovereignty, with the Court's jurisdiction essentially complementing, not supplanting, that of states, and subject to the influence of the United Nations Security Council in important ways (Chapter 9). When all the contrasting interpretations of international community are averaged, the result looks very much like an international society.

With this contrast between the international community and the international society touched upon, we can now return to Hedley Bull's analysis of that society. Having asserted the international society as the current basis of international relations, Bull then defines international order – the central perspective from which he views international relations in the classical tradition, as “a pattern of disposition or activity that sustains the goals of that society: the preservation of the international society itself, the external sovereignty of individual states that comprise this society, and the goal of peace in the sense not of “Universal and permanent peace, such as has been the dream of irenists or theorists of peace, and stands in contrast to actual historical experience”.¹⁸

Rather, Bull defines the peace that the international society seeks in the context of order as “the absence of war among member states of international society as the normal condition of their relationship, to be breached only in special circumstances and according to principles that are generally accepted”.¹⁹ The unnerving manner in which breakdowns of order occur in parts of the world, with or without warning, and the

strivings of diplomats and international lawyers to restore order (“peace processes” that sometimes include provisions for legal accountability) demonstrates Bull’s thesis. Christopher Hill has aptly reflected that “the descent of Yugoslavia into savagery was an existential shock to the post-modern societies of western Europe”²⁰. The eruption of civil wars in the West African nations of Sierra Leone and Cote d’Ivoire -- both previously renowned for their idyllic reputations as placid spots in a volatile region – provides further empirical evidence of the accuracy of Bull’s thesis. The nuclear arms race in which certain states are suspected of aspiring to (or to already possess) nuclear status clandestinely is a sobering indicator that we live in an international society. And “the attacks of 11 September 2001 ended the fear-free lives of prosperous westerners”²¹. In the debate about terrorism, it is often forgotten that 9/11 was a crime against humanity, a violation of international humanitarian law. Kant’s perpetual peace is nowhere in sight.

This, then, is a pluralist view of international relations, and contrasts with the “solidarist” view of the peace movement. It has been criticized by various scholars as being too narrow a perspective because it divorces the international society from the human beings that inhabit its constituent states and conduct interstate relations²². Inherently, as well, this world view of international relations plays down the influence of morality in world politics.²³ And yet very neat divisions between the international society perspective and the solidarist one do not make as much sense as might have been the case when *The Anarchical Society* appeared in 1977. Clearly, elements of solidarism or the world society are now part of international relations, even if “Cosmopolitan networks between individuals and private associations may not live up to expectations of fostering the unity of mankind often placed upon them...” and “complicate life for

official foreign policy through creating other levels of agency”²⁴. Thus even within the “international society” intellectual tradition, there is a group of scholars with a more solidarist bent who stress the importance of individuals rather than states in international society²⁵. The pluralist essence of international society, however, remains dominant as the explanatory factor of world politics.

Since justice, in the sense of justice for individuals as bearers of rights and duties, is the main subject of this work, it is pertinent to examine Bull’s analysis of the tension between order and justice in world politics, and how the evolution of the international society since Bull’s death confirms or disproves his position.

Legal justice for war crimes dispensed by truly international war crimes tribunals, in the sense in which we know it today, was a distant vision in Bull’s lifetime during the Cold War. The Nuremberg and Tokyo trials were the major point of reference for *international* war crimes trials. It is not that the rights of individuals have ever been extinguished, except perhaps in the communist states, but they had, as Bull puts it, “gone underground”.²⁶ If the preservation of the sovereignty of states (including authority over their territories and citizens) is one of the main functions of order, it follows that a high profile for individual rights and duties is, in a sense, inherently subversive of sovereignty. This is because, first, it limits the power of the state directly, and second, it opens up the possibility of external entities sitting in judgment – moral, political, or legal – over the actions of sovereign states vis-à-vis their citizens. Bull posits that questions of the rights and duties of individuals, if answered in a certain way, can lead to disorder in international relations. One scholar has described this perspective with the term the “primacy of order”.²⁷ Bull argued that order was functionally prior to all other goals in

international relations, including justice, but wisely refrained from passing a value judgment on the merits of the two and accepted that the outcome of the order-versus-justice clash will vary according to the “merits” of each particular case.²⁸ One would say that it will vary not according to the merits, but according to the political interests at play at a given time.

Bull recognized the powerful force that international human rights represented even in the Cold War, but argued that the architecture of international order is hostile to demands for human justice. That is why the enforcement of international human rights -- even in the area of international criminal law which is one of the areas where international law has established itself as enforceable -- is essentially selective. Although Bull’s view is correct, there are two inherent qualifications: The first is that, as Bull himself accepted, international society is in historical evolution. While the limitations of that society (namely, its essentially anarchical nature, functional priority of order over other values such as justice, and the kind of “peace” that is possible within it) have been borne out by historical experience, there thus exists a possibility of adaptations in world politics that accommodate the demands of justice, even if selectively, without fundamentally undermining the primacy of order. Bull unwittingly provides support for this interpretation of the rise of international criminal justice when he states:

It is clear that demands for preservation of order and for the promotion of just change in world politics are not mutually exclusive, and there is sometimes scope for reconciling one with the other. Any regime that provides order in world politics will need to appease demands for just change, at least to some degree, if it is to endure; and thus an enlightened pursuit of the goal of order will take account also of the demand for justice. Likewise the demand for just change will

need to take account of the goal of order; for it is only if the changes that are effected can be incorporated in some regime that provides order, that they can be made secure.²⁹

Bull had in mind here mainly other dimensions of justice in international affairs, such as decolonization and the end of the Apartheid system in South Africa. But I interpret the analysis as applicable as well to legal justice for violations of international humanitarian law since this has become an aspect of international relations that is just as important as other manifestations of justice in international affairs today. Moreover, Bull himself addressed the question of international criminal justice to enforce human rights standards in *The Anarchical Society*.

The second qualification to the primary of order position is that it assumes another extreme position, that of an individual justice reflecting a cosmopolitan community of mankind and unregulated by power and order, as the basis of its assertion of the priority of order. There is no persuasive evidence that such a trend, despite having powerful advocates, is winning the day in international affairs. “The growth of the discourse of rights over the last fifty years”, Chris Brown has written, “has been one of the most striking changes in both the theory and practice of international relations”³⁰. Indeed, I have previously asserted that war crimes justice developed in the 1990s into a third dimension of international politics after diplomacy and the use of force³¹. Despite these significant shifts, it is now clear that the system of war crimes justice that has emerged is one that still remains subservient to order and is easily controlled by states as the main actors in international society. Subsequent chapters will demonstrate this proposition very clearly.

What Bull did not foresee is the extent to which a sea change has taken place in international society to adapt the idea of international justice without, in my view,

threatening interpretations of order that are based on *realpolitik* in any fundamental manner. A sense of movement towards universalism that has ultimately been far more apparent than real, has been created. The clash of forces has been a strong one, and both sides have won and lost important battles. Although Bull did not foresee the degree of change in the form of the international society, this evolution owes itself to trends that became dominant after his death, the specific nature of which he could not have foreseen.

The first reason for the conceptual shift towards international criminal justice that has been based not on victory in war, as efforts prior to the Rwanda and Yugoslavia Tribunals were, can be described in terms of the duality of human nature – the ability to be selfish and at the same time to aspire to higher standards. There has always existed a clash between the order-centered view of state interest and a human yearning to higher standards beyond those that merely serve the interests of states. This duality has given heightened prominence to the role of morality in international affairs generally, and specifically in the foreign policies of several states in international affairs. Some of these states are liberal democracies that have sought to transplant their internal political and legal values of accountability and due process to the resolution of problems in the international system. European states such as the United Kingdom have been in the vanguard of ethical foreign policy.³² Even in the creation of the Nuremberg Tribunal this tension was evident. The application of domestic liberal values of due process to a vanquished enemy -- even if as a more perfect way of cementing victory -- was one of several factors that contributed to the outcome of the internal bureaucratic battle between Morgenthau and Stimson in the United States and resulted in American support for the establishment of the Nuremberg Tribunal.

There certainly are competing views about the extent to which moral considerations are the driving force in the support of powerful liberal states for international criminal tribunals. One perspective is that “ethical” foreign policies should be viewed with suspicion, as foreign policies are hardly altruistic. This view can find support in the widely held belief that the war crimes tribunals for Rwanda and Yugoslavia were created as alternatives to a failure of political will to take preventive action in those conflicts, not some outcome of a crusading zeal for international justice.³³ But the moral element is nevertheless present to some extent.

Hans Morgenthau, the pre-eminent realist scholar of his day, captured the place of international morality and ethics in world politics most accurately when he wrote:

A discussion of international morality must guard against two extremes of either overrating the influence of ethics upon international politics or underestimating it by denying that statesmen and diplomats are moved by anything but considerations of material power.

On the one hand, there is the dual error of confounding the moral rules people actually observe with those they pretend to observe, as well as with those which writers declare they ought to observe. “On no subject of human interest, except theology”, said Professor John Chipman Gray, “has there been so much loose writing and nebulous speculation as on international law”. The same must be said of international morality. Writers have put forward moral precepts that statesmen and diplomats ought to take to heart in order to make relations between nations more peaceful and less anarchic, such as the keeping of promises, trust in the other’s word, fair dealing, respect for international law, protection of minorities, repudiation of war as an instrument of national policy. But they have rarely asked themselves whether and to what extent such precepts, however desirable in

themselves, actually determine the actions of men. Furthermore, since statesmen and diplomats are wont to justify their actions and objectives in moral terms, regardless of their actual motives, it would be equally erroneous to take those protestations of selfless or peaceful intentions, of humanitarian purposes, and international ideals at their face value...

On the other hand, there is the misconception, usually associated with the general deprecation and moral condemnation of power politics...that international politics is so thoroughly evil that it is no use looking for moral limitations of the aspirations of power on the international scene. Yet, if we ask ourselves what statesmen and diplomats are capable of doing to further the power objectives of their respective nations and what they actually do, we realize that they do less than they probably could and less than they actually did in other periods of history. They refuse to consider certain ends and to use certain means, either altogether or in certain conditions, not because in the light of expediency they appear impractical or unwise but because certain moral rules interpose an absolute barrier...³⁴

The Canadian scholar Robert Jackson has characterized the ethical dimension in international relations as “the global covenant”.³⁵ He describes this covenant as the result of a political conversation between humankind, conducted by means of the international society that has been going on for the past half century.³⁶ “Fundamental to the global covenant is the recognition of ‘the other’, Jackson argues. “There probably is an underlying ability of human beings everywhere to recognize each other as fellow human beings – however remote their kinship and however large their cultural differences”.³⁷ It is this element in international relations that is reflected in today’s international society. Global technology is a powerful hand maiden of the global covenant: it brings

international crises into our living rooms instantaneously, with strong visual images generating compassion, disgust and cries for action by governments in response to conflicts and mass atrocities.

Even the classical realist E.H. Carr, while advancing the thesis of the conflict between “reality” and “utopia” as one between politics and morality, recognized that: “If, however, it is utopian to ignore the element of power, it is an unreal kind of realism which ignores the element of morality in any world order”.³⁸ While Jackson is on solid ground in identifying the failure to give adequate credit to the human dimension of international relations as a shortcoming of the realist school, he may, however, have overestimated its impact. For the recognition of “the other”, and the degrees of action, outrage or lethargy a violation of that “other” kindles, frequently depends on factors such as geographic proximity, understandings of strategic interest, and race. Examples that come to mind include the U.N.’s failure to intervene in the Rwandan genocide as a result of a combination of factors: the disaster of the then recent humanitarian intervention in Somalia and its effect on American foreign policy, the absence of any strategic interest in Rwanda from the perspective of the great powers, the fact that a domestic interest in powerful states that could have made a difference did not exist or was not articulated, and so on.

The massacres of black Africans in the Sudanese region of Darfur, only a decade after Rwanda and the pious intonations of “never again”, is another example of the significant limitations of the global covenant³⁹. Here again, a desire not to jeopardize the larger peace process between the Arab government in Khartoum and the black Africans of Southern Sudan partially influenced initial inaction to halt the massive violations of

international humanitarian law in Darfur. Moreover, as some of the victims made clear in television interviews broadcast around the world, they were killed raped and displaced from their homes by the lawless Arab “Janjaweed” militias – and the international response to plight slow -- simply because of their race and color.

The U.S.-led intervention in Somalia bucked the trend of non-intervention or intervention for immediately obvious strategic reasons. Long before 11 September 2001 and the war against terrorism, former U.S. President George H.W. Bush ordered humanitarian intervention in that country when it collapsed into anarchy and state failure as a result of civil war – an effort that was taken over by the United Nations, with American leadership, but ultimately came to grief. Perhaps this was an exception to a general rule of vanishing interest in Africa by the Great Powers after the Cold War, when the continent was perceived as having lost its strategic relevance. Perhaps it was undertaken to demonstrate the possibilities offered up by a post Cold War “new world order” – a line of adjustments that led to the creation of international war crimes tribunals by the U.N. Security Council.

Justice in a Society of Unequals

The international criminal tribunals of the 20th century, having been established by powerful states, either as victors in war or as guarantors of international order, are not synonymous with, or even reflective of, Kant’s cosmopolitan interpretations of international relations in which he seeks to transcend the system of states and move to a civil society of mankind in which justice would, by inference, be totally objective and

individual⁴⁰. This is so because international war crimes justice cannot function effectively without the cooperation of states inside and across their national borders.

Rather, international criminal justice has great kinship with the natural law conceptual framework of Hugo Grotius, in which the law of nature is believed to have conferred individuals with rights and duties. In the post-Grotian adaptation in which it exists, it is evidence of what I will describe as an advanced international society. That society is “advanced” not because it is essentially different in substance from Bull’s depiction of it, but because its *form* has changed significantly. The extent of common institutions and international cooperation in several relatively non-controversial areas such as transportation, telecommunications, postal communications, public health, and so on, have vastly increased, and with it a sense of a greater stake in the society among its members. In this process, the *substance* has marginally improved, but only just. The essential attribute of sovereignty leaves enough scope for perspective and action as to guarantee that the anarchical dimension remains a constant.

It is one thing to acknowledge the role of morality and common institutions in international society. It is another to believe that the nature of that society has changed in any fundamental manner because of an *appearance* of having done so. Dorothy Jones, in her insightful analyses of the history of international organization and international justice in the 20th century, adopts the latter approach -- wrongly, one submits⁴¹. She argues that states have developed a code of international ethics that rests on nine principles – sovereign equality, territorial integrity and political independence, equal rights and self-determination of peoples, non-intervention each other’s internal affairs, peaceful settlement of disputes, abstention from the threat or use of force, fulfillment in

good faith of international obligations, cooperation with other states, and respect for human rights.⁴²

All of this is true, and laudable. It is also the case that breaches of these principles are so numerous that, together with many of the 79 international instruments⁴³ she identifies as the source of the principles of this code, they are, in reality, aspirations towards which the international society is laboring. The pre-emptive war in Iraq, and the various other controversial interventions by other countries are just one indicator of how firm or fragile these principles are. To recognize this is to see things as they truly are, while granting that they could be different if states *act* to make it so. Respect for human rights, for example, has experienced steady progress, but this should not lead us to conclude that the international society is a one where rights and freedoms are predominantly respected, or that they are values that exist in total isolation. To do so would be to subscribe to, in Jones's words, "the language of the fervent wish, decked out in legal dress". This is why the tension between cosmopolitan conceptions of justice and order remains and limits the universality of international justice. And the perspective of power still restrains justice because the international institutions through which the new generation of post-Nuremberg international justice has come into being are still beholden to the great powers.

It is precisely for this reason that, when the Canadian law professor Michael Mandel and others including Russian legislators filed a complaint with the ICTY regarding war crimes allegedly committed by NATO forces during their 78-day bombing campaign to stop an 18-month crackdown on ethnic Albanian separatists by Serb forces in Kosovo in 1999, there was much buzz, but no indictment⁴⁴. The allegations set out

cases where scores of civilians were killed by NATO bombs, including the bombing of a bridge as a passenger train was crossing it, a strike against a refugee convoy near Djakovica, and one against a Serbian television building in Belgrade.⁴⁵ The then chief prosecutor, Louise Arbour, ordered an investigation, but her successor, Carla Del Ponte, ultimately declined to file an indictment because the Prosecutor was unable “to pinpoint individual responsibilities”.

But even the mere fact of an assertion of jurisdiction implicit in an internal review by the chief prosecutor at The Hague met with resentment in the circles of power and influence in NATO capitals.⁴⁶ To begin with, the ICTY investigation was initially internal and confidential, though it was later made public. The Tribunal has a mandate to investigate and prosecute violations of international humanitarian law committed in the territories of the Former Yugoslavia from 1991. At a theoretical level at least, NATO did not question that remit. The real demonstration of the limits of international justice lay in the actions and statements by the United States Government, the normally “fearless” Del Ponte, and other officials of the Yugoslavia Tribunal. At a press conference in December 1999, Del Ponte asserted the will to hold NATO accountable should evidence of crimes be confirmed, consistent with her responsibilities as an independent international prosecutor: “If I am not willing to do that, then I am not in the right place”, she said. “I must give up my mission.”⁴⁷ But Del Ponte soon issued a statement in which she backpedaled, emphasizing that “NATO is not under investigation” and that “no formal inquiry” was underway.⁴⁸

While NATO shrugged off the ICTY investigation and its spokesman asserted the military alliance’s respect for the laws of war in its Kosovo campaign, the United States

Government reacted differently: A White House spokesman asserted NATO's exemption and characterized the Tribunal's investigation of the legality of the NATO bombings as "completely unjustified"⁴⁹. Spokesmen for the Tribunal later made it clear that an indictment or prosecution of NATO leaders and officials accused by Mandel was out of the question.

The reasons for this turn of events are not far-fetched. The U.S., a Great Power, is a major financial and diplomatic backer of the ICTY. The turnaround in the Tribunal's fortunes following its frustrating early years in which it was able only to apprehend and try low-level Serb military personnel, to the arrests of higher-profile political figures indicted by it, including Slobodan Milosevic, has depended almost exclusively on NATO's military and American political muscle. Del Ponte was initially under pressure to demonstrate the Tribunal's independence, but ultimately, the international court could not bite the finger that has fed it. More generally, the United States has consistently opposed any possibility that its military personnel or political leaders will be brought under the purview of international criminal tribunals, in particular the International Criminal Court⁵⁰. Critics like Mandel have asserted that America supported the establishment of the UN Tribunal simply in order to further its strategic interest in the Balkans.⁵¹

Rare is the state that would punish its own war criminals. Even rarer is a Great Power that will do so. Great powers often see themselves as guardians of international order, and one of the unspoken prerogatives of their muscular military exertions, frequently in the service of a national interest but also sometimes on behalf of international society, is a lower threshold of accountability. When U.S. soldiers killed

over 300 Vietnamese civilians during the war in Vietnam including infants and elderly persons, “no captains, majors, or generals were ever convicted” despite the precedent command responsibility for the acts of subordinates set by the International Military Tribunal for the Far East in the famous *Yamashita* case⁵². The U.S. military chain of command tried to suppress the story until it was broken by journalists, leading to a trial of the lowly Lt. William Calley who was convicted of war crimes but paroled after a brief imprisonment⁵³.

For the realists in world politics, war crimes justice is a suspect approach. High politics is much to be preferred. From the international society approach adopted in this work, war crimes trials are not the problem. They are necessary and beneficial, as just one of several tools, to the maintenance of international order in certain circumstances. But the dominant factor in the politics of war crimes justice is *who* the defendants are, or will be – *yours* or *mine*? For hegemons, the answer is clearly the former. Whatever may be said of the benefits of war crimes trials in certain circumstances – and there are several – this is how things work out in real life, even if not necessarily in the law books. Although powerful states frequently justify their self-exemption from international criminal procedure on the basis that they are able to bring their own citizens to justice for war crimes when appropriate, the track record points to few examples of this course of action⁵⁴. The attribute of power, then, confers a significant degree of practical immunity from legal consequences in the international arena. This is far less so in areas such as international trade, where even the superpower United States has implemented adverse rulings by the World Trade Organization, than in the more political aspects of international law such as the use of force.

While one does not, like some neo-realists, take a dim view of international legalism, there is merit to the analysis that international institutions are “epiphenomenal, mere veils over state power”.⁵⁵ As the realist political scientist John Mearsheimer puts it: “Realists maintain that institutions are basically a reflection of power in the world. They are based on the self-interested calculations of the great powers, and they have no independent effect on state behavior”.⁵⁶ Mearsheimer’s statement may be hyperbolic. International institutions do in fact affect the actions of weak states, and in limited circumstances, even powerful ones, because they can confer a legitimacy that a powerful state, acting alone, may lack. This has been demonstrated by the international political fallout of the United States-led invasion of Iraq that ousted Saddam Hussein. Moreover, the United Nations, and in particular its Secretary-General, has over several decades acquired a level of independent moral authority and diplomatic influence -- often exercised behind the scenes -- that tests Josef Stalin’s famous sarcastic remark: “how many divisions has the Pope?” As a general rule, however, Mearsheimer’s position remains generally valid, and even scholars that are neither realist nor neorealist can agree.⁵⁷

International Judicial Intervention and Sovereignty

On the other hand, despots and sundry dictators of several illiberal states can no longer act politically or militarily with impunity with no second thoughts about consequence. In the past, it was only the prospect of a war in which the perpetrator of violations of international humanitarian law is defeated that offered any hope of external

judicial intervention that international criminal tribunals represent, even with the caveat that this framework has a far greater impact on the behavior of weak states than strong ones. The creation of the permanent International Criminal Court is an indication of this nuanced reality.

While Christianity was the dominant basis of natural law theory in the time of Grotius, in the 20th century the natural law argument was advanced not in religious terms, but through what has been described as “the bright chain of reason” in international affairs.⁵⁸ This line of thinking has found expression in the aspirations towards justice and peace in the UN Charter, the Genocide Convention, the Universal Declaration of Human Rights, and other documents that influence to some degree the intercourse within the international society.

The second reason for the conceptual shift by which the international society has willingly adapted itself to accept and create a limited form of individual criminal justice at an international level is the emerging doctrine of what I call “contextualized sovereignty”. The classic notion of sovereignty is well explored in the sixteenth century political philosopher Jean Bodin’s treatise *Les Six Livres de la Republic* (1576).⁵⁹ Bodin argued: “it is most expedient for the preservation of the state that the rights of sovereignty should never be granted to a subject, still less to a foreigner, for to do so is to provide a stepping-stone where the grantee himself becomes the sovereign”.⁶⁰

In the contemporary international society, support for this doctrine is found in Article 2 of the UN Charter, which provides: “All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state ...Nothing contained in the present Charter shall

authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state". Other than in the exercise of the right of self-defence by a state under Article 51 of the UN Charter, a deviation from this basic norm of international society may only occur where (a) there is a breakdown of international order and an intervention is undertaken for valid reasons of international peace and security, as provided for in Chapter VII of the UN Charter; (b) where the intervention is executed with the consent or at the invitation of the legal government of the target state; or (c) for humanitarian purposes, to protect or rescue the civilian population from its own government or rebel forces or where there is widespread domestic anarchy that engenders state failure.⁶¹

The third justification, which is not provided for in the UN Charter, remains the subject of raging normative and practical controversy.⁶² There is a trend of opinion in international society, inspired to some extent by the global covenant, that sovereignty can no longer be absolute in the face of egregious violations of human rights such as genocide, not just in time of war, but of "peace" as well. Even classic realists like Morgenthau recognized this fact as one of the absolute limitations morality imposes on statecraft, noting that it was a failure to recognize this boundary that led Hitler to perpetrate the Holocaust, multiple wars of aggression, and ultimately to his destruction⁶³. International relations underwent profound systemic change after the Peace of Westphalia (the Treaties of Münster and Osnabrück) that ended the Thirty Years War in Germany in 1648, to one based on territorial sovereignty. The Westphalian system has been summarized thus:

The actors of the Westphalia System are sovereign states – territorial polities whose rulers acknowledge no equal at home, no superior abroad; except in very exceptional and restricted circumstances, individual human beings have no standing in international society. States are legally equal, differing in capabilities ('Great Powers, Medium Powers, Small Powers') but with the same standing in international society, which means that the norm of non-intervention is central no sovereign has the right to intervene in the affairs of another⁶⁴.

This is the system that broadly remains in place to this day, but developments since 1945 have begun to chip away at its edges, and today individuals are recognized as having juridical standing in international law and society. Kofi Annan, Secretary-General of the United Nations, is a frequent and strong advocate for a more nuanced approach to sovereignty in appropriate cases, arguing for recognition of the sovereignty not just of the state itself, but of the *people* who are its citizens.⁶⁵

The basis of this is an interpretation of sovereignty as *responsibility*, which is to say, it is not enough for a state to argue that it is sovereign in relation to other states in the international society, but it also has a responsibility under international laws, such as the United Nations Charter, not to violate the rights of its citizens. Where it fails to live up to this responsibility, and especially where mass atrocities on a large scale are part of the scenario, a right of the international community to come to the protection of the citizens of a delinquent state kicks in⁶⁶. The advocates for this approach to sovereignty believe that in framing the debate in terms of responsibility of states under various international treaties such as the UN Charter, rather than in terms of a right of external states to intervene in the internal affairs of a state in appropriate circumstances, there is no transfer or dilution of sovereignty but only a re-characterization of it.⁶⁷ The report of a

respected group of statesmen commissioned by Annan has reinforced this concept and recommended that the UN adapt its understanding of the Westphalian system to incorporate what has become known as “the responsibility to protect”⁶⁸.

This argument is applicable as well to judicial intervention within the wider framework of human rights enforcement, as was clearly the case in the Former Yugoslavia, where the International Criminal Tribunal for the Former Yugoslavia was established in 1993 with no invitation from the governments of the states of the Former Yugoslavia (and while the conflict was still active, and well before military intervention by NATO in 1995). While the International Criminal Tribunal for Rwanda was established at the invitation of the Rwandan government, the interpretation of sovereignty as responsibility is echoed in that case as well.⁶⁹ The systematic “ethnic cleansing” that occurred in the wars of disintegration of the Former Yugoslavia and the genocide in Rwanda provided the strongest ethical arguments for intervention. Further evidence of contextualization of sovereignty can be found in the Constitutive Act of the African Union, which explicitly recognized genocide, crimes against humanity and war crimes as situations that would warrant external military intervention in a member state of the Union. But the massacre of more than 100,000 Hutus in Burundi in 1972 did not elicit any threat of intervention, nor did the death of hundreds of thousands of civilians in the breakaway Republic of Biafra from starvation during the Nigerian civil war from 1967-1970 engender intervention to end their suffering, though moral sympathy was much in evidence.

Today, we live in an international society in which the responses (at least moral, if not political or military) to such atrocities have shifted. But because the pace of political

and military action has not kept up with declarations of value judgments, humanitarian and judicial intervention in the context of a global covenant remains far more the exception than the rule. The contextualization of sovereignty does not mean that the world's habitual moral and political reticence to intervene against genocide has vanished. All it means is that, unlike in the past, powerful and willing external actors can now intervene in such situations should they *decide* to so. That decision will be driven in any given case more by a calculation of strategic interests than by ethical considerations.

Sudan's Darfur region is a case in point. The international society's response to the ethnic cleansing of an estimated 70,000 black Sudanese was ultimately not as tepid as it was to Rwanda's genocide, but it still has been a token one that came well after the fact. Rare for an African conflict, the long civil war in Sudan eventually generated domestic political interest within the United States—politically influential and conservative Christian groups opposed to the allegedly continued of slavery in Sudan kept that country on the radar screen of the administration of President George W. Bush, and American involvement led to the cessation of hostilities between the Arab government of Sudan and the rebel groups from Christian Southern Sudan.

This in turn led to intense diplomatic pressure on the Sudanese government to end the Darfur crisis, even if after the fact of the massacres and the humanitarian displacement of over a million people by the *Janjaweed* militias allied with the Sudanese government. While Secretary-General Kofi Annan invoked the sacred duty of a government to protect its citizens – sovereignty as responsibility – and raised the possibility of international sanctions against Sudan's government, there was a clear reluctance to call the massacres genocide, an approach indicative of the politically

explosive power of the word.⁷⁰ American diplomats acknowledged that there were some “indicators of genocide”, but it was difficult to be certain in the circumstances. Condemning the humanitarian situation in Darfur, American Secretary of State Colin Powell told journalists when he visited Khartoum in July 2004: “We can find the right label for it later. We’ve got to deal with it now”.⁷¹ But the United States Congress, however, voted to describe the situation in Sudan as genocide. Powell, based on a detailed American investigation of events in Darfur, ultimately came around to a judgment that genocide had occurred in the Sudan. The European Union, meanwhile, declined to use the “G” word, and UN Secretary-General Kofi Annan established an international commission to investigate the atrocities and determine whether they constitute genocide. That commission found that, while crimes against humanity had been committed, and the Government of Sudan and the Janjaweed were responsible for those atrocities, the Sudanese government had not pursued a policy of genocide.⁷²

The African Union, which flatly stated even before the Commission’s report that it did not believe the massacres constituted genocide, responded to the first test of its constitutional obligation to intervene against massive violations of international humanitarian law by authorizing an intervention force of 300 armed soldiers in Darfur that would monitor the ceasefire between government and rebel forces in Sudan, and its mandate was later widened to protect civilian victims of attacks by the Arab militias. In a symbolic move Rwanda, together with Nigeria and a few other African countries, contributed troops to that force. The AU straddled itself between a reluctance to “name and shame” Sudan’s Government as complicit in the Darfur atrocities and a desire to act decisively in response to the massacres. The United States Ambassador at Large for War

Crimes Issues, Pierre-Richard Prosper, whose efforts to travel to Sudan to investigate the massacres were frustrated by the lack of cooperation from the Sudanese government, named seven members of the *Janjaweed* that the United States believed were culpable for the Darfur massacres.⁷³

International displeasure remained more bark than bite even after the Security Council adopted a resolution that threatened the Government of Sudan with punitive action if the latter failed to disarm and bring the *Janjaweed* militias to justice⁷⁴. Violence against the victims of mass atrocities continued. The interplay of both initial inaction and a subsequent, graduated response in Darfur, the yawning gap between declarations of outrage and the reality of the victims on the ground, and the disparity between interpretations of events there from the perspective of legal accountability, all illustrate the continuing complexities of the concept of sovereignty and the divergence of interests that remains in international relations and renders the international society anarchical.

Out of this anarchical response, however, consensus has emerged that the instigators of the crimes in Darfur should face trial. But even that consensus soon became hostage to anarchy and almost disintegrated. Debate ensued over the options of a trial of Darfur atrocities at the International Criminal Court through a Security Council referral⁷⁵, as recommended by the UN's Commission of Inquiry and favored by European states, and an ad hoc tribunal established by the UN Security Council, an option favored by the United States in light of its strong opposition to the ICC. The United States was not able to muster enough support for its preferred option and the Council ultimately voted in favor of the ICC option, but not without inserting a clause exempting American personnel from the Court's jurisdiction.⁷⁶ Thus we can see that an international response,

even after the fact and based mainly on a reactive attempt to punish violations of international humanitarian law through a legal process, has been buffeted by strong political winds.

International criminal law has “penetrated through the shell of sovereignty”⁷⁷, even if its core essentially remains untouched. It is worth remembering that, for all the advance it made in prosecuting the criminal responsibility of individuals who acted ostensibly on behalf of the German state, the International Military Tribunal at Nuremberg trials prosecuted the Nazi leaders for the extermination of Jews and other minorities only in the context of such crimes that the Nazis committed in foreign countries in the course of aggressive war. In other words, had Hitler confined his Holocaust of Jews within the borders of the German state and not crossed international borders with his ideology, whether the Nazis would have been brought to justice is open to conjecture.

But strategy and power still play a role in the argument for intervention. The norm of sovereignty is unlikely to be breached in the case of powerful states, regardless of the atrocities that might occur therein. In the contemporary international society, the “ethical” foreign policies of some liberal states have not led to more than mild noises about allegations of human rights violations in powerful states like China.⁷⁸ Moreover, assertions of sovereignty, even by weak states, may prevent or affect the nature of international judicial responses to crimes against humanity. Attempts to establish an international tribunal to try the leaders of the Khmer Rouge for the genocide of 1975-1978 in that country met with resistance and ambivalence from the government of

Cambodia, resulting in a compromise agreement for the establishment of a mixed national-international court.

The third and perhaps most important reason for the normative shift in favour of international criminal justice is the implosion of the Soviet Union and the end of the Cold War in 1989. This seminal event in 20th century history broke the ideological superpower rivalry that blocked agreement and effective action in the UN Security Council in the field of human rights. In the Cold War world, there was no appetite for judicial intervention as part of peace processes. It is thus no accident that, despite efforts by advocates of international justice, no international war crimes tribunal was established in the 45 years between the Nuremberg and Tokyo trials on the one hand, and the Hague and Arusha Tribunals on the other.

The shift thus confirms one aspect of the thesis of Hedley Bull and his fellow members of the English School of International Relations, and weakens another. It confirms the relationship between power and international law, in the sense that international law frequently serves to legitimize hierarchies created by the distribution of power, without prejudice to the moral case for the accountability of the weaker party. As Bull argued:

When questions of human justice achieve a prominent place in the agenda of world political discussion, it is because it is the policy of particular states to raise them. The world after the First World War heard about the guilt of the Kaiser, and after the Second World War witnessed the trial of German and Japanese leaders and soldiers for war crimes and crimes against the peace. It did not witness the trial and punishment of American, British and Soviet and soldiers who *prima facie* might have been as much or as little guilty of disregarding their obligations as Goering, Yamamoto and the rest. This is not to say that the idea of the trial and punishment of war criminals by the international

procedure is an unjust or unwise one, only that it operates in a selective way. That these men and not others were brought to trial by the victors was an accident of power politics.⁷⁹

But there is a certain contradiction between the rise of this kind of justice – which enforces international law – following the Cold War, and the view of the English School that a balance of power in international society is an essential prop to international law. That may be true to some degree regarding the use of force by states, but is certainly not the case with regard to human rights norms that also form part of international law. It is most unlikely that trials would have been contemplated for the Cambodian genocide,⁸⁰ or that the International Criminal Court would have been established, if a balance of power can be said to have served the cause of international law, for the existence of client states beholden to the United States or the Soviet Union would have prevented these states from supporting these initiatives.

International Law in the Anarchical Society

Nonetheless Hedley Bull and the English School, with its essentially sociological approach to international law, provide an excellent framework within which to study the relationship between order, on the one hand, and the aspirations towards human justice, and the international law that supports those aspirations on the other. In a contemporary assessment of the English School, Peter Wilson has identified its three essential elements as: (a) the absence of a common government that regulates the international society; (b) the importance of normative rules, with international law as its core, in shaping international societal behavior; and (c) the absence of solidarity among members of the

international society.⁸¹ The English School sees the absence of solidarity as a cause of the unavoidable existence of a significant degree of anarchy in international society, and posits that this lack of solidarity has important consequences for the *nature* of international law, important as the latter is in the architecture of the international society. As Wilson notes, “sense can only be made of international law by making sense of international society”.⁸² It is by making sense of the international society that we can see why and how the absence of complete solidarity within it— despite the advanced stage of that society — makes the prospect of a world justice that transcends the states system a distant one indeed.

Few events have demonstrated the nature of the international society as sharply as the pre-emptive war against Iraq by the United States and Britain in 2003, and the lessons it teaches about the nature of international law. The international crisis generated by that war captures the absence of solidarity within the “international community” as represented in the United Nations, and the role of power and the self interest of Great Powers, in world politics. That event will have profound consequences for international relations. It will especially impact on the future direction of international law, the role of the United Nations, and the future of United States foreign policy.

Bull argued in his classic text that the international society is only one of several elements in world politics, and by no means the dominant one. Other elements include that of a state of war, which the philosopher Thomas Hobbes believed was foremost. Yet others include power (especially the balance of its distribution) and international law, in addition to the pull towards a somewhat utopian world society that is based not on the states system, but on individuals as a civil society of mankind.

Of all these factors, the role of power (military and economic) and its relationship to international law is the most critical. A balance of power was a major feature of international relations in the nineteenth and twentieth centuries. The nineteenth century balance of power was essentially a European one, involving Britain, France, Austria-Hungary, Russia, and Prussia-Germany. Its collapse led eventually to the First World War and the creation of the League of Nations. The twentieth century balance was embedded in the Cold War and nuclear deterrence between the United States and the Soviet Union. China represented an additional pole of power. With the implosion of the Soviet Union and the Cold War long over, the world is left with an American power that is not only dominant, but has practically no effective balance in sight. China remains a major global power, though for now an inward looking one.

The problem with a unipolar world is that international law -- a significant component of the maintenance of order in world politics -- can become a major casualty. In such a world, international law can be violated with little direct consequence to the hegemonic power. Far from consolidating order, such use of power, even in the name of freedom, human rights and liberal democracy, will rather increase disorder. Bull believed that the effective functioning of international law and diplomatic intercourse depend to a large degree on the existence of a balance of power -- or at least a staggered distribution of it. It is probably more accurate to say that, especially in matters of national security and the use of force, the stability of the international system depends more on how much a hegemonic power understands its long term interests as being advanced by obeying international law.

This is where the dynamics of power confront the nature of international law.

The disappointment that many outside the United States felt at the American invasion of Iraq stems mainly from a faith in international law that misunderstands its fundamental nature. Theorists have spent much ink on whether international law, lacking as it does the centralized, coercive power or structure of law in the municipal sphere -- a government with power to legislate, police and prisons to enforce -- is indeed law.

It is, but for different reasons. "Those who would draw a clear distinction between law and politics are to be found more in ivory towers than in the corridors of power"⁸³. The nature of public international law, like most law in fact, is that "[P]olitics decides who the lawmaker and what the formulation of the law shall be; law formalizes these decisions and makes them binding."⁸⁴ From the positivist point of view, law must meet three tests in order to be valid: clear legislation in accordance with recognized procedure, the uniform possibility of adjudication, and enforcement or sanction. In this light, then, if we apply these three tests to international humanitarian law, we find that only the first, legislation, is uniformly present. Adjudication and enforcement exist only partially, as I have discussed above, and this suggests that international law, especially in the political domain of the use of force and international humanitarian law, is, as Oppenheim opined, "weak law" but "nevertheless still law."⁸⁵

To understand international law a slightly different paradigm is needed, especially in light of the absence of a single sovereign and the presence of a multiplicity of sovereigns. What this suggests is that international law is law, but on a basis other than the ones positivists are wont to look out for. States obey and respect international law first, because members of the international society of states can enforce it on their own in certain circumstances; second, national interest; and third, because of the influence of

international or domestic public opinion -- the interstate equivalent of peer pressure. From this standpoint, "law is enforced because it is obligatory, not obligatory because it is enforced", and so it is not necessarily the case that international law is not binding because it cannot always be enforced.⁸⁶

No state, however powerful, wants to be viewed as a habitual law breaker. This is why, whatever its real motives, the United States has justified its action in Iraq as an exercise of their right to pre-emptive self-defence. It also argued that it acted to enforce international law, represented in the UN Security Council resolutions Saddam had serially violated. Moreover, interpretations of who is or is not a law breaker in international society can sometimes become extremely subjective when issues not just of sovereignty or external national interest, but national security, are thrown into the mix.

Any way we look at it, however, it is impossible to get away from the reality that international law is a weaker kind of law than national law, or law that is nationally enforced. While international law as a "social reality" is an important factor in international society, it is not necessarily a dominant one in world politics. Seen from this sociological perspective, international law, as noted earlier, is a reflection of power in the international system, despite the formal sovereign equality of states in the United Nations. Voting rights in the International Monetary Fund and the World Bank are not equal, and "states of chief industrial importance" have special privileges in the International Labor Organization. It is for this reason that international law often binds the weak more effectively than the strong -- which is why the enforcement of legal justice for war crimes is so uneven. For these reasons, the nature of international law allows it to be constantly "updated", adapting even to violations of it in certain circumstances.

The United Nations, around which the international society revolves as a forum for shared values, was wounded by the Iraq crisis. But hasty obituaries of the organization in the heat of the crisis are decidedly premature. For one, it is a far more elastic and adaptive organization than the high minded League of Nations. For another, the United States, despite its power, frequently needs the legitimacy conferred by the United Nations. Although it acted ultimately on its own with a "coalition of the willing", the U.S. sought that legitimacy in the form of an authorizing UN resolution --without success. It is a fact of international life that all states act both unilaterally and multilaterally at different times⁸⁷. In 1979, in an earlier example of "regime change" the late Julius Nyerere, former President of Tanzania, unilaterally invaded Uganda in 1979 and ousted the Ugandan dictator Idi Amin, in contravention of the principle of non-interference in the internal affairs of African states that was a bedrock of the Charter of the Organization of African Unity.⁸⁸ The United States' subsequent efforts to ensure greater United Nations involvement in post-war Iraq proved that these two realities can co-exist. That is the real nature of the international society. The United States is the world's hegemonic power. But from the complications that have attended its ouster of Saddam Hussein has emerged a realization that even its power has limits. Power and legitimacy are not always co-located, and even within the anarchy the societal nature of world politics – as opposed to the international system – makes acquiring legitimacy in the pursuit of strategic goals a recommended approach.⁸⁹

The problem of power relations – and its relationship to the international rule of law – will not go away in the foreseeable future, certainly not for as long as America remains the world's hyper-power. The nature of power and dominance is that those who

have it seek to maintain it, and history is very short indeed on examples of the possessors of such power giving it up voluntarily. Michael Glennon, in a realist essay on the nature of international law regarding the use of force, captures the inherent tension between hegemony and equality: “Hegemons have ever resisted subjecting their power to legal restraint. When Britannia ruled the waves, Whitehall opposed the limits on the use of force to execute its naval blockades – limits that were vigorously supported by the new United States and other weaker states. Any system dominated by a ‘hyperpower’ will have great difficulty maintaining or establishing an authentic rule of law”⁹⁰.

A certain degree of anarchy will always exist in an international society that is based on sovereign states and mobile non-state actors that pursue frequently divergent interests. With the very invasion of Iraq without the support of a United Nations resolution, progress – such as it was – towards a “thicker” international society has been slowed down, and the adversarial currents that challenged the societal nature of international politics and sought to stimulate a shift to a real community have been further weakened. That anarchy must be managed by addressing the fundamental issues that exacerbate it. Those issues are the ones of justice of a different kind, not legal – chief among them the question of poverty and the Israeli-Palestinian conflict.

In clarifying the chief thesis of this work in Chapter 1, I noted that there are several kinds of justice, but that I concern myself here chiefly with formal, or legal justice. That is necessary for the sake of focus and relative brevity. Ultimately, however, there is a strong interconnectedness between the different kinds and meanings of justice, and while they can be separated in an exposition such as this, they all come together in the international society. Thus Kofi Annan has argued, in a solidarist vein:

In fact, to many people in the world today, especially in poor countries, the risk of being attacked by terrorists or with weapons of mass destruction, or even of falling prey to genocide, must seem relatively remote compared to the so-called “soft threats” – the ever-present dangers of extreme poverty and hunger, unsafe drinking water, environmental degradation and endemic or infectious disease. These kill millions of people every year. Let’s not imagine that these things are unconnected with peace and security, or that we can ignore them until the “hard threats” are sorted out⁹¹.

But the Iraq war will affect the path of international justice for war crimes. One of its consequences may be that international war crimes trials under the auspices of the United Nations will become less frequent than it was in the 1990s, especially now that the International Criminal Court is firmly established. This trend is already apparent. That is because the myth that the end of the Cold War spawned – that the international society was now a community with one purpose – has been shattered, not just by the Iraq war, but by the war against terrorism – a war that is potentially endless. And it will take time to return to such a point of promise for human rights in international relations. Saddam Hussein, Iraq’s former ruler will be subjected to an Iraqi war crimes trial that is really a disguise for the classical context of such trials – the victor trying the defeated in war – rather by collective action by the United Nations.

International or World Society?

Barry Buzan has critiqued English School theory as being excessively focused on international law and especially human rights. This approach, he and other critics argue, has trapped the international society-world society debate in a narrow framework that

excludes the relevance of economics. But the reason human rights is so dominant in English School theory is because what Buzan terms a “tyranny of rights” can pose an existential threat to sovereignty.⁹² As Nicholas Wheeler has aptly observed, human rights goes to the heart of the relationship between governments and their citizens, and “poses the conflict between order and justice in its starkest form for the society of states”.⁹³

Buzan reconciles the tension by casting human rights as representing not absolute positions but “degrees of difference”. He anchors his interpretation on a “juridical” view of sovereignty in which that term is open to negotiation. That interpretation is in accord with the one I offer regarding “contextualized” sovereignty. In my definition, and doubtless that of many, the sovereignty of a state is not a blank check to commit genocide. It is also one where the tension between legalism and order is sometimes resolved in favor of the latter.

As well, although an in-depth critique of economic globalization is beyond the scope of this work, inserting the latter into a study of the tension between order and legal justice is inapposite, and not just for the reason of the primacy of the relationship between human rights and sovereignty cited above. Just as important, economic globalization is supposedly a win-win proposition. But, as regards legal justice, there is a huge difference between *internationalization*, which relates to *standards* and is not inconsistent with international society (indeed it is inevitable), and *globalization*, which would relate to *jurisdiction* and a world society or a world government that stipulates and enforces the law. That is why the backlash to “borderless justice” or universal jurisdiction over human rights crimes, which have direct political implications, has been far more profound in the case of attempts at legal globalization than in the economic sphere. Even

economic globalization – and the globalization of law relative to economic activity -- is not without conflict.⁹⁴

It may well be, as Phillip Bobbit has speculated in a seminal essay, that “the nation state, whose legitimacy is based on its undertaking to improve the well-being of its people through law, would be superseded by a market state, which claimed power on the basis that it would maximize the opportunities of societies and individuals. It would do so less through law and regulation and more through the use of market incentives and private action”.⁹⁵ But this is unlikely, for the reason that economic globalization is driven largely by the self-interest of its participants. It does not necessarily translate to any sense of a shared humanity or a uniform character of states and societies that form the bedrock of a universalist view of international order.⁹⁶

Another critique of the English School is that its conception of international society is exclusively global and systemic, ignoring regional trends towards globalization. Buzan has noted that this aversion to regionalism accounts for the pessimism and pluralism of the writings of English School scholars. The European Union is often cited as a distinct example of a shift towards solidarity and a cosmopolitan world society. The “European” identity has become an increasingly strong one, and there are clear tensions between two identities, as it were: the sovereign national one of individual countries, and the supranational one of a closer European Union or super-state for which some European statesmen, citizens and civil society have clamored.

It is certainly the case that the degree of regional cooperation through common institutions (the whole point of an international society) is greater in Europe than in any other part of the world. It is equally the case that, in that context, EU institutions such as

the European Court of Human Rights and the European Court of Justice recognize and adjudicate on the rights of individuals to a degree that significantly transcends the system of sovereign states. European Union states are also the strongest champions of the permanent International Criminal Court.

While prophecy may be rash, and there is no monopoly of certainty as to how the international society may evolve in future, Europe is a mature international society and not a world society, as proponents of universalism would argue. This is because, first, the institutions of the EU have been mediated by sovereign European states, not by a transnational civil society of individuals. Those states agree on close cooperation, but are on quite different wavelengths when it comes to the extent of integration. States such as Britain, Denmark, Sweden and Poland have not been as enthusiastic as France, Germany and Belgium for accelerated and even deeper integration.⁹⁷ Even within the desired miniature world society or super-state of Europe, countries like France and Germany have run budget deficits for years in a row and have faced no effective sanction – a feature not too different from a normal international society.

In short, one agrees with scholars of international law and relations who have argued that the states system – and sovereignty -- is not in serious decline. Rather, the loss of sovereignty is more apparent than real because “no institution – private, regional, or international – can compete with the nation-state’s authority, which it obtains through direct legitimacy conferred by popular majority vote or, at least, by consent”.⁹⁸ What happens is a contextualized form of sovereignty whereby states relinquish total control over affairs that affect them in order to advance their strategic interests, but without taking away in essence their ability to dominate their territory.⁹⁹ Bobbit has argued,

rightly, that the European Union, contrary to appearances, is not on a path to become a super-nation state – which he describes as “a constitutional cul-de-sac”, but rather an “umbrella state” which he defines as “a free-trade and/or defense zone that allows for a common legal jurisdiction on some, but not all, constitutive issues”.¹⁰⁰ He notes that the EU’s ability to induce human rights violating regimes into voluntarily amending their laws in return for admission to the single market as “a classic market state maneuver”. From the interpretations of sovereignty I have offered, with support from Buzan’s, sovereignty cannot be defined in absolute terms as a right of a state to do what ever it pleases with its population. If that is so, as I posit that it is, a marked reduction in human rights violations, attained through observance of international standards, is not tantamount to a loss of sovereignty and so does not threaten a state so long as it has not lost its overall prerogative – and indeed responsibility – to maintain domestic order. It should be noted in this regard that none of the large liberal democracies has allowed within itself a “tyranny of rights” that robs a state of its duty to maintain law and order.

Nothing has tested the complex balance between order and human rights in Western liberal democracies as the “war on terrorism” triggered by the terrorist attacks of 11 September 2001. The battle between order and individual rights has become as visceral as it gets, with the affected governments determined to do all in their power to ensure society’s very survival (the primary goal of the pattern of activities that sustain order), including through controversial detention policies towards suspected or accused terrorists and significant encroachments on privacy rights, and human rights groups battling against the rise of what they view as an increasingly “Big Brother” society akin to that depicted in George Orwell’s book *Nineteen Eighty-Four*. William Safire has aptly

commented: “Your mother’s maiden name is not the secret you think it is”.¹⁰¹

That is why I part company with those scholars and activists who argue that the English School – or, indeed, international relations in general, should discard the primacy of states as the organizing principle of international relations. Among the strongest adversaries of sovereignty and proponents of a global “justice beyond borders” is the transnational civil society movement, represented by its more formal, structural arm, non-governmental organizations (NGOs).¹⁰² Their influence in international affairs, from the adoption of the treaty banning land mines to the establishment of the International Criminal Court over the opposition and reservations of a great power like the United States, is undeniably potent. Ann Florini, in an essay that is supportive of the NGO phenomenon but nevertheless captures the tension inherent in the world-society perspective that civil society so passionately advocates, has asked: “...does the rising power of civil society augur good or ill? Is the world to be rendered just and prosperous by hordes of concerned citizens banding together to demand, and create, a better world? Or will fragile progress toward democracy around the globe be undermined by unelected, unaccountable extremists?”¹⁰³

Certainly, non-governmental organizations have acquired progressively firmer procedural standing within international institutions (including, in recent years, in the United Nations Security Council¹⁰⁴) and, in some cases, a legal one¹⁰⁵. This is a welcome development. But does this make transnational civil society a viable alternative to states? The answer is clearly no. Civil society is a welcome and fresh voice of partnership in international affairs, acting as a watchdog and questioning the excesses of states. If a real need for them did not exist, it is doubtful that they would have thrived as they have. But

this does not give them the same legitimacy as states. NGOs cannot govern countries.

Moreover, even the very accountability of NGOs, derided by their critics as “self appointed do-gooders” and “unelected guardians of the global public good”¹⁰⁶ is increasingly open to question. Andrew Hurrell has noted a need to challenge “a certain romanticization of the potentialities of transnational civil society”:

Civil society is after all, an arena of politics like any other in which the good and the thoroughly awful coexist, in which the pervasive claims made by social movements and NGOs to authenticity and representativeness need to be tested and challenged, and in which outcomes may be just as subject to direct manipulation by powerful actors as in the world of inter-state politics.¹⁰⁷

Secondly, there is empirical evidence that, relative to European integration, the “more is better” approach is driven by the vision of particular politicians and is mostly out of step with the popular will in European countries. The “sense of self” remains high.¹⁰⁸ Elections to the European Parliament in 2004 witnessed low voter turnout and the victories of euroskeptical political parties in several European countries. A major clash will occur as the process of European integration progressively challenges the maxim that “all politics is local”, with “governments increasingly facing situations in which their commitments under EU law clash with domestic political imperatives”.¹⁰⁹

Taking the argument further and connecting it to legalism, it is clear that, despite their support for the International Criminal Court, it is unlikely that any European country would allow its nationals to be tried by the ICC rather than its own domestic courts under the Court’s principle of complementarity *vis-à-vis* national jurisdictions. The logical

conclusion, then, is that the justice of the ICC will again be for the weak and poor states with little power in the international society. And, as we shall see when we discuss the ICC, even attempts to define the use of nuclear weapons as a war crime in its statute were rendered unsuccessful by the divergent self interests of various powers at the negotiations that created the court – again, *society*, not community or universalism, at play.

That the exaggerated claims about the implications of globalization and the imminence of a world society do not reflect the complex reality of the international society as a situational context for war crimes tribunals is clear from the status of “empire” that several commentators have ascribed to the United States – and the implications of this status for the rule of law on the international plane. The historian Niall Ferguson has countered this simplistic view:

All the empires claimed to rule the world; some, unaware of the existence of other civilizations, maybe even believed that they did. The reality, however, was political fragmentation. And that remains true today. The defining characteristic of our age is not a shift of power upward to supranational institutions, but downward. If free flows of information and factors of production have empowered multinational corporations and NGOs ..., the free flow of destructive technology has empowered criminal organizations and terrorist cells, the Viking raiders of our time. These can operate wherever they choose, from Hamburg to Gaza. By contrast, the writ of the international community is not global. It is, in fact, increasingly confined to a few strategic cities such as Kabul and Sarajevo.¹¹⁰

Conclusion

In conclusion, it is hoped that the foregoing examination of the nature of the international society, including the nature of international law, the absence of solidarity (despite claims to the contrary), and the primacy of the interests of sovereign states, has confirmed the approach I have adopted to a study of international criminal tribunals, especially as they have been established to promote international peace and security (although justice remains their primary goal) and thus sometimes find themselves in positions where both goals collide.¹¹¹ One position that confirms my approach holds that there are three perceptions of the role of war crimes tribunals in international society: the “harmonious” view that emphasizes the linkage between peace and justice, frequently expressed as ‘peace through law’ or ‘no peace without justice’; the “adversarial” primacy-of-order perspective that sees only the potential of justice to upset political priorities that are better routes to peace, and the “conditional” view that supports international tribunals without discounting political considerations.¹¹²

I have argued that the third perspective is the best we can achieve in the present stage of international society. The solidarist view of world law that presupposes a *universitas* rather than the *societas*¹¹³ that is the international society is not the dominant causative agency in the politics of war crimes justice because sovereignty remains, as Alan James puts it, “the very basis of international relations”.¹¹⁴ Except some other organizing principle of international relations were to come into existence that discards the states system, with its membership of individual and legally equal members, as the new basis of international relations, international criminal justice can only be conditional – it will exist to the extent and in a form that states decide. It is unlikely that there will be uniform agreement that any system of international justice will permanently and

universally trump the sovereign rights and jurisdiction of states. The international society is far from being, in the words of Allen Buchanan, a “now vanished Westphalian world”.¹¹⁵ Rather, it is one in which pluralist and cosmopolitan models of governance “coexist, usually rather unhappily, with many aspects of the old Westphalian order”.¹¹⁶ In the following chapters I will demonstrate how the “adversarial”, primacy-of-order perspective has sought to checkmate the idealist, Kantian view of international justice that has bloomed at the end of the 20th century into a compromise of conditional international justice.

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- ¹ Hedley Bull, *The Anarchical Society: A Study of Order in World Politics* (Basingstoke and New York: Palgrave Macmillan, 1977)13.
- ² Dorothy V. Jones, *Code of Peace: Ethics and Security in the World of the Warlord States* (Chicago and London: University of Chicago Press, 1991), 51.
- ³ The Hague Convention of 1899, preamble, paragraph. 4; 1907 Convention, preamble, paragraph. 4.
- ⁴ *Ibid*, 59.
- ⁵ *Ibid*.
- ⁶ Christopher Hill, *The Changing Politics of Foreign Policy* (Basingstoke and New York: Palgrave Macmillan, 2003), 163.
- ⁷ See Barry Buzan, *From International to World Society?: The English School and the Social Structure of Globalization* (Cambridge and New York: Cambridge University Press, 2004).
- ⁸ Bull, *The Anarchical Society*, 24.
- ⁹ “Secretary-General Examines ‘Meaning of International Community’ in Address to DPI/NGO Conference”, Press Release SG/SM/7133, PI/1176, 15 September 1999.
- ¹⁰ Edward Kwakwa, “The International Community, International Law, and the United States: Three in One, Two Against One, or One and the Same?”, in Michael Byers and George Nolte, eds., *United States Hegemony and the Foundations of International Law* (Cambridge and New York: Cambridge University Press, 2003), 27.
- ¹¹ *Ibid*, citing the Barcelona Traction, Light and Power Company (*Belgium v Spain*) Judgment, (1970) ICJ Reports 3.
- ¹² *Ibid*. See Vienna Convention on the Law of Treaties, UN Doc. A/CONF.39/27 (1969) at Article 53, which defines *jus cogens* (a norm of international law that all states must obey) as “a norm accepted and recognized by the international community of States as whole as a norm from which no derogation is permitted”.
- ¹³ See Kofi Annan, “Fighting Terrorism on a Global Front”, *New York Times*, 21 September 2001.
- ¹⁴ Martti Koskenniemi, “Comments on Chapters 1 and 2” in Michael Byers and George Nolte, *United States Hegemony and the Foundations of International Law*, 95.
- ¹⁵ *Ibid*, 91 – 101.

¹⁶ See Gary Jonathan Bass, *Stay the Hand of Justice: The Politics of War Crimes Tribunals* (Princeton and Oxford: Princeton University Press, 2002), Notes to Chapter One, Notes 108, 322.

¹⁷ Koskeniemi, "Comments on Chapters 1 and 2", *United States Hegemony and the Foundations of International Law*, 94, quoting Frédéric e Martens, "La Conférence du Congo á Berlin et la Politique Coloniale des Etats Modernes" (1886) XVIII *Revue de droit international et de legislation compare*, 268.

¹⁸ Buzan, *From International to World Society?*, 17

¹⁹ Ibid.

²⁰ Hill, *The Changing Politics of Foreign Policy*, 164. For a comprehensive history of the former Yugoslavia see Misha Glenny, *The Balkans: Nationalism, War, and the Great Powers, 1804 – 1999* (Penguin Books, 1999).

²¹ Hill, *op. cit.*

²² Robert Jackson, *The Global Covenant: Human Conduct in a World of States*, Oxford and New York: Oxford University Press, 2000, 15.

²³ Ibid.

²⁴ Ibid.

²⁵ Andrew Hurrell, Andrew Linklater and Nicholas Wheeler, among others, belong to this sub-division of the international society intellectual tradition.

²⁶ Bull, 80.

²⁷ Dorothy V. Jones, *Toward a Just World: The Critical Years in the Search for International Justice* (Chicago and London: University of Chicago Press, 2002), 30.

²⁸ Bull, 93.

²⁹ Bull, 91.

³⁰ Chris Brown, *Sovereignty, Rights and Justice: International Political Theory Today* (Cambridge: Polity Press, 2002), 116.

³¹ See Kingsley Chiedu Moghalu, "Reconciling Fractured Societies: An African Perspective on the Role of Judicial Prosecutions", in Ramesh Thakur and Peter Malcontent, eds., *From Sovereign Impunity to International Accountability: The Search for Justice in a World of States* (Tokyo, New York and Paris: United Nations University Press, 2004), 197 – 219.

³² See generally Karen E. Smith and Margot Light, eds., *Ethics and Foreign Policy* (Cambridge: Cambridge University Press 2001). See also Bass, 18. For a discussion of the increased role of morality in United States foreign policy see Leslie H. Gelb and Justine A. Rosenthal, "The Rise of Ethics in Foreign Policy", *Foreign Affairs*, May/June 2003, 2-7.

³³ See Ralph Zacklin, "The Failings of Ad Hoc International Tribunals", *Journal of International Criminal Justice* 2 (2004), 541-545.

³⁴ Hans J. Morgenthau, *Politics Among Nations: The Struggle for Power and Peace*, Revised by Kenneth W. Thompson (McGraw-Hill, 1985), 224-225.

³⁵ Jackson, 15.

³⁶ *Ibid*, 14.

³⁷ *Ibid*.

³⁸ E.H. Carr, *The Twenty Years' Crisis, 1919-1939* (New York: Harper & Row, 1964), quoted in Jackson, *op. cit*.

³⁹ Emma Bonino and William Shawcross, "Darfur's Agony is the World's Shame", *Financial Times*, 20 May 2004.

⁴⁰ Kant, *The Idea of Universal History From a Cosmopolitan Point of View* (1784), and Kant, *Perpetual Peace* (1795), both cited in Hedley Bull. Bull notes Kant's acceptance in the latter book of the possibility of a league of "republican" states.

⁴¹ See in particular Jones, *Code of Peace*.

⁴² *Ibid*, Introduction, xii.

⁴³ *Ibid*, Apendix 1, 167.

⁴⁴ "Report Looks at Claims Against NATO", Associated Press, 4 January 2000.

⁴⁵ *Ibid*.

⁴⁶ See Henry Kissinger, "The Pitfalls of Universal Jurisdiction: Risking Judicial Tyranny", *Foreign Affairs*, July/August, 2001.

⁴⁷ Alexander Cockburn and Jeffrey St. Clair, eds., "Yugoslavia a Year Later: Turning a Blind Eye to NATO War Crimes", www.counterpunch.com, 22 May 2000

⁴⁸ *Ibid*.

⁴⁹ Jerome Socolovsky, "White House Blasts Kosovo Inquiry", Associated Press, 4 January 2000.

⁵⁰ Steven Lee Myers, "Kosovo Inquiry Confirms US Fears of War Crimes Court", *The New York Times*, 3 January 2000.

⁵¹ Cockburn and St. Clair, op. cit.

⁵² See David Forsythe, "Politics and the International tribunal for the Former Yugoslavia" in Roger S. Clark and Madeleine Sann, *The Prosecution of International Crimes: A Critical Study of the International Tribunal for the Former Yugoslavia* (New Brunswick and London: Transaction Publishers, 1996), 201. See also *United States v Yamashita* (1945), 4 UN War Crimes Commission, Law Reports of Trials of War Criminals 1 (1947), and *United States v Calley*, 48 C.M.R. 19 (U.S. C.M.A. 1973).

⁵³ David Forsythe, *Ibid.*

⁵⁴ See Amanda Ripley, "A Shot Seen Round the World", *Time*, 29 November 2004, reporting on a televised shooting and killing of a wounded Iraqi insurgent during hostilities in Fallujah. The soldier was subsequently court-martialed, perhaps a consequence of the fallout of the Abu Ghraib scandal. As the article notes, "...under the Pentagon's Uniform Code of Military Justice and the Geneva Conventions, a soldier who shoots an unarmed, wounded combatant can be found guilty of murder".

⁵⁵ Bass, 11.

⁵⁶ John Mearsheimer, "The False Promise of International Institutions," *International Security*, Vol. 19:3, Winter 1994-95, 7.

⁵⁷ Jackson, despite his postulation of a global covenant, essentially states the same view: "The international organizations that states institute to facilitate their relations should not be misunderstood as independent authorities of some kind which exist apart from the states who organize them. The UN, for example, is the creature of its member states; it has no independent authority or power of its own of any significance".

Jackson, 103.

⁵⁸ Jones, *Toward a Just World*, Ch. 1.

⁵⁹ M.J. Tooley (tr.), *Bodin: Six Books of the Commonwealth* (Oxford, Blackwell, n.d.), cited in Jackson, 161.

⁶⁰ *Ibid.*

⁶¹ Jackson, 252.

⁶² Ibid.

⁶³ Morgenthau, *Politics Among Nations*, 227

⁶⁴ Brown, *Sovereignty, Rights and Justice*, 35.

⁶⁵ See Secretary-General's Nobel Lecture, UN Doc. SG/SM/8071 (2001), in which he stated: "The sovereignty of states must no longer be used as a shield for gross violations of human rights".

⁶⁶ See "The Responsibility To Protect", Report of the Commission on Intervention and State Sovereignty, (Ottawa: International Development Research Centre, 2001)

⁶⁷ Ibid, Ch. 2.

⁶⁸ See "A More Secure World: Our Shared Responsibility: Report of the Secretary-General's High-Level Panel on Threats, Challenges and Change, 17, www.un.org.

⁶⁹ In the Tribunal's judgement in the *Kambanda* case, it stressed the abdication of Kambanda's responsibility to protect the Rwandan population as required by his position as Prime Minister and head of government, as an aggravating factor in its conviction of the former leader. See Kingsley Chiedu Moghalu, "Peace Through Justice: Rwanda's Precedent For the Trial Of Milosevic", *Washington Post*, 6 July 1999, A15.

⁷⁰ Tom Masland and Holly Bailey, "The Power of a Word", *Newsweek*, 12 July 2004.

⁷¹ Ibid.

⁷² Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, 25 January 2005, www.un.org/news/dh/sudan/com_inq_darfur.pdf, 4.

⁷³ Statement of Pierre-Richard Prosper at the U.S. House of Representatives Subcommittee on Africa Hearing: "Confronting War Crimes in Africa", 25 June 2004.

⁷⁴ Warren Hoge, "UN Calls for Sudan to Halt Attacks by Militias", *New York Times*, 30 July 2004.

⁷⁵ Sudan is not a party to the Rome Statute of the International Criminal Court, but the Security Council can refer cases to the Court, including involving nationals of non-state parties. See Chapter 9 for a detailed discussion of the ICC.

⁷⁶ Warren Hoge, "UN Votes to Send Any Sudan War Crime Suspects to World Court", *The New York Times*, 1 April 2005.

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- ⁷⁷ Robert H. Jackson, in a hindsight perspective on the Nuremberg trials, quoted in Dorothy V. Jones, *Toward a Just World*, Ch. 202.
- ⁷⁸ See Tim Dunne and Nicholas J. Wheeler, “Blair’s Britain: A Force for Good in the World?” in Karen E. Smith and Margot Light, ch.10.
- ⁷⁹ Bull, 85-86.
- ⁸⁰ See William Barnes, “UN Says Khmer Rouge Leaders to Stand Trial Soon”, *Financial Times*, 19 December 2003, 2.
- ⁸¹ Peter Wilson, “The English School and the Sociology of International Law: Strengths and Limitations”, Paper presented at the Annual British International Studies Association Conference, University of Birmingham, 15-17 December 2003.
- ⁸² Ibid.
- ⁸³ Forsythe, “Politics and the International Tribunal for the Former Yugoslavia”, 185.
- ⁸⁴ Werner Levi, *Law and Politics in the International Society*, 1976, 31, quoted in Forsythe, *ibid.*
- ⁸⁵ See Terry Nardin, “Legal Positivism as a Theory” in Mapel and Nardin, *International Society*, 29.
- ⁸⁶ Ibid, 31.
- ⁸⁷ See Shashi Tharoor, “Why the U.S. Needs the UN”, *Foreign Affairs*, September/ October 2003.
- ⁸⁸ Nicholas Wheeler, *Saving Strangers: Humanitarian Intervention in International Society* (Cambridge: Cambridge University Press, 2000), 111 - 136.
- ⁸⁹ See Joseph S. Nye Jr., *The Paradox of American Power: Why the World’s Only Superpower Can’t Go It Alone* (Oxford and New York: Oxford University Press, 2002) for an excellent discussion of America’s superpower status in the international society.
- ⁹⁰ Michael Glennon, “Why the Security Council Failed”, *Foreign Affairs*, May/June 2003, 29-30.
- ⁹¹ Kofi A. Annan, “A Safer World – Working Together”, *New Perspectives Quarterly*, Vol. 21:3, Summer 2004.
- ⁹² Buzan, 49.
- ⁹³ Wheeler, 1992, cited in Buzan.
- ⁹⁴ See Patti Waldmeir, “The Vanishing Borders of Justice”, *Financial Times*, 5 July 2004, which discusses the impact of the globalization of law on the United States Supreme Court.

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- ⁹⁵ Phillip Bobbit, "Better Than Empire", *Financial Times*, 12 March 2004.
- ⁹⁶ See Andrew Hurrell, "Order and Justice in International Relations: What is at Stake?" in Rosemary Foot, John Lewis Gaddis, and Andrew Hurrell, eds., *Order and Justice in International Relations* (Oxford and New York: Oxford University Press, 2003), 37.
- ⁹⁷ J.F.O. McAllister, "Closer Union or Superstate?", *Time*, 28 June 2004.
- ⁹⁸ Beth Simmons, "Is Sovereignty Still Relevant?", *American Journal of International Law* 94, January 2000, 227.
- ⁹⁹ Richard N. Haas, "Pondering Primacy", *Georgetown Journal of International Affairs*, Summer/Fall 2003, 94, where he states: "It is just a fact -- neither necessarily good nor bad -- that there are things that governments cannot control", but notes at the same time that "governments are not powerless, and they can still do a lot a lot to shape what goes in and out of their borders". See also Bruce Broomhall, *International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law* (Oxford and New York: Oxford University Press, 2003), 58.
- ¹⁰⁰ Bobbit, "Better Than Empire".
- ¹⁰¹ William Safire, "Goodbye to Privacy", *The New York Times Book Review*, 10 April 2005, 1. See also *Rasul et al v Bush, President of the United States, et al*, Supreme Court Decision of 28 June 2004, which held that U.S. courts have jurisdiction to consider challenges to the legality of the detention of foreign nationals captured in connection with the "war on terrorism", www.supremecourtus.gov/opinions.
- ¹⁰² See Mary Kaldor, *Global Civil Society* (Cambridge: Polity Press, 2003) for a strong case for a cosmopolitan approach to international relations.
- ¹⁰³ Ann Florini, "Is Global Civil Society a Good Thing?", *New Perspectives Quarterly* 21:2, Spring 2004.
- ¹⁰⁴ Under the "Arria Formula", so named for Ambassador Diego Arria of Venezuela who contrived it, the Security Council can be briefed informally by non-state actors on matters pertaining to international peace and security. Following disagreements within the Council over several years between Ambassadors with liberal and realist bent as to the scope of the formula, NGOs briefed the Council for the first time ever under the formula on 12 April 2000. For an interesting account, see James Paul, "The Arria Formula", www.globalpolicy.org, February 2001.

¹⁰⁵ Under the Rules of Procedure of the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda, states and non-state entities, including NGOs, which are directly a party to legal proceedings may submit briefs on the matters under consideration in those proceedings as *amicus curiae* (friend of the court). See, for example, Rule 74, Rules of Procedure and Evidence of the ICTR, www.icttr.org.

¹⁰⁶ Ann Florini, *op cit*.

¹⁰⁷ Hurrell, "Order and Justice", 39.

¹⁰⁸ *Ibid*.

¹⁰⁹ "Pieces of Paper: Would a European Constitution Really Change the World?", *The Economist*, 19 June 2004.

¹¹⁰ Niall Ferguson, "The End of Power", *Wall Street Journal*, 21 June 2004.

¹¹¹ Hideaki Shinoda, "Peace-Building By the Rule of Law: An Examination of Intervention in the Form of International Tribunals", *International Journal of Peace Studies*, Spring/Summer 2002, 41-55. See also Moghalu, "Peace Through Justice".

¹¹² Shinoda, 45-47.

¹¹³ Jackson, 105.

¹¹⁴ Alan James, "International Society", *British Journal of International Studies*, 4, July 1978, 91-106, cited in Jackson.

¹¹⁵ Allen Buchanan, "Rawls's Law of Peoples: Rules for a Vanished Westphalian World", *Ethics* 110, 2001, 697-721.

¹¹⁶ Hurrell, 41.

Chapter 4

Prosecute or Pardon?

No one was to recall the past misdeeds of anyone except the Thirty, the Ten, the Eleven and the governors of the Piraeus, and not even these if they successfully submitted to an examination...Trials for homicide should be held in accordance with tradition in cases where a man had himself performed the act of killing or wounding.

Aristotle, *The Athenian Constitution*

*With a truth commission, governments make a pact with the devil.
Our office looks for ways to send the devil to jail
Carillo Prieto, Mexican Special Prosecutor*

In the preceding chapter I discussed the nature of the international society as a context for the quest for justice for violations of international humanitarian law. This chapter will examine and analyze how political considerations condition the choices states make when confronted with two possibilities: prosecuting (or supporting prosecutions), on the one hand, and pardons (political responses that do not invoke criminal trials, such as amnesties and truth commissions) on the other. The aim is to demonstrate the tensions between (1) at the international plane, cosmopolitan/liberal notions of legalism and sovereignty based challenges to such ideals, and (2) in primarily domestic contexts, order, in its most basic sense as a pattern of social activity that guarantees the provision of the primary goals of social life¹ (in this context, stability), and justice. That occasional basic tension flares up in the context of societal transitions from conflict to peace, with the attendant questions of memory in societal construction. If prosecuting particular persons has the potential to destabilize the polity, should such a course be pursued?

I will examine here three examples of these two tensions. The first two are historical – the unsuccessful attempt by the Allied Powers to prosecute the German emperor Kaiser Wilhelm II after World War I, and the political exemption of Japanese emperor Hirohito from the purview of the Tokyo war crimes trials in the wake of World War II. The third is a conceptual one – contemporary debate about “transitional justice” in societies emerging from conflict. That debate is usually framed as one of a choice between, or a combination of criminal trials for mass atrocities, amnesties, and truth commissions.

The Dilemma

There are no straightforward answers to the question of whether violators of international humanitarian law should be prosecuted or pardoned – especially when they are the political leaders the prosecution of whom might lead to a greater breakdown of order. Political exemptions from prosecutions are not new. They are, in fact, a not infrequent approach to the goal of order in some circumstances. The conundrum goes to the heart of the contest for primacy between order and justice in certain circumstances. The question is: do political exemptions or pardons promote order or do they encourage a culture of impunity?² Should justice be done in every deserving case, though the heavens fall?

The proposition is made here that, while there is no “best way” to tackle the question of justice, there is a “better way” in which, while the option of pardons in some circumstances cannot be ruled out, political exemptions from prosecution for violations of international humanitarian law should be the exception and not the rule. In other

words, on balance, legal accountability has a better track record than most of its alternatives (the real issue is: what kind of legal justice?). This proposition is not based on the liberal theory of a Kantian peace, but, as I will seek to establish later, on the international society-perspective that combines recognition of the sovereignty of states, the need to place increased value of the individual human life that is violated by genocide, crimes against humanity and war crimes, and the wishes of a political community, ascertained either through a democratic process or by consensus.

Meeting the challenge calls neither for excessive cynicism nor for cosmopolitan and overly legalistic formulas. To say that perpetrators of genocide, crimes against humanity and war crimes should routinely be put beyond the reach of legal justice, in the name of order, is a perspective that denies the evolution of the international society. To say, on the other hand, that they must be prosecuted in all cases is to fail to take account of other factors that tend to complicate the picture in cases where the dilemma is present. Such a position would be a false assumption that the world has entered a Kantian age of universal justice. It has not.

The realist perspective is that the problem of what to do with conquered leaders or those in transition from the Olympian heights of power, with blood on their hands, is best left to political settlements and not to law courts. The argument is that, in some cases, insisting on prosecutions can do more harm than good. A peaceful settlement of a conflict can be precluded, triggering a breakdown of order. Or an escalation of a breakdown where one has already begun can occur. This can be the case where defeated parties renew conflict, or undefeated parties, seeing only prosecutions at the end of the tunnel, lose any incentive to put swords into plowshares and seek the “total victory” –

and the sovereign state power that comes with it – that can serve as protection from accountability. In other words, better to make a sacrifice for the future by sweeping violations of international humanitarian law under the carpet for the sake of peaceful societal transitions or interstate relations.

Ramesh Thakur has argued: “Criminal law, however effective, cannot replace public or foreign policy. Determining the fate of defeated leaders is primarily a political question, not a judicial one. The legal clarity of judicial verdicts sits uncomfortably with the nuanced morality of confronting and overcoming, through a principled mix of justice and high politics, a troubled past”.³ And as Henry Kissinger, commenting with admiration on the Congress of Vienna’s magnanimous dispensation towards France after the Napoleonic wars, asserts: “It is the temptation of war to punish; it is the task of policy to construct. Power can sit in judgment, but statesmen must look to the future”.⁴

The realist argument against legalism, especially as dispensed by the international criminal tribunals, can be summarized as follows: legalism may claim jurisdiction over the actions of great powers, complicate global diplomacy, and attack the historical concept that only sovereign states may impose criminal justice.⁵ The realist perspective is that attempting to isolate legal justice completely from political context is shortsighted. Legal justice is what a political community is prepared to enforce.⁶ I define a “political community” as a duly constituted society -- sovereign, part of a sovereign entity, or a conglomeration of sovereign entities -- with a cohesive political consensus on its internal social organization, including what constitutes legal justice.

That “consensus” may be attained through a democratic or other deliberative process. In the international society, the degree of legitimacy a political community

enjoys depends increasingly on how democratic its political and law-making processes are. In the international system that preceded the international society, this was not the case. In this definitional context, then, the ad hoc international criminal tribunals and the permanent International Criminal Court are, for better or worse, a kind of justice that groups of sovereign states have decided to create and enforce, fulfilling an impulse that has been a characteristic of the 20th century. The problem with the ad hoc tribunals is that they are the progeny of a more abstract level of political community, one whose “agency” and democratic credentials, in the nature of a Security Council dominated by a few powerful states, is decidedly weaker than, say, a standing international criminal court established directly by treaty. Thus, there is a frequent tension between that agency, legally valid though it is, and the national or sub-national variants of political community.

As its relates specifically to the conundrum of whether to prosecute or pardon, the realist argument is carried forward by noting that because international criminal tribunals lack the power to exercise pardons, they thereby lack an important attribute – a political prerogative though it may be – of a proper criminal justice system. Such tribunals, the argument goes, cannot, in fact, have pardon power because they pretend to be above politics. Support for the argument in favor of discretionary pardon power as a prerequisite for legitimacy has been found in the U.S. Federalist papers (No. 74) where Alexander Hamilton aptly expounded that “humanity and good policy... dictate that the benign prerogative of pardoning should be as little as possible fettered or embarrassed...in seasons of insurrection or rebellion, a well-timed offer of pardon to the insurgents or rebels may restore the tranquility of the commonwealth”.⁷

The prerogative of mercy may indeed be necessary for the greater good. It is an indispensable aspect of sovereign political authority. As Ruti Teitel has argued, both criminal punishment and amnesties can be used to further the goals of political transition – especially where amnesties are made conditional⁸. But she also argues that between the two, there is a preponderance of forbearance of punishment power in order to advance those transitions.⁹ This is a statistical reality, but it should not be conflated with the respective impacts of both courses of action, which I address in greater detail below.

Arguments against prosecutions demonstrate the unequal and selective application of legalism in the service of interests that are often narrow and self-interested, but occasionally may be of a loftier nature, as in South Africa's transition to majority rule. It is for reasons of narrow self interest that some great powers may support specific, localized efforts at international justice, but are reluctant to give carte blanche to across-the-board legal accountability at the expense of client states.¹⁰ To illustrate, the United States has not supported the establishment of an international criminal tribunal for East Timor, or widespread trials for mass atrocities in Chile, because the crimes committed in those contexts, especially during the Cold War, were committed by regimes to which it provided strategic support¹¹. This is precisely why international criminal justice, which failed to develop as expected after the Nuremberg trials, became possible after the end of the Cold War. The selectivity that accompanies the prosecute-or-pardon dilemma is one of the darker, more endogenous qualities of criminal prosecutions for violations of international humanitarian law and is an intrinsic function of the nature of the international society.

Moreover, the argument that international criminal tribunals lack pardon power is erroneous in fact. First, provisions exist in the rules of procedure of the ad hoc international tribunals for Rwanda and the Former Yugoslavia whereby the Prosecutors of these tribunals, where permission is granted by the judges, can terminate judicial proceedings against an accused person for a variety of reasons including those of policy.¹² While this is neither an acquittal (as no judicial finding on guilt or innocence has been made) nor a pardon in the strict legal sense, which can only occur following a conviction, it is a pardon in the policy sense in which that word is used in this work, insofar as it is an exercise of discretion by a prosecutor as to whether or not to prosecute.

Second, even in its strict legal sense, provision for pardons is in fact made in the statutes and procedural rules of the ICTR and the ICTY, the Special Court for Sierra Leone, and the ICC. In an important subtlety, the exercise of pardon power for a person convicted by these tribunals can only be initiated by the state where the convict is serving sentence, where conditions for pardon in the domestic legal systems of such states may have been met. However, a convict cannot be pardoned without the approval of the judges of the international tribunal.¹³ This is a vivid illustration of how international criminal justice is constrained by the sovereignty of states. International courts do not possess the attribute of sovereignty, however independent or powerful they may appear. Admittedly, it is also the case that such courts do not have direct or exclusive prerogative to exercise pardon power in a pure legal sense because that would run counter to the logic of their creation – to act as an accountability mechanism for egregious violations of international human rights.

In the policy sense in which pardons are mainly examined here, compromise approaches have been adopted that are mute on the question of whether to prosecute or pardon, and instead seek to reconcile the requirements of peace and justice. A pragmatic approach is to negotiate peace agreements with warlords without sanctioning impunity. (I define “impunity” as the absence of accountability and the rule of law within states or other formal organizational structures, a situation where coercive power, not rules, regulations or law, is the organizing principle.)

A similar but more formalistic definition is that “impunity means the impossibility, *de jure* or *de facto*, of bringing the perpetrators of human rights violations to account – whether in criminal, administrative or disciplinary proceedings – since they are not subject to any inquiry that might lead to their being accused, arrested, tried and, if found guilty, sentenced to appropriate penalties, and to making reparations to their victims”.¹⁴

A classic example of a pragmatic approach with strong ethical component is that of the former Yugoslavia, where the United States negotiated the Dayton Peace Agreement between the warring parties in 1995, with Slobodan Milosevic, President of the rump Federal Republic of Yugoslavia playing a key role in the negotiations. That agreement explicitly called for the prosecution of war criminals. Milosevic was not indicted at the time, but there was no deal to guarantee him immunity from indictment or prosecution, although the fact of his being NATO’s negotiating partner may have led him to believe he would not meet that fate. Yet, Milosevic was subsequently indicted by the ICTY for genocide and crimes against humanity and put on trial.¹⁵

Inherent in this approach is a deferral to a later stage of the determination of whether to prosecute or pardon, putting peace well before justice. Here, the timing of the indictment is critical. The cart of justice cannot – and, indeed, should not – be put before the proverbial horse of peace, for a warlord may opt to continue a war in the hope of victory rather than come to the negotiating table were an indictment for violations of humanitarian law to be dangled over his head.

Another factor in prosecute-or-pardon situations is the position of the United Nations, which is involved in most negotiations and settlements of armed conflicts. While the U.N. must frequently navigate between the idealism of the goals of its Charter and the realism of world politics, it has taken a decidedly principled and ethical position on the prosecute-or-pardon question. It does not, and cannot, derogate from a sovereign political authority's right to pardon crimes under domestic law. But it has staked out a moral high ground regarding violations of international humanitarian law, for which the international institution refuses to recognize that any amnesties can be valid.¹⁶ This is a solidarist position, consistent with the UN's interpretation of sovereignty since the end of the Cold War. It supports the view that certain crimes are of international concern and cannot be the subject of purported amnesties by sovereign states, even if committed within their territories.

Having set out the dilemma, I now turn to an examination of some cases where the dilemma of whether to apply legal norms and prosecute individuals for war and other heinous crimes, or to seek a political solution in the interests of order, has been acute.

Kaiser Wilhelm II and the Treaty of Versailles

Efforts by Allied countries to prosecute the German Kaiser following World War I represented the second major attempt in the 20th century, after the Constantinople war crimes trials for the massacres of Armenians, at international justice for crimes committed during World War I. Like Constantinople, it failed woefully. Gary Jonathan Bass has provided an excellent and much more detailed account of these unsuccessful efforts.¹⁷

Following Germany's defeat in the Great War in 1918, the Allied Powers (especially Britain and France), motivated by the public and political outrage at atrocities by German soldiers, called for the trial of the German Emperor, Kaiser Wilhelm II for the crime of aggression and other crimes such as violating Belgium's neutrality. At the time, aggression was not codified as a crime in international law and a trial on that basis would have amounted to retrospective jurisdiction. The Treaty of Versailles, by which Germany formally surrendered on June 28, 1919, included severe punitive measures such as sharp reductions in the strength of the German armed forces and disarmament, the payment of reparations to the Allies, the especially resented "war guilt clause" (Article 231) in which Germany accepted responsibility for World War I as a result of its aggression, the return of territory to Belgium, Luxembourg, Austria, France, Poland and Czechoslovakia, and the trial of the Kaiser and other German war criminals. Articles 227 of the treaty provided:

Article 227: The Allied and Associated Powers publicly arraign William II of Hohenzollern, formerly German Emperor, for a supreme offence against international morality and the sanctity of treaties

A special tribunal will be constituted to try the accused, thereby assuring him the guarantees essential to the right of defence. It will be composed of five judges, one appointed by each of the following Powers: namely, the United States of America, Great Britain, France, Italy and Japan.

In its decision the tribunal will be guided by the highest motives of international policy, with a view to vindicating the solemn obligations of international undertakings and the validity of international morality. It will be its duty to fix the punishment which it considers should be imposed.

The Allied and Associated Powers will address a request to the Government of the Netherlands for the surrender to them of the ex-Emperor in order that he may be put on trial.

In Article 228 of the Versailles Treaty Germany recognized the right of the Allies to prosecute in the latter's military tribunals Germans accused of violations of the laws and customs of war. It agreed to hand over all persons requested by the Allies for this purpose, and acceded to a jurisdictional primacy clause in which the provisions of Article 228 would supercede any prosecutions or proceedings in German tribunals or those of her allies.

Since the Allies did not occupy Germany, however, they were unable to compel the handover of suspected war criminals. Other key provisions of the Versailles treaty were also not enforced, mainly as a result of disagreements and reluctance among the Allied Powers over their approach to a defeated Germany¹⁸. Thus, the Allies "were strong enough to win the war, but not strong enough to secure the peace"¹⁹. In a sequence

of events with contemporary resonance in former Liberian President Charles Taylor's departure from Liberia and his exile in Nigeria (which steadfastly refused to hand him over to the Special Court for Sierra Leone for a trial despite the Court's formal indictment and warrant for Taylor's arrest), the Kaiser had abdicated his throne in November 1918 and gone into exile in the Netherlands.

Bringing the Kaiser to trial became a major issue in the internal politics of several Allied States. In Britain, Lloyd George's government had called a general election in December 1918 and, as Gary Bass notes, "British members of Parliament were eager to translate Wilhelm II's massive unpopularity into votes"²⁰. George and several members of his government went on the campaign trail with ringing demands for the prosecution of the German emperor, with cries of "Hang the Kaiser" frequently uttered and heard. Their victory at the elections reflected the overwhelming popular mood in Britain on the trial of the Kaiser²¹. Similarly, French President Georges and Italian President Vittorio Orlando were staunch supporters of the Allied effort to bring the Kaiser to trial. Despite repeated Allied demands that the Kaiser be surrendered to stand trial, including assertions of Dutch obligations based on the legal postulations of Grotius and threats to sever diplomatic relations, the Dutch Government stood firm in its refusal to surrender the former monarch, and the Kaiser eventually died in his country of exile²².

The Versailles treaty and the failure to bring Wilhelm II to trial foreshadowed many of the same conceptual and practical issues embedded in the prosecute-or-pardon conundrum, as well as others that affect international criminal justice to this day. The abortive effort to try the Kaiser demonstrates how issues of justice for violations of international humanitarian law remain a lightning rod in international diplomacy and

domestic affairs. These issues include those of whether legalism advances or opposes order (the heart of the matter); command responsibility and sovereign immunity, which presaged the Nuremberg trials, the U.N. ad hoc International Tribunals, the Special Court for Sierra Leone, and the ICC; who defines aggression in international law?; victor's justice; and the impact of domestic political or foreign policy calculations on juridical intervention.

The Boomerang Effect.

The humiliation inflicted by the provisions of the Versailles Treaty triggered deep resentment in Germany and radicalized domestic politics, galvanizing the extreme right wing of the political spectrum. Of special significance for Germans in this respect were the war guilt clause and the terms of reparations, both of which the Germans protested. In a telegraph from the German National Assembly to the Allies in Versailles, the Germans asserted: "The Government of the German Republic in no wise abandons its conviction that these conditions of peace represent injustice without example".²³ The government of the day refused initially to accept Articles 227 and 228 and experienced a period of severe instability induced by the internal domestic backlash from the Versailles treaty.

Examples of Germany's parlous state at this time include the Kapp Putsch of March 1920, an uprising in Berlin by a right wing group led by Wolfgang Kapp (a right wing journalist who blamed the German government for the Versailles Treaty) and supported by several members of the German paramilitary forces and some army officers²⁴. The uprising failed as a result of a general strike staged by German citizens against it. In 1923, right wing politicians in Bavaria attempted to overthrow the

government, with support from Adolf Hitler and the Nazi party, in the midst of the prevailing economic malaise and turmoil. When the Bavarian politicians hesitated in executing the plan, Hitler and his Storm Troopers staged an uprising in November 1923²⁵. Sixteen Nazi storm troopers were killed in a gun battle with police during the Munich Putsch. Hitler was put on trial and imprisoned for nine months, during which he wrote his famous book *Mein Kampf*. That trial transformed him from an obscure extremist into the leader of the right wing political forces in Germany. Meanwhile, the Rhineland had declared its secession from Germany, and a state of emergency had by now been declared in the country.

Under threat of a military occupation issued by British Prime Minister Lloyd George and French President Georges Clemenceau, the German Government had finally signed the Versailles Treaty.²⁶ Adolf Hitler reportedly met his would-be top lieutenant, Herman Goring, at a right wing political rally protesting French demands for the trial of German war criminals.²⁷

There is a parallel in contemporary Serbia, where a nationalist backlash to the indictment and arraignment of extremist Serb leaders such as Slobodan Milosevic and Vojislav Seselj before the ICTY combined with the general economic stagnation to stimulate a marked increase in the popularity of the Radical Party, headed by Seselj, and of Milosevic. Ultimately, however, this trend was not strong enough to translate into an electoral victory. In the wry comment of a Serbian politician: “My genuine belief is that Mrs. Del Ponte [Chief Prosecutor of the ICTY] was the best head of an electoral campaign that the Radical Party ever had”.²⁸

This is what might be termed “the martyrdom effect” of international criminal justice, whereby villains become heroes in the eyes of populations that feel humiliated either by the power of military conquerors, or by the failure of irredentist military adventures. Is this a valid argument against prosecutions? Clearly, German bitterness over the Treaty of Versailles and the Allies’ failure to occupy Germany after World War I combined with several other factors to bring about World War II, resulting in the kind of changes imposed on that country in the wake of that war. In that context, despite the criticisms that attended it, the international prosecutions of German war criminals in Nuremberg did more good than the harm wrought by the half-hearted domestic prosecutions of war criminals at Leipzig. This was a compromise suggested by Germany after it refused to hand over German war criminals to the Allies as required by Article 228 of the Versailles Treaty. Rather, Germany proposed, it would try the accused persons before the German Supreme Court at Leipzig. In February 1920, the Allies agreed to this compromise. The increasingly likely and unpalatable alternative would have been for the Allies to march into and occupy Germany and arrest the accused war criminals themselves. Allied threats to occupy Germany had been issued simply to obtain the defeated nation’s signature to the Versailles Treaty, but the Allies were reluctant to mount a physical occupation in order to enforce justice for war crimes. From initial Allied lists of suspects that ran into a thousand names, agreement was eventually reached to par these down to 45 names, broken down according the extent of the impact of German war crimes on each Allied country – 16 from the Belgian list, 11 from the French, seven British, five Italian, and four from other countries²⁹.

These trials, which began in May 1921 after much wrangling between the Allies and Germany over the latter's apparent intention to use the trial process to protect the real culprits from prosecution and instead try obscure minions, were an abject failure³⁰. Virtually all the defendants convicted were given ridiculously light sentences, and several escaped from custody. Whereas Nuremberg-style trials after World War I, even if victors' justice, might have established the criminality of German atrocities such as unrestricted naval warfare against civilian targets, all the sham trials at Leipzig achieved was to reinforce the sullen defiance of the German leadership and its determination to emerge as the victor in World War II. Ultimately, concern for the preservation of the stability of the Weimar Republic was to lead Britain to back off from demands for the surrender of German war criminals.³¹

Command responsibility.

Following the armistice that ended the war on 11 November 1918 and preceded the more formal Treaty of Versailles, there was much agonizing and heated internal debate in the British Government over the fate of the German Emperor. Winston Churchill, the future Prime Minister, was cautious about the principle of command responsibility, which was Lloyd George's main ground for arguing for a trial of the ex-Kaiser. He argued that while it was well "within our rights to kill him as an act of vengeance, but ...if you are going to deal with him on the basis of what is called law and justice, it is difficult to say that the ex-Kaiser's guilt is greater than the guilt of a great many very important persons in Germany who supported him"³². He wondered if a case against Wilhelm II would be

sustainable in a court of law. Several other members of the cabinet opposed a trial of the Kaiser because it had no precedent and were convinced it would be bad law.³³

Ultimately, Britain's position on whether to try the Kaiser boiled down to a case for command responsibility – essentially the basis of the anti-impunity trend driven by the ad hoc and permanent international criminal tribunals in the second half of the 20th century. The case was eloquently made by Smith, the then Attorney-General of the United Kingdom, to the Imperial War Cabinet. The chief law officer of the Crown predicated his case on the argument that a trial of German soldiers for war crimes without one of the Kaiser as their leader would be, in effect, a travesty:

The ex-Kaiser's personal responsibility and supreme authority in Germany have been constantly asserted by himself, and his assertions are fully warranted by the constitution of Germany. Accepting, as we must, this view, we are bound to take notice of the conclusion which follows: namely, that the ex-Kaiser is primarily and personally responsible for the death of millions of young men; for the destruction in four years of 200 times as much material wealth as Napoleon destroyed in twenty years; and he is responsible – and this is not the least grave part of the indictment – for the most daring and dangerous challenge to the fundamental principles of public law which that indispensable charter of international right has sustained since its foundations were laid centuries ago by Grotius. These things are very easy to understand, and ordinary people all over the world understand them very well. How then, I ask, are we to justify impunity? Under what pretext, and with what degree of consistence, are we to try smaller criminals? Is it still proposed – it has been repeatedly threatened by the responsible representatives of every Allied country – to try, in appropriate cases, submarine commanders and to bring to justice the governors of prisons? ...In my view you must answer all these questions in the affirmative. I am at least sure that the democracies of the world will take that view, and among them I have no doubt that the American people will be numbered. How can you do this if, to use the title claimed by

himself, and in itself illustrative of my argument, “the All Highest” is given impunity? ...In order to illustrate the point which is in my mind I will read to the Imperial War Cabinet a very short extract, which represents our view with admirable eloquence, from Burke’s speech in the trial of Warren Hastings:-

“We have not brought before you an obscure offender, who, when his insignificance and weakness are weighed against the power of the prosecution, gives even to public justice something of the appearance of oppression; no, my Lords, we have brought before you the first man of India in rank, authority, and station. We have brought before you the chief of the tribe, the head of the whole body of eastern offenders; a captain-general of iniquity, under whom all the fraud, all the peculation, all the tyranny in India are embodied, disciplined, arrayed, and paid. This is the person, my Lords, that we bring before you. We have brought before you such a person, that, if you strike at him with the firm and decided arm of justice, you will not have need of a great many more examples.

You strike at the whole corps if you strike at the head.”

Prime Minister, in my judgment, if this man escapes, common people will say everywhere that he has escaped because he is an Emperor. In my judgment they will be right. They will say that august influence has been exerted to save him...It is necessary for all time to teach the lesson that failure is not the only risk which a man possessing at the moment in any country despotic powers, and taking the awful decision between war and peace, has to fear. If ever again that decision should be suspended in balanced equipoise, at the disposition of an individual, let the ruler who decides upon war know that he is gambling, amongst other hazards, with his own personal safety.³⁴

France, which had the greatest numbers of victims from World War I, was an even stauncher -- and consistent -- advocate of prosecutions of the Kaiser and other German war criminals at the end of the war. Unlike the British, France at no time considered extra-judicial, summary execution for the Kaiser, and President Clemenceau

anchored his support for a trial on the principle of command responsibility. He was, as were the British, motivated by the pressure of domestic public opinion.

Victors' justice and ex post facto law.

The question of the legal basis for trying the Kaiser for aggression, as was clearly implied in the Versailles Treaty, and that of might as right, arose early in the internal debate in Britain's Imperial War Cabinet, mixed with the discussions about command responsibility. Initial exchanges in the war cabinet between Jans Smuts, the South African Defence Minister, Lloyd George, Robert Borden, Prime Minister of Canada, and W.M. Hughes, Prime Minister of Australia, turned on whether the Kaiser could lawfully be tried for waging war. The British and Canadian leaders held the strong view that the Kaiser had a criminal case to answer for "plunging the world into war", which, in Borden's opinion constituted a crime against humanity. But Australian Prime Minister Hughes had a penetrating response: "You cannot indict a man for making war. War has been the prerogative of the right of all nations from the beginning... he had a perfect right to plunge the world into war, and now we have conquered, we have a perfect right to kill him, not because he plunged the world into war, but because we have won. You cannot indict him, Mr. Prime Minister, for breaking the law."³⁵

The preceding dialogue puts into bold relief debates about the legality of war in international law that continue to this day – from the ultimately unsuccessful General Treaty on the Renunciation of War (Kellog-Briand Pact, 1928), and the inclusion of aggression as a crime in the 1998 Rome Statute of the International Criminal Court.³⁶ The Kellog-Briand Pact failed because it was not positive law with any penalties for

breach or enforcement mechanism, but rather a moral and policy declaration which several of the signatory states, including Germany, which had commenced a re-armament program and had no strategic interest in implementing. As such, it did not constitute clear international law, as I have argued in Chapter 2. Even before World War II, the pact had been violated on several occasions, including the Japanese and Italian aggressions in Manchuria and Ethiopia respectively.

The legality of, and limits to, the use of force, is at stake in this debate. We shall return to this topic when we consider the International Criminal Court. It captures as well the 20th century roots of the assault on the concept of sovereign immunity -- even if, in this case, for selfish reasons of national interest rather than an altruistic concern for humanity -- that proponents of pardons believe constitutes a threat to order in an international society of sovereign states.

Sovereign Immunity Shields the Kaiser.

The Kingdom of the Netherlands' adamant refusal to surrender Kaiser Wilhelm over to the Allies for a trial was based on several factors: its neutrality, an absence of enthusiasm for what it considered the Allies' self-serving campaign for victors' justice, and on the view that the Kaiser enjoyed sovereign immunity. Of even greater importance for the Kaiser's ultimate escape from the then short arm of international justice was the extreme reluctance of U.S. President Woodrow Wilson to support the campaign for Wilhelm's extradition from Holland.

There were three major grounds for the American position. First, Wilson viewed the British and French campaign as dubious, self-interested legalism, and opted instead to

use the end of the Great War as a means to a wider, more universalist framework for international law through the establishment of the League of Nations. He believed that a narrow pursuit of Kaiser Wilhelm would complicate the chances for the creation of the League, a project he pursued with messianic zeal. He toured Europe before the negotiations in Paris that ended World War I, selling his vision of a new international order to great acclaim. The League was, in Wilson's vision, no less than a grand compact to reorder international relations along the best aspirations of liberal internationalism. Pursuing the Kaiser was a distraction from the larger strategic picture. "What we are striving for is a new international order based upon broad and universal principles of right and justice – no mere peace of shreds and patches", he proclaimed³⁷.

Second, through his delegates to the Paris Peace Conference Wilson argued that the Kaiser was protected by the principle of sovereign immunity – a remarkably nuanced view for so liberal and purist an internationalist. Third – and in a reflection of the national self-interest that is never far from the surface in the calculations of statesmen – American casualties in World War I were few relative to those of France and Britain. Indeed, the United States joined the war only in 1917, following a German naval attack on a ship carrying American citizens that claimed 128 American casualties – an event that outraged and engaged American public opinion.

To the consternation of other Allies, the United States staked out its disagreement with war crimes trials of the Germans at the Commission on the Responsibility of the Authors of War and the Enforcement of Penalties, established by the Paris Peace Conference and chaired by no other than Robert Lansing, the American Secretary of State. The American delegation filed a memorandum in which it stated the United States

opposition to the proposed war crimes tribunal and distanced itself from the proposal.³⁸ In the memorandum, the Americans contended that the distinction between offenses “of a legal nature” and those of “a moral nature” had become blurred by “a determination to punish certain persons, high in authority, particularly the heads of enemy States, even though heads of States were not hitherto legally responsible for atrocious acts committed by subordinate authorities³⁹. Lansing and James Brown Scott, the other American delegate, cited a decision of the U.S. Supreme Court in 1812 that affirmed the immunity of sovereigns from judicial process⁴⁰. They emphasized that a head of State could only be tried by his country and not by others, and ridiculed the retrospective criminalization of aggression: “The laws and customs of war are of a certain standard, to be found in books of authority and in the practice of nations. The laws and principles of humanity vary with the individual, which, if for no other reason, should exclude them from consideration in a court of justice, especially one charged with the administration of criminal law”⁴¹.

Lansing and Scott, echoing President Wilson, recommended not war crimes trials, but a formal condemnation of German war atrocities. In a telling phrase with echoes in the contemporary impulses to prosecute or pardon, the American diplomats wrote: “These are matters for statesmen, not for judges”⁴². A quarter-century later, in a demonstration of how the policies of many states towards international prosecutions for violations of humanitarian law are subordinate to strategic interests, this position was to be repudiated at the Nuremberg trials.

Beyond Legalism: Hirohito and the Tokyo Tribunal

While the concept of command responsibility was having its heyday at the International Military Tribunal at Nuremberg, the subsequently established International Military Tribunal for the Far East (IMTFE, or the “Tokyo War Crimes Trials”), which sat from May 1946 to November 1948, proceeded along somewhat different lines. The IMTFE, which comprised 11 judges of various nationalities, tried 25 high-ranking political and military leaders accused of unprecedented war crimes and classified as Class A war criminals⁴³. These included four former prime ministers, three foreign ministers, four war ministers, two navy ministers, two ambassadors, three economic and financial advisers, an influential imperial advisor (Koichi Kido), one admiral, and one colonel Kingoro Hashimoto⁴⁴. All had served in successive Japanese governments and the military during the war. By a majority decision, seven defendants were sentenced to death by hanging, 16 were sentenced to life imprisonment, one to 20 years, and another to seven years⁴⁵.

To be sure, the Tokyo tribunal also had aspirations as avowedly lofty as those of the Nuremberg tribunal. The element that has chiefly triggered the ambivalence of historians towards the Tokyo war crimes trials is the extent to which the commitment to justice was compromised by the double standards of the political and strategic considerations of the Allied Powers. It was General Douglas MacArthur, Supreme Commander of the Allied Powers in the Pacific (the “American Caesar” who accepted the unconditional surrender of Japan at the end of World War II), rather than the Chief Prosecutor of the IMTFE, Joseph Keenan, that made the most important decision of the Tokyo trial process. That decision – a deliberate and political rather than judicial one -- was to exempt Hirohito, the Emperor of Japan, from prosecution from war crimes even

as the country's military, the political leadership, and even Hirohito's royal household faced trial. Britain supported the U.S. position, but the Soviet Union insisted on a trial of the emperor⁴⁶. In Tokyo even far more than at Nuremberg, America was the dominant ally and its position naturally prevailed.

History has taken a mixed view of this double standard. Some commentators have been critical of the political exemption of Hirohito from prosecution, and the Tokyo war crimes trials have historically been viewed as inferior to Nuremberg in terms of its relative success and international public awareness of the proceedings. Not least among the reasons for this divergent assessment is that, at Nuremberg, legalism (victor's justice though it was, with a significant dose of political considerations thrown in) was utilized to the full – a fact that was seen as a progressive deployment of power. Regarding Japan, however, many analysts saw MacArthur's exemption of the Emperor as a retrograde step, a missed opportunity. William Webb, the Australian judge that presided at the IMTFE, believed that the trials were fundamentally flawed by reason of Hirohito's absence from the dock⁴⁷. So did Justice Henri Bernard, the French judge on the tribunal⁴⁸.

But there is nothing to suggest that, with the exception of the exemption of Hirohito and a number of differences of a technical nature, the Tokyo trials were fundamentally different from Nuremberg in its nature as victor's justice. In the words of John Dower: "Like Nuremberg, the Tokyo trial was law, politics and theater all in one"⁴⁹. Moreover, as Dower also recounts, several senior military and civilian officials of the Allied Powers privately viewed the Tokyo trials as a sham. A top American military intelligence officer in the Allied Pacific Command Headquarters confided to a judge of the Tokyo tribunal his view that "this trial was the worst hypocrisy in recorded history".

In March 1948 George Kennan, the head of policy planning at the U.S. Department of State visited Japan and issued a stinging commentary on the Tokyo trials as “ill-conceived”, “political trials ...not law”. The trials surrounded the punishment of enemy leaders “with the hocus-pocus of judicial procedure which belies its real nature”, despite having been “hailed as the ultimate in international justice”⁵⁰.

If the Tokyo trials were not regarded as being at par with Nuremberg, is this solely because of the failure to try Hirohito, or does this judgment arise from Western ethnocentrism, in which the West attaches the greatest importance, even in the context of justice, to European theatres, victims, and defendants?⁵¹ After all, critics have asserted that there were a number of cover-ups in the Nuremberg. There, Russia tried to avoid references to the Molotov-Ribbentrop Pact that parceled out “spheres of interest” between the Axis Germany and the Allied Soviet Union in August 1939, the existence of which was only indirectly affirmed through examinations of Ribbentrop at the trial, and it emerged as well that that Germany attacked Norway only to forestall a planned attack by Britain⁵². No less an authoritative figure than Nuremberg prosecutor Telford Taylor observed, “On these matters, the tribunal was engaging in half-truths, if indeed there are such things”⁵³.

Moreover, if MacArthur’s decision to exempt Hirohito is the rallying point of critical assessments of the Tokyo war crimes trials, it is important to address on the merits the question: was that decision justified? In order to better appraise MacArthur’s use of pardon power, it is essential to understand the unique cultural context of Japan at the time, and differing views of the link between that context and the politico-military one. Prior to World War II, the Japanese considered their emperor divine – the Son of

Heaven. In Japanese culture, the emperor's subjects could not look him in the face and were obliged to bow and avoid eye contact for as long as they were in his presence. In short, the emperor was deeply embedded in Japanese psyche and history as a central factor in both, and at a far deeper level than the monarchies of Europe. In this context, then, he was seen as the embodiment of Japanese society and central to societal order.

Yet, in the first part of Hirohito's reign (between 1926 and 1945), the influence of the military in government steadily increased apace with Japan's rise in the early 20th century as a military and irredentist power in the Far East. The Japanese Imperial Army and the Imperial Navy exercised veto power over the formation of the country's civilian governments since 1900. From 1932, following the assassination of the moderate Prime Minister Tsuyoshi Inukai, the military held virtually all political power in Japan and executed policies that fed into its military expansionism in Asia and set the country on an irreversible path to World War II.

It is against this background that there has been heated historical argument about Hirohito's role in Japanese involvement and atrocities in World War II, and the extent of his personal guilt. There is widespread belief that he bore a great degree of command responsibility and was not the figurehead he was claimed to be as a justification for his non-prosecution. Especially in Asia, he was seen by many as the region's Hitler. In this view, he was considered the head of state. Under Japanese law, only the emperor had authority to declare or launch a war. In any case, the war was fought by the Japanese military in his name, and he did not deny knowledge of military plans by Japanese generals to wage aggressive war against China, the Philippines and the United States. From a strict perspective of the equal application of justice and the rule of law (which, as

noted earlier, though embraced by human rights advocates and the moral philosophy of liberalism, is absent at the international plane) it is easy to be scandalized at Hirohito's exemption from the Tokyo war crimes trials. Yet there is a view of him as a figurehead who was unable to influence events in the face of the voracious military irredentism of Japan's generals. He was no more than a mild-mannered fellow who wore a moustache, had a fondness for bacon and eggs, wore a Mickey Mouse watch, and was obsessed with marine biology. The Japanese government at the time certainly advanced the "figurehead" argument in supporting the Allied decision that made Hirohito immune from the legal process of the Tokyo tribunal.

But the weight of evidence suggests a strong case of the emperor's command responsibility. In the saber-rattling lead-up to Japan's attack on the United States, Hirohito was initially distant from military decision-making, and was concerned about the bellicose nature of Japanese demands that the United States and Britain give it *carte blanche* to invade China. Faced with the Imperial Cabinet's unanimous support for war, however, Hirohito shook off his doubts and became a cheerleader of the war effort that was executed in his name. It fell to him, the "voice of the marble", to make the radio broadcast that announced Japan's unconditional surrender after the atomic bombing of Hiroshima and Nagasaki by the United States in 1945.

Although MacArthur did not favor the emperor's abdication and allowed Hirohito to remain as emperor, the god-king was forced to renounce his divinity – a significant humiliation in the Japanese cultural context. Perhaps this was a concession to senior members of the American government in Washington that had sought an investigation of the emperor's war role. MacArthur resisted with an authoritative interpretation, in a

secret cable to Washington, of the reality on the ground in Japan after the war⁵⁴. Hirohito was, in MacArthur's eyes, vital for the future of Japan under the Occupation Government (1945-1952) and beyond. The American general wanted to guarantee the continuity of Japan's body politic, and, in what was the ultimate strategic goal, facilitate the democratization process that would culminate in a transformation of the divine emperor into a constitutional monarch⁵⁵. This was the fundamental reason why MacArthur decided to shield Hirohito from the inconvenient searchlight of the judicial process of the IMTFE. The "American Caesar" believed he needed Hirohito as a symbol of continuity and cohesion of the Japanese people following their defeat. With the societal trauma among the Japanese population in the wake of their defeat, especially the humiliation of the atomic bomb, MacArthur saw Hirohito's survival as a necessary counterweight to a fragile situation. "Seeing their God-monarch in the dock of a Western-run trial" could hardly have helped the situation⁵⁶

MacArthur's cable warned Washington that indicting Hirohito would plunge Japan into chaos from which the country would not recover, trigger guerilla warfare and a communist upsurge, and dash all hopes of introducing a liberal democracy – the ultimate goal of the Occupation Government⁵⁷. In sum, indicting the emperor would lead to a total breakdown of order, requiring at least a million troops and thousands of additional civil servants to reverse⁵⁸. As an intelligence specialist who advised MacArthur on the issue recalled, he favored retaining Emperor Hirohito on the throne "because otherwise we would have had nothing but chaos. The religion was gone, and he was the only symbol of control. Now, I know he had his hand in the cookie jar, and he wasn't any

innocent child. But he was of great use to us, and that was the basis on which I recommended to the Old Man [MacArthur] that we keep him.”⁵⁹

MacArthur did not stop at exempting Hirohito from trial. Occupation policy shielded the emperor from criticism, and ensured a conspiracy of silence about Hirohito’s war role at the Tokyo war crimes trials – directly tampering with witness testimony, or what can only be accurately described, in common parlance in the American domestic legal system, as “obstruction of justice”. Hideki Tojo testified in the course of his trial that “there is no Japanese subject who would go against the will of His Majesty; more particularly, among high official of the Japanese government ...” He later recanted (under subsequent pressure from American officials), stressing Hirohito’s “love and desire for peace”⁶⁰. In a conversation that took place between General Fellers, a senior aide to MacArthur, and the former admiral and Prime Minister Yonai Mitsumasa before the Tokyo trial began, the American is reported to have said: “It would be most convenient if the Japanese side could prove to us that that the emperor is completely blameless. I think the forthcoming trials offer the best opportunity to do that. Tojo, in particular, should be made to bear all the responsibility at his trial. In other words, I want you to have Tojo say as follows: ‘At the Imperial Conference prior to the start of the war, I had already decided to push for war even if His Majesty was against going to war with the United States’”⁶¹. Moreover, in pursuit of this policy, physical evidence in the form of documents and materials that might incriminate the emperor were deliberately ignored and suppressed. Thus the prosecution at the Tokyo tribunal under Keenan functioned, in the words of Dower, “as a defense team for the emperor”⁶².

Sordid as this direct tampering with evidence is, and as unflatteringly as it undoubtedly portrays the Tokyo war crimes trials, it is clear that a majority of Japanese, then and now, view the decision not to put Hirohito on trial as justified. It would be unhelpful to question whether the decision is “right” or “wrong”, as that inquiry would not produce a satisfactory answer in the world of politics and strategy that shapes decisions to prosecute or pardon in international criminal justice: realists who see little value in prosecuting political leaders, only the potential complications legalism can bring to political settlements, would call it the “right” decision and argue that it is justified, while universalists would surely view it as an outrage. An international society perspective on international justice that is conditional would recognize the uniqueness of this case given its cultural context. It might, depending on what part of the international society spectrum (rationalist or solidarist) the observer were to be, criticize the process by which Hirohito was saved from justice, but consider the outcome “typical” of the nature of that society. For, as already noted, the Japanese belief in the divinity of their emperor was a serious one indeed, and to have stripped Hirohito of that aura was already a serious strategic blow. To have stretched policy to the point of putting him on trial may have generated a backlash that might have undermined the goal of order itself. Random samplings of the opinions of Japanese citizens on this question indicate that many in Japan would have committed suicide in response to the embarrassment or loss of face that is taboo in Japanese culture⁶³. At the very least, then, MacArthur’s decision was understandable.

Not everyone agrees that by saving the Japanese throne MacArthur paved a solid path to democracy in Japan. Sterling Seagrave and Peggy Seagrave are of the firm view

that the prospect of real democratic reforms was actually undermined by putting Hirohito beyond accountability for war crimes⁶⁴. In a contrarian interpretation of MacArthur's decision, they argue that the real story was as follows: Japan owed U.S. lenders huge sums of money by 1945. Former U.S. President Herbert Hoover, a Quaker, conspired with fellow Quakers in the Japanese elite to preserve the royal family in order to prevent Japan from lurching towards communism, ensure that the country's financial barons stayed in place, and that debts to wall street financiers were repaid. In this account, MacArthur ensured Hirohito's pardon in the hope that it would facilitate his well-known presidential ambitions by obtaining support from Hoover and other powerful Republicans.

For whatever reason, the prospect of Hirohito's accountability was sacrificed to the imperative of order. Thus, a negative exercise of prosecutorial prerogative may have been justified by a successful outcome in an important societal transition that has benefited not only Japan, but international society and the world economy as well. Moreover, the Tokyo war crimes trials exposed to the Japanese people the excesses of the militarist policies of their governments, and laid an important foundation for a constitutionally guaranteed pacifist foreign policy⁶⁵. In this sense, the numerous "big fish" that were tried at the Tokyo tribunal appears to have effectively counterbalanced the exemption of Hirohito. Despite academic criticisms, there is nothing in this especially unique situation to suggest that, 50 years afterwards, the Japanese society essentially regrets MacArthur's decision to spare the emperor. And if that is so, the argument for that decision appears to have essentially been vindicated.

But the pro and con of the political decision to exculpate Hirohito is one thing. Whether Japan has handled the legacy of its irredentist history astutely is quite another. The benefits of sparing Hirohito remain co-mingled with the deep wounds Japanese war crimes have left in some countries in Asia to this day and a certain moral ambivalence within Japanese society on the question of a formal apology by Japan for those crimes.⁶⁶ Asian countries that had suffered conquest and occupation at the hands of Japanese forces have long argued for a formal apology by Japan, and it was not until 6 June 1995 that the Japanese government issued a declaration expressing “deep remorse” for its aggression⁶⁷.

The conspicuous pardon granted the Japanese emperor is hardly the only decision *not* to prosecute at the Tokyo tribunal. In his review of the Tokyo trial Yves Beigbeder has highlighted some fundamental examples of the endogenous qualities of international criminal law in deciding not just *who*, but *what*, gets prosecuted or pardoned⁶⁸. The first, as I alluded in the introductory chapter of this work, is the atomic bombing of Hiroshima on 6 August 1945, and of Nagasaki three days later. The second is the exclusion from prosecution at the Tokyo trial, for political/strategic reasons, of the development of biological weapons by the Japanese army’s notorious Unit 731, and the use of these devastating agents on prisoners of war.

The atomic bombing of Hiroshima and Nagasaki was the decisive factor in Japan’s surrender and ended the country’s military expansionism. The bombings caused massive physical destruction and loss of human lives. But its most enduring legacy, other than the political controversy that has trailed President Harry Truman’s decision to authorize its use and questions about its legality (to which we will return momentarily) was its crushing psychological impact. The first (Hiroshima) bomb, with fission

produced by 0.85 kilograms of uranium, released an explosive power equivalent to 13,000 of TNT, reached a temperature of 7,000 degrees centigrade that killed persons within one kilometer range through intense burns and rupture of internal organs⁶⁹. It released radiation that injured people within a 2.3 kilometer radius, generated atomic ash and “black rain” that resulted in the deaths of 140,000 persons by year end in 1945. The Nagasaki bomb claimed 60,000 to 70,000 victims in the same period⁷⁰.

Hirohito’s imperial address announcing Japan’s surrender bears witness to the psychological humiliation inflicted by America’s nuclear weapons:

To our good and loyal subjects:

After pondering deeply the general conditions of the world and the actual conditions obtaining in our empire today, we have decided to effect a settlement of the present situation by resorting to an extraordinary measure. ...Moreover the enemy has begun to employ a new and most cruel bomb, the power of which to do damage is incalculable, taking the toll of many innocent lives...We have resolved to pave the way for a grand peace for all the generations to come by enduring the endurable and suffering what is insufferable...⁷¹

In their destructive, indiscriminate impact, the atomic bombings were clearly beyond anything the world had seen, and certainly far beyond the prohibitions of the Hague Conventions and the poison warfare that was employed by the Japanese and was condemned by the United States during the war. Attempts by the defendants at the Tokyo trial to introduce the atomic bombings in evidence at their trial were ruled inadmissible by the Tokyo tribunal and omitted from the majority judgment⁷². But two of the tribunal’s judges held starkly opposing views on the matter, expressed in their concurring

and dissenting opinions. Justice Jaranilla opined that the means justified ends, and thus the atomic bombing was justified because it brought Japan to its knees and ended the war. Justice Pal, on the other hand, believed that: “As a matter of fact, I do not perceive much difference between what the German Emperor is alleged to have announced during the First World War in justification of the atrocious methods directed by him in the conduct of that war and what is being proclaimed after the Second World War in justification of these inhuman blasts”⁷³. In 1993, nearly 40 years after Hiroshima and the Tokyo trial, Justice Röling, reviewing both the massive Allied aerial bombardments of Japanese cities that caused thousands of civilian deaths, and the atomic bombs, wrote: “I am strongly convinced that these bombings were war crimes...It was terror warfare, “coercive warfare”...forbidden by the laws of war”⁷⁴.

In an Advisory Opinion⁷⁵ in response to a majority resolution of the UN General Assembly (narrowly adopted after contentious debate, and in the face of vigorous opposition from France, Russia, Britain and the United States), the International Court of Justice addressed the question: “Is the threat or use of nuclear weapons in any circumstance permitted under international law?” The 15-member Court’s ruling was an equivocal one. It unanimously ruled that neither customary nor conventional international law specifically permits the threat or use of nuclear weapons, but, by eleven votes to three, that neither did both sources of international law “comprehensively and universally” prohibit it. By seven votes to seven, with a casting vote by its President, the ICJ ruled “the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of international humanitarian law, but that in view of the current state of international law

and the facts before the Court, it could not conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of the state would be at stake". The Court then ruled, unanimously, that there was an obligation to pursue in good faith and conclude negotiations that result in nuclear disarmament under international control.

Effectively, beyond the Nuclear Non-Proliferation Treaty (NPT), there is no positive international law that governs the possession of nuclear weapons by the pre-NPT nuclear powers, that is to say, all five members of the U.N. Security Council. Thus, the use of such weapons is really beyond law, resting more in the domain of diplomacy and high politics. By that logic, whether or not using nuclear weapons is a crime is indeterminate, and so it can be said to have been defined out of any possible prosecutorial framework. The fact that such weapons have not been used in a war since 1945 owes itself not to the constraining power of law or the possibility of criminal accountability, but to the doctrines of deterrence and mutually assured destruction that such use would portend.

The decision not to prosecute the members and activities of Unit 731 exposes even more poignantly the arbitrariness inherent in the definitions of who or what are prosecuted or pardoned by international criminal justice. As Beigbeder reports, the Unit, euphemistically tagged a "Water Purification Unit", was the Japanese army's main bacteriological warfare research institution, and was led by Army Medical Lieutenant General Ishii Shiro. Employing 5000 Japanese personnel and motivated by doctrines of racial superiority similar to those that drove the medical experiments of the Nazi doctor Josef Mengele, Unit 731 performed sinister medical and biological experiments on

between 3000 to 12,000 prisoners of war – mainly Chinese and Russian but including some British and Dutch nationals – between 1932 and 1945⁷⁶. These experiments involved exposure to bubonic plague, anthrax, typhoid, mustard gas and other deadly bacteriological conditions. The human “subjects” of these experiments were incinerated afterwards.

In 1947 the U.S. authorities granted Shiro and other participants in Unit 731’s experiments immunity from war crimes prosecution in a secret deal. In return, the U.S. obtained the Unit’s surviving scientific “research” secrets. Japanese authorities officially denied the existence of Unit 731 for nearly fifty years after World War II, even as the Unit’s activities were revealed in various public reports⁷⁷.

Transitional Justice: Between Truth Commissions and Criminal Trials

Countries in transition often face difficult choices in deciding how to deal with the past in order to increase the chances of a better future. The transition may be one from armed conflict (Rwanda, Burundi, Sierra Leone, Mozambique, and other examples), a political one from dictatorship to democracy (Chile, Argentina and Nigeria in the 1990s), a combination of both, or South Africa’s transition from Apartheid to majority rule in 1994. “Transitional justice” is often a critical component of the way forward. By “transitional justice” I mean the phenomenon and process by which a society utilizes legal and quasi-legal institutions to facilitate *fundamental change* from one political order to another or the construction of a new reality against the background of a profound historical memory⁷⁸. It is a means of repudiating the past or building a bridge between it and the future. In short, transitional justice, like Janus, looks backwards and forward at

the same time. It often involves, but is not limited to transitions towards democracy and the rule of law. And it can also be an attempt by a society, national or international, to face squarely a historical memory such as the Holocaust, slavery, and so forth. Such memories may not involve democratic transitions or rule of law issues, but in all cases there is a common thread – the use of legal or quasi legal institutions. The objects of those institutions may vary, converge or diverge. Those objects may be the establishment of the “truth”, reconciliation, reparation, or criminal accountability.

Because transitional justice tends to involve choices between prosecution and pardon, the latter sometimes in the form of amnesties, it is one of the clearest expressions of the dilemma under examination. It belongs squarely in this discussion as well because, while at first sight the scope of transitional justice often appears to be limited to the domestic legal and political sphere, it frequently deals with violations of international humanitarian law that can legitimately be the subject of international jurisdiction. Apartheid, for example, is a crime against humanity in international law⁷⁹. Moreover, the Nuremberg trial, though international, is regarded as an example of transitional justice because it marked the beginning of a shift from a fascist political order to a liberal democratic one. And because the universe of transitional justice encompasses, but is not limited to a cosmopolitan vision of legalism, it frequently runs into the opposition of realist or international society perspectives of domestic or international order.

What, then, is the best path to peace and reconciliation for fractured societies? Truth and reconciliation commissions aimed at uncovering the past, including sometimes by promising amnesty to individuals prepared to confess their crimes, or courts and tribunals – national or international – whose task is criminal prosecution? Does legalism

unearth truth; does “truth” lead to reconciliation in the absence of accountability; and is it necessarily the case that legal justice contributes to reconciliation? These are but some of the many questions in this sphere to which there are no easy answers.

In the 1980s, truth and reconciliation commissions emerged as a middle ground between political exemptions from prosecutions and courtroom trials. This phenomenon was prominent in Latin America but did not, contrary to popular belief, begin in that region⁸⁰. Its adoption following South Africa’s transition from Apartheid to black majority rule is probably the most famous example. No less than 25 countries have utilized combinations of truth commissions and amnesties to facilitate transitions towards stability⁸¹. These commissions had exhibited a wide variety of quality and substance, and some even pre-dated the 1990s. While truth commissions and criminal trials often claim the broadly similar aims of contributing to reconciliation, they approach these goals from fundamentally different angles. In countries such as Nigeria after the civil war that ended in 1970, and in Mozambique following the peace settlement in 1992 that ended the country’s civil war, complete amnesties were granted for acts committed in these conflicts. Seen from legalism’s point of view, it is fair to say that amnesty – impunity, in effect –was the price to be paid for peace and reconciliation⁸². This, then, was not even an attempt at a middle ground.

Mozambique is worthy of more than a passing mention in this context, for it is a rare example of a country that has healed post-conflict wounds without resort either to truth commissions or to criminal trials. Its success has been remarkable, for there is no indication, more than a decade after the guns fell silent, that the country (both the government and its citizens) entertains any sense of loss or regret at the unique path it has

followed⁸³. Cultural factors and the strong role of religion and religious leaders in conflict resolution played a major role here. So did a deflection of the desire for retribution by invoking the responsibility of the extraordinary circumstances of war, rather than the intentional acts of individuals, for atrocities.⁸⁴ Spain, which adopted a comprehensive amnesty policy and avoided what Ruti Teitel has termed “successor trials” in the post Franco era, is another example of success for that policy⁸⁵.

But few other societies have had a similar experience. Through the prism of South Africa’s experience we may examine the strengths and weaknesses of truth commissions.

Forgiving and Forgetting in South Africa

Nelson Mandela’s release in 1990 from 27 years in prison marked the beginning of the end of apartheid. Mandela, in a manner of speaking, walked from prison to the leadership of South Africa, becoming that country’s first black President in 1994 and a symbol of freedom and majority rule. The transition from apartheid to black majority rule was an exhilarating experience for the majority, but a traumatic one for most of the minority, who had to adjust to a velvet political revolution that righted one of recent history’s most egregious wrongs. The gravity of the crime of apartheid, juxtaposed against the economic, political and social complexities of the “rainbow nation” evoked the conundrum: prosecute, or pardon?

Apartheid’s ghost had to be laid to rest if the country was to move forward, but trials for crimes against humanity – legalism – were considered inappropriate in a

situation where the difference between the outcome of a peaceful transition and a bloody civil war with a well-armed white minority government, lay in the success or failure of negotiations.

The negotiations resulted in the establishment of a Truth and Reconciliation Commission (TRC). The creation of the Commission was based on faith in the cleansing power of truth, but largely without the accompanying legal culpability for crimes against humanity perpetrated against the black majority, or acts of violence by apartheid's victims that were seen by many as a justified war of liberation from brutal tyranny – but which, nevertheless, were violations of the official laws of an officially racist state.

For full confessions to the TRC, individuals responsible for major, politically motivated human rights crimes were able to obtain amnesty. As one member of the TRC commented, South Africa did not see retributive justice as an indispensable prerequisite for reconciliation. “The TRC approach trades justice for truth”, he observed frankly. “It is surely for every nation to decide its own approach to these kinds of difficult situations”⁸⁶. In a similar vein, Archbishop Desmond Tutu, who served as Chair of the TRC and its philosopher-king, has described the statesmanship of both F.W. de Klerk, who was South Africa's last apartheid Prime Minister, and Nelson Mandela: “In our case, F.W. de Klerk showed remarkable courage in his reforms, but he was blessed not with an intransigent, bitter and vengeful counterpart, but with the almost saintly magnanimity of Nelson Mandela. The whites wanted to dig in their heels and the liberation movement was hell-bent on demanding every pound of flesh through retributive justice akin to the Nuremberg trial. Neither leader heeded these calls”⁸⁷.

The rationalizations of the TRC approach that attempted to create a mutual exclusivity between justice and truth are fundamentally problematic, as will be argued below. A commentator has attempted to create a subtle, but ultimately unsatisfactory, distinction between the amnesties granted by the South African TRC and blanket amnesties: “In fact the TRC was the best solution. It ensured that amnesty did not mean what the word literally means in Greek (“forgetting”), but was accompanied by a full revelation of the truth; a blanket amnesty would have allowed the criminals to hide everything forever”⁸⁸. It is as if the former ensured a significant degree of accountability, which in fact it did not. This reality is demonstrated by his apt characterization of the disappointment some South Africans felt at seeing “murderous henchmen of the former regime walking free, with their crimes exposed and recorded but not punished”⁸⁹.

The TRC was officially established by an Act of Parliament in 1995⁹⁰. Because the South African TRC provides a good example of the several possible facets that could characterize such commissions (and found to a greater or lesser extent in the customized variants of such institutions in the various countries that have adopted the TRC model), it is helpful to quote the Act of Parliament at some length. The legislation provides, *inter alia*:

Since the Constitution of the Republic of South Africa, 1993 (Act No. 200 of 1993), provides a historic bridge between the past of a deeply divided society characterized by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence for all South Africans, irrespective of colour, race, class, belief or sex;

AND SINCE it is deemed necessary to establish the truth in relation to past events as well as the motives and circumstances in which gross violations of human rights have

occurred, and to make the findings known in order to prevent a repetition of such acts in future;...

AND SINCE the Constitution states that there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for ubuntu but not for victimization;

AND SINCE the Constitution states that in order to advance such reconciliation and reconstruction amnesty shall be granted in respect of acts, omissions and offences associated with political objectives committed in the course of the conflicts of the past;

2. (1) There is hereby established a juristic person to be known as the Truth and Reconciliation Commission...

4. The functions of the Commission shall be to achieve its objectives, and to that end the Commission shall –

(a) facilitate, and where necessary initiate or coordinate, inquiries into –

(i) gross violations of human rights, including violations which were part of a systematic pattern of abuse;

(ii) the nature, causes and extent of gross violations of human rights, including the antecedents, circumstances and factors, context, motives and perspectives which led to such violations;

(iii) the identity of all persons, authorities, institutions and organizations involved in such violations;

(iv) the question whether such violations were the result of deliberate planning on the part of the State or a former state or any organs, or of any political organizations, liberation movement or other group or individual; and

(v) accountability, political or otherwise, for any such violation;

© facilitate the granting of amnesty in respect of acts associated with political objectives, by receiving from persons desiring to make full disclosure of all the relevant facts relating to such acts, applications for the granting of amnesty in respect of such acts, and

transmitting such applications to the Committee on Amnesty for its decision, and by publishing decisions granting amnesty, in the Gazette;...

(e) prepare a comprehensive report which sets out its activities and findings, based on factual and objective information and evidence collected or received by it or placed at its disposal;

(f) make recommendation to the President with regard to –

(i) the policy which should be followed or measures which should be taken with regard to the granting of reparation to victims or the taking of other measures aimed at rehabilitating and restoring the human and civil dignity of victims...

All things considered, the truth and reconciliation approach to South Africa's democratic transition was the best way forward at the time. Had the victims of apartheid insisted on legal accountability negotiations between them and the white minority would have broken down. An escalation of internal armed conflict that would have brought no benefits to either side was a high probability. Yet the benefits of a particular approach to transitional justice, at a specific point in time, should not lead us to conclude that that approach must be similarly beneficial for every situation. Even the passage of time can create a different perspective to the particular situation in question. What, then, are the pros and cons of truth and reconciliation commissions?

Pros and Cons.

The case for them is appealing. First, they approach reconciliation with a strong – and welcome – focus on victims; i.e. restorative justice, in which an effort is made to restore the victim's human dignity. When a perpetrator confesses his crimes, the victim, by exercising a moral prerogative to forgive, is empowered and thus restored in a psychological sense. It can also be a contextually apt approach. Archbishop Tutu has

noted that victim-focused approaches to justice are more akin to historical concepts of justice in African societies: “Retributive justice is largely Western. The African understanding is far more restorative – not so much to punish as to redress or restore a balance that has been knocked askew. The justice we hope for is restorative of the dignity of our people”⁹¹. Moreover, criminal trials in common law systems or international criminal tribunals where common law adversarial procedures are dominant, frequently fail to address the victim as a person and focus exclusively on the perpetrator⁹².

A second benefit of truth commissions is that of the healing effect they can have on the wider society because they are more accessible to ordinary citizens than criminal trials. The public airing of crimes, accompanied by confessions, engenders a greater degree of public participation than criminal trials with their arcane technicalities. Third, the amnesties offered by truth and reconciliation commissions encourage a greater willingness by persons involved in the events in question to participate in the process. In so doing, they tend to yield a far more complete narrative of events.

Fourth, it is worth noting the “truth” dimension of truth commissions. Positing that truth commissions are a superior vehicle for eliciting the “truth” than prosecutions, Priscilla Hayner has argued: “The purpose of criminal trials is not to expose the truth...but to find whether the criminal standard of proof has been satisfied on specific charges. A measure of truth may emerge in this process, but trials are limited in the truth they are able to tell as they must comply with rules of evidence which often exclude important information”.⁹³ Martti Koskenniemi has also questioned the ability of a criminal trial to find or establish the “truth” of complex events involving the actions of

many international players, including the Great Powers and international organizations⁹⁴. In this context, whether “truth” is really established in war crimes trials is limited by the inadequate and selective treatment of context. This happens when one of the parties to the conflict – or a third entity that may or may not be a party to the conflict – establishes the framework for its resolution (including a criminal trial as one possible framework), that excludes the acts of one of the parties. This situation has been described as a *Differend*⁹⁵. The party whose acts are excluded from the framework is usually the victor or an external party that undertook peace enforcement through military action⁹⁶. In this scenario – a common one in international criminal justice -- whose “truth” do trials of an individual or select group of political or military leaders establish?

Fifth, proponents of truth commissions argue that such mechanisms facilitate reconciliation more effectively than prosecutions, and that criminal trials may hinder rather than help reconciliation⁹⁷. South Africa’s Tutu has expressed reservations that international criminal tribunals established by the United Nations:

“risk disrupting fragile situations of transition from repression and conflict to a more democratic dispensation. Such tribunals may well ensure accountability and show there will be no impunity. That is fine as far as it goes. But you need something more than retributive justice for healing. In and of itself, the judicial process is handicapped. It alone cannot be effective in reconciling a society divided by hatred”⁹⁸.

In an elegant and forceful articulation of the same argument, Ramesh Thakur has commented:

“The international criminal justice route takes away from concerned societies the right to decide whether, how and who to prosecute for alleged mass crimes...It also takes away from them the options of alternative modes of reconciliation. The purely juridical approach to transitional justice traps and suspends communities in the prism of past hatreds. South Africa, Mozambique and Rwanda have all made deliberate policy choices to escape cycles of retributive violence. The record of ‘restorative’ justice in bringing closure to legacies of systematic savagery is superior to that of institutions of international criminal justice; the latter’s closure is more authoritative but also more partial and premature”⁹⁹.

On closer examination, however, the truth and reconciliation model in general, including the “South African miracle”, has significant weaknesses. These shortcomings make that model – where unique political circumstances so demand – a secondary option to criminal trials. South Africa’s TRC, for example, appears to have been the object of far more international than domestic admiration¹⁰⁰. Even some thoughtful critics of “show trials” have a hard time coming up with evidence that establishes the salutary effects of “truth-telling” at truth commissions¹⁰¹. On the contrary, for all the controversies that attended or still surround them, the Nuremberg and Tokyo trials of half a century earlier have clear, empirical benefits in terms of their influence on the subsequent evolution of the societies from which the crimes they judged were perpetrated. The contemporary international tribunals for the Former Yugoslavia and Rwanda may ultimately have a similar effect, with the benefit of hindsight, many years hence. A recent opinion poll in South Africa found that only 17 per cent of those interviewed thought that the TRC process had made a positive impact in that country, while two-

thirds of persons interviewed were of the view that race relations had actually worsened post-TRC¹⁰².

To begin with, if, as I have argued, impunity is the absence of accountability, it follows that establishing a culture of accountability, broadly speaking, is a desirable normal state of things. This is not the same thing as blind legalism. It is thus necessary to introduce an element of accountability in order to deter the recurrence of impunity that generates conflicts. In other words, if impunity sows the seed that germinates an actual breakdown of order, is skirting accountability a wise choice in the medium to longer term? Would *habitual* amnesties not then be impunity, and, is that a path to order or disorder? Accountability in a complete sense is not – or should not be – subject to subjective definitions such as those advanced by advocates of truth commissions. It does not mean “truth-telling” for mass atrocities without the consequences of responsibility. This is so though other goals, including the establishment of the truth, may be seen as the end result of that process.

Second, and following from this weakness of definition and expectation, truth and reconciliation commissions, unable as they are to ensure or enforce accountability for mass atrocities, ultimately fail to fulfill the deep hunger that victims often have for justice. Those who favor truth commissions over criminal trials in every circumstance, whether by reason of a realist bent or a genuine belief in the moral superiority of truth commissions over trials fail to take into account this fundamental human urge for justice that is part of the law of nature. Wole Soyinka, the Nigerian poet and Nobel Laureate, has aptly argued that justice is the first condition of humanity.¹⁰³ From Hedley Bull’s perspective, order is functionally prior to justice. But the relation between the two is an

intricate one. While justice should not be done though the world perish, that justice is actually the flip side of order is demonstrated by (a) the central place justice occupies in virtually all the world's major religions, which describe it as a constitutive value, and (b) the central place that issues of justice occupy in world politics. But justice has many faces, including, even in Scriptures, forgiveness under certain conditions. The point then becomes that, while it is not a frequently achievable ideal, avoiding it as a matter of course is not an option.

Experience in several post-conflict societies has shown that, where perpetrators of grave human rights crimes are not prosecuted for any number of reasons, the banished ghost of the victims' thirst for justice returns years later to haunt these societies, reopening old wounds assumed to have "healed". This weakness was famously illustrated by the spate of lawsuits in Britain, Spain and Chile in the late 1990s that sought to bring former Chilean President Augusto Pinochet to justice for massive human rights violations committed by the government he headed decades earlier. The polarization of domestic public opinion that accompanied Pinochet's eventual return to Chile effectively refutes the argument that truth commissions are a sure path to truth and reconciliation. The contemporary view, in hindsight, is that the amnesty granted to Pinochet as part of Chile's transition back to democracy was a straightforward case of impunity.

A similar situation exists in Argentina, where a military coup in 1976 sacked democracy and instituted a draconian reign of terror in which an estimated 30,000 Argentines were systematically persecuted, kidnapped, tortured and murdered during an internal conflict (the "dirty war") with guerillas until 1983, when democracy was

restored. The perpetrators of these state-sponsored crimes were not punished, protected as they were by several decrees in which former President Carlos Menem granted pardons to military officials and former guerillas¹⁰⁴. In a policy reversal, Néstor Kirchner, who was elected President in May 2003, led a process of investigating and arresting members of the former regime responsible for these crimes, the national legislature has annulled some of the laws that shielded the armed forces from prosecution, and a court ruled unconstitutional two of the 10 decrees by which Menem granted pardons to members of the army in 1989 and 1990¹⁰⁵. A public opinion poll in 2003 showed that a clear majority of Argentines (60 per cent) favored reopening investigations, and many believe that until justice is done and the soldiers responsible for the crimes held accountable, Argentina's society will be unable to reach closure and make peace with itself. One Argentine professional put it quite cryptically: "How can you call yourself a democracy if these people are exempt from prosecution? How can people have faith in justice in the future if it hasn't dealt with the past?"¹⁰⁶

This is the problem with "forgiving and forgetting". Just as the Chilean and Argentine dilemmas become the subject of the wisdom of hindsight, so has the South African transition not been immune from a questioning of the conventional wisdom that the TRC process was a saintly affair. There were those who, while recognizing the necessary expediency of South Africa's TRC, were somewhat skeptical of how history would judge it in the longer term. Some years ago, I argued that: "South Africa's case may appear unique, but not enough time has elapsed since the TRC to evaluate it more definitively"¹⁰⁷. By early 2004, a clear split had developed in the ranks of President Thabo Mbeki's Government in South Africa over the arrest of a former security police

colonel charged with the murder of three anti-apartheid activists – an event that appeared to presage an attempt by some senior security officials in the African National Congress (ANC) Government to bring several generals of the former apartheid security force to justice¹⁰⁸. The incident led to fears that South Africa's "miracle" might unravel and prompted a flurry of negotiations between apartheid-era white intelligence operatives and the ANC Government, against the background of mutterings by pro-accountability, ANC stalwarts about the possibility of "Nuremberg-style trials". The angst has sometimes been mutual: There has been a similar backlash within the minority white community over the ANC Government's appointment of individuals considered "terrorists" under apartheid to senior security posts¹⁰⁹.

Regarding societies that opted for the collective amnesia of blanket amnesties, the experience of countries like Nigeria is also instructive. Thirty years after its civil war, the country moved from a point of a willful suspension of memory ("no victor, no vanquished" was the phrase used by the country's President Yakubu Gowon when the war ended in 1970) to one of a truth commission established in 2001 with a temporal mandate stretching back more than three decades. Had Gowon's policy been more consistently implemented over time, Nigeria might have gone the way of Mozambique and Spain, despite the large scale war crimes that were committed during the civil war that was fought to forestall the secession of its eastern region which declared an independent Republic of Biafra. But bad governance, human rights abuses and perceived political marginalization of the Igbo and some other ethnic groups have resulted in serious strains to the body politic.

In June 1999 President Olusegun Obasanjo appointed a Human Rights Investigation Commission headed by the respected former Nigerian Supreme Court Judge Chukwudifu Oputa. The commission, which visited South Africa to absorb lessons from that country's TRC, investigated and received public submissions on numerous human rights abuses, in particular political assassinations, and submitted its report on 28 May 2002. It was also required to recommend judicial, legislative and institutional measures to redress past rights abuses in the country. What this evolutionary process suggests is that judicial accountability in the form of full-blown trials for mass crimes in future is a possibility that, though unlikely, cannot be excluded, especially as the report of the commission was not released for public consumption by the Government. Nevertheless, it may well be that, for some societies, deferring the day of reckoning may facilitate a stronger ability to cope with the trauma of truth commissions or trials at a later date.

A third weakness of truth commissions is that they tend to make a false distinction between truth, as supposedly represented by truth commissions, and justice, as represented by criminal trials. It is not at all empirically established that criminal trials, despite the inherent clash of interests of the defendants and the prosecutor, are intrinsically incapable of arriving at the truth or indeed frequently fail to do so. To be sure, in some cases, an accused may be found not guilty on the basis of a technicality or a prosecutor's failure to establish guilt with the required standard of proof. Meanwhile, beyond the courtroom, other persons or interests "know" that the accused is actually or probably guilty. But the ratio of cases where individual responsibility for mass atrocity is factually and judicially established outnumbers those where it is not. For, when it comes to violations of international humanitarian law, crimes such as genocide, crimes against

humanity and war crimes are – or can -- rarely be secret in the same manner as, say, the “perfect murder” of an individual that becomes an insoluble mystery. Rather, the planning and commission of such crimes usually involves a significant number of agents and a command structure.

In some cases before the international criminal tribunals, in particular the International Criminal Tribunal for Rwanda, some accused persons have pleaded guilty and confessed the details of their crimes¹¹⁰. These confessions were just as remarkable as any in a truth commission, and shed light on the truth of the Rwandan genocide. In none of these cases were the pleas of guilt made in exchange for an amnesty, as courts are bound to impose punishment once the guilt of the accused person is established in a criminal trial¹¹¹.

Moreover, even the extent of the “truth” that can be unearthed by a truth commission can be circumscribed by the commission’s terms of reference. South Africa’s TRC did not examine apartheid as a crime in itself – a not insubstantial omission for so historic an exercise¹¹². It has similarly been noted that the remit of the TRC did not include acts based on official policies that were not illegal under apartheid but, though not involving violence, were just as powerfully oppressive and discriminatory – race classification, social segregation, and forced population movements¹¹³. That these policies, being the core of apartheid that they were, did not receive the searchlight of the TRC lays the “truth” and substance of the commission’s work justifiably open to charges of distortion. Thus, truth commissions, like international criminal tribunals, can be influenced by the *Differend*.

Fourth, while truth and reconciliation commissions are an option for dealing with some kinds of mass crimes, especially crimes against humanity, that approach is of little help when the crime in question is that of genocide. The scope of the genocide that occurred in Rwanda in 1994 was so vast, the time span of its commission so short, and its cruelty so shocking, that the Rwandan Government that came to power shortly thereafter decided that justice must be done for reconciliation to be possible.

The case for criminal trials

Having examined the strengths and weaknesses of truth commissions, I now turn to the case for prosecutions. There are a number of arguments that make prosecutions a necessary component of long-term conflict resolution in strife torn societies. First, justice (accountability through punishment) has a deep psychological impact on individuals and, by extension, on societies. When justice is done, and seen to have been done, it tends to provide a catharsis for those physically and psychologically scarred by violations of international humanitarian law. Deep-seated resentments – key obstacles to co-existence – are removed, and people on different sides of the divide can feel that a clean slate has been achieved. This objective is better achieved where the justice that is handed down is a complete one, involving not only retribution, but restoration as well.

Second, trials establish responsibility for crimes adjudicated, thus negating the notion of collective guilt that can hinder peaceful co-existence. Other members of the group to which the defendant or group of defendants may belong are thus spared the weight and shame of guilt for crimes they did not commit and are thus free to participate

in national life on equal terms. This factor helps answer the question, for example: are all Serbs responsible for the crimes of their extremist leaders in the wars of the Former Yugoslavia; are all Hutus to blame for the genocide in Rwanda in 1994?

In this context, one differs with Mark Osiel's concept of "administrative massacre" as a possible vitiation of individual responsibility on both legal and policy grounds¹¹⁴. According to Osiel, incidents of administrative massacre "characteristically involve many people in coordinated ways over space and time, impeding adherence" to the necessity of proving willful acts of particular defendants.¹¹⁵ The Holocaust of the Jews in Nazi Germany and the Rwandan genocide are perhaps the best examples of administrative massacre, involving many people and central coordination. It is an appealing argument, not because it successfully makes the case for mass amnesia, and thus a successful sociological excuse for impunity, but because it demonstrates why a synthesis of criminal prosecutions and truth and reconciliation commissions are often necessary. Another writer, in what is arguably a version of the "administrative massacre" theory, has criticized the "individualization" thesis, noting that individualization of guilt is not neutral in its effects as it fails to address the political, moral and organizational structures that bred the crime: "To focus on individual leaders may even serve as an alibi for the population at large to relieve itself from responsibility"¹¹⁶.

That may well be, but these arguments, in particular Osiel's attempt to suspend *mens rea*, do not address the bald fact that the act of participation in a conspiracy to commit genocide, for example, is ultimately an *individual* decision, regardless of the prevailing pressures of the circumstance in question. From the point of view of legalism, it is only a valid defense of mental incapacity, as established in a court of law, that

should exculpate an individual from personal responsibility for his or her acts and omissions. Even the well-known concept of following superior orders offers no relief from individual criminal responsibility under the Statutes of the ICTR and the ICTY, but may be considered only in mitigation of punishment¹¹⁷. For individuals to hide under a “not my will” defense for violations of positive law is a path not to order, but to disorder. And, from a policy viewpoint, accepting the concept of administrative massacre totally negates any contribution that a juridical approach can make to preventing conflict. That the leaders and other active perpetrators of the Rwandan genocide assumed they would be safe from judicial accountability, spreading the guilt, as it were, by roping in thousands of their fellow countrymen and women in the commission of the crime is an illustration of why administrative massacre is an unsustainable approach to punishing mass atrocities.

As for the question of the masses being psychologically or historically exculpated by the trial of individual leaders, the responsibility of such leaders must be the price they pay for the misuse of their power or authority. In other words, it is a necessary price of leadership that allows societies to move on after conflict. It would be an unsupportable argument, for example, to say that the German citizenry at large or all Japanese should bear legal responsibility for the Holocaust or the crimes committed by the Japanese Imperial Army in Asia prior to and during World War II.

Third, another point in favor of criminal trials as a contribution to conflict resolution and transitional justice is that trials conducted by international or national courts establish an indisputable, even if not complete, historical record of events with legally binding consequences where guilt or innocence is established. The problem with

this aspect of justice is that of whether such courts are truly independent or impartial in every instance. Attaching historical-record outcomes to criminals raises some problems, for, as has been noted: “For any major event of international politics – and situations where the criminal responsibility of political leaders is invoked is inevitably such – there are many truths and many stakeholders for them”¹¹⁸. Nevertheless, where guilt is established, extremists convicted of violations of international humanitarian law are frequently banished from the political space, creating room for the growth of a democratic culture. This was certainly the case in Germany following the Nuremberg trials.

Limitations of criminal trials

There are few perfect options for confronting impunity and achieving a significant degree of peaceful co-existence. Criminal trials, national or international, are not immune from the complex and messy nature of such efforts. The chief limitation of a criminal prosecution approach is that trials in courts of law for crimes committed in a political context are no substitute for political and other processes of reconciliation. Advocates of legalism, often human rights NGOs, frequently speak and write as if a courtroom trial is a panacea for all the challenges that face a society broken by war or repression. Trials provide a necessary foundation for additional, alternative processes of conflict resolution. On the other hand, the reality that they are often seen as vengeance by the parties to a conflict that are in a relatively weak position at the time that “justice” is done, is an important limitation. The point here is that, especially in the case of civil

wars, post-conflict peace processes must include political dialogue involving opposing groups, even where trials that determine individual criminal responsibility are major components of such a process.

Following from this critique is the question of whether criminal trials result in the oft-touted benefit of reconciliation. Archbishop Tutu makes the point that criminal trials may check impunity, but do not really contribute to reconciliation. He cites the example of the ICTR, where he argues that the Hutus will say that the trials were instigated by the Tutsis against Hutu politics and the military¹¹⁹. This argument is valid, but only up to a point – that rolling back impunity and reconciliation are two different concepts, a distinction that has often escaped policy-makers as they seek to utilize criminal law as an instrument of reconciliation¹²⁰. In her famous critique of the Eichmann trial in Israel Hannah Arendt sought a way out of this hazy conceptualization by trying to keep things simple:

“The purpose of the trial is to render justice, and nothing else; even the noblest ulterior purposes – ‘the making of a record of the Hitler regime ‘ –can only detract from the law’s main business: to weigh the charges brought against the accused, to render judgment and to mete out punishment”¹²¹

But this simplicity, appealing as it is, remains difficult to realize. The frequently political contexts of the events that give rise to criminal trials for violations of humanitarian law will frequently involve didactic considerations in such trials, and is one reason why the excessive focus on the accused has come under criticism¹²². Such crimes frequently involve large numbers of people, and the motivation for the crimes is one

often connected with the identity of the victims. For this reason, trials for genocide, crimes against humanity and war crimes go beyond “pure” criminal trials for ordinary crimes, but rather are inherently political. So while the individual on trial answers for himself and not as a group, the group factor is frequently present in the form of conspiracy or common purpose, as well as in the form of the victim as a member of a group (ethnic, religious, political, and so on). And because war crimes trials and tribunals are often part of societal transitions or seek to construct societal order, it is difficult to get away from the “larger issues” of which the trial becomes a microcosm, although Arendt is surely right about the primary purpose of a trial. If these larger issues become engaged, why focus solely on the defendant? Surely, justice is more complete in this context if the victims as a targeted group are recompensed in some form. Hence the argument for restorative justice that is victim-focused, which may be additional to, or outside of, a criminal trial context.

There are two important questions that Tutu’s critique does not answer. The first is whether reconciliation, certainly a desirable but essentially moral or metaphysical concept, is a necessary condition for peace. The second is: do criminal trials represent “vengeance”? The answer to the first question depends on the prism through which the challenge is viewed – Hobbesian, Grotian or Kantian? There is no question that Tutu’s perspective is a Kantian, irenist one of universal or permanent peace (“peace on earth”). As Hedley Bull has noted, this aspiratory paradigm stands in stark contrast with actual historical experience¹²³. If this is so, it follows that we have established unrealistic expectations of criminal trial processes, and then criticize such trials for having failed when they do not transform the world as we expect them to. To say, as Tutu does, that

trials do not achieve reconciliation but truth commissions do, is an artificial comparison, for by so doing we would be vesting in criminal trials the possibility of an unlikely outcome. This point is related to the one above about historical record outcomes, which are even more realizable than reconciliation. This situation has arisen mainly due to the language that has been used in the preambles of the statutes of international criminal tribunals such as that for Rwanda, where reconciliation was explicitly stated as one of the outcomes expected from the work of the ICTR.

There is no empirical proof of any situation, including the Nuremberg trials and the trials for the Rwandan genocide, where such trials have in and of themselves created reconciliation. The sociological standards against which criminal trials for mass atrocities must be judged, if we are to go beyond their primary purpose of rendering justice, is that of the establishment of co-existence, expressed, for example, through a democratic culture and economic and social integration. In other words, peace in the Grotian sense of the absence of order-destabilizing conflict.

Regarding the issue of criminal trials as vengeance, although such trials prevent unregulated, vigilante justice that is in itself a threat to order, they do indeed represent society's vengeance -- organized, sanctioned and controlled it may be -- on individuals that engage in deviant behavior on a massive scale. This is only a reflection of the current state of evolution of international and national societies. It does not make such trials any less desirable, though "reconciliation" may be a desirable objective as well. Following Tutu's trend of thought to the logical conclusion it omits, it is worth noting that justice is an irreducible underpinning of all major religions, just as forgiveness and reconciliation are. In this sense, legal justice and reconciliation are but two sides of a

coin, with one much more easily achievable in practice than the other. This is so even if, seen from a certain perspective that attaches a high degree of faith to human character, truth and reconciliation mechanisms may create a false impression of superiority over courtroom trials that do not always bring out the best in human nature because of their technical processes.

Synthesis

Truth commissions and criminal trials are not mutually exclusive. Sovereign states may choose the option of truth commissions without extinguishing the jurisdiction of international tribunals or national courts. And it is possible, even advisable, that both options be exercised at different points of a continuum. A state may begin with one and bring closure with the other – or utilize both in tandem. Sierra Leone is an example of a post-conflict society that has utilized both truth commissions for crimes under its national jurisdiction, and criminal trials for violations of international humanitarian law. In that case the truth commission approach has been particularly beneficial because it encompassed children – who had a uniquely prominent role of children as protagonists and victims of the Sierra Leone conflict – where legalism could not. With a policy decision having been taken that children would not be tried before the Special Court for Sierra Leone despite the roles several of them played as child soldiers, the Sierra Leone Truth and Reconciliation Commission provided a forum for them to participate in their country's transitional justice process.

This dual approach is also recommended because the scope of mass atrocities committed in a given case all too often overwhelms either a judicial tribunal or a truth

commission where either one has the sole task of discharging the burden of addressing these crimes. Moreover, a combined approach better addresses the reality that, as David Forsythe put it in a different context, “some problems are simply too large for a judicial solution”¹²⁴. Not all perpetrators of human rights crimes can be brought to justice, but neither should all such persons escape legal accountability. This is a safe middle ground.

An additional path to synthesis is to recognize that truth commissions and courts are fundamentally different. Hayner, writing on truth commissions, has argued that they are not a substitute for prosecutions and should not be seen as second best¹²⁵. In theory, this is an excellent case for truth commissions. As noted above, they have their place because legalism cannot be practical response in every situation of mass atrocity. In practice, however, truth commissions have all too often served as an alternative to criminal prosecutions. But such mechanisms are most useful when what they are and what they are *not* is quite clear to the societies in which they are utilized as part of a political/societal transition. It is when they seek to serve, in effect, as a smokescreen “accountability” in which a recounting of history replaces culpability, that the limitations of truth commissions have been painfully exposed.

¹ Hedley Bull, *The Anarchical Society: A Study of Order in World Politics* (Basingstoke and New York: Palgrave Macmillan, 1977) 83.

² I use the word “pardons” in a broad sense to describe not only formal pardons for offenses, but also policy decisions not to prosecute persons who, *prima facie*, may be guilty of violations of international humanitarian law.

³ Ramesh Thakur, “Politics vs Justice at The Hague”, *International Herald Tribune*, 15 August 2002.

⁴ Henry Kissinger, *A World Restored: Metternich, Castlereagh, and the Problems of Peace, 1812-1822* (Boston: Houghton Mifflin, 1973), 138.

⁵ Testimony of Professor Jeremy Rabkin, Hearings on International Justice, Committee on International Relations, United States House of Representatives, 28 February 2002.

⁶ *Ibid.*

⁷ *Ibid.*

⁸ Ruti G. Teitel, *Transitional Justice* (Oxford and New York: Oxford University Press, 2000), 51 – 58.

⁹ *Ibid.*, 52.

¹⁰ See Joseph Nevins, “Justice Still Eludes Indonesia”, *International Herald Tribune*, 19 February 2004, 7.

¹¹ *Ibid.* See also Jeffrey A. Winters, “U.S. Media and Their Ignorance Partly Blamable for E. Timor’s Misery”, *Jakarta Post*, 28 May 2002, discussing U.S. media reporting of claims of U.S. involvement in Indonesia’s invasion of East Timor in 1975.

¹² Article 51, Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda, www.ictt.org, and Article 51, Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia, www.un.org/icty.

¹³ See Article 27, Statute of the International Criminal Tribunal for Rwanda, www.ictt.org, and Article 28, Statute of the International Criminal Tribunal for the Former Yugoslavia, www.un.org/icty.

¹⁴ See “The Administration of Justice and the Human Rights of Detainees: Question of the Impunity of the Perpetrators of Human Rights Violations (civil and political), Revised Final Report prepared by Mr. Joinet for the Commission on Human Rights, UN Document E/CN. 4 Sub. 2/1997/20/Rev.1, October 2, 1997, 17.

¹⁵ See Kingsley Chiedu Moghalu, “Peace Through Justice”, *Washington Post*, 6 July 1999.

¹⁶ Article 10 of the Statute of the Special Court for Sierra Leone provides: “An amnesty granted to any person falling within the jurisdiction of the Special court in respect of the crimes referred to in articles 2 to 4 of the present Statute shall not be a bar to prosecution.” The crimes referred to are crimes against humanity, Violations of article 3 common to the Geneva Conventions and of Additional Protocol II, and Other serious violations of international humanitarian law. See Statute of the Special Court for Sierra Leone, UN Doc. S/2000/915.

¹⁷ Gary Jonathan Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (Princeton and Oxford: Princeton University Press, 2000), Ch. 3. This section owes much to Bass’s detailed history of the subject. Unlike Bass, however, I have sought in this chapter to analyze the connection between these historical events and the development of some important norms of international humanitarian law. I have also examined another work cited by Bass: James F. Willis, *Prologue to Nuremberg: The Politics and Diplomacy of Punishing War Criminals of the First World War* (Westport, Connecticut: Greenwood, 1982).

¹⁸ See Ruth Henig, *Versailles and After: 1919 – 1933* (London: Routledge, 1995).

¹⁹ James Atkinson, “The Treaty of Versailles and its Consequences”, unpublished paper, 2002.

²⁰ Bass, 73.

²¹ *Ibid*, 74.

²² *Ibid*, 77-87.

²³ *Ibid*, quoting A.M. Luckau, *The German Delegation at the Paris Peace Conference* (New York: Columbia University Press, 1941), 112.

²⁴ See “Seeds of Evil: The Rise of Hitler”, www.schoolshistory.org.uk.

²⁵ *Ibid*.

²⁶ James F. Willis, *Prologue*, 177-178.

²⁷ Bass, 60.

²⁸ Nicholas Wood, “Milosevic’s Name on the Ballot Signals Serbian Nationalism”, *The New York Times*, 27 December 2003. See also Misha Glenny, “The Prosecutor Muddies Serbian Waters”, *International Herald Tribune*, 17 February 2004. Not surprisingly, economic malaise as a factor in the nationalist backlash to war crimes prosecutions was as well active in Germany’s Weimar Republic between World Wars I and II.

²⁹ Bass, 80.

³⁰ Ibid.

³¹ Ibid, 81.

³² Ibid, 67.

³³ Ibid.

³⁴ Proceedings of the Imperial War Cabinet, November 28, 1918, as quoted in Bass, 69-70.

³⁵ Bass, 103.

³⁶ See article 5 (1) (d) of the Rome Statute, U.N. Doc. A/CONF.183/9 of 17 July 1998 and corrected by procès-verbaux of 10 November 1998. Article 5 (2) provides that the Court's jurisdiction over the crime of aggression will become effective once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the relevant conditions for the exercise of jurisdiction. Article 123: "Seven years after the entry into force of this Statute the Secretary-General of the United Nations shall convene a Review Conference to consider amendments to this Statute. Such review may include, but is not limited to, the list of crimes contained in article 5."

³⁷ Woodrow Wilson, Speech to the United States Congress, 11 February 1918, in *The Papers of Woodrow Wilson*, Arthur S. Link et al, ed. (Princeton: Princeton University Press, 1984), 46: 320.

³⁸ Bass, 103.

³⁹ Ibid.

⁴⁰ Ibid.

⁴¹ Ibid.

⁴² Ibid.

⁴³ Numerous other trials were held at various military tribunals established by the victorious Allied Powers, with "conventional atrocities" or "crimes against humanity" classified as "Class B" crimes, and the planning, ordering, authorization and failure to prevent such atrocities categorized as "Class C" crimes. John W. Dower, *Embracing Defeat: Japan in the Wake of World War II* (New York and London: W.W. Norton & Company, 1999).

⁴⁴ Tim Maga, *Judgment at Tokyo: The Japanese War Crimes Trials* (Lexington: The University of Kentucky Press, 2001), 3.

⁴⁵ Dower, *Embracing Defeat*, Ch. 15.

⁴⁶ See B.V.A. Röling and Antonio Cassese, *The Tokyo Trial and Beyond* (Cambridge: Polity Press, 1993).

⁴⁷ Dower, 459.

⁴⁸ Beigbeder, 57.

⁴⁹ Dower, 461.

⁵⁰ *Ibid.*, 451, 453.

⁵¹ For an analysis of the politics of historical truth in the context of international criminal justice, see Martti Koskenniemi, "Between Impunity and Show Trials", *Max Planck Yearbook of United Nations Law*, Vol. 6, 2002, 1-35.

⁵² *Ibid.*, 21.

⁵³ Telford Taylor, *The Anatomy of the Nuremberg Trials. A Personal Memoir*, 1992, 555, quoted in Koskenniemi.

⁵⁴ Dower, 324.

⁵⁵ Beigbeder, 57.

⁵⁶ *Ibid.*

⁵⁷ Dower, 325.

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*

⁶⁰ Beigbeder, 57.

⁶¹ Dower, 325.

⁶² *Ibid.*, 326.

⁶³ For example, Interview with Yoshiko Saito (Japanese national), Geneva, March 2004. I considered it better to pose the question to ordinary Japanese whose answers would, from this writer's standpoint be as authoritative, if not more so, than scholarly authority or declarations on this question.

⁶⁴ Sterling Seagrave and Peggy Seagrave, *The Yamoto Dynasty: The Secret History of Japan's Imperial Family* (New York: Broadway Books, 2000).

⁶⁵ Maga, *Judgment at Tokyo*, 86-87.

⁶⁶ See Yutaka Arai, “Revisionist Views on War Crimes by Japanese Prompt Fears for Nation’s Democracy”, *Financial Times* (Letter to the Editor), 26-27 February 2005, responding to an interview by Yuko Tojo, granddaughter of Hideki Tojo in the same newspaper. See “Let Japan’s Sleeping Gods of War Lie”, Lunch with the FT, *Financial Times*, 19 -20 February 2005.

⁶⁷ Beigbeder, 75.

⁶⁸ Ibid, 66-75.

⁶⁹ Haruko Taya Cook and Theodore F. Cook, *Japan at War, An Oral History* (New York: The New Press, 1992), quoted in Beigbeder at 66-67.

⁷⁰ Ibid.

⁷¹ Ibid, 51.

⁷² Ibid, 68.

⁷³ Ibid.

⁷⁴ Roling and Cassese, 84.

⁷⁵ Advisory Opinion of the International Court of Justice on the Legality of the Use or Threat of Nuclear Weapons, 1996.

⁷⁶ Beigbeder, 72.

⁷⁷ See, for example, Hal Gold, *Unit 731: Testimony* (Boston: Tuttle Publishers, 2004).

⁷⁸ See Ruti G. Teitel, *Transitional Justice* (Oxford and New York: Oxford University Press, 2000). See also Ifi Amadiume & Abdullah An-Na’im, *The Politics of Memory: Truth, Healing and Social Justice* (London and New York: Zed Books, 2000).

⁷⁹ International Convention on the Suppression and Punishment of the Crime of Apartheid, adopted by U.N. General Assembly resolution 3068 (XXVIII), UN Doc. A/9030, 30 November 1973. Art. 7 (j) of the Statute of the International Criminal Court lists “the crime of apartheid” as one of several crimes that constitute crimes against humanity.

⁸⁰ The Commission of Inquiry into the Disappearance of People in Uganda since 25th January 1971 was established by President Idi Amin Dada in Uganda in 1974. See Priscilla B. Hayner, *Unspeakable Truths: Facing the Challenge of Truth Commissions* (New York and London: Routledge, 2002), 51. As Hayner notes without irony, the 1974 Ugandan commission is one of the few in her study that was not part of a

fundamental political transition, having been established by Amin in response to external political pressure to investigate the disappearances that were perpetrated by officials of his own regime. When President Yoweri Museveni came to power in 1986 he established another truth commission, the Ugandan Commission of Inquiry into Violations of Human Rights.

⁸¹ Argentina, Bolivia, Chad, Chile, East Timor, Ecuador, El Salvador, Germany, Ghana, Guatemala, Haiti, Malawi, Nepal, Nigeria, Panama, Peru, Philippines, Serbia and Montenegro, Sierra Leone, South Africa, South Korea, Sri Lanka, Uganda, Uruguay, and Zimbabwe. See United States Institute of Peace, Truth Commissions Digital Collection, www.usip.org

⁸² Jonathan Derrick, "Reconciliation: Incompatible or Inseparable?", *African Topics*, August-September 1999, 10-12.

⁸³ See Helena Cobban, "Healing Lessons From Another War-Torn Society – Mozambique", *Christian Science Monitor*, 8 May 2003.

⁸⁴ Ibid.

⁸⁵ Teitel, *Transitional Justice*, 53.

⁸⁶ Remarks by John Daniel, member of the South African Truth and Reconciliation Commission, at the 17th General Conference of the International Peace Research Association held in Durban, South Africa, June 1998.

⁸⁷ Desmond Tutu, "War Crimes Tribunals May End Impunity, But They Can't Heal Hatred" (Interview by Nathan Gardels), *New Perspectives Quarterly*, Vol. 20:2, Spring 2003.

⁸⁸ Jonathan Derrick, "Reconciliation".

⁸⁹ Ibid.

⁹⁰ Promotion of National Unity and Reconciliation Act, No. 34 of 1995, 26 July 1995.

⁹¹ Quoted in Marta Minow, *Between Vengeance and Forgiveness* (Beacon Press, 1998), 81.

⁹² Agwu Ukiwe Okali, "Note on Restitutive Justice at the International Tribunal for Rwanda", 1998, unpublished paper on file with the author. See also Julie Mertus, "Truth in a Box: The Limits of Justice through Judicial Mechanisms", in Amadiume and An-Na'im, *The Politics of Memory*, 142-161.

⁹³ Priscilla B. Hayner, *Unspeakable Truths: Confronting State Terror and Atrocity* (New York: Routledge, 2002), 100.

⁹⁴ Koskeniemi, "Between Impunity and Show Trials".

⁹⁵ J.F. Lyotard, *The Differend. Phrases in Dispute*, translated by G. Van Den Abbeele, 1988 and quoted in Koskeniemi, 17.

⁹⁶ The *Differend* is applicable to the Nuremberg trials, and the role of NATO in ending the wars of the Former Yugoslavia.

⁹⁷ Desmond Tutu, "War Crimes Tribunals May End Impunity".

⁹⁸ Ibid.

⁹⁹ Thakur, "Politics vs Justice at The Hague". Including Rwanda in this argument appears odd, as Rwanda's present government is unshakably wedded to prosecutions for the impunity of its predecessor regime, including with the assistance of an international criminal tribunal. Except, perhaps, the aim was to juxtapose that country, on the one hand, with South Africa (truth commission) and Mozambique (blanket amnesty).

¹⁰⁰ John Dugard, "Reconciliation and Justice: The South African Experience", conference paper quoted in Anne-Marie Smith, *Advances in Understanding International Peacemaking*, Vol. II (Washington, D.C.: United States Institute of Peace, 2001), 12.

¹⁰¹ Koskeniemi, 8.

¹⁰² E. Kiss, "Moral Ambition Within and Beyond Political Constraints: Reflections on Restorative Justice", in R.I. Rotberg and D. Thompson, eds., *Truth v Justice: The Morality of Truth Commissions* (Princeton: Princeton University Press, 2000), 88 and Rotberg, "Truth Commissions and the Provision of Truth, Justice and Reconciliation", *ibid.*, 19.

¹⁰³ See Amadiume, "The Politics of Memory: Biafra and Intellectual Responsibility" in Amadiume and Abdullahi An-Na'im, 38-55.

¹⁰⁴ See Adam Thomson, "Kirchner Seeks to Heal Wounds Inflicted by Argentina's Junta", *Financial Times*, 24 March 2004.

¹⁰⁵ Ibid.

¹⁰⁶ Ibid.

¹⁰⁷ Kingsley Chiedu Moghalu, "No Peace Without Justice: The Role of International Criminal and Humanitarian Law in Conflict Settlement and Reconciliation", paper presented at a conference "From

Impunity to a Culture of Accountability”, organized by the United Nations University and the University of Utrecht, Utrecht 26-28 November 2001.

¹⁰⁸ “The Threat to SA ‘Miracle’ “, *Africa Analysis* 20 February 2004.

¹⁰⁹ Sharon LaFraniere, “A South African Journey: Bomb Maker to Police Chief”, *The New York Times*, 28 February 2004.

¹¹⁰ Three accused persons have pled guilty before the Tribunal to Genocide and Crimes against Humanity: Mr. Jean Kambanda, former Prime Minister of Rwanda, Mr. Omar Serushago, a former leader of the *Interhamwe* militia, and Georges Ruggio, a Belgian journalist.

¹¹¹ Kambanda was sentenced to life in prison, serushago to 15 years imprisonment, and Ruggio to 12 years.

¹¹² John Dugard, “Reconciliation and Justice”. For the contradictions of the TRC process see also Mahmoud Mandani, “The Truth According to the TRC”, in Amadiume and An-Na’im, 176-183.

¹¹³ Ibid.

¹¹⁴ Mark Osiel, “Ever Again: Legal Remembrance of Administrative Massacre, *University of Pennsylvania Law Review* 144, 1995.

¹¹⁵ Ibid.

¹¹⁶ Koskenniemi, 14.

¹¹⁷ Article 6(4), Statute of the ICTR.

¹¹⁸ Koskenniemi, 12.

¹¹⁹ Tutu, “War Crimes “

¹²⁰ See Preamble of the Statute of the International Criminal Tribunal for Rwanda.

¹²¹ Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil*, (New York: Penguin Books, 1977), 5.

¹²² See Okali, “Note on Restitutive Justice”.

¹²³ Bull, 17.

¹²⁴ Forsythe, “Politics and the International Tribunal for the Former Yugoslavia”, 199.

¹²⁵ Hayner, op cit.

Chapter 5

“The News from Absurdistan”: The Rise and Decline of Universal Jurisdiction

To define the interests of mankind is to lay claim to a kind of authority that can only be conferred by a political process

-- Hedley Bull, *The Anarchical Society*

One dimension of the cosmopolitan view of international justice is the push to obliterate geographical (and jurisdictional) boundaries in the pursuit of alleged war criminals. This is what has been termed “universal jurisdiction” or “borderless justice”. It is a campaign for accountability beyond the jurisdictional borders established in the centuries over which international law has developed. This chapter will examine that phenomenon. It will inquire into the legal basis of the assertion of this controversial form of jurisdiction that touches the heart of world politics, demonstrate how it illustrates the tension between universalist conceptions of justice and the nature of the international society, and establish that, although the concept is not without legal and historical basis, those foundations are of limited scope. Certain clearly defined circumstances permit trials on the basis of universal jurisdiction. But excessively broad assertions of a right to try presumed war criminals in the courts of countries other than theirs rest more on declarations of a cosmopolitan world society than on concrete legality.

Universal Jurisdiction

Universal jurisdiction is a doctrine that asserts that some crimes are so shocking in the affront they represent to all nations that the national courts of any country can and should bring the perpetrators to justice. Accused offenders can be prosecuted in a

country that asserts universal jurisdiction, whether or not a link exists between that country and the place where the crime was committed, or the nationality of the offender or the victim. In other words, universal jurisdiction, in its purest form, is one in which mankind acts on behalf of itself everywhere to ensure that the perpetrators of particularly heinous crimes will not escape justice on the basis of the limitations of national judicial systems or those of international courts. The doctrine assumes the existence of -- or at least proposes -- a community or a *world* society, rather than an *international* society of sovereign states. It is the strongest expression so far of the struggle to give birth to a cosmopolitan regime of legal justice in international relations.

Not surprisingly, then, it is arguably the hottest flashpoint of the tension between that worldview, on the one hand, and that of a pluralist, or even less expansively defined solidarist international society on the other. Henry Kissinger complained in 2001 that: “

In less than a decade, an unprecedented movement has emerged to submit international politics to judicial procedures. It has spread with extraordinary speed and has not been subjected to systematic debate, partly because of the intimidating passion of its advocates. To be sure, human rights violations, war crimes, genocide, and torture have so disgraced the modern age and in such a variety of places that the effort to interpose legal norms to prevent or punish such outrages does credit to its advocates. The danger is in pushing the effort to extremes that risk substituting the tyranny of judges for that of governments; historically, the dictatorship of the virtuous has often led to inquisitions and even witch-hunts”.¹

Elder statesman in the eyes of some, the reincarnation of Machiavelli for others, Kissinger, a geopolitical strategist with few equals in contemporary history, had reason to be irked: as National Security Adviser and later Secretary of State of the United States, he

is credited with several controversial policies, some of which had serious implications for human rights. His extremist critics on the ideological left see him as a prime candidate for the exercise of just such “universal jurisdiction.”² It emerged from a declassified telephone conversation between him and President Richard Nixon, for example, that Kissinger, in the service of a liberal democracy that is the United States, actively supported the overthrow of Salvadore Allende, a democratically elected president of the Latin American nation of Chile, by Pinochet in 1973³. The goal was to protect capitalism -- a strategic interest of the United States -- by preventing the entrenchment of leftist governments in Latin America during the Cold War.

In the still anarchical international society, powerful officials of state like Kissinger exist in many countries. And, because the nature of statecraft often involves tradeoffs between morality and cold calculations in foreign and domestic policy that in extreme cases results in violations of international humanitarian law, the doctrine of universal jurisdiction generates apprehension on the part of those whose duty it is to advance the strategic interests of states. The prospect of an arrest warrant served in an airport VIP lounge during an airplane stopover or on arrival at its destination is enough to cause discomfiture to many a traveling statesman. But there are those who are not high priests of *realpolitik* that have as well questioned the manner in which this controversial legal doctrine has sometimes been asserted.

The concept of universal jurisdiction is closely related to the international law principle of *jus cogens* -- a norm of international law from which no derogation is permitted, not even by a treaty⁴. A clear example is the prohibition of piracy. Pirates have historically been considered *hostis hominis generis*, or “enemies of the human

race”⁵. It is widely accepted in international law that, largely because piracy often occurs on the high seas where no nation can assert jurisdiction, any or all states may apprehend and punish pirates captured on the high seas or the territory of the arresting state. The United Nations Convention on the Law of the Sea stipulates:

On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship, aircraft, or a ship or aircraft taken by piracy and under the control of pirates, and arrest the person and seize the property on board. The courts of the State which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith.⁶

Thus, universal jurisdiction is a theory that clearly exists in positive international law.

Advocates of universal jurisdiction in relation to genocide, crimes against humanity and war crimes, have offered the need to combat impunity as the rationale for borderless justice. They see the doctrine as one way to bring to justice tyrants and errant high officials of state that are beyond accountability either because their acts are not contrary to domestic law or, where they indeed violate such laws, the legal system is in practice subordinate to the political authority wielded by such individuals. Alternatively, these individuals avoid accountability by reason of immunities or national amnesties conferred by truth and reconciliation commissions.

This is the heart of the matter. Who is fit to judge? Should the courts of one state judge the alleged infractions of leaders or citizens of another? Universal jurisdiction in this context is controversial because (a) it transcends – or threatens to transcend – the

sacrosanct principle of sovereignty without the consent of states or the support of other accepted exceptions in international law such as enforcement action by or under the aegis of the United Nations Security Council; (b) for this reason, it can be a serious threat to international order. Before examining some contemporary cases of the exercise of universal jurisdiction, it is necessary to review its legal basis – and its limitations – as a response to violations of international humanitarian law.

There are several misconceptions about universal jurisdiction, although the doctrine has gripped the popular imagination since the “legal soap opera” that was the Pinochet case in Britain (that case was, technically speaking, more one of extradition and immunities than of universal jurisdiction, although the latter doctrine was discussed at various stages of the legal proceedings against the former Chilean leader in several countries).⁷

Territory has been the strongest basis for the exercise of jurisdiction in legal history. Jurisdiction is strongest where the state exercising it is the one where the crimes occurred. Human rights activists have confused the extraterritorial application of territorial jurisdiction with universal jurisdiction. Mutations of territorial jurisdiction include the nationality principle (where a state exercises jurisdiction over its national), the passive personality principle (where a state claims jurisdiction to prosecute an individual for offences committed outside its territory which has or will impact nationals of the state – this was the basis of the celebrated trial of Adolf Eichmann in Jerusalem in 1961 following his abduction from Argentina); and jurisdiction by a state over foreign nationals when they have committed an act abroad that compromises the security of that

state.⁸ These kinds of jurisdiction are to be distinguished from the pure universality principle, where each and every state has jurisdiction to try specific offences.⁹

Universal jurisdiction should also be distinguished from the jurisdiction of international criminal tribunals, such as the ad hoc United Nations Tribunals for Rwanda and the former Yugoslavia, or the permanent International Criminal Court. As Cherif Bassiouni has noted, none of the ad hoc international tribunals established since the end of World War II (Nuremberg, Tokyo, Yugoslavia and Rwanda) has been based on the theory of universal jurisdiction.¹⁰ The ad hoc tribunals represent an extension of national territorial jurisdiction. An occupying power acquires and exercises jurisdiction over a defeated enemy state by virtue of conquest and physical occupation, as was the case in Iraq from the end of the U.S.-led invasion in 2003 until the return of sovereignty to Iraq on 30 June 2004. In the case of the U.N. Tribunals, these courts assume *concurrent* territorial jurisdiction by virtue of the peace enforcement powers of the United Nations Security Council. Bassiouni clarifies the more nuanced case of the ICC by noting that the Rome Statute does not automatically confer the character of universal jurisdiction on situations referred to the Court. Rather, it only has a “universal scope” in relation to crimes *within its jurisdiction* [emphasis added]. In the case of the ad hoc U.N. tribunals, this limitation extends not only to crimes under their jurisdiction, but to the geographical boundaries of their jurisdiction as well – Rwanda and neighboring states in the case of the ICTR and the states of the Former Yugoslavia in that of ICTY. In other words, the ICTY can only try individuals for crimes committed in the territory to which its jurisdiction is confined, and this cannot be accurately described as “universal” jurisdiction.

This distinction may appear at first sight to be mere sophistry. But it is an important one. Bassiouni explains that, because cases can only be “referred” to the ICC by a State Party or a non-state party, the Court’s jurisdiction cannot be seen as flowing from the doctrine of universal jurisdiction. The point, then, is that an international, but nonetheless limited jurisdiction that merely reacts to states is not what would normally be considered “universal”, because the exercise of universal jurisdiction does not require an external trigger. Universal jurisdiction is either inherent by virtue of customary international law or specifically by treaty, or both. However, Bassiouni makes the distinction that a “referral” to the ICC from the Security Council (presumably in its capacity as a guardian of international security, with an automatic global reach), would constitute universal jurisdiction.

Against the background of the distinctions noted above, there are very few examples of actual trials based on the exercise of universal jurisdiction, with the exception of piracy.¹¹ The notable contemporary exception was the trial of four Rwandans in Belgium, under Belgian law, for crimes related to the Rwandan genocide of 1994. That case and the law on which it was based will be discussed below.

Most importantly, Bassiouni has sought to help clear the confusion between assumptions of universal jurisdiction on the basis of international human rights standards (at least in the view of the liberal human rights movement), and the actual state of international law on the matter. He establishes convincingly that the doctrine of universal jurisdiction is far more persuasive in the writings of scholars and human rights activists with a vested interest in advancing the concept, than it is in the actual practice of states, and that human rights groups have engaged in a self-interested misinterpretations of how

widespread the doctrine is in practice. Coming from an eminent academic expert in international criminal law, this critique is a weighty one. It highlights the problems of universal jurisdiction and why, despite its potential benefits in certain circumstances, it is necessary to approach the doctrine with caution.

Legal Basis: Declaratory v Positive Law

To understand the validity or otherwise of claims of universal jurisdiction, it is necessary to distinguish two situations. The first is one where jurisdiction is asserted on the basis of what *ought* to be universally punishable by the courts of all nations, usually because such acts are an affront to the collective conscience of mankind. This is the declaratory ethical tradition in action. The second is one where an act is actually made punishable on the basis of universal jurisdiction by a law authoritatively declared in accordance with recognized procedure, with a mechanism for adjudication, whether international or national, and an enforcement mechanism – again, whether national or international. This is legal positivism¹². Advocates in the declaratory tradition tend to believe that because the moral repugnancy of certain crimes is self-evident, coupled with the firm establishment of individual justice in international law, it must follow that jurisdiction over those crimes cannot be hemmed in by geographical borders. Legal positivists would share the same degree of moral outrage at these crimes, but interpret the applicability of universal jurisdiction against the standards of what law, national or international, really is. We can now test this approach on the three major violations of international humanitarian law – war crimes, crimes against humanity, and genocide.

War Crimes

The Geneva Conventions of 1949 and Protocol I clearly provide for the exercise of universal jurisdiction. However, some scholars are of the view that, absent the Geneva Conventions, state practice does not reflect the application of the doctrine to customary international law.¹³ But the view that the Geneva Conventions are somewhat tentative in their support for universal jurisdiction is unnecessarily conservative.¹⁴ In the first of the four Geneva Conventions of August 12, 1949 the states parties to the treaty undertook to enact laws that would punish persons who commit or order the commission of any of the grave breaches defined in the Convention. In a clear provision of universal jurisdiction,

Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a *prima facie* case¹⁵.

Amnesty International has asserted that at least 120 states have enacted legislation permitting their courts to exercise universal jurisdiction over conduct that would amount to war crimes.¹⁶ These claims may be exaggerated by interpretation, as noted above. Even Amnesty notes that “the absence of authoritative commentary or jurisprudence, as well as ambiguities in wording, in many countries makes it difficult to say with some certainty whether courts may exercise universal jurisdiction over conduct amounting to war crimes”. A few countries, such as Belgium, Canada and New Zealand, have national

legislation that expressly confers universal jurisdiction over war crimes committed not only in international armed conflict, but in non-international armed conflicts as well. Considering that most contemporary armed conflicts are civil wars, this reality of so few states having the required national legislation is the more accurate indicator of the real state of universal jurisdiction over war crimes. Moreover, having a law on the books is often quite different from the political will to apply it in terms of a practical assertion of universal jurisdiction.

What has more often been the case is that several states have enacted laws that give their courts universal jurisdiction over certain ordinary crimes under national law (such as murder and crimes of sexual violence) which would amount to war crimes if committed in an armed conflict.¹⁷ This was the basis for the trial and the conviction in Switzerland of a former Rwandan soldier for crimes committed during the 1994 genocide.¹⁸ And it was the first by a national court exercising universal jurisdiction under the 1949 Geneva Conventions¹⁹.

Historically, there is a judicial track record that suggests a consistent, if partial reliance on the doctrine of universal jurisdiction for war crimes by the courts of the Allied Powers in the aftermath of World War II, although universal jurisdiction was not a basis for the Nuremberg trials.²⁰ (The Nuremberg tribunal was based on the territorial principle of jurisdiction because the Allies, relying on their status as an occupying power, promulgated the Nuremberg Charter in the exercise of their right in that context to establish special courts.) Accused war criminals were prosecuted by United States military courts for crimes against non-nationals of allied countries.²¹

In the *Hadamar* trial, for example, a U.S. military commission tried Germans charged with killing nearly 500 Russian and Polish civilians at a sanatorium in Germany. Even in this case there is a territorial link to Germany, in which the U.S. was an occupying power. However, the commission invoked the doctrine of universal jurisdiction, with the commission's judgment explaining the basis of its jurisdiction as follows:

the general doctrine recently expounded and called universality of jurisdiction over war crimes; which has the support of the United Nations War Crimes Commission and according to which every independent State has, under International Law, jurisdiction to punish not only pirates but also war criminals in its custody, regardless of the nationality of the victim or of the place where, the offense was committed, particularly where, for some reason, the criminal would otherwise go unpunished.²²

In the same vein, another United States military commission in Shanghai asserted jurisdiction over Germans in China who were charged with the war crime of continuing hostilities against the Allies after the German surrender in 1945. Rejecting a defense claim challenging its extra territorial jurisdiction, the commission ruled:

A war crime is not a crime against the law or criminal code of any individual nation, but a crime against the *ius gentium* [international law]. The laws and usages of war are of universal application, and do not depend for their existence on national laws and frontiers. Arguments to the effect that only a sovereign of the *locus criminis* [place of the crime] has jurisdiction and that only the *lex loci* [law of the place] can be applied, are therefore without any foundation".²³

Here the commission invoked universal jurisdiction in a case where the U.S. had a significant security interest and the accused persons were nationals of an enemy state occupied by the Americans. British military courts after World War II also adopted a similar jurisdictional stance in some cases.²⁴ And what the historical cases demonstrate is not so much clear examples of universal jurisdiction but rather, an apparent confusion as to what the doctrine really meant. That universal jurisdiction was cited by these tribunals is perhaps evidence of the doctrine's appeal even in the 1940s. Reference to it in this context is also not surprising, considering that its invocation served the strategic interests of the Allies.

Crimes against Humanity

With exceptions of the Apartheid Convention and the Torture Convention, there is no positive international law that establishes universal jurisdiction for the prosecution of crimes against humanity. Whether such crimes *should*, on ethical grounds, be the subject of universal jurisdiction, is another matter. One reason for this state of affairs is that, unlike the 1949 Geneva Conventions on war crimes, there is no specific convention covering crimes against humanity. Crimes against humanity have been defined only in the statutes of various international criminal tribunals ranging from the Nuremberg and Tokyo tribunals, through the Yugoslavia and Rwanda tribunals, to the Rome Statute of the International Criminal Court. Over the years the definitions of that particular category of violations of international humanitarian law have evolved, with the definition in the Rome Statute the most detailed, incorporating the crimes of apartheid, torture, and various other more recent developments of international humanitarian law²⁵. Crimes

against humanity were first defined in the Nuremberg Charter as “murder, extermination, enslavement, deportation, other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the tribunal whether or not in violation of the domestic law of the country where perpetrated”. One of the most important aspects of crimes against humanity is that they can be committed whether in times of peace or war, and thus do not require an activating element of armed conflict. The Nuremberg Charter’s definitional link to armed conflict is thus peculiar to that document and is not a general requirement in contemporary international law as defined in the statute of subsequent international criminal tribunals. But it is precisely the fact that crimes against humanity can be committed in a non-conflict context that makes it politically sensitive, for this wider definition covers the kinds of crimes that tyrants would usually commit in order to crush domestic political opposition in the name of order and national security in a time of “peace”.

The most valid progressive statement of whether universal jurisdiction can automatically be asserted against crimes against humanity is that made by Robert Jennings and Arthur Watts: “no general rule of positive international law can as yet be asserted which gives states the right to punish foreign nationals for crimes against humanity in the same way as they are, for instance, entitled to punish acts of piracy”, but there were “clear indications pointing to the gradual evolution of a significant principle of international law to that effect”.²⁶

As noted earlier, the ad hoc tribunals for Rwanda and the former Yugoslavia have contributed, through judicial activism, to a progressive development of universal

jurisdiction. In 1999 the ICTR, allowing a motion by the Prosecutor to drop charges against a former Rwandan soldier accused of genocide on policy grounds, explicitly encouraged all countries to exercise universal jurisdiction over violations of international humanitarian law within its jurisdiction, which include war crimes in non-international armed conflict. The tribunal stated:

the Tribunal wishes to emphasize, in line with the General Assembly and Security Council of the United Nations, that it encourages all States, in application of the principle of universal jurisdiction, to prosecute and judge those responsible for serious crimes such as genocide, crimes against humanity and other grave violations of international humanitarian law.²⁷

Four years earlier, the Appeals Chamber of the ICTY had declared, in a discussion on jurisdiction, that “It would be a travesty of law and a betrayal of the universal need for justice, should the concept of State sovereignty be allowed to be raised successfully against human rights. Borders should not be considered as a shield against the reach of the law and as a protection for those who trample underfoot the most elementary rights of humanity”.²⁸

These statements are clearly indicative of a universalist bent in the jurisprudence of those tribunals. But it is relatively easy, in the context of crimes with a clear territorial ambit such as those on trial at Arusha and The Hague, and on which there is general international political agreement that the perpetrators should be brought to justice, to propound a universal justice. That is not the same thing as saying that there is a widespread agreement, let alone practice, among states on asserting universal jurisdiction

over crimes against humanity. The controversy between the United States and the International Criminal Court notwithstanding, the exercise of universal jurisdiction by international criminal tribunals does not pose as significant a threat to sovereign states as would the widespread exercise of such powers by the national courts of similarly sovereign states. As will be seen later, it is at the domestic judicial level that the stakes are much higher: international tribunals have no independent law enforcement institutions, but states that adopt universal jurisdiction can actually enforce it within their territories should they choose to do so. According to Amnesty International, only a few states, such as Canada, Belgium, New Zealand, and Venezuela, have national laws that expressly authorize universal jurisdiction over crimes against humanity.

Genocide

It is the “crime of crimes”. But, incongruous as it may appear, and strong though the case for it undoubtedly is, positive international law, at least as it exists in the 1948 Convention on the Prevention and Punishment of Genocide, does not provide for the exercise of universal jurisdiction over the crime of genocide. This is in stark contrast to the Geneva Conventions on war crimes.

This legal gap was no accident: it was the result of a political process that recognized the gravity of the crime of genocide, but was unwilling to empower states at large to punish it without a strong jurisdictional basis. In the wake of the 1994 genocide in Rwanda, there has been much talk in the international society of states to “never again” allow a recurrence of genocide. But, despite the moral sense of outrage that genocide evokes, and the strenuous, aspiratory arguments of human rights groups, no explicit step

has been taken in positive international law to make genocide a universally punishable crime.²⁹

The Genocide Convention states, in pertinent part:

Article 1: The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and punish.

Article 4: Persons committing genocide or any of the other acts enumerated in Article 3 [genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide, complicity in genocide] shall be punished, whether they are constitutionally responsible leaders, public officials or private individuals.

Article 5: The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in Article 3.

Article 6: Persons charged with genocide or any of the other acts enumerated in Article 3 *shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction* [emphasis added].

Article 8: Any Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as

they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in Article 3.

From the plain text of Article 6, it is clear that the jurisdiction envisaged is a territorial one. Only if (a) an “international penal tribunal” is established, and (b) state parties to the Convention also become state parties to such a tribunal, can the latter have universal jurisdiction.³⁰

Advocates of universal jurisdiction for genocide have sought to establish that, while article 6 clearly affirms a territorial jurisdiction in the absence of an international tribunal, it does not *prevent* the exercise of other forms of extraterritorial jurisdiction such as active or passive personality jurisdiction.³¹ Reviewing the Convention’s *travaux préparatoires*, Amnesty International seeks to establish that this permissive extraterritorial jurisdiction over conduct that amounts to genocide is the result of a compromise that was arrived at by states negotiating the Convention after an initial draft of that article prepared by Raphael Lemkin was rejected. Similar proposals by Saudi Arabia and Iran introducing an express universal jurisdiction to prosecute offenders or extradite them to other state parties, which were rejected.³² Article 7 (the original version of Article 6) read: “The High Contracting Parties pledge themselves to punish any offender under their Convention within any territory under their jurisdiction, irrespective of the nationality of the offender and or the place where the offence has been committed”.³³ The Ad Hoc Committee on Genocide, rejected that language and replaced it with the one that survived in the final version of the Convention.³⁴

Raphael Lemkin, the Polish lawyer who coined the word “genocide” and lobbied hard for the adoption of the Genocide Convention, tried to obtain accountability through

pure universal jurisdiction and not a permanent international criminal tribunal. He believed the world was “not ready” for such a court, which would be too obvious a threat to state sovereignty.³⁵ Even that roundabout route to justice was too much for the strategic interests of states. If, a full 56 years later, this tension persists in international society, it surely was bound to have been even sharper in 1948. As William Schabas has commented, Article 6 of the Genocide Convention “was a pragmatic compromise reflecting the state of the law at the time the Convention was adopted”, and “although universal jurisdiction, and the related concept of *aut dedere aut judicare* (prosecute, or extradite), had long been recognized for certain crimes committed by individual outlaws, few in 1948 wanted to extend it to crimes which would, as a general rule, involve State complicity”.³⁶

A duty to prosecute perpetrators of genocide has not been formerly established, but a permissive right to do so, or extradite, is gaining ground. International law and the form of the international society are not static. Even if we discount the crusading writings of some publicists of international law, we cannot fail to notice the judicial pronouncements of the International Court of Justice and resolutions of the United Nations Security Council and General Assembly. These all point in a certain direction, even if individual states will still act in a mostly strategic and self-seeking fashion.

From a policy perspective, it is desirable that, where a strong basis for the exercise of jurisdiction by a national court exists (most appropriately by virtue of the criminalization of genocide in domestic law), the crime can be prosecuted by a court outside of where the crime was committed, or outside of an international tribunal with competence to do so. A careful reading of the Genocide Convention, especially when

articles 1, 4 and 5 of the Convention are taken together, suggests a basis for this approach. The caveat is that there must be strong links between the prosecuting state and the defendant.

Although the Genocide Convention consciously did not include a duty to prosecute or extradite, the International Court of Justice noted in 1996 that there are no territorial limitations to the obligations of all states to prevent and punish genocide. The Court has pronounced that the rights and obligations enshrined by the Convention are rights and obligations *erga omnes*, noting that the obligation each State has to prevent and to punish the crime of genocide is not territorially limited by the Convention³⁷.

The Pinochet Case

The multiple law suits in the late 1990s against Augusto Pinochet Ugarté on the basis of the exercise of universal jurisdiction by courts in Spain and Belgium, and his arrest and 18 month detention in the United Kingdom, marked a high point for the doctrine of universal jurisdiction and its advocates. For many leaders around the world, however, it was a most unsettling development, one that brought home a new sense of vulnerability. Pinochet's travails, widely televised to millions around the world in an age of instant communications, were a giddy period that observers and practitioners of international justice pronounced as a revolution in international law and human rights.³⁸

As Richard Falk has observed in an excellent review of the Pinochet legal proceedings, they meant different things to different people.³⁹ For many, it was a major blow against impunity. For others, it was a welcome lifting of the veil of sovereign immunity. And for many victims of his oppressive rule in Chile, it was a chance for

Pinochet to face justice beyond borders after the self-amnesty that accompanied his exit from power had sealed his domestic impunity.⁴⁰

While Pinochet was undergoing medical examinations in Britain in late 1998, Balthazar Garzon, a crusading Spanish investigating magistrate, issued an international warrant against Pinochet dated 16 October 1998, for alleged crimes against humanity.⁴¹ The next day, a London magistrate issued a provisional warrant for Pinochet's detention. Pinochet mounted an initially successful legal response that saw the Divisional Court of the Queen's Bench unanimously quash the first Spanish international arrest warrant and a subsequent one with additional charges that included crimes of torture.

The Crown Prosecution service appealed on behalf of Spain to the House of Lords. This appeal dealt mainly with issues of immunity and extradition, and so was not so much about universal jurisdiction, although the doctrine was the underlying basis Judge Garzon's attempt to bring Pinochet to justice. Several human rights groups, including Amnesty International and Human Rights Watch were invited as "intervenor" to clarify some of the issues of international law in dispute at the trial. By a vote of 3-2 on 25 November, the House of Lords ruled in favor of extradition on the important ground that Pinochet did not enjoy immunity for crimes under international law. At issue: Were the alleged crimes part of his normal functions as a head of state?

Issues of immunity lie at the heart of the controversy over universal jurisdiction. The targets of attempts at universal jurisdiction are frequently sovereigns and other high officials of state. And concepts of sovereign immunity, sacrosanct in the international system of centuries past, remain a major plank of order in today's international society.

In the first House of Lords decision, a majority of the judges ruled that “international law has made it plain that certain types of conduct, including torture and hostage-taking, are not acceptable conduct on the part of anyone. This applies as much to heads of state, and even more so, as it does to anyone else; the contrary conclusion would make a mockery of international law”. Lord Steyn stated in a separate opinion that, the criminal charges against Pinochet being “international crimes deserving punishment”, it was “difficult to maintain that the commission of such high crimes may amount to acts performed in the functions of a Head of State”.⁴²

The pro-Pinochet arguments were made by the minority-opinion judges. Lord Slynn stated: “it does not seem to me that it has been shown that there is any State practice or general consensus let alone a widely supported convention that all crimes against international law should be justiciable in national courts on the basis of the universality of jurisdiction. Nor is there any *jus cogens* in respect of such breaches of international law which require that a claim of State or Head of State immunity, itself a well established principle of international law, should be overridden”.⁴³

The British Secretary of State for Home Affairs, Jack Straw, was vested with authority to make final decisions on extradition, on the basis of other strategic, non-legal considerations, and, in theory, his decision could directly contradict the judicial decision.⁴⁴ Were Pinochet’s opponents trying to settle in law courts matters best left to diplomats and statesmen?

In the event, Straw authorized Pinochet’s extradition, minus the additional charge of genocide in the Spanish request, on the basis that it was not an extradition crime under British law.⁴⁵ The House of Lords decision was eventually set aside as a result of a

conflict of interest involving one of the judges -- Lord Hoffman, who had strong personal links with Amnesty International, an intervenor in the case. At a rehearing of the original appeal to the House of Lords (with an enlarged, seven member panel that excluded Lord Hoffman), Chile supported Pinochet's immunity claim and asserted its sovereign jurisdiction to prosecute crimes committed on Chilean territory.⁴⁶

On 24 March 1999, the House of Lords ruled 6-1 against Pinochet's claim of immunity. But the law lords based their decision on the narrow ground of positive British law (its obligations under the Torture Convention, which had been incorporated into domestic British law and made torture a crime in the United Kingdom, irrespective of the place of the crime or the nationality of the perpetrator).

Pinochet eventually returned to Chile on 2 March 2000, with the 1978 amnesty law and his immunity as "Senator for Life" intact. However, subsequent decisions by Chilean courts stripped him of his immunities following a legal complaint filed by human rights lawyers, and the former leader was placed under house arrest on 2 December 2000.⁴⁷ Pinochet was later indicted for his responsibility in the abduction and murders of 75 victims in the October 1973 "Caravan of Death". However, subsequent medical examinations of the over-80 former dictator led the Chilean Supreme Court to find him unfit to stand trial.

That appeared to have ended the Pinochet saga, with justice winning the day in principle, if not in practice. But a Chilean court reopened the controversy by ruling that Pinochet could stand trial, following the broadcast of a television interview in which he appeared lucid enough to defend himself as "a good angel" and passed blame for the atrocities committed during his rule to his subordinates.⁴⁸ Chile's Supreme Court upheld

this ruling in a decision of 3 January 2005, thus closing all legal obstacles of a trial of Pniochet.

Belgium's Law v American Power

In the decade between 1993 and 2003, the Kingdom of Belgium became the epicenter of the doctrine of universal jurisdiction. An apparent judicial revolution was underway, with attempts at the globalization of justice and a conscious effort to bring the primacy of order to its knees at the altar of justice. In the heyday of universal jurisdiction that led to Kissinger's predictable complaint, this small European country was virtually alone in its will to authorize prosecutions in its domestic courts for genocide, crimes against humanity, and war crimes. The attempt was short-lived.

In 1993, Belgium made the 1949 Geneva Conventions and their two additional protocols part of its domestic law. The statute criminalized 20 acts that are "grave breaches" under the conventions as "crimes under international law". On 10 February 1999, Belgium amended and expanded the 1993 law to include genocide and crimes against humanity, adopting the definition of crimes against humanity in the Rome Statute of the International Criminal Court.⁴⁹ The new legislation gave Belgian courts sweeping, unconditional and universal jurisdiction of utopian scope: "The Belgian courts shall be competent to deal with breaches provided for in the present Act, irrespective of where such breaches have been committed".⁵⁰

It has been observed that the universal jurisdiction conferred on domestic courts by the Belgian law went well beyond its treaty obligations, as no international law required Belgium to prosecute crimes against humanity or genocide.⁵¹ The decision to

expand the Belgian law was the result of a domestic political process that had its genesis in the 1994 genocide in Rwanda, a former Belgian colony.⁵² A colloquium organized by a liberal political party in the Belgian Senate in 1996 recommended an expansion of the 1993 law in order to close gaps that might exist in international justice.⁵³ The report of a parliamentary commission in 1997 provided further support for a new law, concluding that “it is necessary to include in domestic criminal law provisions that punish crimes against humanity, in particular the crime of genocide”.⁵⁴

The executive arm of the Belgian Government through the Minister of Justice, made clear its intention that official immunities would be no barrier to prosecution, and that the new law would apply to crimes committed before it entered into force. But the attempt to strip away immunities was not altogether successful, as will be seen when an important decision of the International Court of Justice is discussed below. It is noteworthy that, even before the adoption of the new law in 1999, Belgian courts were already attempting to exercise universal jurisdiction over crimes against humanity by claiming support in customary international law. It was on this basis that, on 6 November 1998, Daniel Vandermeersch, an investigating magistrate in Brussels, ruled during proceedings against Pinochet that the court could assert universal jurisdiction over acts committed in Chile that amounted to crimes against humanity.⁵⁵

The 1999 law engendered a flood of investigations, indictments and prosecutorial attempts against the political and military leaders of various countries. These efforts warmed the hearts of human rights enthusiasts and the victims of rights abuses, presaging -- in their expectations -- a universal community in which justice for human rights violations would be borderless. In short order, cases were filed against Prime Minister

Ariel Sharon of Israel by the survivors of the 1992 massacres at the Sabra and Shatila refugee camps in Lebanon by pro-Israeli Lebanese militia under Israel control when Sharon was Israel's Minister of Defence. Similar suits were brought against Saddam Hussein, then President of Iraq, for attacks against Iraqi Kurds in 1991 that were alleged to be crimes against humanity; against Yasir Arafat, leader of the Palestinian National Authority, and against President Paul Kagame of Rwanda. Suits were filed against several other political leaders of foreign countries. It was becoming clear even to the many supporters of the Belgian law that assuming the role of the world's moral/judicial policeman created diplomatic and even practical logistical problems that could not be overlooked.⁵⁶

One landmark case that was conclusively and successfully prosecuted in Belgium under the 1993 law involved offenses committed during the Rwandan genocide. On 7 June 2001, a Belgian court with 12 jurors sentenced four Rwandans – two Roman Catholic nuns, a physics professor and a former government minister – to prison terms of 12 to 20 years for crimes committed during the genocide.⁵⁷ Although they were charged with war crimes under the 1993 law and not genocide or crimes against humanity, the precedent-setting case attracted much publicity because of the exercise of universal jurisdiction and because it was a jury trial. The case was relatively uncontroversial – the convicts were living in Belgium at the time of their arrest. *The New York Times*, in an editorial on the case, expressed support for the doctrine of universal jurisdiction.⁵⁸ It noted that “Ideally, trials should be conducted in the country where the crimes occurred, but Rwanda lacks the resources and judicial expertise to provide adequate trials”.⁵⁹ The case was also viewed in some quarters as one of partial atonement by Belgium for its

historical and contemporary responsibility for creating a national socio-political situation that ultimately gave rise to the genocide in Rwanda.⁶⁰

If the Belgian trial of the Rwandans won general acclaim, the indictment of Ariel Sharon, a sitting head of government, generated contentious debate on the merits of the Belgian law and the extent to which it could complicate the country's diplomatic relations. Sharon cancelled a scheduled visit to the European Union's Brussels headquarters and recalled Israel's newly appointed ambassador to Belgium. The country's then Foreign Minister, Louis Michel, called the law "embarrassing" and hinted that it would be reviewed to protect the immunity of serving senior officials of state.⁶¹ In a repudiation of the Belgian law's refusal to side-step sacred cows, the Belgian Supreme Court would later rule that Sharon was immune from prosecution while serving as a prime minister, although the court upheld the principle of universal jurisdiction and left open the possibility of a suit once the Israel leader left office.⁶² With nearly 30 suits against various world leaders filed under the Belgian law, and a British citizen reportedly arriving at a Belgian embassy abroad and requesting a Belgian investigation of his claim that the British Broadcasting Corporation was attempting to assassinate him, universal jurisdiction suits in Belgium had turned into what one Belgian newspaper editor headlined "The News from Absurdistan".⁶³

The dam broke when indictments were filed against several United States political and military leaders in connection with the bombing of a civilian shelter in Baghdad that killed over 400 people in the Persian Gulf War of 1991.⁶⁴ The prosecutorial targets included former President George Herbert Walker Bush, Vice President Dick Cheney (who had served as a Secretary of Defence under Bush I), Secretary of State Colin Powell

(former Chairman of the Joint Chiefs of Staff) and Gen. Norman Schwarzkopf, the American military commander in the Gulf war. Subsequent suits relating to the American and British pre-emptive war against Iraq in 2003 were filed against President George W. Bush, Powell and U.S. military commander Tommy Franks.

These lawsuits were the most important factor that led to the ultimate death of the Belgian law in its potent form – and the inevitable decline of universal jurisdiction. The United States issued several warnings to Belgium, which also hosts the headquarters of NATO. American officials like Powell and Donald Rumsfeld, the Secretary of Defence, made it clear that the United States would withhold its financial contributions to the construction of a new NATO headquarters in Brussels, and would boycott meetings in Belgium until the Belgian law of 1999 was rescinded and the suits against U.S. leaders dismissed.⁶⁵ “Belgium needs to recognize”, Rumsfeld said, “that there are consequences for its actions”.⁶⁶

Faced with this confrontation between the universal jurisdiction law and the world’s most powerful nation, the cosmopolitan notions of justice represented by the law gave way to political reality. Belgian Prime Minister Guy Verhofstadt, previously a staunch defender of the law, pledged quick action to repeal it. Belgian Senator and human rights campaigner Alain Destexhe, one of the law’s main sponsors, told a journalist that Rumsfeld’s threat left Belgians with “a kind of vertigo”. “Suddenly, the law became very unpopular. People like me were saying, ‘We’ve got to get out of this’”.⁶⁷

On 1 August 2003, the Belgian Parliament passed a new law amending the 1999 law, repealed the 1993 law, and established a mechanism for quashing pending

complaints that were outside the new, strict confines within which the exercise of universal jurisdiction could now take place in Belgium. Under the new law's provisions, Belgian courts could assert universal jurisdiction over international crimes only where the accused is of Belgian nationality or lives in Belgium; where the victim is Belgian or has lived in Belgium for at least three years prior to the commission of the crimes, or where Belgium has a treaty obligation to prosecute.⁶⁸ Unless the accused is Belgian or lives in Belgium, it is entirely up to the state prosecutor to decide whether or not to proceed with a complaint. The prosecutor could reject a complaint without investigation if he considered it "manifestly without grounds" or on the grounds that another country has a better claim to jurisdiction. Officials of NATO or European Union countries are automatically exempted from Belgian jurisdiction under the new law. Thus, the new law has aligned Belgium to the more restrictive universal jurisdiction laws of other European countries.⁶⁹

Following the repeal of the universal jurisdiction law, the cases against Bush and other American officials, as well as those against Sharon and other Israeli officials, were dismissed by the Belgian Supreme Court. Without a doubt, the principle of universal jurisdiction had suffered a serious blow. That blow came from within – the decision of an apex domestic court. Another was to land from without – an international jurisdiction.

You Can't Touch Sovereigns

The judgment of the International Court of Justice in the *Yerodia* case⁷⁰ was just as damaging to the doctrine of universal jurisdiction as the repeal of the Belgian law. Emanating as it did from the Peace Palace at The Hague, it was less political in its

motivation and appropriately restrained. But the result was the same. The issue for decision in that case was not universal jurisdiction as such (though reference was made to it) but rather that of the immunity of certain individuals under international law. This, however, is legal sophistry. As noted earlier, immunity and universal jurisdiction are often linked in the contemporary legal and political sphere. Judicial challenges to immunity from prosecution of international crimes have often been inspired by the concept of universal jurisdiction.

At issue was the legality of a “international arrest warrant in *absentia*” issued on 11 April 2000 by a Belgian investigating judge in Brussels, against Yerodia Ndombasi, then Minister of Foreign Affairs of the Democratic Republic of Congo (DRC). The warrant was based on the Belgian law of 1999 and circulated internationally through the International Police Organization (INTERPOL). It charged the Congolese diplomat with criminal responsibility for war crimes under the 1949 Geneva Conventions, and crimes against humanity, in particular hate speech that was reported by the media and allegedly incited the population to attack Tutsi residents in the Congolese capital of Kinsasha.

As the ICJ noted, and Belgium did not contest, the alleged acts on which the arrest warrant was based were committed outside Belgium, Yerodia was not a Belgian national at the time, and he was not in Belgian territory when the warrant was issued and circulated. Moreover, no Belgian nationals were victims of the attacks that reportedly resulted from Mr. Yerodia’s statements. Yerodia was re-assigned as Minister of Education in November 2000 and in April 2001 ceased to hold office as a Minister altogether.

The Congolese government, which brought the case to the ICJ, urged the Court to rule that Belgium violated the rule of customary international law concerning the absolute inviolability and immunity from criminal process of incumbent foreign ministers; in so doing, it violated the principle of sovereign equality among States, and all states, including Belgium, were thereby precluded from executing the warrant. The DRC argued that Belgium be required to recall and cancel the arrest warrant and to inform the foreign authorities to whom the warrant was circulated that Belgium “renounces its request for their co-operation in executing the unlawful warrant”.⁷¹

Belgium for its part argued that, although it accepted the immunity of serving Ministers of Foreign Affairs from jurisdiction before foreign courts, such immunity applied only to acts done in the course of their official functions. Belgium asserted that there was no evidence that Yerodia was acting in an official capacity when he made statements alleged, and in any case the warrant was issued against him personally.

The International Court of Justice ruled that Ministers of Foreign Affairs enjoy full immunity from civil suit throughout the duration of their office, when they are abroad. No distinction, the Court concluded, could be drawn between the “official” or “private” acts of such an official of state, or between acts done before the person assumed office and acts performed while in office.⁷² It found that the jurisprudence of international criminal tribunals such as the ICTR, ICTY and ICC, which expressly state that sovereign immunity is no bar to prosecution, cannot be applied to national courts in this context, and that no exception to sovereign immunity exists in customary international law regarding national courts. Lest it be seen as providing tacit encouragement to impunity, the ICJ noted that “jurisdiction does not imply

absence of immunity, while absence of immunity does not imply jurisdiction". It also clarified that "the *immunity* from jurisdiction enjoyed by incumbent Ministers of Foreign Affairs does not mean that they enjoy *impunity* in respect of any crimes they might have committed, irrespective of their gravity. Immunity from criminal jurisdiction and individual criminal responsibility are quite separate concepts".⁷³

Accordingly, the ICJ laid down some circumstances in which the immunity of a Minister of Foreign Affairs would not shield such an official from prosecution: in the courts of their own countries; if the state they represent or have represented decided to waive that immunity; after a person ceases to hold such an office, a former Minister of Foreign Affairs may be tried in the court of another state that has jurisdiction, for acts committed before or after his or her period in office, as well as for acts committed during the period in a private capacity; an incumbent or former Minister of Foreign Affairs may be tried before international criminals established by the Security Council resolution under Chapter VII of the United Nations Charter, such as the ICTR and the ICTY, and the permanent International Criminal Court.⁷⁴

By a 13-3 vote, the Court found that the issue and circulation of the arrest warrant was a violation of Belgium's legal obligation to respect the immunity and inviolability of a serving Minister of Foreign Affairs under international law. By 10-6, it ruled that Belgium must cancel the warrant and so inform the authorities to whom it had been circulated.⁷⁵

This decision, coming as it did from the apex judicial organ of the United Nations, an institution seen by virtually all state and non-state actors in international society as the last word in international law, was especially weighty. Although it dwelt on

immunity, and did not address at significant length the issue of whether or not Belgium had jurisdiction, it nevertheless gave the advance of universal jurisdiction a decidedly frosty reception that has diminished the latter's conceptual appeal and influence.

The decision appeared to have had a dual purpose. First, although one can only speculate on this point, it was probably aimed at restraining the spirit of the Belgian law and discouraging radical judicial interpretations of international law by national courts and scholars. By delineating the situations where sovereigns were untouchable and where their immunities were forfeited, the ICJ, in a ruling that human rights advocates unsurprisingly view as retrogressive, acted as a quarterback for traditional notions of international law. Certainly, the decision was seen by dispassionate observers as reigning in a political/legal movement that was fast becoming a runaway train.

Second, the decision had the effect, if not the motivation, of reasserting the ICJ's primacy in international law at a time when it appeared that the political spotlight – and the attendant financial resources -- had shifted to the ad hoc international tribunals at The Hague and Arusha. As of 2000, when the U.N. General Assembly granted the first significant increase in the ICJ budget since 1946, the Court's annual budget was \$10 million, while that of the ICTY was \$100 million. Shifting from a Cold-War imposed mode when it was derisively dismissed as “the case of the empty courtroom”, the ICJ's docket exploded phenomenally in the 1990s.⁷⁶ Part of this stream of cases inevitably included questions of international humanitarian law as it concerned the rights and obligations of states, which was the preserve of the Court, in contrast to the criminal responsibility of individuals, which is the jurisdiction of international criminal tribunals

such as ICTY and the ICTR (“norm entrepreneurs” that swept unto the international society in the 1990s⁷⁷).

Two separate opinions of the judges of the ICJ in the Yerodia case on the matter of universal jurisdiction appear to support a conclusion that it was the real issue simmering beneath the surface of the decision. It should be noted that the DRC did not make a specific claim on universal jurisdiction in its final submission to the Court, and so the court could not address it in its majority opinion. Judge Guillaume is particularly persuasive, and differs starkly in his conclusions on the status of universal jurisdiction in international law from that of Judge Abdul Koroma.

Judge Guillaume thought it useful to address in a direct manner the question of universal jurisdiction, in other words, whether the Belgian judge had jurisdiction to indict Yerodia.⁷⁸ Dismissing the Belgian claim to jurisdiction, Judge Guillaume rendered one of the most elegant and well supported arguments against unbridled borderless justice, beginning by tracing the development of opposing views on universal jurisdiction. It is worth quoting at length:

The primary aim of the criminal law is to enable punishment in each country of offences committed in the national territory. That territory is where evidence of the offence can most be gathered. That is where the offence generally produces its effects. Finally, that is where the punishment imposed can most naturally serve as an example. Thus, the Permanent Court of International Justice observed as far back as 1927 that ‘in systems of law the principle of the territorial character of law is fundamental’.

The question has however, always remained open whether states other than the territorial state have concurrent jurisdiction to prosecute offenders. A wide debate on this subject began as early as the foundation in Europe of the major modern states. Some writers, like Covarruvias and Grotius, pointed out that the presence on the territory of state of a foreign criminal peacefully enjoying the fruits of his crimes was intolerable. They therefore maintained that it should be possible to prosecute perpetrators of certain particular serious crimes not only in the state on whose territory the crime was committed but also in the country where they sought refuge. In their view, that country was under an obligation to arrest, followed by extradition or prosecution...

Beginning in the eighteenth century however, this school of thought favouring universal punishment was challenged by another body of opinion, one opposed to such punishment and exemplified notably by Montesquieu, Voltaire and Jean-Jacques Rousseau. Their views found expression in terms of criminal law in the works of Beccaria, who stated in 1764 that 'judges are not the avengers of humankind in general... A crime is punishable only in the country where it was committed'.⁷⁹

Judge Guillaume noted treaty exceptions to the absence of universal jurisdiction,⁸⁰ as well as the limited practice of certain states such as Germany, which has limited universal jurisdiction over genocide committed by a foreigner abroad. He declared: "...international laws know only one true case of universal jurisdiction: piracy", and as well that "universal jurisdiction *in absentia* as applied in the present case is unknown to international law".⁸¹

The president of the ICJ went on to link this understanding of the law and its development to a strong view of contemporary judicial policy:

“ International criminal law has itself undergone considerable development ...It recognizes in many situations the possibility, or indeed the obligation, for a state other than one on whose territory the offense was committed to confer jurisdiction on its courts to prosecute the authors of certain crimes where they are present on its territory. International criminal courts have been created. But at no time has it been envisaged that jurisdiction should be conferred upon the courts of every state in the world to prosecute such crimes, whoever their authors and victims and irrespective of the place where the offender is to be found. To do this would, moreover, risk creating total judicial chaos. It would also be to encourage the arbitrary for the benefit of the powerful, purportedly acting as agent for an ill-defined ‘international community’. Contrary to what is advocated by certain publicists, such a development would represent not an advance in the law but a step backward”.⁸²

Despite Judge Koroma’s call in his own separate opinion that the ICJ decision in the Yerodia case not be seen as a rejection or validation of the principle of universal jurisdiction, the judgment was undoubtedly seen around the world precisely as a rejection of the theory, or at the least as strictly curtailing its scope. Judge Guillaume’s separate opinion simply provided an intellectual explanation for the unspoken, “body language” of the majority ICJ ruling. Judge Koroma’s separate opinion nonetheless points up how starkly divided lawyers - even two members of the International Court of Justice-and policy makers are on the subject. He argued:

“On the other hand, in my view, the issue and circulation of the arrest warrant show how seriously Belgium views its international obligation to combat international crimes. Belgium is entitled to invoke its criminal jurisdiction against anyone, save a Foreign Minister in office. It is unfortunate that the wrong case would appear to have been chosen in attempting to carry out what Belgium considers its international obligation.

...In my considered opinion, today, together with piracy, universal jurisdiction is available for certain crimes, such as war crimes and crimes against humanity, including the slave trade and genocide”.⁸³

Policy Issues in Universal Jurisdiction

In seeking to radically extend what Robert Jackson called the “global covenant” the doctrine of universal jurisdiction, as represented by the Belgian law, clearly has run into a serious obstacle. That stumbling block is the nature of the international society. That we live in a society, not yet a real community is reflected in Judge Guillaume’s opinion when he refers to “an ill-defined international community”. That society continues to be one of sovereign states, and there are clear limits to how far justice should be not just borderless, but completely unregulated in its borderless nature. Even the 1994 German legislation that authorizes the assertion of universal jurisdiction recognizes the contemporary nature of the international society of sovereign states. The law states that, where an appropriate link does not exist between Germany and the prospective defendant, “prosecution would violate the principle of non- interference, under which every state is required to respect the sovereignty of other states”. Wisely, Germany based its assertion of jurisdiction on a realization Belgium would only come to a decade later.

In rejecting the immunity of serving state officials – a foundation of intercourse in the international society -- without the backing of positive international law, Belgium's universal jurisdiction law was a recipe for potential disorder. Let us assume, for example, that Belgian authorities had arrested Ariel Sharon, Yassir Arafat or Donald Rumsfeld in the exercise of universal jurisdiction. It is certain that their countries would have used force to obtain their release or in reprisal. That such a scenario does little to advance international law is self-evident. There are several supporters of the universal jurisdiction doctrine who accept that, in the pure form in which Belgium sought to assert it, the principle was liable to abuse. As the numerous opportunistic suits brought against world leaders demonstrated, the perfect became an enemy of the good. In addition to the total absence of sustainable bases for jurisdiction in the Belgian law and its attempt to assert jurisdiction in absentia, any private citizen could file a complaint against anyone. How ridiculous the situation had become was poignantly illustrated when a fringe political party in Belgium filed a complaint against the country's then Minister of Foreign Affairs, Louis Michel, for approving arms sales to Nepal. As a Belgian law professor commented, "it was not the government that was making foreign policy, but independent judges"⁸⁴. And while the inevitable repeal of an unsustainable law was described as another lost battle in a "clash of civilizations" between Europe and the United States, it was more accurately a clash between cosmopolitan and positivist conceptions of international law and society.

Is there space for the doctrine of universal jurisdiction in international society? There most undoubtedly is. Were it otherwise, the doctrine would not exist in a number of treaties. Crimes like hostage taking cannot be effectively checked without some form

of universal jurisdiction. But a universal jurisdiction that is based solely on the nature of the crime, and not on any other connections to a potential prosecuting state, will be exceedingly difficult to translate into state practice. Certainly, it remains important to discourage impunity with accountability. But every legal theory ought to be subject to empirical tests – and even to common sense standards. In this case, the practice of states is a clear indicator of the possibilities of universal jurisdiction. The exercise of such jurisdiction based solely on the nature of the crime will be difficult to attain when we consider the nature of international society.

This is why an effort by some eminent scholars and practitioners of international law to clarify this subject in the “Princeton Principles on Universal Jurisdiction” has not resolved the debate.⁸⁵ The Principles have essentially restated the sweeping viewpoints of scholastic activism on this thorny question, and avoid some of the more difficult issues. They seek to maintain universal jurisdiction on the basis of the nature of the crime and nothing else. They avoid taking a position on the assertion of jurisdiction *in absentia*, arguing that trials *in absentia* are acceptable in the civil law tradition of which Belgium is a part. The Princeton Principles do not recognize the substantive immunity of heads of state and government -- complete immunity of sitting heads of state, with the exceptions laid down by the International Court of Justice in *Yerodia*, from prosecution for acts performed in their official capacity. It is unhelpful to juxtapose clear exceptions such as the Nuremberg Charter and the statutes of the Rwanda and Yugoslavia tribunals and the permanent International Criminal Court, with the jurisdiction of national courts under customary international law. And while recognizing the great potential for politically motivated litigation, the Principles propose no remedy. They could not have, having

foregone an opportunity to do so by stipulating some connection between the offender and the prosecuting state. The postulations of the Princeton Principles are so starkly divergent from the subsequent decision of the International Court of Justice in the *Yerodia* case and the repeal of the Belgian law that some middle ground is simply not in sight. The competing tensions that engender hesitation on the parts of states to unreservedly embrace universal jurisdiction are real, just as the ICJ decision in *Yerodia* is a legal fact of life with weighty implications in the international political sphere. For these reasons, the influence the Princeton Principles were meant to have will likely remain illusory.

Thus, there appears to be qualified merit in Lord Browne Wilkinson's dissent from the Princeton principles when he argues:

"I am strongly in favor of universal jurisdiction over serious international crimes if , by those words one means the exercise by an international court or by the courts of one state of jurisdiction over the nationals of another state with the prior consent of that latter state, i.e. in cases such as the ICC or the torture convention.

But the Princeton principles propose that individual national courts should exercise such jurisdiction against nationals of a state which has not agreed to such jurisdiction. Moreover the principles do not recognize any form of sovereign immunity.... If the law were so established, states antipathetic to Western powers would be likely to seize both active and retired officials and military personnel of such Western powers and stage a show trial for alleged international crimes. Conversely, zealots in Western States might launch prosecution against for example, Islamic extremists for their terrorist activities. It is naïve to think that, in such cases, the natural state of the accused would stand by and watch the trial: resort to force would be more probable...I believe that the adoption of such universal jurisdiction without preserving the existing concepts of immunity would be more likely to damage than to advance the chances of international peace".⁸⁶

The point on which one would add a caveat to Lord Browne-Wilkinson's dissent is his requirement of prior consent, without exception, of the state whose citizen is subject to prosecution in the courts of another state. In a world in which the moral dimension in international relations is stronger than it was once, a few states will occasionally summon political will to prosecute persons accused of violations of international humanitarian law. But such jurisdiction must be based on something more concrete than moral outrage. And, from the standpoint of international society, Lord Wilkinson is right when he worries about the potential consequences of attempting to bring to justice in foreign courts the high officials of another state.

Lord Browne's observations lead us to another fundamental weakness of the doctrine of universal jurisdiction: the justified concern that it can only be exercised against citizens of weaker nations by the courts of powerful states⁸⁷. For if powerful states such as the United States can successfully resist the doctrine as we have seen, it follows that the citizens of states that do not have recourse to similar strategic leverage in the international society are in a weaker position should more powerful states decide to implement it. As Professor Shadrack Gutto has pithily observed, "What would happen if an African state like Djibouti would prosecute let us say a national of the United States for crimes against humanity? The prosecuting state would either be bombed or will not receive aid from the World Bank"⁸⁸

With a careful eye to balancing these tensions, Germany has prosecuted a small number of individuals for war crimes, crimes against humanity and genocide committed during the wars of the Former Yugoslavia in the 1990s. In one such case, the Supreme Court of Düsseldorf in 1997 convicted Nikola Jorgic, a Bosnian Serb, on 11 counts of

genocide and 30 counts of murder during the “ethnic cleansing” of Bosnian Muslims.⁸⁹ The Court established that in June 1992, Jorgic, the leader of one of the paramilitary groups in the Doboj region of Bosnia-Herzegovina, together with another person executed 22 citizens of Grabska (including disabled and elderly persons) who had gathered outdoors as a result of the fighting in the region. They forced three other Muslims to carry the victims to a mass grave, where their bodies were disposed of. The accused and his subordinates later forced 50 residents of another village from their homes, brutally abused them and shot six of them. In an appeal from the convict, the Federal High Court of Germany rejected the appeal in 1999. It confirmed, however, only one count of genocide involving 30 persons, and addressed the question of a German court’s jurisdiction to try a national or Bosnia-Herzegovina.

The court ruled that its jurisdiction could not be questioned if legitimate grounds existed for the exercise of such jurisdiction under German law. Those grounds included: the provisions of Section 16, article 220a of the German Penal Code, which conferred on German courts jurisdiction to prosecute certain international crimes including genocide, and the provision in the Genocide Convention (to which Germany became a party in 1954) that genocide is a crime which all nations should punish. That the prosecution of the International Criminal Tribunal for the Former Yugoslavia declined to prosecute this case was another ground on which it asserted jurisdiction. Also pertinent, the German High Court ruled, was the fact that the convict had lived in Germany from 1969 to the beginning of 1992, when he returned to Bosnia but remained registered in Germany even after his departure. His German wife and his daughter still lived in Germany and he visited them even after the commission of his crimes, and he was arrested in Germany,

which he had entered of his own volition⁹⁰. Short of a scenario where the crime was committed in Germany, or the accused or the victims were German, there could hardly be a stronger example of the exercise of universal jurisdiction.

Conclusion

The situation, then, is that while universal jurisdiction exists in limited forms in treaties and in the national laws of some states, it has gone into relative decline at a more general level. Despite the doctrine's visibility and moral appeal, its absence and near-dormant state in the general practice of states is one more indication of how the nature of international society balances the tension between order and cosmopolitan notions of justice. The repeal of the Belgian law and the ICJ's *Yerodia* bear out the thesis that two conceptions of justice – cosmopolitan or human, on the one hand, and state or international, on the other – remain locked in competition. True, the existence of the concept of universal jurisdiction in customary international law demonstrates Hedley Bull's acknowledgement that even traditional notions of order cannot exist without justice, and human justice has made significant advances in the past century.

Nevertheless, consistent with the fundamental structure of international society, the sovereignty-based, positivist approach to international justice is not in real decline. This is not an argument in support of impunity for dictators. Rather it is an empirical statement based on an examination of the relationship between law and politics in a world of sovereign states. And what that analysis points up is that, because the "international community" is more of an aspiration than reality, there are limits to the globalization of

justice. As far as justice for war crimes is concerned, the world society has not yet arrived.

¹ Kissinger, "The Pitfalls of Universal Jurisdiction: Risking Judicial Tyranny", *Foreign Affairs*, July/August 2001.

² See Christopher Hitchens, *The Trial of Henry Kissinger* (London and New York: Verso Press, 2001).

³ Eduardo Gallardo, "Court Strips Chile's Pinochet of Immunity", Associated Press, 28 May 2004.

⁴ See article 53 of the Vienna Convention on the Law of Treaties, 1969.

⁵ See Coleman Phillipson, *The International Law and Custom of Ancient Greece and Rome*, vol.2 (Salem, Nitt.: Ayer, 1911). Hugo Grotius expanded in this theory in his classic work *De Jure Belli AC Pacis*, translated by Francis W. Kelsey (Oxford: Clarendon Press, 1925).

⁶ United Nations Convention on the Law of the Sea, UN Doc A/Conf.62/122, art. 150, 7 October 1982, which reproduces Art. 19 of the 1958 Geneva Convention on the Law (Philadelphia, Pennsylvania: University of Pennsylvania Press, 2004), 97-120.

⁷ See Richard A. Falk, "Assessing the Pinochet Litigation", in (Stephen Macedo, ed), *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes Under International Law* (Philadelphia: University of Pennsylvania Press, 2004), 27-120.

⁸ See Malcolm Shaw, *International Law* (Cambridge: Cambridge University Press, 1997), 462-469.

⁹ *Ibid*, 470.

¹⁰ M.Cherif Bassiouni, "The History of Universal Jurisdiction", in Stephen Macedo, *Universal Jurisdiction*.

¹¹ *In re Piracy Jure Gentium*. See also Alfred Rubin, *The Law of Piracy*, (Irvington on Hudson: Transnational Publishers, 1998). But it should be noted that the genocides in Rwanda and the former Yugoslavia have led a number of European countries to bring perpetrators to justice through trials that have been based on universal jurisdiction. See Bassiouni, Note 101.

¹² See Terry Nardin, "Legal Positivism as a Theory of International Society", in Mapel and Nardin, *International Society: Diverse Ethical Perspectives* (Princeton: Princeton University Press, 1998).

¹³ Bassiouni, "The History of Universal Jurisdiction", 51.

¹⁴ *Ibid*.

¹⁵ See Geneva Conventions of August 12, 1949, (International Committee of the Red Cross). Identical provisions are made in all the four Geneva Conventions.

¹⁶ Amnesty International, “Universal Jurisdiction: The Duty of States to Enact and Implement Legislation”, Ch. 4 (War Crimes: State Practice at the National Level, AI Index (OR 53/004/2001) London 2001), 1.

¹⁷ Ibid.

¹⁸ *Niyonteze v Public Prosecutor*, Tribunal Militaire de Cassation (Switzerland), 27 April 2001, www.vbs.admin.ch.

¹⁹ Luc Reydams, “International Decision: *Niyonteze v Public Prosecutor*”, 96 *American Journal of International Law*, January 2002.

²⁰ Amnesty International, “Universal Jurisdiction”, Ch. 2 (The History of Universal Jurisdiction), 25-26. Amnesty has clearly placed excessive emphasis on a scholarly article in this regard. It relies extensively on Willard Cowles, “University of Jurisdiction Over War Crimes”, 33 *California Law Review*.177 (1945).

²¹ Ibid.

²² *The Hadamar Trial*, Judgment, Case No.4, U.S. Mil Commission – Wiesbaden, 8-15 October 1945, quoted in Amnesty, “Universal Jurisdiction”, 28.

²³ *In re Eisentrager*, judgment Case No.84, U.S. Mil Commission – Shanghai, 3 October 1946 – 1947, quoted in Amnesty, “Universal Jurisdiction”.

²⁴ *Sandrock and three others (The Almelo Trial)*, Judgment, Case No.3, Brit. Mil.Ct – Almelo, 24-26 November 1945, 1 *Law Reports of Trials of War Criminals* (1949).

²⁵ See Article 7, Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9.

²⁶ Robert Jennings & Arthur Watts, *Oppenheim’s International Law* (London and New York: Longman 9th ed. 1992).

²⁷ *Prosecutor v Ntuyahaga*, Decision on the Prosecutor’s Motion to Withdraw the Indictment, Case No.ICTR-98-40-T, 18 March 1999). The Tribunal also noted the Tribunal does not have exclusive jurisdiction over crimes included in its mandate and that its criminal proceedings are complementary to those of national jurisdictions”. Ibid.

²⁸ *Prosecutor v Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-AR72 (Appeals Chamber), 2 October 1995, para.58.

²⁹ See Rosalyn Higgins, *Problems and Processes: International Law and How We Use It* (Oxford University Press 1992). Higgins noted, rightly, in this writer's view, that "the fact that an act is a violation of international law does not of itself give rise to universal jurisdiction". Ibid.

³⁰ Bassiouni, "The History of Universal Jurisdiction", 53.

³¹ Amnesty International, "Universal Jurisdiction", Ch.7, 6.

³² Ibid.

³³ Ibid, See also Samantha Power, *A Problem from Hell: America and the Age of Genocide* (London: Flamingo, 2003), Ch. 3-4 for a detailed account of Raphael Lemkin's lobbying for adoption of the Genocide Convention.

³⁴ Ad Hoc Committee on Genocide, Report of the Committee and Draft Convention Drawn up by the Committee, U.N. Doc. E/794, 24 May 1948.

³⁵ Samantha Power, *A Problem From Hell*, 55-56.

³⁶ William A. Schabas, *Genocide in International Law* (Cambridge: Cambridge University Press 2000), 548.

³⁷ *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia)*, Preliminary Objections, Judgment of 11 July 1996, International Court of Justice, para 31.

³⁸ See Kingsley Chiedu Moghalu, "Rwanda Panel's Legacy: They Can Run But Not Hide", *International Herald Tribune*, 30-31 November 1998.

³⁹ Richard Falk, "Assessing the Pinochet Litigation: Wither Universal Jurisdiction?", in Stephen Macedo, *Universal Jurisdiction*.

⁴⁰ Ibid, 97,98.

⁴¹ See Craig S. Smith, "Aiming at Judicial Targets All Over the World", *The New York Times*, 18 October 2003, for a profile of Judge Garzon and his related judicial activities.

⁴² *Regina v Bartle and the Commissioner of Police for the Metropolis and others Ex Parte Pinochet Ugarte*, All England Law Reports, Vol. 1998 pt.1, 97 (1999).

⁴³ Ibid.

⁴⁴ Richard Falk, “Assessing the Pinochet Litigation”

⁴⁵ Ibid.

⁴⁶ Ibid.

⁴⁷ Amnesty International, “Universal Jurisdiction”, Ch. 2.

⁴⁸ Eduardo Gallardo, “Court Strips Chile’s Pinochet of Immunity”.

⁴⁹ Belgium: “Act Concerning the Punishment of Grave Breaches of International Humanitarian Law”, 38 *International Legal Materials* 918 (1999).

⁵⁰ Ibid., Article 7.

⁵¹ A. Hays Butler, “The Growing Support for Universal Jurisdiction in National Legislation”, Macedo, 69.

⁵² Amnesty International, Ch. 6, 8.

⁵³ Ibid.

⁵⁴ Quoted in Amnesty, Ibid.

⁵⁵ Amnesty, Ch. 6. 11.

⁵⁶ Marlise Simons, “Human Rights Cases Begin to flood to Belgian Courts”, *The New York Times*, 27 December 2001.

⁵⁷ See Marlise Simons, “Mother Superior Guilty in Rwanda Killings”, *The New York Times*, 9 June 2001.

⁵⁸ “Rwandans on Trial”, *The New York Times*, 1 May 2001.

⁵⁹ Ibid.

⁶⁰ Ibid.

⁶¹ Marlise Simons, “Human Rights Cases”.

⁶² See Richard Bernstein, “Belgium Rethinks Its Prosecutorial Zeal”, *The New York Times*, 1 April 2003.

⁶³ See Glenn Frankel, “Belgian War Crimes Law Undone by its Global Reach”, *Washington Post*, 30 September 2003, and Richard Bernstein, “Belgium Rethinks”.

⁶⁴ Bernstein, “Belgium Rethinks”.

⁶⁵ Ian Black and Ewen MacAkill, “US Threatens to Boycott Belgium Over War Crimes Law”, *The Guardian*, 13 June 2003.

⁶⁶ Glenn Frankel.

⁶⁷ Ibid.

⁶⁸ Human Rights Watch: “Belgium: Universal Jurisdiction Law Repealed”, Press Statement, 1 August 2003, www.hrw.org.

⁶⁹ Ibid.

⁷⁰ International Court of Justice, Case Concerning the Arrest Warrant of 11 April 2000 (*Democratic Republic of Congo v Belgium*), Decision of 14 February 2002.

⁷¹ Ibid, 7.

⁷² Ibid, 20.

⁷³ Ibid, 22.

⁷⁴ Ibid.

⁷⁵ Ibid, 29-30.

⁷⁶ See Kingsley Moghalu, “International Law and the ‘New World Order’”, *The Guardian* (Nigeria), 29 April 1991.

⁷⁷ The ad hoc international criminal tribunals were the first international court post-Nuremberg to try individuals for crimes of international humanitarian law as subjects of international law, thus bringing international law as applied by international courts into the sphere of mere mortals, while the ICJ remained the lofty guardian of international law as it applied to states and had no jurisdiction over individuals. Proposals made by some scholars after World War I to give the Permanent Court of International Justice, the ICJ’s forerunner, jurisdiction over international crimes committed by individuals, were not adopted. See Dorothy V. Jones, *Toward A Just World: The Critical Years in the Search for International Justice* (Chicago and London: University of Chicago Press, 2002), 198.

⁷⁸ International Court of Justice, Case Concerning the Arrest Warrant - Separate Opinion of President Guillaume.

⁷⁹ Ibid.

⁸⁰ Ibid. These include the New York Convention Against the Taking of Hostages of 1979, the Torture Convention of 1984, and the New York Convention for the Suppression of Terrorist Bombings of 1997, amongst several others.

⁸¹ Ibid.

⁸² Ibid.

⁸³ ICJ, *Yerodia Case*, Separate Opinion of Judge Koroma.

⁸⁴ Glen Frankel, “Belgian War Crimes Law Undone by Its Global Reach”..

⁸⁵ Princeton University Program in Law and Public Affairs: “ The Princeton Principles on Universal Jurisdiction” (Princeton: 2001), www.princeton.edu .

⁸⁶ Ibid, 49.

⁸⁷ See Edward Kwakwa, “The Cairo-Arusha Principles on Universal Jurisdiction in Respect of Gross Human Rights Offences: Developing the Frontiers of the Principle of Universal Jurisdiction”, *African Yearbook of International Law*, 2003, 407-430, at Note 23.

⁸⁸ Ibid.

⁸⁹ *Public Prosecutor v Jorgic*, Obergericht Düsseldorf, 26 September 1997.

⁹⁰ See “Federal High Court Makes Basic Ruling on Genocide”, Press Release of the Federal High Court of Germany (English Translation), Nr. 39 of 30 April 1999, www.preventgenocide.org.

PART III

**CASE STUDY: THE POLITICS, DIPLOMACY AND PRACTICE OF THE
INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA, 1994 - 2004**

Chapter 6

Genocide and International Judicial Intervention

*Turning and turning in the widening gyre
The falcon cannot hear the falconer;
Things fall apart; the centre cannot hold;
Mere anarchy is loosed upon the world.*

-- Y.B. Yeats, *The Second Coming*

Previous chapters have discussed the historical background to and conceptual framework for the inquiry into the tensions between political and judicial responses to violations of international humanitarian law. This chapter will begin the major case study of this work -- the Rwandan genocide of 1994 and the international judicial intervention that followed in its wake. It will trace the path to judicial intervention, demonstrate how the inaction of the society of states impacted on the dynamics of the relationship between Rwanda and the International 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 such other violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994, established by UN Security Council resolution 955 of 8 November 1994¹. I will analyze the early challenge to the very legitimacy of the Tribunal. And I will conclude with an examination of the relationship between the framework of the Tribunal and the overarching political and strategic considerations of the parties to the conflict.

In analyzing the international response to the genocide, this chapter empirically establishes that the notion of "international community" is more illusory than real, and the international society and its characteristics as noted in Chapter 3 is the more accurate

perspective for this response. Following on from there, this chapter answers the question: can international criminal tribunals be best understood as a legal or political process, or one in which legalism is a subset of a larger political framework?. If, as I seek to demonstrate empirically, international criminal tribunals are completely framed by political negotiations, processes and interests, then the resulting nature of international justice for violations of international humanitarian law, which is thus profoundly political, supports my thesis that this kind of justice can best be explained by the international society perspective of international relations. It cannot be considered as a straightforward exercise in international law. It also supports the position stated in the Introduction chapter about why the study of international law can be helped by an understanding of international relations.

Historical Background

The expansion of the European-dominated international system of the late 19th century was an indirect factor in the Rwandan genocide of 1994. That expansion occurred mostly through colonization. Rwanda is made up of three ethnic groups - the Twa (historically pigmy hunters believed to have been the area's first inhabitants), the Hutu of Bantu origin and believed to have come from Cameroon, and the Tutsis who are believed to have come from Ethiopia in the 13th and 14th centuries. The Hutus, who constitute 85 percent of Rwanda's population, were mainly farmers, while the Tutsis, who comprised 14 percent prior to the genocide, were mainly pastoral keepers of cattle.

There are nonetheless contending historical accounts of the nature of the relations between Hutus and Tutsis - conflicted or harmonious, hierarchical or egalitarian.² What

is clear is that the Tutsis eventually established a kingdom around the 15th century in the east of today's Rwanda, and had expanded westward and southward by the 16th century. This expansion engendered a corresponding loss of autonomy for the mainly agricultural Hutu³. The Tutsi and Hutu groups lived in a mutual arrangement of symbiotic and organic integration for the next three centuries. Certain cultural practices of Hutu origin and Hutu participation in the advisory councils to the Tutsi monarchy were significant realities of this relationship. The dividing line between the two groups was not as rigid as is commonly presumed by non-Rwandans - they both spoke (and still speak) a common language, Kinyarwanda; intermarriage was not infrequent, and, with the performance of certain socio-cultural rites, a successful Hutu could cross over the socio-ethnic line and now be regarded as a Tutsi.

But tensions between the two groups emerged even in the pre-colonial period in the 19th century. The appropriation of private pasture land by the Tutsi monarchy and the institution of payment of dues - in commodities or service - by the Hutu and socially lower ranked Tutsi in exchange for access to land was a major contributor to this changed texture of relations. This institution was known as *ibikingi*⁴.

Europe's "scramble for Africa" in the late 19th century made Rwanda a German protectorate as a result of the Anglo-German treaty of 1880 by which much of East Africa became German colonies. Germany was to lose these territories after World War I, and Rwanda was transferred to a Belgian mandate under the League of Nations in 1919. Belgium asserted its political authority in Rwanda far more actively than Germany had. To sustain and strengthen its hold in the country, the Belgian colonizers used a classic divide-and-conquer method, first among the Tutsi to select those who would most

willingly advance Belgium's agenda, and then between Tutsis and Hutus. A struggle ensued within rival camps in the Tutsi ruling class for the colonial administration's patronage. A group opposed to the Rwandan king *Mwami* Musinga (whose independent streak had earned him Belgium's displeasure) emerged victorious. The Belgians dethroned Musinga and banished him to neighbouring Burundi in 1925. It is noteworthy that in the neighbouring Belgian Congo (today's Democratic Republic of Congo), the Belgian king Leopold had presided over grotesque massacres of Congolese natives in order to enforce rubber production quotas that supplied his personal wealth. Historians estimate that King Leopold ordered the killings of some 10 million victims between 1880 and 1920⁵.

In Rwanda, Belgium over the next several decades supported the Tutsi ruling class in expanding the colonial power's delegated hegemony to other parts of the country. Belgium introduced several radical reforms of Rwandan society that widened ethnic divisions. The education of children of Tutsi notables in European style schools was encouraged. This in turn gave Tutsis great advantages over the Hutus in recruitments for administrative positions in the colonial administration as well as in business activities. In 1933-1934 Belgium introduced identity cards that divided Rwandans along ethnic lines between Tutsi and Hutu.

These policies were based on Belgian perceptions of Tutsi racial superiority over the Hutu. The Tutsis were taller, lankier and thin-lipped and had aquiline noses, so Belgian colonialists judged them closer to Europeans in their physical traits than the generally shorter and thick-lipped Hutus. The pseudo-science fostered by the Belgian colonialists has parallels with Hitler's theory of the Aryan "master race" that led to the

Jewish Holocaust by the Nazis in the 1930s and World War II. In an interesting demonstration of this parallel that exists between the roots of the Rwandan genocide and the Holocaust, Amy Chua has argued that, contrary to the view among supporters of globalization that the expansion of free market economies and democracy will reduce the incidence of ethnic hatred and violence, the phenomenon of globalization actually fuels ethnic violence in the non-western world.⁶ She argues that this consequence arises because free markets frequently put wealth in the hands of minorities, in the case of Rwanda the Tutsi ethnic group, triggering resentment by poor majorities -- in Rwanda's case the Hutus.

This factor combined with colonial practices such as ethnic stereotyping to produce a potent mix of hatred. Philip Gourevitch describes how Belgian colonialists fostered myths of racial superiority through dubious "science":

In addition to military and administrative chiefs, and a veritable army of churchmen, the Belgians dispatched scientists to Rwanda. The scientists brought scales and measuring tapes and calipers and they went about weighing Rwandans, measuring Rwandans' cranial capacities, and conducting comparative analysis of the relative protuberances of Rwandan noses. Sure enough, the scientists found what they believed all along. Tutsis had "nobler", more "naturally" aristocratic dimensions than the "coarse" and "bestial" Hutus. On the "nasal index", for instance, the median Tutsi nose was found to be about two and a half millimetres longer and nearly five millimetres narrower than the median Hutu nose.⁷

Tutsis warmed to these pseudo-scientific myths in order to perpetuate their political, economic and social dominance in Rwanda. As Bill Berkeley puts it, "elitism

evolved into racism, and a myth of historic Tutsi domination - and cunning - came to be broadly accepted by Hutus and Tutsis alike"⁸. This situation fostered progressively increasing resentment on the part of the Hutu population.

Three factors created the immediate conditions for the first major wave of violence in colonial Rwanda. The first factor was the increasing agitation by Tutsis for independence from Belgium in the mid-1950s⁹. The second (and most important) was the arrival of mostly Flemish Belgians as missionaries in Rwanda in the 1940s, in contrast to the predominantly French Belgians who preceded their compatriots at the turn of the century¹⁰. The Flemish Belgians transposed Belgium's domestic politics into the combustible mix that was Rwanda's. For the Flemish - the majority of Belgium's population - were engaged in a struggle against the political dominance of the francophone political leadership class. Not surprisingly, they empathized with Rwanda's Hutu and began to provide them with political support. This led to an alliance between the Belgian missionaries and the Rwandan Hutu within the religiously dominant Roman Catholic Church. Here the Hutus, largely shut out from the professional educational system and having gone instead to religious seminaries, were dominant as clergy. The church was thus to play a strategic role in the political mobilization of the Hutus. Several clergymen and women became active perpetrators of genocide. The third factor that triggered violence during the colonial era was the Belgian colonizers' resistance to the scenario of an independent Rwanda led by Tutsis, who by now enjoyed the support of elements of the international communist movement.¹¹

A group of nine Hutu intellectuals published the *Hutu Manifesto* in March 1957, demanding democracy.¹² The manifesto embodied the rising degree of intolerance and

xenophobia that had become typical among the Hutu. It branded the Tutsis "foreign invaders" and asserted that "Rwanda was by rights a nation of the Hutu majority"¹³. In November 1959, these tensions and a series of events (most immediately that of an attack on a Hutu politician by Tutsis) triggered what Rwanda's Hutus termed a "social revolution". This situation was simply a reversal of what the Hutus considered the tyranny of the minority with a new tyranny of the majority. It was not simply dominance that was sought, but one that was to be characterised by the active persecution of Tutsis as an integral component. This new movement of extremist Hutu politicians and peasants announced that it had cast off the yoke of centuries of domination by the Tutsi minority. The movement was led by Grégoire Kayibanda, who later became the president of the new republic in 1962. Kayibanda's PARMEHUTU party utilized ethnic differences as a wedge to consolidate power. Its primary agenda was not governance, but to establish a tyranny of the majority. A referendum organized in 1961 consolidated the 1959 revolution and facilitated full independence in 1962. That process was accompanied by mass killings of Tutsi and the flight of tens of thousands more to the neighbouring countries of Burundi, Tanzania, Uganda and Belgian Congo.

The events of 1959 - 1962 arguably amounted to the first genocide in Rwanda, even if the numbers of victims were nowhere near the death toll in 1994. At any event, they were the first of a series of mass atrocities that would continue, with impunity, for the next 35 years. From 1961, a group of Tutsi refugees in the diaspora organized themselves into a military force and launched repeated stealth attacks on Rwanda from bases in Uganda and Burundi.¹⁴ These attempts by Tutsi rebels to re-enter Rwanda by force of arms during the 1960s led to revenge massacres of Tutsi inside Rwanda.

In 1973 Kayibanda was ousted in a military coup by Juvénal Habyarimana, a Hutu army officer from the north-western part of the country. The coup was the direct result of tensions between southern Hutus, on the one hand, and northern Hutus who felt marginalized by their southern brethren, on the other. Although Habyarimana pledged to end mass killings of Tutsis, he was just as steeped in nepotism as his predecessor in office. He concentrated power and access to wealth in the hands of a small group of Hutus from his home region, especially a core group of relations of his wife, Agathe. This group was known as the *Akazu* (small hut), borrowing a term used for the courtiers of the king¹⁵. This group played a major role in the genocide of 1994.

Habyarimana's policies towards the Tutsis were contradictory. He severely restricted opportunities for the Tutsis in education and in government, while maintaining financially beneficial relationships with Tutsi businessmen.¹⁶ Most important, he firmly denied Tutsi exiles and refugees the right of return to their country, to which they were entitled in international law, claiming that pressures on land made refugee return impracticable¹⁷. This policy led to the revival of the armed struggle by Tutsis outside Rwanda and the civil war that served as an immediate context for the genocide.

A combination of factors, namely an economic downturn as a result of the fall in the price of coffee, Rwanda's main export commodity, and the end of the Cold War, led to pressure on Habyarimana from Western European donors, in particular France, to embark on political reforms away from a one-party state to multiparty democracy. He was reluctant reformer, but was faced with little choice. For the Tutsi rebels, all of this was too little and too late. On 1 October 1990, the Rwandan Patriotic Army (RPA), the

military wing of the Rwandan Patriotic Front (RPF), attacked Rwanda from their base in Uganda. A full-scale war had begun.

The RPA was under the command of Paul Kagame and comprised mostly Tutsi soldiers who had fought alongside Yoweri Museveni in the civil war that brought the latter to power in Uganda in 1986. Kagame had risen to become deputy director of military intelligence in the Ugandan army under Museveni. But he and his fellow Rwandan Tutsis in that army were not Ugandan citizens by birth, although they acquired Ugandan nationality as Rwandan exiles - Kagame was in fact an infant survivor of the massacres of Rwandan Tutsis in 1959 who had been taken into exile in Uganda by refugee parents. Kagame and his fellow travellers felt a strong psychological pressure to return to Rwanda, by force of arms if necessary. Museveni, while not ungrateful for their support, was relieved to see them return to Rwanda, for ethnic tensions had developed between the "Rwandan-Ugandans" and some indigenous Ugandan ethnic groups.

Predictably, the RPF invasion triggered a new wave of massacres of Tutsis in Rwanda in the months that followed. Rwandan Government Forces (RGF) initially beat back the RPF attack with the military support mainly of France¹⁸, but the French Government nonetheless prodded Habyarimana to open up Rwandan politics.¹⁹ The Rwandan despot made reluctant, half-hearted gestures in that direction but had no intention of ceding significant degrees of power. Meanwhile, the RPF had regrouped following its initial military setback. In 1991 and 1992 it captured enough territory in Rwanda to bring Habyarimana to the realization that it presented a credible threat and forced him to the negotiating table.

International peace talks to end the Rwandan conflict began in the northeastern Tanzanian town of Arusha in 1992, but stalled on the sensitive questions of representation in a proposed broad based transitional government (BBTG) and the makeup of the new Rwandan armed forces. Habyarimana and his ethnic supporters feared that granting the Tutsi rebels and the internal Rwandan opposition a dominant role in the transition would be tantamount to a "negotiated coup".²⁰

The pressure of circumstances however - military, economic and domestic political pressure - left him with few alternatives. In August 1993 he buckled and signed the Arusha peace accords. The agreement included protocols on refugee returns, as well as political power sharing and shared membership and command of the armed forces. Habyarimana's nightmares were happening in real time. The Arusha Accords awarded the RPF and domestic opposition parties a majority of seats in the interim cabinet and the parliament, and the RPF was awarded 50 percent of officer-level positions in a reintegrated national army, including 40 percent of the army rank and file.

The combination of the Arusha Accords and the RPF's progressive military victories radicalized and polarized the Rwandan polity even further. Hutu extremists felt betrayed by Habyarimana and were extremely apprehensive about the inevitable loss of power and privilege that would flow from the implementation of the Arusha agreements. From their perspective, the accords amounted to ethno-political class suicide. The peace deal could not be allowed to stand.

Following the Arusha Accords, the UN Security Council established a peace keeping operation, the United Nations Assistance Mission for Rwanda (UNAMIR) in 1993. UNAMIR absorbed an earlier and smaller UN military observer force, the United

Nations Observer Mission Uganda-Rwanda (UNOMUR), along the Uganda-Rwanda border. The new peacekeeping mission's mandate included ensuring security in Kigali, the Rwandan capital, monitoring observance of the ceasefire between the warring parties, monitoring the security situation in the lead-up to elections for a longer term government that would replace the transitional government, investigating breaches of the Protocol of Agreement on the Integration of the Armed Forces of the two parties, monitoring the return of refugees, and supporting humanitarian assistance activities. Lt. General Romeo Dallaire, the Canadian soldier who had commanded UNOMUR, was appointed Force Commander of UNAMIR. With a force strength of 2,548 troops that included two infantry battalions - only one of which was eventually deployed on the ground in Rwanda - UNAMIR was a small force in comparison with other UN peacekeeping missions in the early 1990s. Dallaire recalls his distinct impression at the time that, compared to U.N. peacekeeping operations in Bosnia-Herzegovina, Somalia and Mozambique, Rwanda was a sideshow: a "tiny central African country that most people would be hard-pressed to locate on a map"²¹. This foreboding was to be proved right by the international response to subsequent events in Rwanda.

Meanwhile, Habyarimana was busy attempting to derail or delay the implementation of the Arusha Accords. He bribed, coerced and rallied Hutu politicians, including his more moderate political opponents, by casting all Tutsis as the common enemy. The opposition parties split into factions in mid-1993, between extremist "Hutu Power" factions and more moderate ones as a result of these machinations. Jean Kambanda, who was later to become the country's prime minister, was the favourite candidate of the Hutu Power factions of the Democratic Republican Movement (MDR)

party for the post of prime minister, while signatories to the Arusha Accords stuck to their choice of the more moderate Faustin Twagiramungu. With each of the opposition parties presenting conflicting candidates for posts in the BBTG, that government could not be established, essentially rendering the peace accords inoperable.

These ominous events were fuelled by the influence of anti-Tutsi hate propaganda broadcast by the *Radio Television Libre des Milles Collines* (RTLM) and *Kangura* newspaper, and the militarization and transformation of youth wings of the main Hutu political parties into militias. RTLM claimed in its broadcasts that the RPF's agenda was to restore Tutsi hegemony and wipe out the benefits of the 1959 social revolution. It called for attacks against all Tutsis in Rwanda, who were branded accomplices of the invading RPF. The RPF, sensing an imminent breakdown of the Arusha Accords, prepared for a decisive military push against Habyarimana's government. Hutu extremists, on the other hand, were planning an equally decisive "final solution" to the "Tutsi problem" - genocide. This plan included the preparation of lists of individuals to be targeted, large scale importation and distribution of weapons to the extremist Hutu militias. Events in neighbouring Burundi, which has a similar Hutu-Tutsi population ratio as Rwanda, were grist to the mill. There, Melchior Ndadaye, a popularly elected Hutu president, was assassinated in October 1993 by extremist Tutsi soldiers in the Burundian army, stoking the diabolical rage of the Rwandan Hutu extremists.

On 6 April 1994, a regional summit of heads of state was convened in Dar es Salaam, the Tanzanian capital where, it is believed, Habyarimana finally agreed to implement Arusha.²² Travelling back to Kigali the same day in the company of Burundian president Cyprien Ntaryamira, the Rwandan president's jet was hit by two

missiles, killing him and his Burundian counterpart. RTLM immediately blamed the assassination on the RPF, although other schools of thought believe that Hutu extremists disappointed at Habyarimana's "betrayal" were the culprits. At any rate, within an hour of the plane crash Hutu militias and the Presidential Guard established roadblocks around Kigali and commenced massacres of Tutsis.

One of the first targets early the next morning was the Rwandan Prime Minister, Agathe Uwilingiyimana, a moderate Hutu politician who advocated peaceful co-existence with Tutsis. She was killed by members of the Presidential Guard believed to have acted on orders from Col. Theoneste Bagosora, chief of staff at the Rwandan Ministry of Defence. Bagosora is widely believed in Rwanda to have been the mastermind of the genocide and is on trial at the International Criminal Tribunal for Rwanda at Arusha.²³ Ten Belgian UNAMIR peacekeeping soldiers assigned to protect Uwilingiyimana were also murdered along with her. This prompted the withdrawal of the Belgian UNAMIR contingent from Rwanda, an outcome that was evidently planned, or at least desired, by Bagosora and his associates on the so-called "crisis committee" he established immediately after Habyarimana's death.²⁴

Over the next 100 days, an estimated 800,000 Tutsis and moderate Hutus were massacred in all regions of Rwanda - the fastest genocide in history. On 8 April, extremist Hutus in the RGF, led by Bagosora, installed an Interim Government headed by Jean Kambanda as prime minister. It was precisely in order to execute the genocide plan that Agathe Uwilingiyimana had to be assassinated - to create a vacuum of power and succession. Kambanda and his government then presided over the genocide of Tutsis and moderate Hutus, reviewing the progress of the massacres at cabinet meetings.²⁵

Despite Dallaire's best efforts, UNAMIR was too thin on the ground to affect the course of the genocide. The world failed Rwanda in its hour of need as Rwandans hacked Rwandans to death. This was not, as some western analysts are wont characterize it, "a tribal slaughter". Rather, it was coldly calculated genocide motivated by a desire to maintain political power, capitalizing on ethnic cleavages. The world did not respond to stop the slaughter while it was happening, but intervened afterwards to seek justice for the perpetrations of the genocide, crimes against humanity and war crimes in Rwanda in 1994. It is to why and how this was so that we shall now turn.

Spectators to Genocide

The world's failure to launch a military intervention to stop the genocide has been copiously analyzed in several books and reports.²⁶ It is not the main focus of this work. Rather judicial intervention, the use of international legal institutions to intervene in the Rwandan conflict - after the fact of the genocide though it certainly was - and the political and strategic context of that intervention, is what this chapter is about. Events and processes in international affairs, however, are rarely coincidences. It is in this context of international criminal justice as a default option to preventing genocide that the world's non-response in a military-humanitarian sense will be discussed here, in order to demonstrate how the nature of the international society affected the likelihood of humanitarian intervention in Rwanda. I will establish the political link between that non-intervention and the judicial intervention that followed in its wake and point out how the former has impacted the latter.

The global covenant was tested during the Rwandan genocide and found wanting. There is undoubtedly a combination of several factors that accounted for the non-military/humanitarian intervention to prevent, or halt the genocide. But the most important background or conditioning factor, at a conceptual level, was that of a *society*, not a community of states. At a practical level that factor is demonstrated by the actions or inactions of states and the limitations of the United Nations as the institution where states collaborate in the pursuit of sometimes common but at other times divergent interests.

The three states whose foreign policies and actions had the greatest impact on the course of the genocide were the United States, Belgium and France. Of these, America was by far the most influential. Its positioning will therefore be considered first. Humanitarian intervention, despite the phrase, is frequently guided by strategic interest. The U.S. administration under President Clinton judged that it had little strategic interest in Rwanda. Thus, not only did it not act, but worse, it blocked actions or initiatives that might have affected outcomes on the ground even if not prevented the genocide.

As Samantha Power has noted, "the United States has never in its history intervened to stop genocide and had in fact rarely even made a point of condemning it as it occurred"²⁷. In this context the interventions in Bosnia in 1995 and in Kosovo in 1999 were exceptions to this characteristic of American foreign policy. And those interventions can be credited largely to sustained pressure by Madleine Albright, Ambassador to the United Nations and later Secretary of State in the Clinton administration, and other interests in the United States. This insularity has a long history, going back to the late 18th century when Thomas Paine signed the American Declaration

of Independence because Europe was "too thickly planted with kingdoms to be long at peace" and George Washington warned his country against "entangling alliances".

Not only did Rwanda offer no strategic interest to warrant American intervention, but it was doomed, even before the genocide erupted, by the shadow of Somalia. In 1993, 18 American soldiers participating in a United Nations peacekeeping operation under U.S. command were killed by Somali militias, and their bodies dragged through the streets. This setback so traumatized American public opinion that the Clinton administration enacted a new restrictive peacekeeping policy known as Presidential Decision Directive (PDD-25). The policy laid out sixteen factors that would influence United States decisions on whether to support or participate in peacekeeping operations. U.S. participation required that such participation had to advance American interests, be deemed essential for the operation's success, and have legislative support in the U.S. Congress. The likelihood of casualties had to be low, and a clear exit strategy had to be articulated.²⁸

Several U.S. policymakers, in post-mortems of the country's foreign policy responses to the Rwandan genocide, confirmed that the American experience in Somalia was the most powerful influence on U.S. policy towards the Rwandan genocide.²⁹ At its core, the Somalia experience and its impact can be interpreted as having triggered a response that questioned the basis of humanitarian or peacekeeping intervention by American forces in foreign lands. Was the projection of American military power, with the hazards inherent in such exercises, to be determined by the idea of a cosmopolitan international community or by the strategic national interest in an international society, with such interest domestically defined? Clearly, the question was resolved in favour of

the latter approach, thus foreclosing a serious military effort by a great power or great powers acting in concert to prevent or stop the genocide of 1994.

Based on an absence of political will to intervene in Rwanda, the U.S. government took a number of far-reaching policy positions. First, it studiously avoided calling the massacres in Rwanda genocide. Using the "G-word" as Power termed it, would have raised the stakes for international society and put further pressure on America and other nations to take action to halt the genocide as required by the Genocide Convention. In other words, legalism would have kicked in, and that scenario was out of kilter with political and strategic considerations in Washington D.C. and some other capitals. From late April, by which time the genocide was well advanced, and for the next several weeks this policy continued. The U.S. administration, with support from Britain and China, blocked the use of the word "genocide" in a statement by the president of the United Nations Security Council on 30 April. The original draft of the statement clearly specified "genocide": "The Security Council reaffirms that the systematic killings of any ethnic group, with intent to destroy it in whole or in part constitutes an act of genocide... The Council further points out that an important body of international law exists that deals with perpetrators of genocide".³⁰ But the final statement was to read:

The Security Council condemns all these breaches of international humanitarian law in Rwanda, particularly those perpetrated against the civilian population, and recalls that persons who instigate or participate in such acts are individually responsible. In this context, the Security Council recalls that the killing of members of an ethnic group with the intention of destroying such a group in whole or in part constitutes a crime punishable under international law.³¹

Meanwhile, on 13 April, the RPF Representative at the United Nations, Claude Dusaidi, had written to the president of the Security Council stating that "a crime of genocide" had been committed against Rwandans in the presence of a United Nations peacekeeping force. Dusaidi called on the Council to establish an international war crime tribunal and apprehend persons responsible for the atrocities.³² This appears to have been the first time the idea of setting up a war crimes tribunal was put to the Council. In an irony reflective of sovereignty as the hallmark of the international society, Rwanda held a rotating seat on the Security Council in 1994 and was represented by Ambassador Jean-Damascene Bizimana, Permanent Representative of the extremist Hutu government that was perpetrating the genocide. This situation, however, while a personal embarrassment for most of the other ambassadors on the Security Council, was not a weighty factor for decision-making by the Council on the genocide.³³

Secondly, the United States rejected proposals from the UN Secretariat for assistance to jam the RTLM and so stop its broadcasts that were inciting the genocidal massacres. The UN clearly did not have the technical capacity to do so. While a State Department adviser for the region supported this position, the U.S. Department of Defence recommended a rejection of the proposal on the grounds that it would cost \$8,500 an hour to position a jamming aircraft over Rwanda, and that jamming a national radio station would violate Rwanda's sovereignty.³⁴ Dallaire commented: "The Pentagon judged that the lives of the estimated 8,000 - 10,000 Rwandans being killed each day in the genocide were not worth the cost of the fuel or the violation of Rwandan airwaves."³⁵

Here I disagree with Kuperman who, in arguing that the genocide could not have been prevented or halted after it had gotten underway, asserts that the radio broadcasts

were not an essential driver of the massacres.³⁶ The evidence, anecdotal and judicial, establishes exactly the opposite. The judgement of the International Criminal Tribunal for Rwanda in the "media trial" has established once and for all the crucial role hate media, including RTLM, played in fanning the genocide, beginning several months before and continuing during the massacres.³⁷ Kuperman recalls the curious legal opinion of a Pentagon lawyer that silencing a hate radio that was broadcasting explicit instructions for genocide would have violated the American principle of freedom of speech.³⁸ The noted American First Amendment lawyer Floyd Abrams has rebuffed this argument, asserting that inciting genocide does not rise to a standard that could be protected by the First Amendment³⁹.

Thirdly, American policy during the genocide was perceived as sympathetic to the RPF.⁴⁰ This raises the question of whether there was a grand strategic design to replace French influence in the African Great Lakes region. If such a design can be identified at all, it can only be one that evolved in response to events. Those events were not driven by any Anglo-Saxon master-plan, but rather by the excesses of Rwanda's francophone, Hutu-dominated governments. As for France and Belgium, their main diplomatic roles during the genocide lay in France's decision not to reinforce UNAMIR and instead, obtaining Security Council authorization to establish a controversial, parallel humanitarian intervention force in the waning days of the Rwandan conflict. The force, named Operation Turquoise, was blessed with the robust mandate under Chapter 7 of the United Nations Charter that UNAMIR never had. The Security Council authorized Operation Turquoise⁴¹ on the strict condition that it would last for no longer than sixty days. It was also operationally restricted to western Rwanda. The RPF was consulted by

the French government on the humanitarian operation. For its own strategic reasons, the RPF agreed to the plan despite its misgivings about the French.⁴² Belgium's troops having been targeted in early April as part of the genocide plan, the country pulled its troops from Rwanda the week of 14 April 1994. This development broke the back of UNAMIR and removed any viable threat to the armed forces and militia that carried out the slaughter. It has been observed that Belgium also played a major role in the practical disintegration of the UNAMIR, not only by withdrawing its troops, but by persuading other countries involved in Rwanda at the time to leave the country in order to justify its own response to the Belgian public.⁴³

The United Nations Secretariat, meanwhile, like most players in the crisis (with the exception of one or two governments) interpreted the information it received from UNAMIR in early 1994 in the context of the ongoing political and ethnic violence, rather than as portends of genocide. Kofi Annan, then Under-Secretary-General for peacekeeping operations, instructed Dallaire to discuss information the latter had received about weapons caches in Kigali with President Habyarimana. The United Nations Secretariat has been criticised for not doing enough to prevent the genocide. And Kofi Annan, who has been personally criticized by Rwanda on this score and was met with critical demonstrations by Rwandan citizens when he visited the country in 1998, has expressed regret for not having done more than he did to stop the massacres.⁴⁴ But, as Kuperman explains, much of this criticism is overblown.⁴⁵ Member states of the United Nations *decided* by their actions and inactions not to intervene in Rwanda.

It cannot be doubted that UN Secretariat officials, especially senior officials in the Department of Peace-keeping Operations in New York⁴⁶, could have responded in more

imaginative ways when confronted with knowledge of the violent plans of Hutu extremists. Romeo Dallaire has detailed in his memoirs his meetings with these officials, the sense of impending cataclysm he strained to get across in his reports, and the circumstances that worked against him.⁴⁷ But even he acknowledges the role that the material and logistical limitations of the UN Secretariat and the “political state of mind in the Security Council regarding the future of the [UNAMIR] mission”, as well as the larger geopolitical context of simultaneous conflicts in the former Yugoslavia, Mozambique, Haiti and Somalia, played in shaping the responses he received from the Secretariat.⁴⁸ No doubt, as the genocide unfolded it is entirely possible that then Secretary-General Boutros Ghali and Annan might have opted to fall on their sword and resign in frustration at the non-response of the international community to requests by Boutros-Ghali for additional troops to strengthen UNAMIR. But that is a matter of speculation, one that places a somewhat exaggerated burden on the instincts of international civil servants for heroism.

The United Nations response is more indicative of the role of international institutions as epiphenomenal, relying on the power and political will of the states; a will to act was not forthcoming in the case of the Rwandan genocide. Thus the real constraint was the mandate of UNAMIR, inspired by the reluctance of states to intervene. Framed as it was within the traditional concept of the peacekeeping -- effective neutrality --in Chapter VI of the UN Charter, the mandate constrained aggressive military action to halt the slaughter.

Meanwhile, another group of states in the U.N. Security Council in 1994 favoured intervention to stop or contain the genocide, or at least were not in favour of a

reduction of the force strength of UNAMIR at the time it was desperately needed and thus sending a signal of lack of resolve to the *genocidaires*. Czech Republic, New Zealand and Nigeria were active members of this group. On 13 April 1994, Ibrahim Gambari, Nigeria's Ambassador to the United Nations presented a draft resolution on behalf of the Non Aligned Movement (NAM) calling for an expansion of UNAMIR's size and mandate. Nigeria was concerned that the Security Council was preoccupied far more with the security of United Nations personnel and foreigners than the fate of Rwanda's innocent civilians.⁴⁹ Again, on 28 April, Gambari called the Security Council's attention to its focus on a cease-fire but not on civilian massacres.⁵⁰ But Nigeria had voted for Security Council resolution 912 which reduced the UNAMIR strength -- largely due to institutional pressures to reach a consensus-- a vote that Gambari, in retrospect, regrets.⁵¹

It was New Zealand's Ambassador Colin Keating, supported by Czech Ambassador Karel Kovanda, who proposed that the Security Council issue a statement calling the killings in Rwanda a genocide. Keating it was, as well, who proposed a draft resolution on 6 May that would beef up UNAMIR and change its mandate to peace enforcement after the political embarrassment that followed resolution 912. But his proposal was watered down into a compromise, based on a report to the Council by Secretary-General Boutros Boutros Ghali that recommended a force of 5,500 troops. The Council adopted resolution 918 a few days later, but without Chapter VII enforcement powers. When resolution 929 authorizing Operation Turquoise was tabled and adopted by the Security Council on 22 June, New Zealand and Nigeria, together with Pakistan, Brazil and China abstained.

“Never Again” Yet Again

Returning to the nature of the international society, the question must be asked, in light of Rwanda: would the society of states take robust action to prevent or halt another genocide? If the answer is yes, then the society of states has made progress and solidarity would have become a stronger force in international affairs. If the answer is no, then the "international community" as I have posited, remains more of an aspiration than reality, and the world society very far off indeed. The outcomes of the 60th General Assembly of the United Nations in 2005, which will consider a report on threats and change in world politics by a high-level panel established by the Secretary-General, will provide guidance as to whether or not a “responsibility to protect” (humanitarian intervention to prevent or stop genocides) will be adopted by member states of the United Nations.

There exists a widespread global sentiment that another Rwanda-like genocide should not be allowed to happen⁵². But the gap between the recognition of moral values and state action remains wide. The massacres and deportations in Darfur in 2004 and the feeble international response have made the point. One simple reason, in addition to others I have advanced in Chapter 3, is that, intervention is not cost-free. It involves putting soldiers in harm's way and few states, especially democracies, are willing to take that risk with little to justify it to their publics other than moral concern. As the United States discovered when it intervened in Somalia, originally on humanitarian grounds, humanitarian intervention is often messy in practice. Nicholas Wheeler has argued that there is a certain moral bankruptcy to this position. But it happens to be the prevailing reality, though one that is without question under assault by the solidarist worldview of

international politics.⁵³ Even in the context of an international society I would argue that genocides such as Rwanda and Darfur merit intervention.

Kofi Annan has stated: "I long for the day when we can say that confronted with a new Rwanda or a new Srebrenica, the world would respond effectively, and in good time. But let us not delude ourselves. That day has not yet come. We must all do more to bring it closer."⁵⁴ And so the world for now appears left with only the remedy of judicial intervention. In Rwanda, the conspicuous inaction in the face of genocide coloured the subsequent international judicial intervention that took place in a number of significant ways.

First, the failure to intervene meant that the RPF ended the genocide in July 1994 and established a new government in Rwanda. The RPF government thus believes it is on moral high ground vis-à-vis the "international community". This has left the Security Council with limited practical leverage to ensure Rwanda's cooperation with the International Tribunal and other attempts to investigate human rights abuses by the current government's troops, during and after the genocide.

Second, the world's moral failure to stop the genocide has left Rwanda believing that only it can guarantee its own security in the face of continuing threats from the remnants of the *genocidaires* scattered in its neighbouring countries. This has practical implications for order in the Great Lakes region. Third, non-intervention has left a sense of guilt over policy towards Rwanda in some western countries, leading to strategic alliances with the RPF government in Kigali.

Fourth, non-intervention has affected the overall dynamic of Rwanda's relations with the United Nations, and thus with the International Criminal Tribunal for Rwanda.

Rwanda has tended to view the international judicial intervention that the tribunal represents as a fig leaf, even if one that also serves Rwanda's strategic interests. Rwanda assesses even the Tribunal's officials from the perspective of the politics of intervention and non-intervention in the genocide. Officials of the Tribunal from non-Francophone countries are generally viewed with less suspicion than those from France or francophone African countries close to France, who have to prove their bona fides. This factor is not a decisive one in the scheme of things, for Rwanda must deal with the Tribunal as an institution regardless of who represents it. Nevertheless, in combination with others, it affects the dynamics of Rwanda's cooperation with the International Tribunal in significant ways.

Send in the Lawyers

The society of states, whether through the United Nations or alternative arrangements, did not send troops to halt the slaughter. But within the Security Council the dynamic evolved towards international judicial intervention --the establishment of an international criminal tribunal to enforce individual accountability for the genocide and other violations of international humanitarian law. The road to the international tribunal began in April 1994, the first month of the mass slaughter. Although, as we have seen, the United States and Britain were reluctant to put the label "genocide" on the killings in Rwanda at that time, the statement issued by the President of the Security Council on 30 April 1994 condemned all breaches of international humanitarian law in Rwanda and noted that the persons who instigated or participated in such acts were individually responsible. The statement made reference to the killing of members of an ethnic group

with the intention of destroying the group, wholly or partially, as constituting a crime in international law and requested the Secretary-General to make proposal for an investigation of the atrocities committed during the conflict.

In its resolution 918 of 17 May 1994, the Security Council requested the Secretary-General to present a report on the investigation of violations of international humanitarian law. In its resolution 925 of 8 June 1994, following a report by the Secretary-General on the situation of Rwanda of 31 May 1994 in which the latter concluded that the killings constituted genocide, the Security Council noted that "acts of genocide" had occurred in Rwanda and that genocide was a crime punishable under international law.

Against this background, the Security Council adopted resolution 935 on 1 July 1994, instructing the Secretary-General to establish urgently an impartial Commission of Experts to investigate the atrocities and provide conclusions on the evidence of grave violations of international humanitarian law in Rwanda, including genocide.⁵⁵ The Commission was also to obtain information through the work of other bodies, notably that of the UN Special Rapporteur for Rwanda, Mr. René Dégni-Ségui, who had a similar mandate from the UN Commission on Human Rights in Geneva.⁵⁶

On 26 July 1994, the Secretary-General established the Commission of Experts. The Commission had three members: Mr. Atsu-Koffi Amega of Togo (chairman), Ms. Habi Dieng of Guinea and Mr. Salifou Fumba of Mali. The Commission, whose members served in their own capacities, began its work on 15 August 1994 in Geneva. Information on the details of the genocide and other atrocities poured in to the Commission of Experts from non-governmental organizations, private individuals,

churches and the Governments of Spain, United States, France and Ireland. The submissions from the U.S. included those from the Foreign Affairs Committee of the Senate and the Department of State. All the submissions pointed to a well planned and executed massacre of Tutsis and Hutus that were political opponents of the Habyarimana regime. They cited the particular responsibility of specific high-ranking officials of the regime and the journalists of the RTLM for instigating the slaughter. Most of the reports (especially those from the NGOs) recommended the establishment of an international tribunal to try the perpetrators of the killings in Rwanda.

Degni-Ségui submitted two reports to the Commission on Human Rights, made available as well to the Commission of Experts. His first report confirmed the responsibility of the Hutu *interhamwe* (“those who work together”, ostensibly members of the youth wing of the ruling MRND party) militias and the Interim Government of Rwanda that was established on 9 April 1994. Degni-Ségui recommended that an ad hoc international criminal tribunal be established, or else the jurisdiction of the International Criminal Tribunal for the former Yugoslavia established on 25 May 1993 to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991⁵⁷, be expanded to cover the Rwanda crimes.⁵⁸ His second report condemned RTLM's role in the genocide and that of the former interim government that had by then fled Rwanda to Zaire and was actively preventing the return of Rwandan refugees to the country.⁵⁹ A significant finding by both Degni-Ségui and the Secretary-General's Commission of Experts was that the RPF troops had also undertaken revenge killings and persecution of Hutus on a systematic scale. These included the murder of the Archbishop of Kigali, the Bishop of Kabgayi and 11

other priests - all Hutus - on 3 June 1994 at the historic Catholic Centre in Kabgayi that had been recently captured by the RPF in the course of the conflict. Given the influential role of the Catholic Church in Rwanda, this massacre caused quite a stir, even it paled in comparison to the hundreds of thousands of Tutsis that were slaughtered during the genocide. Degni Ségui also reported the massacres of 63 other individuals by the RPF. The RPF itself, which by July 1994 had established a new government in the country, acknowledged these killings by its soldiers, although it described them as "isolated incidents". The victims had been summarily executed and their floating bodies, bound hands and feet, were recovered from the Kagera river (the same river where Hutu extremists had dumped the bodies of Tutsi victims months earlier) in late August and early September 1994.⁶⁰

The work of the Commission of Experts became a statistical battleground between the genocidal Hutu-dominated former government, now exiled in Zaire, and the RPF Government, with both sides submitting lists of alleged perpetrations and victims. The RPF gave the Commission a list of Hutu individuals that instigated and organized the genocide. The leaders of the *ancien regime* provided the Commission with (a) the names of several persons it claimed were massacred by the RPF, (b) the specific sites of 15 mass graves that held the victims of RPF atrocities, and (c) written testimonies of some Hutus who had escaped from RPF-occupied zones during the war.⁶¹ The politics of justice had begun in earnest. These facts were important because they were to frame the mandate of the international judicial intervention that followed. And, especially regarding the admittedly lesser crimes by the RPF that could nevertheless not be swept under the carpet,

they were central to the battle for what the future historical record of that international intervention would say.

The Commission of Experts concluded that individuals from both sides of the war in Rwanda had committed serious breaches of international humanitarian law - genocide, crimes against humanity and war crimes (in this case violations of the obligations set out in article 3 common to the four Geneva conventions of 12 August 1949 and in Protocol II additional to the Geneva Conventions and relating to the protection of victims of non-international armed conflicts, of 8 June 1977). The Commission found that acts of genocide were perpetrated by Hutu elements against Tutsis in "a concerted, planned, systematic and methodical way".⁶² These acts, the Commission reported, constituted genocide within the meaning of the Genocide Convention of 1948 - chiefly the commission of the massacres with the intent to destroy, wholly or partially, the Tutsi group.

The Commission also concluded that Tutsi elements engaged in mass assassinations, summary executions, and crimes against humanity against Hutu individuals and these allegations deserved further investigation. However, it did not uncover any evidence that RPF forces acted with genocidal intent.

The Commission had to rule on whether the conflict that formed the immediate context of the crimes in Rwanda was an *armed* conflict and, if so, whether it was an *international* or *non-international* armed conflict. These determinations would in turn point to which rules of international humanitarian law would apply. Rwanda became a party to the Geneva Conventions on 5 May 1964 and acceded to the Convention's Additional Protocols on 19 November 1984. The Commission found that an armed

conflict undoubtedly existed in Rwanda between 6 April and 15 July 1994, and the conflict was of a non-international character because it was confined to Rwandan territory and did not involve the active military engagement of any other state.⁶³

In reaching this legal assessment, the Commission observed in its report that ascribing the status of a non-international armed conflict did not mean the Rwandan civil war did not have serious consequences on its neighbouring states, which had to absorb a massive influx of refugees from Rwanda, and on the wider international community. The threat that the Rwandan war presented to international peace and security in the context of the Charter of the United Nations was obvious. But the essential character of the conflict was non-international. Thus the provisions of common article 3 to the four Geneva Conventions and Additional Protocol II thereto were applicable.⁶⁴

Common article 3 of the Geneva Conventions bind parties to a non-international conflict to the humane treatment of persons not actively involved in the fighting, including soldiers who have laid down their arms and those removed from combat by sickness, wounds, detention or other causes. It prohibits "at any time and in any in place whatsoever":

- a) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- b) Taking of hostages
- c) Outrages upon personal dignity, in particular humiliating and degrading treatment; and
- d) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples;

Next the Commission examined the question of individual responsibility in international law, and that of the merits and disadvantages of international prosecution by an international tribunal versus prosecution in domestic courts. In the circumstances this was not surprising, if for no other reason than Rwanda's total lack of judicial capacity in 1994 to undertake such a task. But there were other reasons why the Commission supported an international approach to prosecutions for the Rwanda crimes. Valid as those reasons were, the arguments on which the Commission based its recommendations pointed to future conceptual and political tensions between Rwanda and the international society over the pursuit of justice for the crimes of 1994.

The Commission of Experts recognized that prosecutions in a municipal tribunal would be more sensitive to the expectations of a local community by reason of its proximity to where the crimes occurred. It would be less difficult to gather evidence. And the judgements of such courts would have an impact multiplied several times by the local ownership of the process by the affected community. Conversely, an international tribunal may be perceived as being too remote from the communities they were meant to serve.⁶⁵ The Commission reasoned that an international jurisdiction and the local relevance of such a jurisdiction were not mutually exclusive, and the two could be reconciled if such a tribunal were to be situated in Rwanda.

However, recognizing the high possibility that, in the emotionally charged atmosphere prevailing in post-genocide Rwanda, municipal trials for violations of international humanitarian law could fall victim to perceptions of bias, the Commission weighed in favour of an international criminal tribunal sitting outside Rwanda. In its view, the need for independence, objectivity and impartiality of such a court trumped

other factors. Another significant argument was that the tribunal would have better familiarity with the "technique and substance of international law" than a municipal court.⁶⁶

For these reasons, the Commission of Experts recommended the establishment of an international criminal tribunal to adjudicate the Rwandan atrocities. This came as no surprise. The somewhat baffling recommendation by the Commission, bucking its earlier reasoning, was that the jurisdiction of the International Criminal Tribunal for the former Yugoslavia should be expanded to cover the crimes perpetrated in Rwanda, rather than create a separate ad hoc international tribunal. In other words the perpetrators of genocide and related crimes in a central African country should be tried not in an international tribunal situated on Rwandan territory or at least in the African continent, but in an ad hoc tribunal originally dedicated to war crimes in the Balkans and situated in a European capital.

It is difficult to rationalise this recommendation. Was it a desire to hasten the expansion of such a tribunal into a permanent international criminal court? To be sure, the ICC later came into being, and has its seat at The Hague, but it is institutionally separate from the ad hoc Yugoslavia tribunal. And the logic of its location is a somewhat different matter, for the ICC is permanent and not limited to any particular geographical region in its jurisdiction, and so The Hague - just as any other major city - might as well have been the successful candidate to host the ICC. An ad hoc prosecution of Rwandan war criminals is, however, another matter. The interim report of the Commission of Experts provided the formal basis for the establishment of an international tribunal by the Security Council. It was followed by a formal request from Rwanda to the Security

Council to establish a tribunal⁶⁷. The Rwandan request was a marked difference from the situation in the former Yugoslavia where the Security Council established the ICTY without an invitation from any of the warring parties. Thus, at least at the formal level, international judicial intervention in Rwanda proceeded with the consent of the affected state, whereas in the former Yugoslavia it did not.

The United States, having played a major role in blocking an international response to halt the genocide, now took the lead in creating an international tribunal. It largely drafted and negotiated with other members of the Security Council in late 1994 a draft resolution setting up such a mechanism. These negotiations, especially with Rwanda, whose rotating seat in the Security Council had by then been taken by the victorious RPF government, were difficult. Serious political tensions had developed between Rwanda and the Western states in the Security Council over several issues of policy and strategy in the emerging international framework of judicial accountability. Rwanda's requests for more time for these difficulties to be ironed out were essentially rejected by the Western powers in the Council, which had already made significant compromises in a final draft resolution based on Rwandan objections.

On 8 November 1994, at the 3453rd meeting of the Security Council under the U.S. rotating presidency, Argentina, France, New Zealand, Russian Federation, Spain, Britain and the United States sponsored a draft resolution to create a tribunal. When the draft resolution was put to a vote, 13 of the Council's 15 member states voted in favour, one (China) abstained and one voted against. The negative vote was cast by Rwanda. Thus did the Security Council, acting under the peace enforcement powers conferred on it by

Chapter VII of the United Nations, adopt a resolution establishing an international tribunal⁶⁸.

As noted a moment ago, several political and strategic issues loomed large in the voting patterns for the tribunal's creation and the diplomatic horse-trading that led up to the vote. The most important of these are what I call "framework" issues. They include the period for which crimes committed therein would fall within the International Tribunal's mandate, and the specific crimes over which it could exercise jurisdiction. Others include the "primacy" of that jurisdiction, the death penalty debate, and the location of the tribunal. Many of these issues were related to the question of the independence of the International Tribunal.

The Framework

In its statement after the vote on Security Council Resolution 955, Rwanda cited its disagreement with the timeframe of crimes that the International Tribunal would adjudicate.⁶⁹ Rwanda had proposed that the remit of the ICTR extend backwards to the massacres of Tutsis from 1 October 1990, when the civil war began, up to 17 July 1994, when the RPF took Kigali, established a new government, and brought the war to an end. That this proposed timeframe was calculated to maximize the de-legitimization of the previous Rwandan government through the comprehensive judicial and historical record the tribunal would establish is not in question. Conversely, in the pre-vote negotiations, the new Rwandan government strenuously objected to the extension of the Tribunal's mandate to crimes committed after 17 July 1994, for that framework would inevitably focus on revenge killings committed by its own forces. This is a classic demonstration of

the concept of the *Differend* at play. The Security Council's compromise decision was to extend the International Tribunal's temporal jurisdiction backwards to 1 January 1994 in order to capture within the judicial framework part of the preparations to wipe out Tutsis and the Hutu political opponents of the *ancien regime*.

The statement by Jean-Bernard Mérimée, the French Ambassador to the United Nations, captures this tension. Mérimée, noting the significance of taking into account offences committed as from 1 January, also highlighted the importance of the Tribunal's remit extending to post-July offenses in Rwanda and neighbouring states, especially in the refugee camps in Zaire.⁷⁰ He pointed to the possibility of further violations of international humanitarian law beyond December 1994, and asserted the Security Council's competence to further extend the Tribunal's temporal remit in that event. But this was not to be, for massacres of Hutus in a refugee camp in Kibeho near Zaire in 1995 by the now Tutsi dominated Rwanda army in response to the use of that camp by the extremists that carried out the genocide, were to go unpunished for lack of any effective international jurisdiction.

Simply put, the RPF, having won the war in Rwanda, and with Tutsis the victims of a genocide, did not intend that an international tribunal should judge its own crimes and thus introduce any attempt at a balanced judicial/historical record. As will become clear when we examine Rwanda's subsequent relations with the International Tribunal, this was really the heart of the matter. This tension was also foreshadowed in the statement by Rwanda's Ambassador Bakuramutsa after the vote on the ICTR, when he expressed concern that the statute of the International Tribunal would lead it to "dispense its energy by prosecuting crimes that come under the jurisdiction of an internal tribunal"

(a reference to war crimes, to which the RPF had admitted in the report of the Commission of Experts), "instead of devoting its meagre human resources, and probably equally meagre financial ones, to trying the crime of crimes, genocide...".⁷¹

Primacy

The statute of the ICTR provided that both the International Tribunal and national courts would have concurrent jurisdiction to prosecute violations of international humanitarian law in Rwanda and neighbouring states during the calendar year of 1994. But, in what was to establish the normative supremacy of the international court, the statute provided as well as that: "The International Tribunal for Rwanda shall have primacy over the national courts of all States. At any stage of the procedure, the International Tribunal for Rwanda may formally request national courts to defer to its competence...."⁷² What this means is that although Rwandan and other national courts (the latter in the exercise of universal jurisdiction) could try the culprits of the crimes of 1994, the International Tribunal had the first call. As such, even if proceedings against an accused person had begun in such national courts, the International Tribunal could request that such proceedings be discontinued and the persons on trial handed over to it.

This is the essential quality of international judicial intervention, under the auspices of the Security Council, in Rwanda and the former Yugoslavia. In the case of Rwanda, the International Tribunal's primacy has not been asserted through a take-over of cases in the Rwandan courts, for these did not involve the leadership of the genocide that the Tribunal considered its prime targets. Thus, such a scenario would have been truly absurd except in cases where a national judicial proceeding could be manifestly

shown to be a kangaroo court⁷³. Rather, the Tribunal's focus has been on ensuring that

it had the upper hand in obtaining custody of the "big fish" accused of responsibility for the genocide, virtually all of who were at large in third countries. Thus in the early years of the tribunal, efforts by the Rwandan government to apprehend major accused persons hiding in foreign countries were unsuccessful, as several countries preferred to surrender fugitives from justice to the International Tribunal. As for other national courts, initial judicial proceedings against some Rwandan accused persons in Belgium and Switzerland, for example, were terminated and the accused handed over the International Tribunal at the latter's request.⁷⁴

Legally speaking, the primacy provision had the *formal* effect of rendering the International Tribunal independent of Rwanda and its authorities. This presaged major tensions between the two entities, for it also meant that not only did Rwanda have minimal input into the judicial work of the International Tribunal in respect of the prosecution of the *genocidaires*, but also, as we shall see later, from a legal standpoint it was on weak ground in terms of influencing how and by whom RPF forces might be prosecuted for war crimes and crimes against humanity.

New Zealand, which together with the United States was an original sponsor of resolution 955 and had led the Security Council's pre-vote negotiations with Rwanda over six weeks, was quick to assert the need to prevent the International Tribunal from coming under Rwanda's thumb. "New Zealand could not support any proposals that would change the international character of the tribunal or introduce any suggestion that the Tribunal could be subordinated to Rwandan political intervention", Ambassador Keating stated.⁷⁵ Pointing to the probable future tensions between Rwanda and the International

Tribunal (but almost certainly not intending that his words would become a self-fulfilling prophecy), Keating urged Rwanda, although having voted against the Tribunal's creation, to cooperate with it in light of the efforts made by the Security Council to accommodate Rwandan concerns about the court's framework.⁷⁶

Spain, in a similar vein, emphasized the importance of the Tribunal's independence: "Just as in the case of the tribunal for the former Yugoslavia, we believe that the independence of the International Tribunal for Rwanda is its most important attribute: independence *vis-à-vis* Governments, independence *vis-à-vis* national tribunals and even independence *vis-à-vis* the United Nations itself."⁷⁷ Britain's Ambassador, Sir David Hannay made clear that the "international character" of the tribunal had to be maintained, and some changes proposed by Rwanda could not be made without sacrificing that character⁷⁸.

If, as we have seen, other states in the Security Council were prepared to--and did -- ultimately override Rwanda's objections to the framework of the International Tribunal, China was not. Despite its reservations on the very concept of international judicial intervention (which will be discussed shortly), China had been prepared, based on Rwanda's initial request for an international tribunal, to support the draft resolution on the establishment of such a tribunal. From China's standpoint, however, the eventual absence of Rwandan support for the resolution had changed the picture in a fundamental manner. Rwanda's full cooperation was essential if the International Tribunal was to be effective, China argued. The Security Council's efforts to address Rwandan objections did not go far enough, and Rwanda's request for further consultations should have been acceded to. Li Zhaoxing, China's Ambassador, thus concluded that, "it is therefore an incautious act

to vote in a hurry on a draft resolution that the Rwanda Government still finds difficult to accept, *and it is also hard to tell what impact this may have on relevant efforts in future.* Therefore, the Chinese delegation cannot but express its regret and has abstained from the vote"⁷⁹. (Emphasis added).

The actual effect of international judicial intervention's primacy, then, is to suspend the sovereignty of state actors in the judicial sphere in certain respects and to vest it in the Security Council, in the case of international criminal tribunals such as the ICTR and the ICTY. Nigeria's Ambassador Ibrahim Gambari alluded to this normative anomaly in his post-vote statement in the Security Council: "It is our understanding that the International Tribunal for Rwanda is designed not to replace, but to complement, the sovereignty of Rwanda...".⁸⁰ In fact, legally speaking, what Gambari warned against had already happened. (Politically, however, the reality turned out somewhat differently, as we will see later).

Rwanda was not the only country affected by this normative scenario. Resolution 955 conferred jurisdiction on the ICTR for genocide crimes against humanity and war crimes committed, first within Rwanda in 1994 (no matter the nationality of the perpetrator), but also in respect of such crimes committed by Rwandan citizens in "neighbouring states" during the same period. There was no indication of just who those neighbours were, but the provision is understood to refer to the countries with which Rwanda shares a border - Democratic Republic of Congo (then Zaire), Uganda, Burundi and Tanzania.

In just one illustration of the tension between sovereignty and international judicial intervention, Odyek Agona, Charge d'Affaires ad interim of Uganda's Permanent

Mission to the United Nations, addressed a letter to the President of the Security Council one week before the vote on the draft resolution.⁸¹ Uganda, which was not a member of the Security Council at the time, pronounced itself opposed to the language of the draft statute of the International Tribunal that conferred the latter with primacy over national jurisdictions. The East African state asserted that it "considers that its judicial system has primacy and supreme jurisdiction and competence over any crimes committed on Uganda territory by its citizens or non-citizens, at any particular time."⁸² Uganda stated that it would agree to language that circumscribed the jurisdiction and competence of the proposed tribunal to "Rwandan territory and the territory of those member states which expressly declare acceptance of such jurisdiction". It pointed to the ongoing debates in the United Nations General Assembly on a standing international criminal court as a forum to which it would refer its full view on the surrender of its national jurisdiction over violations of international humanitarian law.

Closely interwoven in the issue of primacy and the independence of the International Tribunal was that of its eventual location. While it was not until February 1995 that the Security Council was to decide on the seat of the tribunal, it was already apparent in early November 1994 (when the tribunal was formally created) that it would not be located in Rwanda. Rwanda read this as a slap on the face. How could an international tribunal "for Rwanda" - especially given the country's unique need to *see* and *feel* justice for the genocide - be situated outside Rwanda?

The answer is to be found, again, in the emphasis on the international tribunal's primacy and its independence from Rwanda. The International Criminal Tribunal for the former Yugoslavia had already been situated in the Hague, far away from the Balkans

and setting the precedent. Indeed as we have seen, the ICTR avoided being consigned to The Hague by a whisker. In that context it is not surprising that it was not located in Rwanda itself. One reason for this is that, as Jose Alvarez has noted in a study of the logic and limitations of primacy, the prevailing wisdom at the time was to organize trials for mass atrocities away from the regions where the crimes occurred.⁸³ That approach reinforced the state-centric prism from which international lawyers viewed such atrocities (although the purpose of criminal trials were to assign individual responsibility), thus necessitating top-down intervention by the "international community's most reputable enforcer, the United Nations".⁸⁴ Trials in the *locus criminis* were likely to be show trials, or selective and incompetent in applying the international norms that are the legacy of Nuremberg.⁸⁵ This is the will-not-or-cannot argument. In the former Yugoslavia, it would have been inconceivable in 1993 that any national court would put senior political or military figures on trial for the crimes that accompanied the break up of that entity. In Rwanda, the infrastructure for such an effort simply did not exist. And the Rwandan government's willingness to put members of its own forces on trial for committing mass atrocities was far from palpable. Moreover, the atmosphere in Rwanda in the aftermath of the genocide was one in which many survivor-victims could accurately be described as the "walking dead". In these circumstances it was not surprising that several, especially Western, members of the Security Council concluded that an environment in which impartial justice could be handed down was absent.

For Rwanda, China, Nigeria and Pakistan, however, Kigali was the best place to establish the International Tribunal provided necessary arrangements could be made for its efficient operation.⁸⁶ While these countries appeared focused on the tribunal's

potential positive impact on Rwandan society, the group of states that opposed locating the Tribunal in Rwanda were more concerned about its independence from Rwanda. Thus the latter group focused on the international court as a post-Nuremberg instrument to advance international law for a global audience. As of the vote on resolution 955 in November 1994, Pakistan argued that the Security Council should consider alternative locations only in the event it was clear that citing the Tribunal in Kigali would undermine its efficiency and impartiality -- an indication of which way the wind was blowing. And Rwanda, citing this as one of several reasons for voting against resolution 955, expressed its "surprise to see that the authors of the draft still hesitate to indicate where the future seat of the Tribunal will be".⁸⁷

This was an admittedly difficult political problem to solve, for while the independence of the tribunal was seen as paramount at the time, subsequent lessons from international judicial intervention have pointed up the limited relevance of the ad hoc tribunals to the societies whose conflicts they were established to address. The compromise that was already imminent by the time the vote was taken on resolution 955 by the Security Council was that of the imperative of establishing a major arm of the Tribunal in Kigali. The statement of the United States supporting the establishment of such an office and underscoring that a large part of the International Tribunal's work should be done in Rwanda was a clear indication of this compromise.⁸⁸ That office was to be that of the prosecutor, which was to conduct investigations, mostly in Rwanda. The Security Council later established the seat of the Tribunal in Arusha, Tanzania⁸⁹.

Still, the question must be asked whether citing the judicial seat of the ICTR in Rwanda would have undermined the independence of the Tribunal. In retrospect, as a

former senior official of the tribunal acknowledged, the answer is "yes".⁹⁰ Indeed, subsequent events also indicate that "independence" and impartiality" are relative terms in the context not of trials and judgements in individual cases before the tribunal (in the case of the ICTR these were unquestionably fair), but rather in that of carrying out the mandate of the Tribunal to investigate and adjudicate atrocities by *both* the genocidal, extremist Hutu Government, and the RPF forces that formed the post-genocide government.

At any rate, the safe distance between Arusha and Kigali created space in which the judges of the International Tribunal could consider evidence and adjudicate in a dispassionate manner. The obvious disadvantage of this situation was that the Tribunal's judges were somewhat divorced from the reality of the enormity of the genocide. Thus, in the early years of the tribunal, they bent over backwards not to be seen as a victor's court - a situation the defendants manipulated with great success to slow down or disrupt the judicial proceedings through frivolous motions, leading to sarcastic assessments of the Tribunal by Rwandans.⁹¹ Not surprisingly, trials initially moved at a plodding pace, a situation that has been progressively reversed to one of brisk judicial proceedings. Indeed for several years after the tribunal was established, its judges resisted pressure to visit Rwanda and see the mass graves of genocide victims, believing that this would taint them emotionally and politically.⁹²

That the Tribunal may have come under direct Rwandan political influence had its seat been in Kigali is apparent from a number of factors. The first is the effective socio-political organization established by the victims of the genocide through victims support organizations such as *Ibuka* ("remember"), and their close links with the Rwandan

authorities - many of the latter genocide survivors as well. Second, while the Rwandan authorities fully understood the very high standards of impartiality the ICTR had to maintain, the country's authorities include self confident, strategic thinkers capable of playing political "hardball". Their strong public reactions to occasional judgements of the ICTR that did not accord with their perspective, coupled with the "spontaneous" protest rallies and demonstrations by citizens and victims groups, leaves open to conjecture what might have been the psychological impact of such activities on international judges sitting in Kigali. It is this anecdotal peculiarity of the Rwandan national context, one in which there is a tendency to use the fact of the genocide to advance strategic political interests ⁹³, that makes the situation there different from, say, Sierra Leone, where a mixed national/international court adjudicating mass atrocities in that country is situated. Third, were the ICTR situated in Kigali, the prospects for investigations into crimes allegedly committed by the RPF would have been even more difficult - not that the Tribunal's location in another country has made it easy, for reasons we will see later.

The death penalty was perhaps the most emotional issue for Rwanda that led to vote against resolution 955. The framework of the International Tribunal, as contained in the resolution, ruled out capital punishment, which is part of Rwanda's penal code. The Tribunal's statute provided for a maximum sentence of life imprisonment. Given that the ICTR was to try the architects of Rwanda's genocide, this situation created what Madeline Morris has called "anomalies of inversion" in which the "big fish" got better treatment at the International Tribunal in accordance with international human rights

standards, while foot soldiers tried in Rwandan national courts could presumably get the death penalty if convicted.⁹⁴

But the death penalty issue in the process of creating the Tribunal was really a proxy battle in the global politics of international human rights. The European states in the Security Council would not support the inclusion of the death penalty in the remit of a UN tribunal. That would be viewed as antithetical to, first, the "ethical" foreign policies of several liberal European states, and second, UN human rights standards that have made a definite shift away from capital punishment in the past four decades. Thus, the choice was between creating an international tribunal with death-penalty sentencing powers (a near impossibility in the contemporary international society) and having no tribunal at all. In this context, it is not surprising that Colin Keating, who possessed much moral authority as a strong advocate of humanitarian intervention to halt the genocide, made clear his country's firm position on this thorny topic. Following the principle of "an eye for an eye", he stressed, was not "the path to establishing a civilized society, no matter how horrendous the crimes the individuals concerned may have committed."⁹⁵ Rwanda, which was later to execute 22 persons convicted of genocide in 1998, brushing aside appeals for clemency from Pope John Paul II and human rights groups, saw things rather differently.⁹⁶ And it was no surprise that the United States, much criticized by European states for its tradition of capital punishment, was consistent in its sympathy for Rwanda's position on this particular point.⁹⁷

Bound up as well in the question of the independence of the ICTR was that of its independence from the ICTY at The Hague. The implications of the Security Council's decision to extend the ICTY Chief Prosecutor's responsibilities to cover the ICTR, as

well as the rationales that have been offered for it, will be discussed in the next chapter. Suffice to say at this juncture that failure to appoint a separate Chief Prosecutor for the ICTR, despite the tribunal's institutional status as one separate and independent from the ICTY, was an additional ground on which Rwanda cast the sole vote against resolution 955. Argentina, in its statement after the vote, noted that it would have preferred a separate prosecutor for the ICTR. In 2003, almost a decade later, this issue was to come to a head.

Why the International Tribunal was Created

There are a number of reasons why the international society intervened judicially in Rwanda after the fact. First, as several other practitioners and commentators have asserted, the ICTR, as the ICTY, was established primarily as an act of political contrition for the failure of political will to intervene militarily to halt mass atrocities, and not because there was a *proactive*, deliberate policy to promote international justice.⁹⁸ Faced with its moral failure, the society of states did the next best thing - establishing a mechanism of judicial intervention to ensure that those responsible for the massacres were brought to justice. It was the path of least resistance, for it did not offer up the prospect of body bags that accompanied the far more risky option of sending in troops to stop the slaughter under a Chapter VII mandate. And the society of states could look itself in the face and say: "we did do something". It was largely for this reason that the United States, in light of its role in the debates on military intervention, championed the creation of the ICTR.

Other rationales were grafted on to this fundamental guilt factor. It was conceived that such a tribunal would help achieve reconciliation between Tutsis and Hutus and deter future atrocities. The latter premise should be seen in the context of the apprehension diplomats felt that the conflict, although settled in Rwanda for the time being by the RPF's military victory, could be carried into Zaire and thus a clear and present danger to international peace and security remained.⁹⁹ Thus, the ICTR became the first international criminal tribunal to be handed a remit encompassing "reconciliation" as a goal of juridical intervention. The ICTY statute had no such provision, and neither did the Nuremberg Charter.

Second, reacting as it was to an event that had already happened, the ICTR, like the ICTY, was then seen as a useful tool to advance the development of international criminal law - and within it a retributive model of accountability - as a post Nuremberg legacy.¹⁰⁰ It was clearly understood (certainly by European delegations to the UN, as well as by human right advocates) that the ICTR and the ICTY would serve as a trial run for the creation of a permanent international criminal court.

Thirdly, the ICTR was created because the ICTY had been established 19 months earlier in May 1993 and was thus a strong precedent. And there are commentators like Samantha Power who believe that the existence of the ICTY at The Hague provided a precedent that was more than merely institutional: "With a UN court in place to hear charges related to the killing of some 200,000 Bosnians, it would have been politically prickly and manifestly racist to allow impunity for the planners of the Rwandan slaughter, the most clear-cut case of genocide since the Holocaust."¹⁰¹

Who killed the President?

Like the assassination of U.S. President John F. Kennedy in 1963, it may never be known who fired the missiles that brought down president Habyaramina's plane and killed him and his Burundian counterpart on 6 April 1994. Does it matter? From the legal standpoint of international judicial intervention, it does not. The ICTR was established to hand down justice for the genocide and other violations of international humanitarian law in Rwanda. These, by definition, are *mass* atrocities. The killings began in full force *after* the plane crash, although the conspiracy that led to the massacres was in place much earlier. Thus successive chief prosecutors of the Tribunal have not considered determining who killed the Habyaramina a line of inquiry worth pursuing for the Tribunal's purposes.¹⁰² The genocide is an objective fact and the identity of the Rwandan President's killers is not of central relevance to the Tribunal's task of adjudicating individual criminal responsibility for the massacres, although, of course, it is important for Rwandans.

Nevertheless, the question of Habyarimana's assassination is an explosive political question that hangs in the background, making occasional ghost-like appearances as if to remind the Tribunal and the world that the genocide and the international judicial intervention it spawned are surrounded by questions that are profoundly political¹⁰³. Supporters of the regime, such as Kenya under former President Daniel Arap Moi, were quick to point out in the Tribunal's early days, ultimately to no avail, that this should have been the starting point of inquiry for the ICTR¹⁰⁴.

The reason the assassination is so politically significant is that, in the hands of the extremist forces in the dock of Arusha, if they are able to pin responsibility on the RPF,

they would be better able to deflect their individual responsibility for the massacres at a *political*, even if not legal level. It would thus serve as a political justification for the genocide: the Tutsis killed the President of the Republic and the Rwandan masses reacted uncontrollably. Ergo, those of us in the dock are merely scapegoats. Responsibility for the atrocities could thus be divided between Tutsis and Hutus, and the establishment of an international tribunal that has so far prosecuted only Hutus would be seen as victors' justice. The legitimacy of the ICTR would therefore be greatly weakened.

Hutu extremists began to allege RPF responsibility for the plane crash as soon as it happened. The French judge Jean Louis Brugiere prepared a report based on investigations he conducted on behalf of the families of four French crew members who also died in the plane crash, which blamed the current Rwandan President Paul Kagame and his RPF forces for the assassination of Habyarimana¹⁰⁵. The report was leaked to the French newspaper *Le Monde* in the lead up to the tenth anniversary of the genocide in early April 2004. Kagame strenuously denied the report's allegations. "The RPF and myself have nothing to do with the death of Habyarimana", Kagame declared at a press conference in Brussels. "I cannot comment on what Judge Brugiere may have found or may have fabricated. The story is invented."¹⁰⁶

There are several hypotheses about the identity of the persons who shot down Habyarimana's Falcon 50 jet, and Gerard Prunier ably analyzes them all in his magisterial history of the genocide.¹⁰⁷ But it is clear that he believes -- with abundant support from first hand information and commonsense deduction - - that the greater likelihood is that Habyarimana was assassinated as part of a plot by the extremist *akazu* for whom he had become a political liability by virtue of his concessions to the RPF, in order to advance to

the "final solution" phase of the genocide plan. There are few stronger indicators of this probability, and the connection between the two events, than the speed with which the attack on Habyarimana's plane was followed by the establishment of roadblocks in Kigali manned by death squads who began to search houses for Tutsi victims. The time lag between the two events was no more than 45 minutes.¹⁰⁸

Some authoritative sources are sceptical of the Brugiere report. Bernard Muna, the former deputy chief prosecutor of the ICTR holds the position that the Brugiere's report is based largely on the theories of Paul Reyntjens, a Belgian academic who was a close adviser to Habyarimana.¹⁰⁹ Moreover, the Brugiere report relied significantly on interviews (with the tribunal's permission) in Arusha with several accused persons on trial at the tribunal, including Hassan Ngeze, as well as a defector from the RPF who had fallen out with the regime and went into exile in the United States.¹¹⁰

The Brugiere report has reopened controversy -- and old wounds -- in relations between Rwanda and France. As noted earlier, the shooting of Habyarimana's plane appears to have merely *signalled* the start of the massacres, but put nothing new in place in terms of preparations for the genocide. From all the evidence established by the ICTR, the genocide had been meticulously prepared. Moreover, the area where the plane was shot down was under the control of the Rwandan Government Forces¹¹¹.

There are yet other angles to the question of who shot the plane, based largely on who had interest in Habyarimana's death. Contrary to the conventional wisdom that the RPF had no strategic interest in committing the act -- as Prunier argues -- a school of thought, speculative though it is, is that Habyarimana's death would certainly have benefited the RPF by demoralising the Rwanda Government forces, and the visceral

slaughter of Tutsis that (predictably) followed would give the RPF an excuse to renew hostilities and push for the decisive military victory and political power that was its ultimate goal. After all, there was a state of war, and Habyarimana could be considered a legitimate target¹¹².

All these theories are, in the end, speculative. Only concrete or credible eyewitness evidence can confirm who did the deed of Habyarimana's death. In the absence of either, all that Rwandans and the world have to go on is circumstantial evidence and logical deductions. And in Rwandan politics, nothing can be taken fully at face value. The real questions remain: was the genocide prepared in advance? It is clear that it was. What then could have launched it? Answer: a bold act, such as the assassination of Habyarimana that could be used as a convincing pretext. In the words of *The Economist*: "The crime was planned in advance; the machetes had already been ordered. It would have happened anyway"¹¹³.

¹ UN Doc. S/Res/955 (1994).

² Emmanuel Gasana Jean-Bosco, Byanafashe Deo, and Alice Kareikezi, "Rwanda" in Adebayo Adedeji, ed. *Comprehending and Mastering African Conflicts* (London and New York: Zed Books, 1999) 141-142.

³ Ibid, 143.

⁴ Gasana et al, 145.

⁵ See Adam Hochschild, *King Leopold's Ghost: A Story of Greed, Terror and Heroism in Central Africa* (Boston: Houghton Mifflin, 1998), 225-234. It should be noted that it is uncertain how reliable the figure of 10 million victims is.

⁶ Amy Chua, *World on Fire: How Exporting Free market Democracy Breeds Ethnic Hatred and Global Instability* (New York: Anchor Books, 2003), 8-9.

⁷ Philip Gourevitch, *We Wish to Inform You That Tomorrow We Will Be Killed With Our Families* (New York: Picador, 1998), 47-49, 55-56.

⁸ Bill Berkeley, *The Graves Are Not Yet Full: Race, Tribe and Power in the Heart of Africa* (New York: Basic Books, 2001), 258.

⁹ Alan Kuperman, *The Limits of Humanitarian Intervention: Genocide in Rwanda* (Washington, D.C: Brookings Institution Press, 2001), 6.

¹⁰ Gasana et al, 151.

¹¹ Kuperman, 6.

¹² Chua, 167.

¹³ Ibid.

¹⁴ Kuperman, 7.

¹⁵ Gasana et al, 159.

¹⁶ Kuperman, 9.

¹⁷ Rwanda is one of the world's most densely populated countries. The struggle for access to land, with its origins in the *ibikingi*, may have been a contributing factor to the genocide. See Jared Diamond, *Collapse: How Societies Choose to Fail or Succeed* (Viking Adult, 2004) where this thesis of political geography is argued.

¹⁸ Romeo Dallaire, *Shake Hands with the Devil: The Failure of Humanity in Rwanda* (Canada: Random House, 2003), 62.

¹⁹ Kuperman, 9.

²⁰ *Ibid.*, 10.

²¹ Dallaire, 55.

²² Gasana et al, 162.

²³ See Report of the Independent Inquiry into the Actions of the United Nations during the 1994 Genocide in Rwanda, UN Doc. S/1999/1257,15.

²⁴ Dallaire, 254-257.

²⁵ *Prosecutor v Jean Kambanda*, Case No. ICTR-97-23-1: Plea Agreement between Jean Kambanda and the Office of the Prosecutor, 29 April 1998.

²⁶ See Alan Kuperman, *op cit.* See also Nicholas Wheeler, *Saving Strangers: Humanitarian Intervention in International Society* (Oxford: Oxford University Press) and UN Doc S/1999/1257.

²⁷ Samantha Power, *A Problem From Hell: American and the Age of Genocide* (London: Flamingo, 2003), xv (preface).

²⁸ "The Clinton Administration's Policy on Reforming Multilateral Peace Operations", Presidential Decision Directive, 25, 3 May 1994.

²⁹ See, for example, comments by Michael Sheehan in an interview with the U.S. Public Broadcasting System (PBS) programme Frontline: "Ghosts of Rwanda", www.pbs.org. 1 April 2004.

³⁰ Linda Melvern, *A People Betrayed: The Role of the West in Rwanda's Genocide* (London: Zed Books, 2000), 180. See also Dallaire, 374.

³¹ "Statement by the President of the Security Council, UN Doc. S/PRST/1994/21, 30 April 1994.

³² S/1999/1257, 68.

³³ See comments by Ibrahim Gambari in "Ghosts of Rwanda. www.pbs.org. 1 April 2004.

³⁴ Dallaire, 375. See also Kuperman, 92.

³⁵ *Ibid.*

³⁶ Kuperman. 35.

³⁷ *Prosecutor v Ferdinand Nahimana, Jean-Bosco Barayagiza and Hassan Ngeze*, Case No. ICTR-99-52-

T, Judgement and Sentence, December 2003.

³⁸ Kuperman, 92.

³⁹ See Sharon LaFranière, "Court Convicts 3 in 1994 Genocide Across Rwanda," *New York Times*, 4 December 2003.

⁴⁰ Dallaire.

⁴¹ S/Res/1994/929, 22 June 1994.

⁴² Dallaire, 425-426.

⁴³ Ibrahim Gambari: "Ghosts of Rwanda".

⁴⁴ See "UN Chief's Rwanda Genocide Regret", BBC News, 26 March 2004, www.bbc.co.uk.

⁴⁵ Kuperman, 87-91.

⁴⁶ I was a Political Affairs Officer in the Africa Division of that Department at the time.

⁴⁷ Dallaire, 207-208.

⁴⁸ Ibid.

⁴⁹ S/1999/1257, 68.

⁵⁰ Ibid.

⁵¹ See Ibrahim Gambari, "Ghosts of Rwanda".

⁵² See "Rwanda, Remembered", *The Economist*, 27 March 2004, 11.

⁵³ Wheeler, 285-310.

⁵⁴ "Annan Calls for Urgent Action, Even Military Intervention, to Prevent Genocide", United Nations News Service, 26 January 2004. www.un.org.

⁵⁵ Letter dated 1 October 1994 from the Secretary-General Addressed to the President of the Security Council, UN Doc. S/1994/1125, 4 October 1994, Annex (Preliminary Report of the Independent Commission of Experts Established in Accordance with Security Council Resolution 935 (1994), 9.

⁵⁶ Ibid.

⁵⁷ UN Doc. S/Res/808 (1993).

⁵⁸ UN Doc E/CN.4/1995/7, 28 June 1994.

⁵⁹ E/CN.4/1995/ 12, 12 August 1994.

⁶⁰ S/1994/1125, 13.

⁶¹ Ibid, 15.

⁶² Ibid, 39.

⁶³ Ibid, 26.

⁶⁴ Ibid, 27.

⁶⁵ Ibid, 37.

⁶⁶ Ibid.

⁶⁷ UN Doc S/1994/115.

⁶⁸ S/Res/955 (1994), 8 November 1994.

⁶⁹ UN Doc S/PV 3453 (1994), containing the text of speeches delivered in the Security Council by its members following the adoption of resolution 955.

⁷⁰ Ibid, 3.

⁷¹ Ibid, 15.

⁷² Statute of the ICTR, S/Res 1994, Annex, Article 8.

⁷³ Ibid, Article 9.

⁷⁴ *Prosecutor v Joseph Kanyabashi; Prosecutor v Alfred Musema.*

⁷⁵ S/PV. 3453,5.

⁷⁶ Ibid.

⁷⁷ Statement by Mr Yáñez-Barnevo, Permanent Representative of Spain, *ibid*, 12.

⁷⁸ S/PV. 3453.

⁷⁹ Ibid, 11.

⁸⁰ Ibid, 13.

⁸¹ Letter dated 31 October 1994 from the Charge d'Affaires a.i. of the Permanent Mission of Uganda to the United Nations Addressed to the President of the Security Council, UN Doc. S/1994/1230, 31 October 1994.

⁸² Ibid.

⁸³ Jose Alvarez, "Crimes of States/Crimes of Hate: Lessons from Rwanda", *25 Yale Journal of International Law*, Summer 1999, 5..

⁸⁴ Ibid, 4.

⁸⁵ Ibid, 5.

⁸⁶ S/PV.3453.

⁸⁷ Ibid, 16.

⁸⁸ Ibid, 17.

⁸⁹ UN. Doc. S/Res/977 (1995), 22 February 1995.

⁹⁰ Interview with Bernard Muna, former Deputy Chief Prosecutor of the ICTR, London, United Kingdom (17 July 2004) (on file with author).

⁹¹ See Lara Santoro, "One for the Law Books: In Africa, A UN Court Prosecutes Genocide", *Christian Science Monitor*, 13 March 1998. The then President of the Tribunal, Judge Laity Kama, attributed the glacial pace to the imperatives of justice: "We have to abide by the rules of evidence and avoid expeditious justice at all costs. The same people that are pressuring us today will accuse us tomorrow saying, 'This is what African justice amounts to' ".

⁹² I know this from my personal knowledge of policy debates within the Tribunal.

⁹³ There is nothing to say, of course, that such interests are necessarily at variance with those of Rwandans at large, but the current Rwandan government has a certain tendency to brand political opponents "divisionists" – a veiled reference to the divisions that yielded the genocide of 1994.

⁹⁴ Madeline H. Morris, "The Trials of Concurrent Jurisdiction: The Case of Rwanda", 7 *Duke Journal of Comparative and International Law*, 349, Spring, 1997.

⁹⁵ S/PV. 3453, 5.

⁹⁶ "Rwanda Executes Genocide Convicts", BBC News, 24 April 1998, www.bbc.co.uk.

⁹⁷ Ibid, 17.

⁹⁸ See Ralph Zacklin, "The Failings of Ad Hoc International Tribunals", *Journal of International Criminal Justice* 2 (2004), 541-545.

⁹⁹ See the preamble to the Statute of the ICTR, S/Res 955 (1994), Annex.

¹⁰⁰ For a thorough discussion of this point, see Jose Alvarez, *op.cit.*

¹⁰¹ Power, *A Problem From Hell*, 484.

¹⁰² Michael Hourigan, a former investigator in the Tribunal's Office of the Prosecutor has claimed that he was investigating the plane crash and was later instructed by chief prosecutor Louise Arbour to close the investigation as it was not within the Tribunal's remit. Hourigan claims this was the result of political interference in the work of the Tribunal. See "Questions Unanswered 10 years After Rwandan Genocide", Interview of Hourigan by the Australian Broadcasting Corporation, 30 March 2004, www.abc.net.au/pm.

¹⁰³ See "Chambers Order Release of Hourigan's Memorandum to Parties", ICTR Press Release, Arusha, 8 June 2000, www.icttr.org.

¹⁰⁴ Email interview with Agwu Ukiwe Okali, for Registrar, International Criminal Tribunal for Rwanda, 22 July 2004..

¹⁰⁵ "Who Shot the President's Plane?", *The Economist*, 27 March 2004.

¹⁰⁶ Betsy Pisch, "Long-lost Rwandan Black Box at UN," *Washington Times*, 12 March 2004.

¹⁰⁷ Prunier, 213 - 229

¹⁰⁸ Ibid 223.

¹⁰⁹ Muna, Interview.

¹¹⁰ See "French Judge Interviews Genocide Suspects", United Nations Integrated Region Information Network Central and Eastern Africa Weekly Round -up 20, 13-19 May 2000, www.cidi.org.

¹¹¹ Muna, Interview. See also Prunier.

¹¹² Muna, Ibid.

¹¹³ "Who Shot the President's Plane?"

Chapter 7

The Politics of Justice: The International Prosecutor Is Ousted

We try to keep politics out of it, but over the years I've seen how hard it is.
- Carla Del Ponte

This chapter seeks to establish in an empirical manner through a case study, the political and strategic environment in which the International Criminal Tribunal for Rwanda pursues justice. It will review and analyze the tension between political and legalistic approaches to violations of international humanitarian law inherent in the split of the previously combined position of chief prosecutor of the ICTY and the ICTR, and the removal of the Swiss lawyer Ms Carla Del Ponte as chief prosecutor of the ICTR. That tension arose chiefly from Del Ponte's attempts to investigate and prosecute one of the parties to the Rwandan conflict of 1990-1994.

The ICTR has made significant strides in advancing the cosmopolitan norms of international humanitarian law, i.e. individual criminal responsibility for genocide, crimes against humanity and war crimes, or what Hedley Bull called "human justice" in a world of states.¹ As noted in the previous chapter, it was the first international criminal tribunal to hand down verdicts for the crime of genocide, ruling that rape can be genocide. It has been particularly successful in bringing to justice the high ranking political leaders, military commanders and other individuals accused of responsibility for the genocide and other violations of international humanitarian law in Rwanda in 1994. In this context it was the first international criminal tribunal to convict a head of government, in this case the former Prime Minister of Rwanda, of genocide, a precedent that the ICTY built upon in indicting and prosecuting Slobodan Milosevic.²

I cite these strides in the work of the Tribunal first because they are facts that form part of its legal and political context, for the establishment of norms -- described as “norm entrepreneurship” -- by international war crimes tribunals is a political dynamic in so far as it seeks to affect or modulate the behaviour of states or individual political leaders in national and international society by enforcing norms in the name of the “international community”.³ But, especially because they represent the progress of the solidarist view of international relations, in this case international justice as policy, I cite them to protect myself from a charge of selecting self-serving cases to suit my arguments in the cases I examine below.

What this case demonstrates is that other political and strategic factors impact on war crimes justice as applied in the ICTR (and other such tribunals) and are therefore just as important -- or even more important -- a reality. It illustrates the tension between Rwanda’s pursuit of its strategic interests and the International Tribunal’s efforts to protect its judicial independence as a court of law. These political and strategic interests have significantly limited the potential of the ICTR to fully achieve (a) its specific mandate to prosecute the persons responsible for the violations of international humanitarian law in 1994 committed by both sides to the conflict, and (b) the wider goal of contributing to reconciliation as expressed by the Security Council in the Tribunal.

I make significant use of interviews with key principals at the tribunal and a diplomatic representative of the great power that has been most actively supportive of the Tribunal, personalities who have been among the prominent *dramatis personae* in these events, in addition to standard research and analysis, to demonstrate the interplay

between justice and politics that is a particular characteristic of international criminal tribunals.

Rwanda (and others) v Carla Del Ponte

When the ICTR was established in 1994, its statute provided that the ICTY chief prosecutor would also be the chief prosecutor of the ICTR.⁴ Thus for much of the past decade, the two tribunals had a common prosecutor. The South African Judge Richard Goldstone was the first prosecutor for both tribunals. He was followed by the Canadian Judge Louise Arbour, who was succeeded in 1999 by Carla Del Ponte, the former Attorney-General of Switzerland. On 28 August 2003, the Security Council decided that the ICTR should have its own full-time prosecutor, splitting the chief prosecutorial post and effectively removing Carla Del Ponte as ICTR prosecutor against her wishes.⁵ Del Ponte was nevertheless reappointed as chief prosecutor of the ICTY.

This chapter analyzes Del Ponte's removal and the Security Council's decision. It concludes that there were a combination of factors, some institutional, others of a raw political nature, that led to the chief prosecutor being ousted from her prosecutorial role in Arusha. Taken together, these factors were all ultimately political, to the extent that they demonstrate how the great powers determine the framework of war crimes tribunals. And the decision was the outcome of a *political* process in the Security Council. Mixed with what is, from an objective standpoint, a potentially beneficial impact on the effectiveness of the Tribunals, the decision was also taken to serve medium to longer term strategic interests of the great powers regarding the future and lifespan of the ICTR and the ICTY. Carla Del Ponte's prosecutorial policies had become inimical to those

interests. Her convictions about her statutorily guaranteed "independence" as a prosecutor clashed with the reality that it was the Security Council, the tribunal's parent organ and a political body that called the shots.

It is widely believed, certainly by Del Ponte herself, that she was removed as ICTR prosecutor as a result of a diplomatic campaign waged by the Rwandan government in reprisal for her attempts to investigate war crimes committed by RPF troops in 1994 and bring charges against some of those soldiers (all of whom were Tutsi) before the Tribunal. However, the publicly stated reason for her removal from the ICTR post had to do with expediting the efficient implementation of the road map to wrap up the work of the ICTY and the ICTR by 2010. In that context, there were valid questions about the continued viability of having one prosecutor for ICTR/ICTY. Management problems in Del Ponte's prosecutorial office at the ICTR also appear to have become intertwined with the "completion strategy" question. I shall examine the question of a single prosecutor for the International Tribunals at the Hague and Arusha, followed by the completion strategy question, and then the "Rwanda factor".

Yoked to The Hague

A root problem that had faced the prosecutorial function of the ICTR was the structural one of the ICTR situated in Arusha and the ICTY headquarters at The Hague, having a single chief prosecutor in the first place. The arrangement appeared plausible and workable when it was made. The ICTY had been established 19 months earlier than the ICTR in May 1993. It was not fully appreciated in the early days of 1993-1994 just how complicated and time consuming the trials at both Tribunals would become. There

was also a certain view that both courts would benefit from the development of a common prosecution strategy, standardized procedures, and case law, developed in the then newly emergent system of international criminal justice and facilitated by their having a single chief prosecutor.⁶

But this is an apolitical view, or an apolitical rationale for a politically inspired construct. The counter-factual is that the ICTR having been established largely out of guilt and then only because the ICTY existed as a precedent, there was a perhaps unconscious instinct to situate it in the shadow of the The Hague by having the ICTY chief prosecutor supervise prosecutions at the ICTR. Moreover, it was clear that, in establishing the two International Tribunals, a totally new concept of intervention had emerged in the international society, and it was strategically important at the time to centralize control of that instrument in one person who would be accountable to the Security Council.

Furthermore, setting common jurisprudential standards is a task for judges, not prosecutors. The two tribunals have appellate courts that are technically separate but are composed of the same judges. As most verdicts at the trial level are appealed, the appellate chambers were expected to ensure that there were no embarrassing contradictions in the jurisprudence that was being established for the first time since Nuremberg. All of this is to make the point that having one prosecutor for both tribunals was not essential or even logical - a rough equivalent is to argue that, because the Nuremberg and Tokyo tribunals were established by the same group of allied states, they should have had the same prosecutor for separate war crimes tribunals in two continents.

There also was a fundamental, practical question: could one chief prosecutor oversee prosecutors at The Hague and Arusha at the same time, with the heavy caseloads at both courts and the necessary commitment of time? Even in the early days of the ICTR and the ICTY Judge Goldstone had a difficult time heading the prosecution functions of both Tribunals.⁷ And, as an internal investigation by the UN's Office of Internal Oversight Services (OIOS) found ten years after the ICTR was created, the expected synergy from having a common chief prosecutor for the two Tribunals did not materialize, leading the internal watchdog to conclude that "consideration needed to be given to the ICTR having its own Prosecutor."⁸

As we have seen, at the time ICTR was established in 1994, Rwanda criticized the strong - and subordinate - institutional link to the ICTY of the prosecutorial office of the ICTR, a Tribunal that was formally separate and independent from the ICTY.⁹ Argentina would also have preferred a tribunal with its own appeals chamber and prosecutor but "understood the reasons why the present solution was accepted", and was pleased to see that as a compromise, a deputy chief prosecutor was to be appointed for the ICTR.¹⁰

The greatest political impact of the original design that yoked the ICTR to ICTY through one prosecutor based at The Hague was that the arrangement appeared decidedly "colonial". It created a strong impression of the ICTR as an appendage of the ICTY, reinforcing a view that the "African" Tribunal was not really as important in the eyes of global policy makers as the "European" Tribunal. The Rwandan government certainly felt that justice for their citizens was not as high a global priority as justice in the Balkans.¹¹ Thus the ICTR appeared second class in relation to the ICTY by reason of

having a "part-time chief prosecutor" based at The Hague and pre-occupied with the trials of Slobodan Milosevic and other accused Balkan war criminals.

When Arbour was the chief prosecutor of both Tribunals, Bernard Muna, her deputy for the ICTR, essentially ran the prosecution and enjoyed a large degree of delegated authority. Upon Arbour's departure, Muna's relationship with her successor Del Ponte soured progressively because the latter whittled down Muna's role and insisted on centralizing decision-making for the ICTR prosecution office at The Hague. Del Ponte eventually removed Muna from his position in 2001 by declining to recommend to the Secretary-General the renewal his appointment upon its expiration ; the deputy chief prosecutor's position (and that of chief of prosecutions) were then subsequently left unfilled for nearly two years (partly because of internal disagreements between the Prosecutor and the then newly appointed Registrar, Adama Dieng over the qualifications of the candidates and on procedural issues regarding the selection process), creating grave management problems for war crimes prosecutions for the ICTR half of her office.¹²

Carla Del Ponte had been aware of the criticisms of neglect of Rwanda war crimes trials by a Hague-based chief prosecutor. On arrival at the ICTR, she indicated a desire to rent permanent accommodation at Arusha and divide her residence between The Hague and Arusha, but subsequently appeared unable to follow this through. Her subsequent visits to Arusha and Kigali (about four times a year) still did not remove an impression of a parachuting prosecutor who ran the ICTR prosecution team by remote control from The Hague.

All of this notwithstanding, there was nothing in the public domain to indicate that the Security Council was considering a re-structuring of the post of chief prosecutor of the ICTR and the ICTY. However, as Del Ponte approached the completion of her initial four-year appointment as chief prosecutor of the ICTY/ICTR in September 2003 and a renewal was up for consideration by the Security Council, Secretary-General Kofi Annan wrote a letter to the Council recommending the appointment of a separate prosecutor for the ICTR. It was on the basis of that recommendation that the Council split the previous single prosecutor position into two¹³ and in a subsequent decision¹⁴, appointed former Gambian attorney-general and Supreme Court Judge Hassan Bubacar Jallow chief prosecutor of the ICTR. Annan's letter anchored his recommendation on the need for efficient completion strategies for both Tribunals. The Security Council's decision agreed with this rationale, with the Council noting that it was "convinced that the ICTY and the ICTR can most efficiently meet their responsibilities if each has its own Prosecutor."¹⁵

Completion Strategy

Several states on the Security Council have become increasingly weary of financing the ad hoc tribunals for Rwanda and former Yugoslavia, although the costs of both Tribunals do not amount to more than a tiny fraction of global military spending by the Western powers that contribute most of the Tribunal's costs¹⁶. This is an indication that the real reason for the pressure for a completion strategy may be that, after a decade, the Tribunals are close to discharging their core mandates, and their continued existence exerts pressure for the application of similar judicial interventions in other, politically

inconvenient situations where such a course of action is not perceived as a matter of state interest by the great powers.

There is, of course, the quite valid need to avoid "mission creep". The Tribunals had no "sunset clause" that assured a date for the completion of their work, a situation that Brazil had expressly criticized during the statements in the Security Council that followed the vote that established the ICTR.¹⁷ The cases before the two ad hoc Tribunals initially moved at a plodding pace, largely because they had too few judges and crowded dockets. After a decade of existence, it was obvious that if nothing drastic was done, hearings would continue for another 15 to 20 years -- situation that would make a mockery of the phrase "ad hoc Tribunals". It became imperative to establish an end date -- initially called an "exit strategy" but later changed to the more elegant and politically correct phrase "completion strategy" -- for the ICTY and ICTR to wrap up their trials. In Rwanda's case, where the ICTR prosecution relied mostly on witness testimony (unlike the Nazi trials where there was a long trail of documentary evidence, or the former Yugoslavia, where Western powers had satellite images of mass graves and communications intercepts of the conversations of Serb military commanders) the accuracy of recollections from memory of events that occurred more than a decade ago, was an additional concern. The Security Council has set a cut-off date for the end of 2008 for trials and 2010 for appeals for both International Tribunals. To achieve that target, all investigations by the prosecution were to be completed by the end of 2004¹⁸.

For the United States, the main financial and political supporter of the two courts, there were even more strategic reasons to shorten the lifespan of the Tribunals: America's critics were making good use of the inconsistency in principle between American support

for the ad hoc tribunals and its vigorous opposition to the ICC. In reality, however, the ad hoc tribunals were set up to deal with specific regional conflicts and did not pose as much of a strategic threat to America as the ICC, which covers many more countries by treaty arrangement and thus aims to be universal. Even then, as discussed in Chapter 2, an attempt had been made to bring charges against U.S. troops for alleged war crimes committed during the NATO bombing in Kosovo in 1999 - an incident that infuriated American policy makers and strengthened their resolve against the ICC.

Thus both ad hoc, UN Security Council created tribunals and the ICC were institutions that reflected the same ideal of cosmopolitan justice, but were different only as a matter of specifics – the ad hoc tribunals created by the Security Council were more easily amenable to great power influence than a standing international war crimes tribunal established by treaty. An overly extended life span for the ICTY and the ICTR had become inconvenient, and consistency of position from an American foreign policy perspective had to be established. U.S. war crimes ambassador Pierre Richard Prosper announced the year 2008 as Washington's preferred completion date for the work of the tribunals¹⁹. It is no coincidence that this view was to become the official policy of the UN Security Council.

An important factor in U.S. policy is also that of a general shift in preference from top-down, international interventions to the establishment of accountability by national courts for violations of international humanitarian law²⁰. Prosper faced criticism for his proactive policy push for a specific end date for the work of the Tribunals, with some critics complaining that his statements called the independence of the ad hoc Tribunals into question – a criticism that glosses over the political reality that the Tribunals were

created by the great powers and their lifespan thus dependent on the political decisions of those powers.²¹

To calls for a completion strategy involving significant pruning of numbers of investigations in order to meet a cut-off date of 2004, Carla Del Ponte was initially politically tone-deaf. She saw her role as an independent prosecutor. One of investigating, indicting and prosecuting accused war criminals as long as there were any at large. As late as November 2001, addressing the Security Council, Del Ponte outlined her intention to launch a further 136 investigations at the ICTR to bring her investigative mandate to an end by December 2004.²² This was an "outer universe", as the chief prosecutor explained that several factors affected whether or not investigations resulted in actual prosecutions - some of the suspects may be dead, not all investigations succeeded in gathering substantive evidence, and some of the accused persons simply could not be traced.²³

Despite these caveats, several members of the Security Council, judges of the ICTR, and even Del Ponte's staff in Arusha and Kigali were uneasy with such a large number of investigative targets. Knowing how slowly the wheels of justice turned, there was no realistic prospect of completing so many investigations of alleged war criminals by the end of 2004. Moreover, not a few of her colleagues believed that many of the additional suspects Del Ponte was bent on pursuing were persons who ought to be no priority for an International Tribunal that hitherto had focused mainly on apprehending the "big fish". But Del Ponte now sought to establish what she called "the local face of the genocide" by indicting persons who, though only of minimal significance in the planning nationwide massacres in the national context, were important ringleaders at

local levels. She believed that she should investigate and propose indictments as long as there were targets, but several members of the Security Council became increasingly concerned at her purist approach. By July 2002, reluctantly responding to the political pressure from states, Del Ponte revised her investigations program for the ICTR from 136 new suspects to 14, with 10 ongoing investigations, making a total of 24 projected new indictments.²⁴ In May 2003, however, the number of new investigative targets increased to 26.²⁵

At the Security Council

What, then, happened in the capitals of members of the Security Council and in New York regarding the future of the ICTR chief prosecutor? U.S. Ambassador Prosper provided this rationale for the removal of Del Ponte:

The management of the OTP [Office of the Prosecutor] was severely lacking from the very beginning, exacerbated by the fact that the prosecutor was based at The Hague. There were all the problems [between Del Ponte and the ICTR deputy prosecutor] Everyone was afraid to make a decision because it had to be cleared at The Hague - and that's no way to run an office. The set-up was inherently inefficient. That was a driving factor. The next part was the completion strategy. Because the prosecutor's office was inefficient, the chances of our reaching a completion strategy were reduced. So we put the two together and decided that this [removing Del Ponte] was the best way to go."²⁶

It is clear, then, that United States foreign policy played a critical role in Del Ponte's ouster. But the manner in which the process transpired was not scripted by

Washington. It was rather the United Kingdom that proposed splitting the position of the ICTY/ICTR chief prosecutor and appointing a separate prosecutor for ICTR.²⁷ The U.S. was drafting the Security Council resolution on a decision on Del Ponte's mandate when it came up for review in August 2003. America's initial strategy, led by Prosper, had been to deny the chief prosecutor a full four-year appointment. Rather, Del Ponte's joint appointment for ICTY and ICTR would be extended for one year only, with the possibility of yearly renewals.²⁸ This strategy was designed to be used as a leverage to ensure that the completion strategy followed a script written by the great powers, especially the U.S. That way, they could say to Del Ponte: "either you get things moving in a certain direction or you may lose your job."²⁹

It was at this point that Britain proposed the idea of splitting the prosecutorial functions of the two tribunals. Washington's initial response was cautious. It did not oppose the British proposal, and in fact eventually warmed to it. But the U.S. still felt committed to its original approach. As it "shopped" its draft of a resolution around to members of the Security Council, however, Washington found that it was "not getting any traction" on its proposal for a one-year extension, but "everyone was getting excited about the proposal for a split" of the prosecutor's functions.³⁰ The U.S. then swung behind the British proposal. It still toyed with the idea of renewing Del Ponte's mandate at The Hague for one year, with roll-overs while approving a new chief prosecutor at Arusha for a full four-year term. The possibility was discussed by several diplomats, but it proved too complicated and was dropped.

While national diplomats in various capitals and in New York were talking quietly to themselves about Del Ponte's future, Secretary-General Kofi Annan, who had

perhaps the most accurate picture of the institutional problems that had afflicted Del Ponte's tenure as chief prosecutor of the U.N. ad hoc tribunals (the chief prosecutor is appointed by the Security Council, but on the recommendation of the Secretary-General), was coming to his own conclusions about the position. He too, keenly aware that, in his words "the question of the separation of the prosecutor function has been around for quite a long time,"³¹ reached an assessment that the completion of Del Ponte's four year term presented the perfect opportunity to solve the problem once and for all. Annan was motivated largely by the logistical problems that confronted a prosecutor in directing prosecutions in two tribunals thousands of kilometres apart, the need for undivided attention to both the cases at Arusha and the Milosevic trial at The Hague, and the Security Council's judgement that the time had come for the ICTY and the ICTR to each have its own prosecutor if the work of the two tribunals was to be completed in good time.³² The negotiations among members of the Security Council were low-key, but it was Annan's letter of 28 July to the Council recommending a split that sealed Del Ponte's fate.³³

The Swiss-born prosecutor, however, was determined to retain her dual position – and to fight for it if necessary. She flew to New York in late July and held two tense meetings with Annan. Following their initial meeting, the Secretary-General agreed to give Del Ponte a chance to lobby Security Council members to renew her appointment at both Tribunals, which was to expire on 15 September.³⁴ On 29 July Del Ponte met Annan again to brief him on her discussions with members of the Council before returning to Europe. Sensing that what she termed a “political” decision on her fate had already been made, she made a proposal she thought could save the day and take the sting

out of the looming decision to relieve her of her Rwanda post: Del Ponte informed Annan that, if her post was to be split, she would rather be prosecutor of the International Criminal Tribunal for Rwanda than the International Criminal Tribunal for the Former Yugoslavia. Could she choose between The Hague and Kigali?, she asked.³⁵ "No", she recounted that Annan responded. "The trial of Milosevic is too important to be left in the hands of someone else"³⁶. It is doubtful that Carla Del Ponte's request was anything more than a tactical ploy to keep her double-barrelled title. Few believe she had any real desire to give up the Hague for Arusha. Leaving the UN Headquarters building after her meeting with the Secretary-General, and with political reporters in tow, Del Ponte was asked about the encounter. "No comment," she responded. "Ask the Secretary-General". But she was to tell the media later that the head of the UN's office of legal affairs had informed her that a majority of Security Council members favoured dividing the prosecutor's post. Annan, she said, was "inflexible" and "I realized there was no room for negotiation."³⁷

Rwanda's Campaign

Although Rwandan officials disavowed any role in Del Ponte's removal from her post,³⁸ Del Ponte attributes her removal from the ICTR largely to pressure by Rwanda's government on various members of the Security Council in response to Del Ponte's attempts to investigate war crimes committed by the RPF.³⁹ Circumstantial evidence points to a concerted diplomatic lobby by Rwanda to have Del Ponte consigned to The Hague as ICTY prosecutor and a separate prosecutor appointed for the ICTR. In addition to New York, part of that campaign is believed to have taken place at the annual summit

of heads of state and government of the African Union in Maputo, Mozambique in July 2003, bringing the African members of the Security Council on board⁴⁰. The relative weight of the Rwandan campaign vis-à-vis the other factors discussed above is difficult to determine. That it had some influence on some key member states of the Security Council is not in doubt. It is not certain whether the Rwandan campaign's influence on the great powers was predicated on the order-based, strategic argument that derives from a perceived need to ensure the stability of Rwanda's government, as Del Ponte and many observers believe, or on the institutional reasons discussed earlier. It is more likely that, for certain states at least, both factors were important.

Rwanda's relationship with the ICTR has always been one of shifting alliances and moods, guided by what the country considers as its strategic interest. Its leader, President Paul Kagame is widely respected as a cerebral, strategic soldier and political leader. His credibility rests on his reputation for discipline and for having ended the genocide with the RPF military victory. In the latter fact lies the tension in Rwanda's relationship with the International Tribunal's mandate to prosecute crimes committed by both sides to the conflict. Thus, despite the letter of the Tribunal's statute, the RPF has consistently been sensitive to what it sees as attempts to create a moral equivalency between the genocide of nearly a million Tutsis and war crimes of relatively far lesser gravity committed by the troops that liberated the country. It has sought to ensure that the day when the ICTR would indict RPF (and mostly Tutsis) troops would never come. When the then ICTR registrar, Okali, met with Paul Kagame in Kigali in 1998, Kagame described his country and the Tribunal as "partners" in the search for justice⁴¹. Whether that "partnership" concept includes trials of RPF troops is open to conjecture. For the

Hutu opponents of the Rwandan government, the credibility of the Tribunal - and the possibilities of political reconciliation -- rest on whether or not the ICTR is able to punish crimes committed by RPF soldiers. Absent such accountability, these Hutus say, the Tribunal is the justice of the victor. From this perspective, the Hutu extremists that authored the genocide regret not the massacres they planned and committed, but losing the war.

This situation was always a challenge for the ICTR. The nature of the institution meant that it could not function effectively -- including in investigating RPF crimes -- without Rwanda's cooperation because much of those investigations had to take place in Rwandan territory. Although non-cooperation could trigger sanctions by the Security Council if the Tribunal reported as much, in reality the guilt that states felt over their failure to prevent or halt the genocide, coupled with the close strategic relationship the U.S. and Britain established with Rwanda after the genocide, made resort to such a tool -- at least in the early years of the Tribunal's work -- unlikely.

It was in this context that the Tribunal had to proceed. And there was a tactical question: should the ICTR investigate RPF war crimes early on, when the likes of alleged genocide mastermind Theoneste Bagosora were yet to be judged? Or should such investigations be left to the tail end of the Tribunal's work? Despite the provisions of the statute, in light of the heavy caseload from the genocide, were trials of RPF prosecutions really unavoidable? We will return to this question later.

In the beginning, however, the Government of Rwanda indicated in its interactions with the ICTR prosecution that it would cooperate with investigations of alleged RPF crimes. But subsequent events proved that, when faced with the imminence

of such inquiries, Kigali balked.⁴² It soon became evident that the Rwandan authorities were not inclined to allow the investigation and possible indictment of RPF soldiers.

In the period from 1997 to 1999 chief prosecutor Louise Arbour and her deputy Bernard Muna embarked a discrete conversation with the Rwandan government on this sensitive aspect of the chief prosecutor's task.⁴³ The response from Kagame was initially positive. The ICTR senior prosecutors wanted the government to turn over files on alleged massacres such as the killings of the Catholic priests in Kabgayi. They sought to persuade the Rwandan authorities, including through Rwanda's military prosecutor that cooperating with the International Tribunal was in the country's interest.

Del Ponte's appointment as the new chief prosecutor - and the jarring note introduced by the *Barayagwiza* case, in which the Tribunal's appellate court ordered the release of a high ranking genocide accused and reversed its decision following the deterioration of relations between Rwanda and the international court, delayed these negotiations.⁴⁴ Moreover, Del Ponte's aggressive stance complicated the more cautious strategy of her predecessors.⁴⁵ Some ICTR prosecution investigators were subsequently dispatched to European countries to follow up on investigative leads regarding alleged war crimes by RPF soldiers. But this approach was never going to yield nearly as much as investigations on the ground in Rwanda conducted with Rwanda's cooperation.

When Del Ponte first discussed the investigations into RPF atrocities with President Kagame sometime in 2000, the Rwandan leader pledged his cooperation, but he later backtracked as a result of pressure from hard-liners within the Rwandan military. Their argument: The RPF government had integrated several Hutu soldiers of the former

RGF into the new post-genocide national army. Not a few of these integrated soldiers had doubtless committed atrocities. If they (former RPF troops) are to be prosecuted, then the Hutus in the army would have to face trial too, they argued. If everyone who committed violations of international humanitarian law were to be prosecuted, order would be threatened.⁴⁶ In the African political context, a coup attempt by disgruntled Tutsi soldiers who would feel threatened by ICTR indictments could not be ruled out. And such a scenario would be profoundly destabilizing to the RPF's hard-won victory. Kagame had to keep his troops pacified by *not* giving in to the chief prosecutor's demands.

Del Ponte met with Kagame in Kigali again in April 2001. Kagame again promised his government's cooperation. Rwigamba, the Rwandan military prosecutor, participated in the meeting. He told the media afterwards: "We reiterated our determination to cooperate in dealing with suspects of genocide and other crimes against humanity...especially, on behalf of the [Rwandan] military we reiterated the same cooperation".⁴⁷

One year later the picture had changed, with a decidedly frosty chill emanating from the Rwandan authorities towards Del Ponte's investigations. Three specific investigations of RPF crimes were already underway, and Del Ponte was hoping to issue the first indictments before the end of the year.⁴⁸ "We have opened investigations into three massacres", she said. "I have spoken to Paul Kagame. I showed him a list of the massacres and said we will be investigating. I said that if Rwanda wants justice and peace there must be accountability on both sides."⁴⁹ But the international prosecutor noted that the Rwandan leader had not delivered on his pledge to cooperate, and most of

the investigations into massacres allegedly committed by the RPF had been conducted outside Rwanda.⁵⁰

The relationship between the ICTR prosecutor's office and the Rwandan authorities had by now become so tense that the Tribunal relocated the chief prosecutor's "special investigations team" that was conducting those investigators from Kigali, where it had been based all along, to Arusha, Tanzania, the seat of the Tribunal in order to ensure a more free atmosphere for their work. This move, of course, also had the disadvantage of limiting the investigator's access to Rwandan sources. Del Ponte felt, however, that she could not compromise the security of her staff.

In mid-2002, Rwanda suspended cooperation with the Tribunal by imposing restrictions on Rwandan witnesses who had to travel from Kigali to Arusha to give evidence as prosecution witnesses in trials. This action was based on claims by some of the witnesses -- who also happened to be survivors -- that they had been subjected to insensitive treatment at the hands of defence counsel, court officials and even judges. With witnesses effectively barred from coming to Arusha to testify in the hearings, several trials ground to a temporary halt. In these circumstances, the Tribunal's judges issued judicial rulings in the cases affected by the witness crisis, reprimanding Rwanda's non-cooperation and reminding the Rwandan government of its statutory *obligation* to cooperate with the Tribunal's judicial work.

This was to no avail. The Tribunal's President at the time, the South African Judge Navanethem Pillay, formally reported Rwanda's non-cooperation to the Security Council, backing up complaints by Del Ponte. It took the Council a full six months to respond to Judge Pillay's report. This delay created the impression, right or wrong, that

the Council's commitment to exerting pressure on Rwanda was open to question. Nevertheless, several governments especially the U.S. privately pressed Kigali to resume cooperation with the Tribunal. The flow of prosecution witnesses from Rwanda to Arusha resumed after several months, but by then Rwanda's relationship with Del Ponte had deteriorated even further.

When Del Ponte met on 18 November 2002 with representatives of the Alliance for the Liberation of Rwanda (ALIR), an extremist Hutu opposition group based in the Democratic Republic of Congo, the Rwandan government issued a press release condemning the prosecutor in strong terms for hobnobbing with "a known terrorist organization which regards genocide in Rwanda as an unfinished business..."⁵¹ The Rwandan statement continued:

"For sometime now, the ICTR prosecutor has acted in a manner clearly designed to politicize the office she occupies and indeed, she has on several occasions confessed that some of the decisions she has made were motivated by political considerations and pressure. Carla Del Ponte's meeting with a known Rwandan terrorist and genocidal organization.. comes as a culmination of her deliberate policy of dangerously veering from the issues of justice, to a point where she is now wining and dining with people whose confessed ideology and practice is genocide. Today, the people of Rwanda have lost faith in Del Ponte's objectivity and capacity to deliver justice....

It is in light of these shocking revelations, therefore, that the Government of Rwanda calls upon the international community and the United Nations Security in particular to hold her accountable for her deliberate conduct, which clearly bears grave consequences."⁵²

On that ominous note, then, the die was cast. Rwanda had drawn a line in the sand. But Del Ponte was not one to be easily cowed. Barely one week later, seeking to capitalise on Rwanda's strong relations with Britain, Del Ponte responded to Rwanda's attacks against her. The occasion was a speech the international prosecutor delivered to the British Parliament's All Party Parliamentary Group on the Great Lakes Region and Genocide Prevention in London on 25 November 2002. Following a review of the Tribunal's judicial activities, Del Ponte described the prevailing situation in which the Rwandan authorities had withdrawn their cooperation with the ICTR, and expressed her disappointment:

Although it has been publicly stated that the reason for the suspension of cooperation is the way witnesses are treated, the true reason is to be found elsewhere. As I indicated to the Security Council, we have good reasons to believe that powerful elements within Rwanda strongly oppose the investigation, in the execution of the ICTR mandate, of crimes allegedly committed by members of the Rwandan Patriotic Army in 1994. Despite assurances given to me in the past, no concrete assistance has been provided in response to repeated requests regarding these investigations. There is no genuine political will on the part of the Rwandan Authorities to provide assistance in an area of work that they interpret to be political in nature...

Only a few days ago, the Government of Rwanda released a statement accusing me of acting politically and also of abusing my office, for having met with representatives of groups opposed to the Kigali Government. Without commenting further on my rights and duties as an independent Prosecutor. I wish to record my disappointment. For me, a victim is a victim, a crime falling within my mandate as the ICTR Prosecutor is a crime, irrespective of the identity or the ethnicity or the political ideas of the person who committed the said crime. Justice does not

accommodate political opportunism. No one should remain immune from prosecutions from the worst crimes. The political and military leadership of Rwanda has to accept to respond to the allegations of crimes that may have been committed by their own side. If they are genuinely interested to foster true peace and reconciliation in their country and in the Great Lakes Region, they should fully and unconditionally cooperate with the ICTR (emphasis in original).⁵³

Del Ponte was careful to stress that prosecuting the instigators of the genocide of Rwanda's Tutsis remained "without any ambiguity" the core of the mandate of the Tribunal's mandate. But she raised the philosophical question of denying justice to any victim of the crimes within the Tribunal's remit - genocide, crimes against humanity and war crimes. This is the argument of principle versus pragmatic relativity that is at the heart of the thorny question of prosecuting the soldiers of the government that is now in power in Rwanda.

But Del Ponte, principled as she appears to be in her judicial work, has indeed occasionally introduced political considerations into judicial matters. Her opening courtroom statement in the *Barayagwiza* appellate hearing is a case in point. Seeking a reversal of the appellate chamber's initial decision to release Barayagwiza, the international prosecutor bluntly told the appellate judges, not in a legal proposition but in an appeal to political facts of life, that: "whether we like it or not, we must come to terms with the reality that our ability to continue our investigations depends on Rwanda". Without Rwanda's help "we might as well open the doors to the prison. It is my hope that Barayagwiza will not be the one to decide the fate of this tribunal."⁵⁴

On one hand, this was a reluctant admission of the political reality that affects her work. Given the political framework of international criminal tribunals, this is an inevitable reality. On the other, it was also a conscious application of political tactics to supposedly purist juridical ends. Either way, her verbal appeal to politics in that case has lent her to criticisms of double standards by her Rwandan and other critics. In London, she again appealed to political / strategic realities in soliciting British support: "I am particularly turning to you," she told the British parliamentarians, "as I believe that the United Kingdom is in a strong position to recall to the Government of Rwanda its obligations of cooperation. The financial aid allocated by your country to Rwanda corresponds to a very substantial part of the budget of Rwanda...."⁵⁵ This was a clear appeal to hegemonial power and influence in aid of the "pure" principle of justice. In the next breath she offered the argument of legalism's imperative – justice as policy -- against that of strategy, drawing parallels with the Balkan states of the Federal Republic of Yugoslavia and Croatia:

Obviously, there is always a 'good' reason to justify non-cooperation. There is always some political consideration or struggle, some forthcoming election. There will always be unresolved strategic issues of genuine concern to the International Community... Broad concerns of this kind will occupy the minds of those who have to deal with the reconstruction of divided societies... My point, however, is that some "magical" or "ideal" moment will never arise for cooperating with International Tribunals. No system of justice anywhere in the world is expected to work that way. The right time concerning investigating and prosecuting crimes such as genocide, crimes against humanity, war crimes is always now, today.⁵⁶

As the summer of 2003 approached - and with it the matter of the renewal of Del Ponte's appointment - Rwanda emphasized its position that it would try RPA soldiers suspected of war crimes in the exercise of its national jurisdiction, and that the ICTR should focus on the genocide of Tutsis. There were three problems with this position. First, while Rwandan courts surely had jurisdiction over these crimes, the jurisdiction of the ICTR was pre-eminent over that of national courts. Second, although Rwanda frequently claimed to have tried Tutsis suspected of war crimes, or to be perfectly willing to do so, its record in this respect was spotty. As some human rights groups have observed, the Rwandan military court has tried just one senior officer, a major, for war crimes committed in 1994.⁵⁷ The officer confessed to a massacre of more than 30 people and was sentenced to life in prison, but he successfully appealed his sentence and was set free.⁵⁸ Of five others convicted of war crimes in 1994, four were privates, one was a corporal, and all were given light sentences: the corporal, convicted of killing 15 civilians, was sentenced to a two-year prison term.⁵⁹ Alison des Forges, a Rwanda expert and human rights activist whose record as a chronicler of the genocide does not easily lend her to any possible charges of anti-Tutsi bias, commented wryly that "Rwanda has had nine years to deal with such cases, and it has not done a significant job."⁶⁰

Rwanda's record is reminiscent not just of the domestic trial of German war criminals in Leipzig following World War I, but is consistent with a pattern that is recurrent in many other countries, including powerful states and victors in war. Few are willing to try their own war criminals, but would be happy to put on trial those of other defeated states or groups. The third problem with Rwanda's position is the perception

problem it hands the ICTR. If the Tribunal ends up not having prosecuted any Tutsis, many will consider that it failed to discharge its mandate in full.

Ambassador Prosper, seeking to leverage American influence with both the ICTR and the Rwandan government, offered to mediate between Carla Del Ponte as chief prosecutor and Rwanda on the specific matter of investigations into alleged RPF atrocities. But first, what was Washington's point of departure on the accountability of RPF forces for crimes committed in 1994? Was it opposed to the ICTR undertaking such prosecutions, if they would have the effect of destabilizing Rwanda and the Great Lakes region as Rwanda claims they would? The prevailing anecdotal assumption is that the United States would not like to see RPF troops and commanders prosecuted by the ICTR in such a scenario. Undoubtedly, this sympathy exists in a larger, geopolitical context. But the situation is considerably more nuanced.

For Prosper, the starting position of his government was that allegations of atrocities by RPF soldiers needed to be investigated. "We are agnostic as to who investigates these allegations, so long as it is done fairly and properly and it is genuine. If it is by the International Tribunal, that's fine; if it is by Rwanda, that's ok, but it is necessary to close the chapter of 1994".⁶¹

From this perspective, Prosper tried to broker an agreement that recognized the International Tribunal's primacy but gave Rwanda a sense of ownership of the investigations. In the spring of 2003, Prosper met in his 8th floor office in the U.S. Department of State in Washington with Carla Del Ponte, accompanied by her aides, and the Rwandan delegation, for negotiations on the issue. On the Rwandan side there was attorney-general Gerald Gahima, Richard Sezibera, then Rwanda's ambassador in

Washington D.C., and Martin Ngoga, a Rwandan diplomat in Tanzania who was Kigali's official observer at the ICTR in Arusha.

Del Ponte's recollection is that she was invited to Washington for a general discussion on cooperation between her office and the Rwandan authorities, but to her "surprise", Prosper suggested that she let the Rwandan government take over responsibility for investigations into alleged crimes by the RPA⁶². But she was unwilling to pass on to the Rwandan authorities the information she had gathered in her investigations. And, against the background of positions that Kagame had expressed to her in their meeting in 2002, she doubted the workability of any understanding that would be reached at this meeting if such an agreement was based on the Tribunal's primacy⁶³. The international prosecutor believed the Rwandan leader's current position left little or no room for an ICTR role in prosecutions of RPF soldiers. Against this background, Del Ponte declined to relinquish the Tribunal's investigations, but rather agreed to Rwanda conducting its own investigations in the exercise of its concurrent jurisdiction, which would be reviewed by the international prosecutor after two or three months to assess their credibility⁶⁴.

Over coffee, the delegations worked out an agreement whereby Rwanda would carry out some investigations of RPF suspects and submit the results to the ICTR for an assessment.⁶⁵ If they were judged to have been a credible and fair process, the Tribunal would not issue indictments but support prosecution in Rwandan courts. The meeting then tried to reach an understanding on what events would actually be investigated. Thus, it was a "partnership approach" towards these investigations, and all parties walked away believing they had reached an understanding.⁶⁶ This was important because the tension

between Rwanda and the Tribunal was, in Prosper's view, detrimental to the Tribunal and "ripe for resolution", not to mention that the spill-over effect of resolving the standoff would be beneficial to the political equation in the Great Lakes region as a whole.⁶⁷

On returning to The Hague, however, Del Ponte later telephoned Prosper and informed him that she had received advice against implementing the agreement. Prosper presumed this advice had come from the U.N. headquarters in New York. Del Ponte then backed out of the understanding and followed up her oral communication with a letter to Prosper⁶⁸. A subsequent meeting that had been planned in Kigali fell through. The "deal" was dead.

Meanwhile, Rwanda's campaign against Del Ponte in the Security Council was picking up, riding on the British proposal for a split of the chief prosecutor's post and America's still-tepid support for it.⁶⁹ The African states in the Council were by now supportive of a split. Rwandan diplomats approached the United States for more robust support. America gave in, tacitly. America's response was: "if you get the votes, we're with you."⁷⁰

Rwanda's campaign did not put forward the main reason for its opposition to Del Ponte – its resistance to her attempts to investigate alleged RPF atrocities. Rather it dwelt on the more appealing - and objectively more persuasive - rationale that ICTR prosecutions were suffering neglect at the hands of a "part-time" prosecutor that considered Rwanda only as part of a far-flung prosecutorial empire and had spent only 38 days in the preceding year in Arusha and Kigali. By late July, diplomats in the Security Council, and human rights groups were publicly confirming Rwanda's campaign. "We and others have been heavily lobbied by the Rwandan government complaining about

Del Ponte, saying her work has lagged behind and that she is too busy in The Hague", a diplomat from a Security Council member state told the *New York Times*.⁷¹

There was initial division in the Council over the proposed split of the chief prosecutor's job, although a majority of member states was clearly in favour of the approach. While Britain and the United States backed the move, some Council members, such as Germany and Spain, shared Del Ponte's view that it was too late in the day to split the prosecutor's job. "If I had to vote, I would vote for giving her an extension of one or two years on both courts", said Inocencio Arias, Spain's ambassador to the United Nations and the President of the Security Council for the month of July 2003. Removing Del Ponte from the Rwanda Tribunal "makes it look as if she did a bad job", he said. "She didn't do a bad job."⁷²

Some members of the Security Council that were in favour of the decision were nevertheless critical of what they perceived as Rwanda's political interference regarding Del Ponte. "No government, particularly the Rwanda government, should interfere in the work of the Tribunal and the independence of the prosecutor", said Mexico's ambassador to the U.N., Adolfo Aguilar Zinser, while confirming his country's support for the decision to split the chief prosecutors post.⁷³ Ultimately, the decision eventually won the unanimous support of the Council's 15 members, and was described by a key player in the process as "one of the easiest decisions the Security Council has made".⁷⁴

Prosper is dismissive of the view that investigating RPF crimes, and the related consideration that such investigations may destabilize Rwanda, was behind the removal of Carla Del Ponte from her Rwanda post. "The completion strategy and management issues were the driving force" he explained. "Indicting the RPF had nothing to do with

this. That's a myth."⁷⁵ It was to dispel this myth, Prosper contended, that the United States ensured the inclusion of a compromise clause in the Security Council resolution by which the post was split, explicitly calling on Rwanda, Kenya, DRC and the Congo to cooperate with the prosecutor on investigations, "including investigations of the Rwandan Patriotic Army....."⁷⁶

Although Del Ponte pronounced her self "saddened" at the Council's decision⁷⁷ but "relieved" by the wording of resolution 1503, she told the media interview her version of the events that resulted in her sacking in which she laid blame squarely on President Kagame and the primacy-of-order perspective in Rwanda. Del Ponte recounted that, at a meeting she had with Kagame, the Rwandan's President insisted that it was up to his government to investigate alleged RPF atrocities while her duty was to prosecute the genocide. "This work of yours is creating political problems for me", she recalls the Rwandan leader as saying, "you are going to destabilize the country this way."⁷⁸ In Del Ponte's words, "Probably, if I had given in - if I had accepted his orders - I would still be here."⁷⁹ The international prosecutor was saying, in other words, that the tension between legalism and order was the direct cause of her defenestration.

The Rwandan government's concern with the stability of its domestic order is entirely consistent with state behaviour in this kind of situation. There is, at the very least, a perceived if not actual tension between bringing members of the victorious army to justice, and order in its basic form within such a fragile polity, although whether this tension translates into actual destabilization depends on how Rwanda's Tutsis collectively react to prosecutions of RPF soldiers in a country where the society of states clearly has invested far less in pursuing even-handed justice than it has in the Former

Yugoslavia. In the latter, the great powers, in pursuit of the strategic interest of bringing the states of the former Yugoslavia into the mainstream economic and strategic Western alliance over the long term, have used admission to the European Union as part of a carrot-and-stick approach to compel cooperation with the ICTY. As that International Tribunal is the beachhead of the construction of a particular order in the region, and the appearance of any of the parties successfully resisting accountability would weaken that process, the great powers have ensured that not only Serbian war criminals but also Croats, Bosnian Muslims, Kosovars and even Macedonians suspected of war crimes have been indicted by the Hague Tribunal.

In the case of Rwanda the calculations appear to be different, with international criminal justice playing a somewhat more nuanced role, wittingly and unwittingly. Let us imagine one scenario where the ICTR prosecutes RPF soldiers, especially if they had significant ranks and roles in the “struggle to liberate Rwanda”, as that country’s government officially describes the civil war, and some elements in the army, feeling betrayed, become restive and take unconstitutional steps to register their protest. What then? Would the “international community” that failed the country once now intervene in its “internal affairs”? That is most unlikely. Then again, we can imagine another scenario, one in which the Rwandan government, Mandela-like, pursues a path of forgiveness that encompasses submitting RPF troops to accountability for war crimes. If the Hutu extremists in exile in the Great Lakes region were to respond in kind and seek political accommodation, it would have been a worthwhile move. But if they did not, and were to utilise the historical record established in those trials to further their opposition to the Tutsi dominated government on ethnic grounds, attempting to apply even-handed

justice (although the crimes by both sides are not comparable in scope) would have backfired.

These constructs for now remain hypothetical. Del Ponte, for her part, would not accept the argument that stability in Rwanda should have been prioritized over her prosecutorial functions during her tenure at the Tribunal. For her, "stability must proceed from the application of justice"⁸⁰ -- a classic legalist/liberal worldview of international justice. Del Ponte, in fact, expressed to Kagame and the Security Council her position that an amendment of the Tribunal's statute by the Security Council that removed the prospect of prosecuting crimes committed by RPF forces was an option⁸¹ -- although, as she ought to know, an impractical one at this point in the life of the Tribunal. Absent such a decision, she would implement that mandate in its current form, which meant investigating *both* parties to the conflict⁸².

An additional element in Del Ponte's removal as chief prosecutor of the ICTR was a campaign by several Rwandan civil society groups in tandem with the Rwandan Government's efforts. In a petition to the Security Council in July 2003, a group of 46 organizations in Rwanda representing women, genocide survivors and students urged the Security Council "to strongly consider the dismal record of Prosecutor Carla Del Ponte at the International Criminal Tribunal for Rwanda when deciding on her renewal in September 2003."⁸³ The NGOs indicted Del Ponte on the following grounds: that she had failed to articulate a coherent long-term prosecution strategy; lacked a comprehensive approach to the inclusion of sexual violence charges in its cases; that there were undue delays in appointing key leadership personnel in the Office of the Prosecutor and unpredictable hiring decisions that had undermined the work of the

Tribunal; and that the care and dignity of genocide survivors had not been accorded priority.⁸⁴

This petition focused on issues of direct relevance to the Tribunal's daily work, with emphasis on the gender aspects of justice. This dimension of the Tribunal's prosecutions has long preoccupied NGOs that observe the Tribunal, and for good reason: women, both as victims of rape and survivors of the slaughter, bore the brunt of the genocide. In a context in which sovereign states were the prime movers of events, the impact of the NGO campaign lay in the all-inclusive air with which it clothed opposition to the feisty Swiss prosecutor. The message it sent was: "even the grassroots organizations don't want her too."

All things considered, then, it was virtually impossible for Del Ponte's prosecutorial role at the ICTR to have survived such a determined and carefully orchestrated political onslaught on her position by Rwanda and the great powers. Nevertheless, several international human rights groups, while non-committal on Del Ponte's individual fate, were concerned about the potential longer term impact of the split of the prosecutor position on the larger question of the international prosecutor's independence from the Rwandan government. There was concern that, given the outcome in this battle between a puny "David" (a prosecutor employed by an intergovernmental organization (the UN), and a "Goliath" (a sovereign state with *effective* control of its territory), the incoming chief prosecutor of the ICTR would have little incentive to act independently of the Rwandan government and challenge the latter's strategic interests.

In what is essentially a battle between liberal legalism, on the one hand, and state power, strategy and order in world politics on the other, will the purist view of justice

pushed by Del Ponte - with legal backing from the Tribunal's statute - prevail? It is more likely that the opposing view that is selective about the instruments and subjects of justice - national courts or international tribunals, *your* defendants or *mine* - that, in the words of Shinoda, "warns against inappropriate implementation of legality that ignores political considerations"⁸⁵ - will emerge triumphant. It is increasingly unlikely that the ICTR will be able to prosecute any *substantive* figure from the RPF, although the outside chance remains that it could indict a few low-level Tutsi soldiers⁸⁶. Even in that scenario, the Tribunal, with time for it to complete its work running out, may be forced by circumstances to hand over such indictees, among others, to Rwanda for trial in national courts.

Hassan Bubacar Jallow, Del Ponte's successor as chief prosecutor of the International Tribunal, has visited Rwanda frequently and cultivated good relations with the Rwandan government since his appointment. Given the deadlines imposed by the completion strategy and the reality he faces in the need for Rwanda's cooperation, it is unlikely that Jallow will reopen active investigations of RPF atrocities with a view to bringing charges, unless the Security Council were to make a robust political intervention in the matter. Such an outcome would, in effect, be victor's justice - surely not what the Security Council intended when it framed the remit of the ICTR. But perhaps, as Okali has noted, "it is a little optimistic to think that the world is ready yet for international criminal adjudication of the conduct of victorious forces in armed conflict".⁸⁷ It remains to be seen whether the advent of the ICC as a supposedly independent and permanent institution will alter this existing reality.

There are those who argue that this outcome cannot be accurately described as victor's justice, and that the Tribunal is unlikely to prosecute the RPF not because it does not want to, but simply because it will not be able to gather enough evidence to do so. "Prosecutions cannot happen in a vacuum", says former ICTR deputy chief prosecutor Muna. His analysis: The way the Tribunal is politically constructed, it cannot go into Rwanda and forcefully oblige Rwanda to turn over RPF soldiers. It has no SFOR [NATO's Stabilization Force that largely provided muscle for the apprehension of war criminals in the former Yugoslavia]. The ICTR was created at Rwanda's demand, even if they [Rwanda] were not pleased at the outcome. The international community saw Rwanda as a partner. If this was purely a UN initiative, the Security Council would have created an enforcement mechanism. It would be wrong, therefore, to blame the Tribunal should the institution close its doors without prosecuting any Tutsis.⁸⁸ In this view the Tribunal, after all, is an epiphenomenal interstate institution, reflecting, for better or worse, the degree of political support it has from its political master – the Security Council.

If this scenario is the one that unfolds, then the most that can be said, as not a few attorneys and policy makers even in the ICTR prosecutor's office argue, is that faced with these limitations the Tribunal should focus its efforts on the more heinous crimes of genocide and crimes against humanity committed against Tutsis. This would be an imperfect outcome, but we live in an imperfect world. It is possible that the feared negative impact of this "victor's justice" will be counterbalanced by power realities and the evolution of democratic governance and economic growth in Rwanda. This situation would be akin to that in which the Nuremberg trials have been criticized for serious flaws,

but those flaws have not obviated the outcome 50 years later - the construction of a democratic, peaceful and wealthy Germany, on the ashes of Nazi ideology despite - or perhaps *because of* - the victor's justice imposed by the Allied Powers.

Nevertheless, the contradiction of one-sided justice would be better avoided by the Security Council. That contradiction has not been allowed to ossify at the ICTY, despite initial claims by the Serbs that their leaders are on trial there because they lost the war to NATO's military superiority. In the end, behind the veil is a struggle over what version of history will prevail in Rwanda and the Great Lakes region of Africa.

Del Ponte argued that having one prosecutor for the ICTY and the ICTR strengthened the hand of the holder of that office. While it may strengthen the hand of the individual that holds the office, it has clearly not strengthened the ICTR institutionally, as we have seen. From both institutional-efficiency and political standpoints, the decision to split the prosecutor's role for two judicial institutions that are statutorily independent is a welcome one. It will free the prosecutor of the ICTY to focus on the significant challenges that confront that Tribunal, and give prosecutions at the ICTR the undivided leadership and managerial attention the equally weighty challenges at that court so clearly deserve.

¹ For a detailed discussion of the normative contributions of the ICTR to the development of international humanitarian law and criminal justice see Kingsley Chiedu Moghalu, "International Humanitarian Law from Nuremberg to Rome: The Weighty Precedents of the International Criminal Tribunal for Rwanda", *Pace International Law Review*, Vol. 14, Fall 2002, 273-305.

² See Kingsley Chiedu Moghalu, "Peace Through Justice: Rwanda's Precedent for the Trial of Milosevic", *The Washington Post*, 6 July 1999.

³ See John Hagan, *Justice in the Balkans: Prosecuting War Crimes in the Hague Tribunal*, (Chicago and London: University of Chicago Press, 2003), 105-107.

⁴ Article 15(3), Statute of the ICTR.

⁵ UN Doc. S/Res/ 1503 (2003).

⁶ See Richard Goldstone's interview with Radio Netherlands, "Del Ponte Axed from Rwanda Tribunal", www.rnw.nl, 29 August 2003.

⁷ Ibid.

⁸ Report of the Office of Internal Oversight Services on the Review of the Office of the Prosecutor at the International Criminal Tribunals for Rwanda and the Former Yugoslavia, UN Doc A/58/677, 6-7, 7 January 2004. The conclusions of the report, which was issued after a separate chief prosecutor had been appointed for the ICTR, appear to have been drawn prior to the Security Council decision.

⁹ Statement after the Security Council vote on resolution 955, UN Doc S/PV. 3453.

¹⁰ Ibid.

¹¹ Goldstone's comments in interview with Radio Netherlands.

¹² UN Doc A/58/677 (2004).

¹³ UN Doc S/Res/1503 (2003).

¹⁴ UN Doc. S/Res/1504 (2003)

¹⁵ Ibid.

¹⁶ Since 1993, a total of USD 966 million has been spent on the ICTY, and since 1995, the total expenditure on the ICTR since 1995 is approximately USD 600 million. See www.icty.org (the figure for the ICTR is a rough estimate from the author's personal knowledge). These figures are as of 2004. In comparison, annual global military spending for 2004 is projected at nearly USD 1,000 billion, i.e. USD 1 trillion.

Moreover, the Lockerbie trial at Camp Zeist, Netherlands, which lasted for about nine months and ended in early 2001, cost an estimated USD 80 million. See Peter Ford, "Lockerbie Success As New Model", *The Christian Science Monitor*, 1 February 2001.

¹⁷ S/PV. 3453.

¹⁸ See S/Res/1503.

¹⁹ See Statement by U.S. Ambassador for War Crimes Before the International Relations Committee, U.S. House of Representatives, 28 February 2002.

²⁰ Ibid.

²¹ See Andrew F. Tully, "U.S. Defends Diplomat's Criticism of War Crimes Courts", Radio Free Europe, 4 March 2002, <http://truthnews.com>.

²² Prosecutor's Address to the Security Council, November 2001 (on file with the author).

²³ Ibid.

²⁴ Report of the OIOS, A/58/677,8.

²⁵ Ibid.

²⁶ Interview with Pierre-Richard Prosper, U.S. Ambassador at Large for War Crimes Issues, Washington DC, 16 June 2004.

²⁷ Ibid. See also Aryeh Neier, "Effort to Oust Prosecutor Is Misguided", *International Herald Tribune*, 8 August 2003, where the author identifies Britain's strong support for Rwanda's campaign, and the "somewhat more ambivalen[t]" support of the United States.

²⁸ Prosper, Interview.

²⁹ Ibid.

³⁰ Ibid.

³¹ See the Secretary-General's comments as reported in Transcript of Press Conference by Secretary-General Kofi Annan at United Nations Headquarters, 30 July 2003, UN Press Release SG/SM/8803, www.un.org, 9.

³² Felicity Barringer, "Annan is Said to Want a New Prosecutor for Rwanda War Crimes", *New York Times*, 29 July 2003.

³³ Prosper, Interview.

³⁴ John Hooper, "I was Sacked as Rwanda Genocide Prosecutor for Challenging President, says Del Ponte,"

The Guardian, 13 September 2003.

³⁵ Ibid.

³⁶ Ibid.

³⁷ Ibid.

³⁸ See "Rwandan Anger at Slow Justice", <http://news.bbc.co.uk>.

³⁹ Carla Del Ponte, Interview with the author, 13 September 2004, The Hague (on file with the author).

⁴⁰ Ibid.

⁴¹ See "UN Tribunal Registrar Meets Rwandan Vice-President Paul Kagame", ICTR Press Release,

Arusha, 24 July 1998, www.ictor.org.

⁴² Telephone Interview with Catherine Cisse, former Policy Advisor to the Prosecutor, ICTY/ICTR,

telephone interview, Geneva/ The Hague, 4 June 2004.

⁴³ Interview with Bernard Muna, former Deputy Chief Prosecutor, International Criminal Tribunal for

Rwanda, London, 17 July 2004.

⁴⁴ *Jean Bosco Barayagwiza v The Prosecutor*: Decision of the Appeals Chamber, Case No. ICTR-97-19, 3

November 1999. See also *Prosecutor v Jean-Bosco Barayagwiza*: Prosecutor's Motion for Review or

reconsideration of the Appeals Chamber Decision Rendered on 3 November in *Jean-Bosco Barayagwiza v*

The Prosecutor and Request for Stay of Execution, and *Jean-Bosco Barayagwiza v The Prosecutor*:

Decision (Prosecutor's Request for Review or Reconsideration), 31 March 2000.

⁴⁵ Ibid.

⁴⁶ Ibid.

⁴⁷ Rodrique Ngowi, "Rwandan Army Ready to Cooperate with Investigation into Alleged Abuses",

Associated Press, 9 April 2001.

⁴⁸ See Chris McGreal, "Genocide Tribunal Ready to Indict First Tutsis", *The Guardian*, 5 April 2002.

⁴⁹ Ibid.

⁵⁰ Ibid.

⁵¹ News Release by the Government of Rwanda, 21 November 2002, www.gov.rw.

⁵² Ibid.

⁵³ Presentation by Ms. Carla Del Ponte, Prosecutor of the International Criminal Tribunal for Rwanda to the All Party Parliamentary Group on the Great Lakes Region and Genocide Prevention, London, 25 November 2002 (on file with the author).

⁵⁴ See Kingsley Chiedu Moghalu, "The Barayagwiza Affair: A Judicial and Political Crisis at the International Criminal Tribunal for Rwanda", Unpublished Paper, November 2004.

⁵⁵ Ibid.

⁵⁶ Ibid.

⁵⁷ Jim Lobe, "Rights: Groups Urge UN to Ensure Impartiality of Rwanda Tribunal", Inter Press Service, 12 August 2003.

⁵⁸ Ibid.

⁵⁹ Ibid.

⁶⁰ Quoted in Kevin Kelley, "War Crime Prosecutor: Is She Ineffective or Unfairly Targeted?" *The East African*, 4 August 2003.

⁶¹ Pierre-Richard Prosper, Interview.

⁶² Carla Del Ponte, Interview.

⁶³ Ibid.

⁶⁴ Ibid.

⁶⁵ Prosper, Interview. It is unclear if the suspects were to have been identified by the Tribunal or by Rwanda itself, but it appears they would more likely have been identified by the Rwandan authorities.

⁶⁶ Ibid.

⁶⁷ Ibid.

⁶⁸ Ibid.

⁶⁹ Ibid.

⁷⁰ Ibid.

⁷¹ Marlise Simons, "Rwanda Is Said to Seek New Prosecutor for War Crimes Court", *New York Times*, 28 July 2003.

⁷² Felicity Barringer, "Annan Is Said to Want New Prosecutor for Rwanda War Crimes", *The New York Times*, 29 July 2003.

⁷³ “Security Council Members Support Annan’s Proposal on Rwanda and Yugoslav Tribunals”, www.english.peoplesdaily.com.cn, 9 August 2003.

⁷⁴ Prosper, Interview.

⁷⁵ Ibid.

⁷⁶ Ibid. See also S/Res/ 1503.

⁷⁷ See Ms. Carla Del Ponte Press Conference, The Hague, 12 September 2003, Press Release by the Office of the Prosecutor, www.icty.org.

⁷⁸ See John Hooper, “I Was Sacked as Rwanda Genocide Prosecutor for Challenging President”.

⁷⁹ Ibid.

⁸⁰ Carla Del Ponte, Interview.

⁸¹ Ibid.

⁸² Ibid.

⁸³ “Civil Society Groups Deeply Concerned about Renewal of Carla Del Ponte as ICTR Prosecutor: A Petition From Civil Society Groups to the UN Security Council” July 2003 (on file with the author).

⁸⁴ Ibid.

⁸⁵ Hideaki Shinoda, “Peace-Building By the Rule of Law: An Examination of Intervention in the Form of International Tribunals”, *International Journal of Peace Studies*, Spring/Summer 2002, 41-55.

⁸⁶ Catherine Cisse, Interview.

⁸⁷ Email Interview with Agwu Ukiwe Okali, former Registrar, International Criminal Tribunal for Rwanda, 22 July 2004. U.S. Ambassador Prosper also admits to some concern about this situation, noting that the whole point of the agreement he tried to broker between Rwanda and the ICTR Prosecutor in 2003 was to ensure substantial progress on this matter before the December 2004 end date for initiating investigations (Prosper, Interview).

⁸⁸ Muna, Interview.

Chapter 8

Apprehending War Criminals: Law, Politics and Diplomacy

Kabuga is our Osama bin Laden

- Rwandan genocide survivor

The very idea of international criminal justice for violations of international humanitarian law is predicated on a framework in which sovereign states cooperate with international criminal tribunals, giving effect to their judicial orders and providing political and financial support. This is what makes the work of such tribunals possible. It could not be otherwise, for the ICTR and the ICTY have no police forces or prisons of their own. These two tribunals, created as they are by the UN Security Council's enforcement powers, impose on states an obligation to cooperate with them. In the treaty-based ICC, that obligation is taken on by accession to the treaty regime. And for the "hybrid" courts such as the Special Court for Sierra Leone, the weak legal framework for state cooperation has had important practical consequences. That court, not having the Chapter VII enforcement power of Security Council-created ICTY and ICTR, cannot compel the cooperation of states. Charles Taylor, the Special Court's most important indictee, is in exile in Nigeria, which has declined to hand him over to the Court.

In this chapter I review the cooperation of states with and their political support for the International Criminal Tribunal for Rwanda, beginning with the legal basis for that cooperation. In so doing, we will see how a combination of legal and political/strategic factors made possible the apprehension in various states of persons indicted by the Tribunal. As well, we shall see how the absence of political will in some cases has limited the Tribunal's success.

Legal Basis

The legal basis¹ in international law for the cooperation of states with the ICTR is Article 2 of Security Council resolution 955. In Article 2, the Security Council decided that all States shall cooperate fully with the International Tribunal and that consequently all states shall take any measures necessary under their domestic law to implement the provisions of the resolution and the Statute of the Tribunal. Article 2 also provided that implementing the provisions of the resolution and Statute included the obligation of States to comply with judicial requests or orders issued by the Tribunal under Article 28 of its statute.

Article 28 of the statute provides:

1. States shall cooperate with the International Tribunal for Rwanda in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law.
2. States shall comply without undue delay with any request for assistance of an order issued by a Trial Chamber [of the Tribunal], including but not limited to:
 - (a) The identification and location of persons;
 - (b) The taking of testimony and production of evidence;
 - (c) The service of documents;
 - (d) The arrest and detention of persons;
 - (e) The surrender or the transfer of the accused to the International Tribunal of Rwanda.

Several African and European states, and the United States, have provided the International Tribunal with the judicial cooperation envisaged in these and other statutory

provisions.² As we have seen, in the discussion on the Tribunal's legitimacy, decisions of the United Nations Security Council are binding on member states. Article 48 of the organization's Charter obligates U.N. member states to support decisions of the Security Council by cooperating in their implementation.

It might be wondered why the provision in Article 2 of resolution 955 is necessary if decisions of the Security Council are automatically binding on states. Are the decisions of the Security Council somehow, then, subordinate to the domestic laws of member states? Certainly, the answer is no, for the reasons that follow. The first part of the answer to this seeming contradiction lies in Article 2 itself, in which the council *decides* that all states *shall* cooperate fully with the International Tribunal" (second emphasis added). Both words are mandatory in law. The second part of the answer can be found in the nature of international law and the general problems of enforcement that attend it, as discussed in Chapter 3. This provision is a bow to the practical realities of sovereignty. And, in making it mandatory for states to take necessary measures under their domestic law, the Security Council, intentionally or not, makes a practical recognition of the theories of monism and dualism in the relationship between international law and municipal law.

According to the monist doctrine, international law and state laws are mutually reinforcing aspects of one system -- law in general. Monists believe that all law is a single body of legal rules that are binding -- whether on states, on individuals or on non-state entities.³ Dualists believe that the juridical origins of state law and international law are fundamentally different; the source of state law being the will of the state itself, and that of international law being the common will of states.⁴ Thus, in the dualist view, for

international law to apply within the domestic sphere, it needs to be enabled, empowered or validated by domestic legislation.

The practical impact of the monist and dualist attitudes to international law on the work of the ICTR is that it tends to condition how national institutions, including judicial institutions and law enforcement agencies, react or pro-act to the needs and requests of the International Tribunal for judicial cooperation or assistance. States with a dualist perspective believe that, to facilitate such cooperation with the ICTR, it is necessary to adopt enabling domestic legislation. Monist states see no legal bar to cooperating with the International Tribunal's requests for arrests of suspects in their territory and their transfer to the Tribunal at Arusha. In practice, however, political and non-legal considerations weigh more heavily on the degree of cooperation the ICTR has received from states than issues of monism and dualism. This has been especially true of African countries, in particular in the early years of the Tribunal. It has been observed that "Not one of the African states that have executed arrest and transfer orders of the Rwanda Tribunal had a legal instrument at their disposal authorizing national authorities to comply with such order"⁵. Their responses have been conditioned more by political reflexes than legal considerations. The adoption of domestic legislation, while it may be indicative of a dualist legal tradition, is not an automatic barometer. A number of states, all non-African, have adopted domestic cooperation acts in relation to the ICTR⁶.

Whether or not a state is monist or dualist, the position taken by the UN Secretary-General in the formative stages of the ICTY that "the establishment of the International Tribunal on the basis of a Chapter VII decision creates a binding obligation on all States to take whatever steps are required to implement the decision" holds true.⁷

Moreover, the practice of various states in regard to facilitating the apprehension of fugitives from justice at the request of the ICTR confirms the view that: "The fact that municipal courts must pay primary regard to municipal law in the event of a conflict with international law, in no way affects the obligations of the state concerned to perform its international obligations."⁸ This has not prevented the occasional legal challenge to the arrest and surrender of ICTR indictees in domestic courts, in the rare case of protracted nature.

The case of Elizaphan Ntakirutimana, a former Seventh Day Adventist pastor indicted by the ICTR and arrested in the United States, was one such case. In the *Barayagwiza* case the United States had applied political pressure to Cameroon to surrender an ICTR indictee to the Tribunal.⁹ It has applied similar pressure on other countries, as will be seen below when the political dimension of state cooperation is examined. In this context, the *Ntakirutimana* case provided the U.S. with the first - and so far, only - domestic legal and political test of its commitment to the ICTR.

In 1996, the ICTR indicted Elizaphan Ntakirutimana on charges of genocide, complicity in genocide, conspiracy to commit genocide, crimes against humanity, and violations of the Geneva Conventions.¹⁰ These charges were based largely on allegations that in April 1994 Ntakirutimana and his son, Gerard, a medical doctor, had planned and executed the massacres of hundreds of Tutsis at a church complex in Mugonero in the Kibuye region of western Rwanda.¹¹ The victims had been instructed by the clergyman to hide in the church premises as the massacres of Tutsis unfolded across Rwanda. The Tutsis were separated from non-Tutsis who were released, and on 16 April Pastor Ntakirutimana returned in a convoy of several vehicles and armed individuals and

participated in the slaughter of unarmed Tutsi men, women and children.¹² Following the genocide, Ntakirutimana left Rwanda and eventually immigrated to the United States where he lived in Laredo, Texas with another son, Eliel Ntakirutimana, a medical doctor.

On 7 September 1996, the ICTR issued a Warrant of Arrest and Order for Surrender of Elizaphan Ntakirutimana which read in pertinent part:

To: The United States of America,

I, Judge William Sekule, Judge of the International Criminal Tribunal for Rwanda,

Considering the United Nations Security Council Resolution 955 of 8 November 1994....and Articles 19 (2) and 28 of the Statute of the International Criminal Tribunal for Rwanda.

Considering the indictment submitted by the Prosecutor against Elizaphan Ntakirutimana, and confirmed by me.... on 7 September 1996, a copy of which is attached to this warrant of arrest,

HEREBY DIRECT the Authorities of the United States of America to search for, arrest - and surrender to International Criminal Tribunal for Rwanda: Elizaphan Ntakirutimana, [who] is currently believed to be in the United States of America...

And to advise the said Elizaphan Ntakirutimana at the time of his arrest, and in a language he understands, of his rights as set forth in the Statute...and of his right to remain silent and to caution him that any statement he makes shall be recorded and may be used in evidence.

REQUEST THAT The United States of America, upon the arrest of Elizaphan Ntakirutimana, promptly notify the Registrar of the International Criminal Tribunal for Rwanda, for the purposes of arranging his transfer to the custody of the International Criminal Tribunal for Rwanda...¹³

This document represents the general format of warrants of arrest and surrender orders issued by the ICTR. Arrest warrants invariably are addressed to states; they state the legal basis of the warrant in international law (the relevant decision of the Security Council and the statute and procedural rules of the International Tribunal); they enumerate the charges against the accused person; they provide for the respect of due process rights; and they provide guidance on how to initiate the actual surrender of the accused to the International Tribunal.

On the basis of this warrant U.S. federal marshals arrested Ntakirutimana, then 73, on 26 September 1996. But his transfer to the ICTR was to become an obstacle course, for the Rwandan clergyman subsequently mounted a spirited legal battle in U.S. courts that tested America's commitment to the ad hoc international criminal tribunals, tested American extradition law, and delayed his effective surrender to the Tribunal for three and a half years.

The United States had enacted domestic legislation¹⁴ on 10 February 1996 to establish a basis in its domestic law to implement two international agreements its executive branch of government had entered into with the ICTY and the ICTR.¹⁵ When the U.S. Federal Government filed a request at the U.S. District Court for the Southern District of Texas to secure Ntakirutimana's surrender to the Tribunal in January 1997, his defence team, headed by former U.S. attorney-general Ramsey Clark opposed the motion on the basis of four main arguments: (1) that the ICTR was not legitimate as it was improperly created, (2) that extradition would be unconstitutional, there being no valid treaty between the U.S. and the ICTR; and (3) that the U.S. authorities had not

established enough evidence to meet to standards of "probable cause" and (4) that he would not receive a fair trial at the Tribunal.¹⁶

The U.S. Government and an *amicus curiae* brief filed by the New York based NGO Lawyers Committee for Human Rights¹⁷ argued that (1) the Rwanda Tribunal was validly established under the authority of the United Nations Charter; (2) member states of the United Nations should cooperate with the Tribunal because they were "obligated to abide by and carry out decisions made by the Security Council"; (3) the Agreement on Surrender of Persons was properly authorized under U.S. law and created a binding obligation to surrender Ntakirutimana under domestic law and a legal basis for extradition by either treaty or statute; and (4) disputed the defendant's claims that he would not receive a fair trial and that the International Tribunal had not shown probable cause.¹⁸ U.S. Magistrate Judge Marcel C. Notzen ruled that the Congressional-Executive Agreement of Surrender of indictees to the ICTR and the ICTY was unconstitutional and could not provide a legal basis for extraditing Ntakirutimana. Rather, Judge Notzen ruled, extradition required a treaty, and no treaty existed between the U.S. and the International Tribunal; he then ordered Ntakirutimana's release from custody.¹⁹ This decision was legally unsound, displaying as it does a lack of understanding of the status of the ICTR in international law and the basis of obligation that exists in the United Nations Charter (a multilateral treaty to which the U.S. is a party and has ratified).²⁰ Indeed, Judge Notzen ignored that core argument altogether in his decision. His legal reasoning stemmed in part, no doubt, from the ambiguous status of international law, including validly concluded treaties, in American domestic law. American law provides that even international treaties concluded by the United States are invalid if they are

unconstitutional. In other words, the U.S. constitution is asserted by some American lawyers as superseding international law in the American legal sphere, a position that goes beyond dualism to one of primacy. Louis Henkin has stated that "treaties are subject to constitutional limitations that apply to all exercising federal power", and noted that the U.S. constitution does not forbid the President or Congress to violate international law.²¹ However, "suspending domestic law does not relieve the United States of its international obligations."²²

At a practical level, Judge Notzen's ruling was an embarrassing setback to U.S.'s political positioning in the 1990s as the leading political and operational supporter of the ad hoc international criminal tribunals for Rwanda and for the former Yugoslavia.²³ Ramsey Clark had already echoed the challenge to the legitimacy of the Tribunal. "This is the first time in our history that we've been asked to surrender a person to a tribunal and one of doubtful legality", he told the *Houston Chronicle*. "There is nothing in the U.N. Charter that allows for a criminal tribunal."²⁴

The Tribunal, in a position articulated at the time by this writer, took the view that it was up to the U.S. Government to determine its next move, but restated its view that states, including the United States, were required to cooperate with the Tribunal.²⁵ And the U.S. Department of State, which bore the political burden of ensuring the surrender of the fugitive from justice on American territory, reassured the media of its conviction that Ntakirutimana would still be surrendered.²⁶

As decisions on extradition are not subject to appeal under U.S. law, the U.S. Government refiled its request for the surrender of Ntakirutimana with a different judge in the Laredo judicial division. The magistrate that was to hear the case recused himself

and the matter subsequently ended up on the docket of the U.S. District Court (a federal court) for the Southern District of Texas. There, Ntakirutimana filed a writ of *habeas corpus*. Judge John Rainey denied the writ and upheld Ntakirutimana's surrender, ruling that the Surrender Agreement and the National Defence Authorization Act provided adequate constitutional basis for extradition.²⁷ Ntakirutimana petitioned for *habeas corpus* to the United States Court of Appeals, Fifth Circuit.²⁸

The appellate court, in a majority ruling handed down by Judge Emilio Garza held (1) that it was not unconstitutional to surrender Ntakirutimana to the International Criminal Tribunal for Rwanda, even in the absence of a treaty, so long as extradition was authorized by statute; (2) the district court's finding of probable cause was supported by sufficient preliminary evidence; and (3) issues involving the legal validity of the creation of international tribunals by the Security Council, and whether the Tribunal would guarantee the petitioner's rights under the U.S. Constitution and international law, were beyond the scope of *habeas* review.²⁹ The Fifth Circuit affirmed the denial of Ntakirutimana's petition for a writ of *habeas corpus* and lifted the stay of extradition.³⁰

In a separate, specially concurring opinion in which he expressed his doubts about Ntakirutimana's probable guilt, Judge Robert Parker acknowledged the role of high politics in the Ntakirutimana saga. Speculating on the final decision of the Secretary of State (whose prerogative it is to approve extradition) on the extradition of the Rwandan clergyman he stated: "I fully understand that the ultimate decision in this case may well be a political one that it is driven by important considerations of state that transcend the question of guilt or innocence of any single individual. I respect the political process that

is necessarily implicated in this case, just as I respect the fact that adherence to precedent compels my concurrence."³¹

Meanwhile, Judge DeMoss, dissenting from the majority, in turn acknowledged an opposing political factor – sovereignty:

"Notwithstanding our nation's moral duty to assist the cause of international justice, our nation's actions taken in that regard must comport with the Constitution's procedures and with respect for its allocation of powers...

The Attorney General...stakes her case on the validity and enforceability of a warrant issued by the United Nations International Criminal Tribunal for Rwanda, which is a non sovereign entity created by the United Nations Security Council, purporting to "Direct" the officials of our sovereign nation to surrender the accused. In defence of this, the Attorney-General relies exclusively on what my colleagues have termed a "Congressional Executive Agreement" - the coincidence of an "executive agreement" with the Tribunal, entered on behalf of the United States by an ambassador appointed by the President in the course of his duties to conduct foreign affairs, and a purported enabling act passed by simple majorities of both houses of Congress and signed into law by the President...."³²

Ntakirutimana then applied to the U.S. Supreme Court for a review and setting aside of the Fifth Circuit Court's decision, but in January 2000 the Supreme Court denied review. In late March 2000, his extradition having been authorized by Secretary of State Madeleine Albright, a U.S. airplane carrying Ntakirutimana, accompanied by U.S. marshals, landed at Kilimanjaro International Airport at Arusha, Tanzania. Diplomats from the U.S. Embassy in Rwanda and officials of the ICTR registrar's office constituted the "welcoming party". The U.S. authorities handed him over to Tribunal officials after

procedural formalities. Thus did the Ntakirutimana saga draw to a close. And with this demonstration of dogged commitment in the face of a political embarrassment, the United States, in the words of one commentator, "with little public notice...dipped its toe into the waters of international justice. It remains to be seen whether Uncle Sam will ever wade in deep enough to get his trunks wet. But he has crossed the water's edge."³³ Ntakirutimana was subsequently tried by the Tribunal, found guilty, and sentenced to ten years to prison.³⁴

The Politics

The level of direct political support that states have given the ICTR depends on a number of factors. These include the connection between particular states, on the one hand, and Rwanda (and the genocide) on the other. Another factor was the general foreign policy of particular states towards human rights questions (of which violations of international humanitarian law were prominent, whether or not those states were linked to Rwanda before or during the genocide). And third, there was the practical question of the presence of fugitives from justice, sought by the ICTR or the Rwandan Government, on the territories of particular countries. In all three contexts, African, European and North American (United States and Canada) states were the theatres for the politics and diplomacy of the capture of Rwandans (and in one case a non-Rwandan) accused of perpetrating the 1994 genocide.

From the discussion above, we have seen how questions of law played out in a case where a fugitive's surrender to the International Tribunal encountered a robust challenge in the domestic legal sphere. What is clear is that in all cases political attitudes to

accountability for genocide, crimes against humanity and war crimes affect the level and depth of cooperation and support.

The United States, the prime mover of the Rwanda Tribunal among the great powers, supported the Tribunal for a number of reasons. First, it has sought to expiate its political guilt for inaction during the genocide by subsequently lending its political weight on the global stage to the charge for accountability. Closely allied to this reason was its historical leadership of the earlier effort at the Nuremberg trials. To be sure, the circumstances were different in 1994 from 1945, when U.S. troops fought in World War II, but the opportunity presented for moral leadership was essentially similar.

It was quite fortuitous, then, that Secretary of State Madeleine Albright happened to be, as a Jew of European origin, a genocide survivor.³⁵ Either by this reason or independently of it, she had championed military intervention in the Balkans, the modern day European theatre of mass atrocities, as the U.S. Ambassador to the United Nations from 1992. Thus, although she opposed similar intervention in Rwanda after Somalia in line with her Government's policy at the time, she was psychologically primed to throw her weight behind a war crimes accountability effort. Third, from a strategic point of view, U.S. support for the Tribunal was support in effect for Paul Kagame and a number of other Anglophone leaders - Yoweri Museveni of Uganda, Meles Zenawi of Ethiopia and Isaias Aferworki of Eritrea - in central and eastern Africa and the Horn of Africa who were seen as representing a "new breed" of African leaders "worthy" of America's support. This factor is applicable far more directly to Kagame, and to the others more by extrapolation. Museveni was no great supporter of the ICTR. He believed that it was a

big waste of time and money and, like Churchill and Stalin, that the perpetrators of such heinous crimes should simply be rounded up and shot.

European countries have also been firmly supportive of the ICTR. Some of them have foreign policies with an “ethical” dimension, placing strong emphasis on the moral dimensions of international affairs, and tend to be active in humanitarian responses to global crisis - to the extent that there are such responses. European countries have also been a favourite hiding place for Rwandan *genocidaires*. These countries, such as Belgium, Switzerland and Netherlands, have been quick to apprehend genocide suspects and indictees at the Tribunal's request.

The growing support for institutionalized international criminal accountability in Europe in the 1990s was also a major contributory factor to European support for the ICTR. Thus, although the United States has remained the largest financial backer of the Tribunal through assessed (compulsory) contributions to the U.N. budgets of the ICTY and the ICTR, Europe was by far the leader in contributions to a voluntary contributions trust fund for the ICTR set up by the U.N. General Assembly in 1995. Moreover, Anglophone countries like Britain also saw support for the ICTR as an extension of support for the Anglophone RPF that was now wresting Rwanda from its francophone colonial roots.³⁶

Weak African Support

African support for the ICTR has been far more ambivalent, especially in the Tribunal's early years. With the conspicuous exceptions of leaders like Alpha Omar Konare, the former President of Mali and currently Chairman of the Commission of the

African Union, President Benjamin Mkapa (head of state of Tanzania, the Tribunal's host country), Mathieu Kerekou of Benin, and King Mswati III of Swaziland³⁷, African leaders were initially unsure of just how to respond to the idea of an intrusive international tribunal in the creation of which they played little or no political role. Some were suspicious, some apprehensive and the majority noncommittal, adopting a wait-and-see posture.³⁸

Thus, although African states have largely cooperated in the apprehension of the war criminals from Rwanda, a certain reticence in public and political engagement with the Tribunal has remained constant. Discussions on the ICTR in the United Nations have been dominated by non-African States. Indeed, to watch or participate in these discussions is to become aware of how marginal issues of cosmopolitan international justice are to the foreign policies of most African states. This trend can be compared with the clear political support that European states have provided to the Yugoslavia Tribunal at The Hague - an attitude based on conscious foreign policy in several Western capitals and recognition of a linkage between the political evolution and enlargement of the European Union and resolving the question of war crimes in the Former Yugoslavia.

Moreover, with one exception, no African state has contributed to the voluntary contributions trust fund of the ICTR, which has received contributions in excess of \$8 million.³⁹ Thus it is fair to say that, were it left to African states the ICTR would not exist, let alone operate, and this would not be simply for the reason of paucity of resources for such an endeavour. It is clearly far more a question of a very limited commitment to legalism -- liberal or not -- as a dimension of conflict resolution and a means to the construction of a stable political order. And yet, political discourse in many

African countries is suffused with references to the Rwandan genocide and the need to avoid its repetition in any other African country. It is precisely this sentiment that led to the inclusion in the Charter of the African Union of a right to military intervention in cases of genocide, crimes against humanity and war crimes. Of course, the Rwandan genocide and the African response to it cannot be discussed in isolation from the politics of exclusion and ethnic domination that are still prevalent in the continent despite the gradual progress of democratization and has frequently produced violence.⁴⁰

To what, then, can we ascribe the general political apathy of African states towards the ICTR? Three factors are clearly at play. First, a conceptual resistance to legal justice and a preference for amnesties and truth and reconciliation commissions is a major factor. This argument has several strands: war crimes trials could further destabilize fragile societies in transition from a period of conflict by trapping old hatreds within the quest for "vindictive" legal accountability; the new fad of war crimes trials does not necessarily represent a commitment to peace because the Western nations that are its chief advocates invariably provided support to despotic African regimes during the Cold War; Africa has more immediate needs for justice of a different kind - access to basic necessities like clean water and healthcare; and dialogue and reconciliation are seen as more reflective of societal/cultural norms than imported notions of legalism.⁴¹

But a second and self interested reason is that of a fear of the possible unintended consequences of being too supportive of war crimes trials. There are few countries in sub-Saharan Africa where politically or ethnically aspired mass killings or war crimes have not occurred in the past four decades. These events necessarily implicate the responsibility of the political and military leadership, past or present, in these countries.

Consequently, there is little appetite for a normative approach that could return to haunt its supporters.

Third, the manner of the Tribunal's creation - as an ad hoc and interventionist institution that is externally imposed - is one reason why several African political leaders look at the ICTR with mixed feelings and provide it with only cautious support. This is the question of ownership, of the tension between international and domestic justice. Many an African leader would be quick to condemn violations of international humanitarian law, but would simultaneously assert that the proper persons to judge war criminals are the courts of their own countries -- if there is no better alternative than a legal trial. Lost in this response is any confrontation of the question of what happens where (as is frequently the case) domestic courts have no capacity or political will to bring highly placed individuals to justice for war crimes. (Ethiopia, where national courts have tried past officials for violations of international humanitarian law, is a striking exception.) Truth and reconciliation commissions thus became an easy halfway house that offers a path out of the dilemma. Rwanda is also a rare exception to a continental political aversion to a legalistic approach to justice.

This third factor offers some insight into the apparent contradiction in which Africa's leaders are decidedly cool to ad hoc international criminal tribunals, but several have led their countries to ratify the Rome Statute of the International Criminal Court. They can point to its consensual nature as a treaty-based international court. But here, as well, there are in a few cases significant elements of strategic self-interest at play. For others, signing up to the Rome Statute may be a commitment that looks good on a foreign policy resume, but the consistency of which is yet to be tested. And even in the case of

the ICC, the African states "missed the boat" by their general failure to engage more actively and politically with the ICTR.⁴² That failure has placed them in a relatively weak political position in the politics of the ICC, as we shall see later.

Kenya and America's Bounty Hunters

It is against the background of these factors that we can now turn to Kenya, a country with a pivotal place in any assessment of the cooperation of African states with the ICTR, and the role of U.S. war crimes diplomacy in that country and the Great Lakes region in general.

Under the leadership of then President Arap Moi, Kenya enjoyed close relations with the Habyarimana regime in Rwanda. It was thus understandably lukewarm to the idea of an international tribunal, especially as it had sought without success to link accountability for the genocide with the shooting of Habyarimana's plane⁴³ (in obvious sympathy with Hutu extremist claims that the RPF bore responsibility for the plane downing). In the same period that the Tribunal was beginning its work in 1995, several members of the defeated former Rwandan Government and other leaders of the genocide had begun to move from Zaire to Kenya, where the capital, Nairobi, offered better lifestyles and more modern amenities. In these circumstances, Kenya soon acquired a reputation as the leading host to high-ranking fugitives from justice for the genocide. It thus became the main target area for the special investigators of the office of the Tribunal's chief prosecutor, known as the "tracking team."

The tracking team's reports led then chief prosecutor Arbour and her deputy, Muna to plan a major arrest operation that was to apprehend a number of the Tribunal's

indictees and suspects in Kenya, to be executed by Kenyan law enforcement authorities. But it was clear to the international prosecutors that the exiled Rwandan *genocidaires* were living in Kenya with the blessing of Moi's government. A major arrest operation could not be planned, let alone successfully executed, without the political approval of the Kenyan leader. Arbour and Muna decided to solicit the assistance of the great powers and a number of other influential states in applying political pressure on Moi.⁴⁴ A situation where Kenya had become a major regional link for the exiled Rwandan regime was becoming politically unsustainable for Kenya, a country that is largely dependent on donor aid.⁴⁵ At the same time the Rwandan leader Kagame, whose relations with Moi were understandably frosty, was coming to the realisation that he had to deal with Moi's government - unpalatable as the prospect was - in order to advance his country's strategic interests. At the top of those interests was that of the apprehension of the Rwandan *genocidaires* in Kenya, as well as economic ones. Rwanda is a landlocked country, and Kenya is the region's economic hub, from which land based commerce and the shipping port of Mombasa are indispensable to the Rwandan economy.

Meanwhile, Arbour and Muna had obtained the support of Canada, which, through its ambassador in Nairobi, took the lead in the application of diplomatic pressure on Moi to break with his government policy of sheltering war criminals. Canada was supported in this effort by the U.S., Britain and South Africa. Arbour ultimately met with Moi, who, assenting to the planned swoop, asked the international prosecutors to meet with Kenyan Attorney-General Amos Wako. Arbour and Muna met with Wako, with whom they prepared a strategy for the arrest operations. Muna then reported their plans and progress to Tribunal registrar Okali, who subsequently provided the final political and

legal liaison for the operation in meetings with the Kenyan Attorney-General and Minister of Foreign Affairs.

On 18 July 1997, Kenyan authorities arrested seven persons in Nairobi at the International Tribunal's request in a stunning raid code-named "Operation NAKI" (Nairobi-Kigali) and transferred them to the Tribunal's detention centre in Arusha.⁴⁶ At the top of the list of fugitives captured in the NAKI operation was former Rwandan Prime Minister Jean Kambanda. Others apprehended in the raid were Pauline Nyiramasuhuko, former Minister of Family Welfare and Women Affairs (the first woman ever to be indicted by an international criminal tribunal), her son Arsene Shalom Ntahobali, the journalist Hassan Ngeze, and erstwhile senior military commanders Gratien Kabiligi and Aloys Ntabakuze. The NAKI operation was the most successful such operation in the Tribunal's history, and provided the ICTR with a much needed boost in legitimacy at a time when it was still a fledgling international judicial institution. But this success could not have been achieved without the political agreement of a reluctant sovereign state, and the political pressure applied by influential external parties in the nature of influential Western states and South Africa.

There are two ironies here. The first is that the execution of NAKI was delayed by a day because Kagame, returning from a trip to South Africa, visited Nairobi during that period and met with Moi, following the intercession of South African leader Nelson Mandela.⁴⁷ Six high level Rwandan suspects escaped the dragnet of the operation as a result of a leak that occurred by reason of the delay.⁴⁸ The second irony is that although other accused persons or suspects were subsequently arrested in Kenya at the Tribunal's

request, none of those captured in Kenya included the wealthy persons that were close to Habyarimana and also had actual links with the Kenyan leadership.⁴⁹

Rewards for Justice.

None of those individuals has been more elusive than Felicien Kabuga, the millionaire Rwandan businessman who was a major shareholder in the hate radio station RTLM and allegedly financed the murder squads and the importation of machetes and other weapons that were used to execute the genocide. He is wanted by the Tribunal on charges of genocide. In 1994 Kabuga fled to Switzerland, from where he was expelled in 1995. He then settled in Nairobi, where he had strong relationships with President Moi and powerful members of Moi's government, including mutually beneficial business deals. In 1995, Kabuga's daughter wed Habyarimana's son in Nairobi.

Kabuga is on the U.S. Federal Bureau of Investigations (FBI) "most wanted list" together with Osama bin Laden, and the U.S. Government has offered up to US\$ 5 million for information leading to Kabuga's capture. But the fugitive, deploying his considerable wealth, international connections and multiple aliases and passports, has remained several steps ahead of international law. He was one of the "big fish" that escaped from the NAKI operation in 1997. A handwritten note found in the house where he was believed to be hiding revealed that he was tipped off by a Kenyan police informant.⁵⁰ In the words of one genocide survivor, "Kabuga is our Osama bin Laden".⁵¹ Although Kenya, under international pressure, had revoked Kabuga's Kenyan residence permit in 1997, he is believed to have continued receiving protection from senior officials of the Moi-era government on Kabuga's payroll.⁵² The ICTR subsequently went after his

financial assets, and \$2.5 million in Kabuga's bank accounts in France, Belgium and Switzerland were frozen at the Tribunal chief prosecutor's request in 1999.⁵³

It was around this period that the U.S. government began to take an active interest in bringing Kabuga to justice through its "Rewards for Justice" programme. The total budget of that programme is uncertain, but it is a global initiative that encompasses the ICTR and ICTY, and the \$25 million reward for information leading to the capture of Bin Laden. Under the program, the full bounty of, say, \$5 million in the Kabuga case could be given as reward to an informant, or a lesser sum could be disbursed. How much an informant is paid is determined by an internal committee, and the highest actual payment appears to have been \$500,000.⁵⁴ A reward is paid in cash, unless otherwise indicated by an informant. In one case, the U.S. authorities brought three suitcases stuffed with cash to a payment meeting with an informant, who indicated that he wanted half of his payment in cash and the other half in a bank account.⁵⁵ Such are the resources and pragmatic tactics that the U.S. authorities have deployed in their hunt for Kabuga, without success as of this writing. While the program brought the FBI close to locating Kabuga on a number of occasions, the scent of near success has frequently proved a mirage, on one occasion tragically.

In 2002, two Kenyan sources came forward, claiming to possess information that would lead to Kabuga's arrest.⁵⁶ One of the informants was William Munuhe, who contacted the U.S. Embassy in Nairobi, the locus of the U.S. hunt for Kabuga in the region under the local direction of the U.S. ambassador to Kenya, Johnny Carson and the overall direction of war crimes ambassador Prosper.

The Kenyan sources indicated to the American authorities that Kabuga was receiving protection from the high echelons of the Moi government.⁵⁷ Washington obtained information on the vehicles in which Kabuga travelled - vehicles of a government security team. The Americans tried to establish with Kenyan authorities a discrete plan to arrest Kabuga, but as Prosper recalls, the informants became compromised. One of the two informants was kidnapped for a weekend, threatened, released and subsequently kidnapped a second time. The second informant (Munuhe) had by now become very afraid. Realizing that the hunt for Kabuga was no ordinary criminal investigation, as the information the Americans were receiving appeared to point all the way to the then President Moi and the Permanent Secretary for Internal Security in the Office of the President, Zakayo Cheriuyot, Prosper brought in the Federal Bureau of Investigation (FBI) to administer polygraph tests, first on the two informers (to ascertain the veracity of their claims), and then on Permanent Secretary Cheriuyot (the latter almost certainly with Moi's knowledge and acquiescence). For Prosper, this was a necessary precaution before the U.S. Government could apply stronger political pressure on Moi to surrender Kabuga to the ICTR. While the two informants passed the lie-detector test, the Kenyan permanent secretary failed it - "miserably", in Prosper's recollection.

With this outcome, the American authorities reverted to Moi. The septuagenarian politician's rule was coming to an end after 20 years, under pressure from opposition politicians to relinquish power. The Americans were now anxious to step up the momentum in the manhunt for Kabuga and apprehend him before Moi left office. A stakeout was set up to snare Kabuga at a house in the affluent Nairobi neighbourhood of

Karen.⁵⁸ Munuhe was to lure the Rwandan there. Outside, U.S. and Kenyan security agents waited in hiding, ready to pounce on Kabuga as soon as he appeared. Kabuga never showed up, and Munuhe was later murdered with a shot to the back of his head.⁵⁹ Thus ended -- temporarily at least -- the trail to Kabuga. The U.S. authorities relocated their second informant outside Kenya to assure his safety.⁶⁰

In January 2003 a new Kenyan government headed by President Mwai Kibaki was elected, and Kibaki pledged his support to the hunt for Kabuga. But first, he needed to clean up Kenya's security and intelligence services which at every turn had been shown to have been compromised by Kabuga or interests loyal to him. Nearly two years later in late 2004, Prosper acknowledged that the search for Kabuga had lost momentum, but asserted that it would resume in earnest.⁶¹ Kabuga's pursuers in Washington believe that he has remained in Kenya but entered and left the country frequently after the manhunt for him became intense in 2002. The Kenyan authorities, however, have consistently discounted the possibility of Kabuga's presence on Kenyan territory. And the investigators of the International Tribunal admit they simply do not know Kabuga's whereabouts. "Sometimes we can be very close. Sometimes we can be very far," Richard Renaud, the Tribunal's chief of investigations commented. "This guy is very smart. He has a lot of money. He has a lot of contacts. And he travels a lot."⁶²

Meanwhile, in the wider Great Lakes region, the U.S. Rewards for Justice program has made progress. The international conflict in the Democratic Republic of Congo has served as the political context for the handover of some Rwandans sought by the Tribunal to stand trial. The historical slaughters of Tutsi in Rwanda over the past 45 years have contributed to a significant Tutsi minority in the DRC, who are resented by indigenous

Congolese. And the 1994 genocide provided the immediate context for further conflict in the region when the defeated *genocidaires* blended into about two million ordinary Hutu civilians and crossed the border into DRC in one of the swiftest and largest movements of refugees in history. There the war criminals regrouped, planned and executed military incursions into Rwanda. Perceiving its national security to be under threat, Rwanda's new Tutsi-dominated army invaded DRC in 1996 using the subterfuge of an "indigenous revolt", defeated the Congolese despot Mobutu Sese Seko's army with little resistance (Mobutu fled into exile in Morocco and France and later died of illness), and installed Laurent Kabila, a flamboyant Congolese dissident who had spent many years in exile in Tanzania, as the new head of state of DRC.⁶³

Ultimately, however, Kabila fell out with his Rwandan puppeteers and asserted his own authority by aligning himself with the pro-genocide Hutu forces in the region, and orchestrated mass killings of Tutsis, publicly supported by his political adviser Yerodia Ndombasi.⁶⁴ Rwanda responded in 1998 with a second invasion of DRC in order to oust Kabila, who invited the military intervention of Angola, Zimbabwe and at least five other African states that ultimately saved him from certain defeat. The conflict, described as "Africa's first World War", lasted five years. Kabila was assassinated in 2001 and was succeeded by his son Joseph Kabila. Several troops of the genocidal former Rwandan Government Forces fought on Kabila's side during the war. In their various incursions into the Congo since 1994, the Rwandan army is alleged to have massacred more than 200,000 Hutus in the Congo.

The Lusaka Peace Accords in 1999 (ultimately not respected by the warring parties) called for the handover to the ICTR of persons accused of the 1994 genocide who fought

on Kabila's side. And it was in the context of subsequent negotiations that ultimately led to a peace deal between the parties in South Africa that the U.S. launched the Rewards for Justice Program in the Great Lakes region, seizing what it saw as an evolving political window of opportunity.

From the beginning of the African part of the rewards programme, Prosper adopted a partnership approach that sought to secure the “buy-in” of the political leadership of the three main countries that harboured Rwandan war criminals in the region - Kenya, DRC and the Republic of Congo (Congo-Brazaville) in cooperation with senior officials of the ICTR, in particular its registrar, Adama Dieng. Prosper was anxious to demonstrate to the region, through meetings and joint press conferences with these officials, that the American programme had local political support, in clear contrast with the Balkans, where the governments of the states of the former Yugoslavia resisted endorsing the U.S. rewards programme and thus robbed it of any political legitimacy in the region.⁶⁵

In this context, two political factors influenced the generally moderate Congolese President Joseph Kabila. First, he recognized that the strong presence of the ex-RGF forces, the interhamwe militia and the ALIR in his military and governmental structures presented him with a major foreign relations problem. He had inherited this situation from his father. This topic was discussed during Kabila's meeting with President Bush in Washington D.C. in 2002.⁶⁶ Second, it posed an internal security problem as well. Some of the Rwandan exiles had aligned themselves with hard line elements in Kabila's Government, creating further political complications. Moving against them too precipitately might affect the internal political order in unpredictable ways.

Thus, although he wanted to get rid of these wanted men, including approving their being brought to justice at Arusha, in doing so Kabila would be making a significant gesture to Rwanda, and was reluctant to do so without a reciprocal action of equal significance by Rwanda.⁶⁷ The peace talks in South Africa's Sun City, which included Rwandan negotiators, provided an enabling environment for a quid pro quo. As Rwandan and other foreign forces began their withdrawal from the Congo under intense international pressure, Kabila made the political decision to support the apprehension of Rwandan war criminals in this country and their handover to the ICTR under the U.S. Rewards programme.

Nevertheless, the results, although a significant achievement compared to the prevailing situation before the rewards programme, have been modest in comparison to the numbers (at least 15) of ringleaders of the Rwandan genocide believed to be hiding in the DRC. As of this writing, five persons have been captured and handed over to the International Criminal Tribunal. The biggest catch among them has been Augustine Bizimungu, former chief of staff of the Rwandan Government Forces who fought actively in the DRC army - and had been one of the Tribunal's highest priorities for arrest. Bizimungu was arrested in Angola in August 2002 after American authorities confirmed his presence at a demobilization camp. Others captured under the aegis of the American programme are Tharcisse Renzaho, former governor of Kigali (arrested in DRC, 2002), Yusuf Munyakazi, a militia leader during the genocide (DRC, 2004), Jean-Baptiste Gatete, a senior civil administrator (Congo, 2002) and Idelphonse Hatagekimana (Congo, 2003).

In conclusion, this chapter has established how, yet again, the definition by states of their strategic interests has influenced the level and kind of support they give to international criminal justice despite the mistaken impression that the creation of international war crimes tribunal represents a major shift away from the Bullian, international society perspective on international affairs. State cooperation with the ICTR has ranged from the forthcoming to the hesitant and conditional and, in the rare case where national interests are deemed to dictate such a course of action, non-cooperation. As we will see in the next, concluding chapter of this dissertation, not even the creation of a standing International Criminal Court, designed to remove the ad hoc approach to punishing war criminals and instead institutionalize it, has brought about an end of history as we know it in the attitudes of states towards international war crimes justice.

¹ The following discussion of the legal basis of state cooperation with the ICTR draws from an earlier publication by the author. See Kingsley Chiedu Moghalu, "International Humanitarian Law from Nuremberg to Rome: The Weighty Precedents of the International Criminal Tribunal for Rwanda", *Pace International Law Review* Vol. 14 (fall 2002), 273 – 305.

² As of 21 August 2004, individuals sought by the Tribunal for trial have been arrested in, and transferred to the Tribunal from, the following states: Angola, Belgium, Benin, Burkina Faso, Cameroon, Congo, Côte d'Ivoire, Democratic Republic of Congo, Denmark, France, Kenya, Mali, Namibia, Netherlands, Senegal, South Africa, Switzerland, Tanzania, Togo, Uganda, United Kingdom, United States, and Zambia.

³ J.G. Starke, *Introduction to International Law* (London: Butterworths, 1984), 68-71.

⁴ *Ibid.*, 69.

⁵ See Dagmar Stroh, "State Cooperation with the International Criminal Tribunals for the Former Yugoslavia and for Rwanda", *Max Planck Yearbook of United Nations Law*, Volume 5 (Kluwer Law International: The Hague, London, New York, Kluwer Law International, 2001), 282.

⁶ *Ibid.*, 271. Examples include Austria, Australia, Belgium, Denmark, Germany, France, New Zealand, Netherlands, Norway, Sweden, Switzerland, the United Kingdom, and the United States.

⁷ Report of the Secretary-General Pursuant to paragraph 2 of Security Council Resolution 808, UN Doc. S/52/704/Add.1, 1993.

⁸ Starke, 85.

⁹ See Kingsley Chiedu Moghalu, "The Barayagwiza Affair: A Judicial and Political Crisis at the International Criminal Tribunal for Rwanda", Unpublished Paper, November 2004..

¹⁰ *The Prosecutor v Elizaphan Ntakirutimana and Gerard Ntakirutimana*, Case No. ICTR-96-9.17.I, 7 September 1996.

¹¹ *Ibid.*

¹² *Ibid.*

¹³ *The Prosecutor v Elizaphan Ntakirutimana*, warrant of Arrest and Order for Surrender, 7 September 1996.

¹⁴ National Defense Authorization Act, Public Law No. 104-106 (1996). This legislation validated the Executive Agreement between the U.S. Government and the ICTY and ICTR.

¹⁵ Agreement on Surrender of Persons, U.S. – ICTY, 5 October 1994, and Agreement on Surrender of Persons, U.S. – ICTR, 24 January 1995. Both Agreements entered into force on 14 February 1996. See Kenneth J. Harris and Robert Kushen, “Surrender of Fugitives to the War Crimes Tribunals for Yugoslavia and Rwanda: Squaring International Legal Obligations with the U.S. Constitution”, *Criminal Law Forum*, Vol. 7:3, 1996, 563.

¹⁶ Evan J. Wallach, “Extradition to the Rwandan War Crimes Tribunal: Is Another Treaty Required?” 3 *UCLA Journal of International Law and Foreign Affairs* 59, Summer 1998, 3-4. See also Sean D. Murphy, “Surrender of Indicttee to International Criminal Tribunal for Rwanda”, 94 *American Journal of International Law* 131, January 2000. It should be noted that although the American courts discussed the Ntakirutimana case in the context of U.S. extradition law, surrender to the ICTR or the ICTY is technically different from an extradition. The Tribunals, though supranational institutions, are not states, and extradition can only occur when a state releases an individual to another state to face judicial proceedings usually on the basis of a bilateral treaty.

¹⁷ Brief of the Lawyers Committee for Human Rights as Amicus Curiae, 28 April 1997.

¹⁸ Evan Wallach, “Extradition to the Rwandan War Crimes Tribunal”.

¹⁹ See Eric D. Bocherding, “Validating a Constitutional Shortcut - The “Congressional -Executive Agreement”: *Ntakirutimana v Reno* (Fifth Circuit 199), 69 *University of Cincinnati Law Review* 1055, Spring 2001.

²⁰ This argument was amplified by the Government and Amicus submissions to the Court. See Evan Wallach.

²¹ Louis Henkin, *Foreign Affairs and the Constitution* (1972), cited in Kenneth Harris and Robert Kushen,, 564, at Note 7.

²² Harris and Kushen, citing the *Restatement (Third) of the Foreign Relations Law of the United States* (1987).

²³ See Barbara Crossette, “Judge in Texas Jars UN Effort on War Crimes”, *New York Times*, 30 December 1997.

²⁴ Quoted in Barbara Crossette, *ibid.*

²⁵ *Ibid.*

²⁶ Ibid.

²⁷ Ibid.

²⁸ *Elizaphan Ntakirutimana v. Janet Reno, Attorney General of the United States; Madeleine Albright, Secretary of State of the United States; Juan Garza, Sheriff of Webb County, Texas*, United States Court of Appeals, Fifth Circuit, No. 98-41597, 5 August 1999.

²⁹ Ibid.

³⁰ Ibid., 10.

³¹ Ibid, 11.

³² Ibid.

³³ Douglass Cassel, "U.S. Cooperation with International Justice: A First Step", Commentary, 12 April 2000, www.law.northwestern.edu.

³⁴ The relatively light sentence took into account his advanced age.

³⁵ Email Interview with Agwu Ukiwe Okali, former Registrar, International Criminal Tribunal for Rwanda, 22 July 2004.

³⁶ Ibid.

³⁷ Benin, Mali and Swaziland have signed agreements with the ICTR to enforce its sentences in their territories, and several persons convicted by the Tribunal, including Rwandan Prime Minister Jean Kambanda, are serving their prison sentences in Mali.

³⁸ Okali, Interview.

³⁹ Egypt contributed \$1,000 in 1995. See also "The European Commission to Fund Tribunal Projects", ICTR Press Release, Arusha, 10 May 2004.

⁴⁰ Interview with Bernard Muna, former Deputy Chief Prosecutor, International Criminal Tribunal for Rwanda, London, 17 July 2004.

⁴¹ See Ian Fisher, "War Crimes in Africa; Where Justice Takes a Back Seat to Just Ending a War", *New York Times*, 15 July 2001.

⁴² Muna, Interview.

⁴³ Okali, Interview.

⁴⁴ Muna, Interview.

⁴⁵ Okali, Interview.

⁴⁶ “Rwanda: Top Figures of Former Regime Arrested, ICTR Press Release, Arusha, 18 July 1997, www.icttr.org.

⁴⁷ Muna, Interview.

⁴⁸ Ibid.

⁴⁹ Okali, Interview.

⁵⁰ See Sudarsan Raghavan, “Ten Years later, Rwanda Still Seeking Justice”, *Kansas City Star*, 2 April 2002, quoting a report by the International Crisis Group.

⁵¹ Ibid.

⁵² Ibid.

⁵³ Ibid.

⁵⁴ Pierre-Richard Prosper, Interview.

⁵⁵ Ibid.

⁵⁶ Ibid.

⁵⁷ Ibid.

⁵⁸ Raghavan, *supra*.

⁵⁹ Ibid.

⁶⁰ Prosper, Interview.

⁶¹ Ibid.

⁶² See Raghavan.

⁶³ For a good account of the geopolitical and strategic place of the Tutsis in Central Africa, see “The ‘Jews’ of Africa”, *The Economist* 21 August 2004.

⁶⁴ Ibid.

⁶⁵ Prosper, Interview.

⁶⁶ Ibid.

⁶⁷ Ibid.

PART IV

**THE FUTURE OF INTERNATIONAL CRIMINAL JUSTICE: FORWARD TO
THE PAST?**

Chapter 9

Conclusion: The Politics of the International Criminal Court

We believe that states, not international institutions are primarily responsible for ensuring justice in the international system

-- Marc Grossman, U.S. Under Secretary of State

The establishment of the Court by a treaty signed by 120 states at a diplomatic conference in Rome in 1998 is a remarkable development that, at first sight would appear to presage "global justice", "justice for all", or an end to impunity. But it is nonetheless a phase in the struggle between universalist notions of justice, on the one hand, and international society conceptions of international order based on sovereignty, on the other. In other words, the ICC is not "the end of history" (to borrow Francis Fukuyama's memorable phrase) in international criminal justice.

As a conclusion to the argument of this thesis, this chapter will attempt to analyze of the political dynamics and implications for the international society of the ICC. There are several aspects of the ICC with important political /strategic ramifications, but owing to space constraints, only two will be addressed here. These are (1) the framework of the ICC -- the "balance of power" between the Court and the sovereign states that are parties to its statute as expressed in the "complementarity" of the Court's jurisdiction; and (2) the United States' opposition to the ICC. In doing so in the context of a permanent institution created by treaty, as opposed to the ad hoc international tribunals established by the Security Council's fiat, I seek to demonstrate the permanence of the tensions that

have been examined in previous chapters, so long as sovereign states remain the dominant unit in the international society.

The UN Diplomatic Conference on the Establishment of the International Criminal Court held in Rome from 15 June to 17 July 1998 was much more than a normal diplomatic event. It drew hundreds of civil society organizations in addition to 160 states and numerous international organizations. A palpable sense of history was in the air. Five weeks of frenetic negotiations later, the Rome Statute of the International Criminal Court was adopted after 120 states voted to create what has been optimistically described as "the last great international institution of the twentieth century".¹ Seven states voted against the Rome Statute, with 21 others abstaining. Among the dissenting states was the United States, which was an active participant throughout the negotiations and drafting process. Although the vote was not recorded, China, India, Iraq, Israel, Libya, Qatar and Yemen are believed to have voted against the Court's creation.

The success of Rome and the establishment of the ICC more generally can be attributed mainly to a coalition of states known as the "like-minded" group of about 60 states that included most of the European states. The role of civil society organizations was also a major contributory factor.

Expectations of a drawn out ratification process, one in which attaining the minimum threshold of 60 ratifications would take several years, were ultimately confounded. The ICC treaty was ratified by 66 states by April 2002 and went into operation in July 2002.² Although the momentum of ratifications has slowed, as of this writing 97 states had ratified the Rome Statute – roughly one half of all members states of the UN. Of these, 26 are African states, 11 are Asian, 15 Eastern European states, 19

states in the Latin American and Caribbean region, and 26 Western European and other states.

The Political Framework of the ICC

The ICC is the product of a major ideological or conceptual battle in international relations between visions of cosmopolitan world society and those of international society that favour interstate cooperation, but one predicated on sovereignty. Both sides have claimed victory, but the institution in its current form is a compromise from that battle. This is the most important point of departure in assessing the ICC.

That this battle is real and was present in the minds of protagonists is evident in the exultant and optimistic commentary of the cosmopolitan group, the more muted wariness of the advocates of an international order in which sovereignty remains ascendant, and the determined opposition of the United States, for which sovereignty is nothing short of sacrosanct. ICC supporters such as Antonio Cassese expect it to become "the central pillar in the world community for upholding the fundamental dictates of humanity."³ Leila Nadya Sadat adopts the metaphor of "revolution" and "counter-revolution" to describe the deep significance of the Court and the opposition to it. She admits that, despite the conceptual and potential practical shift the ICC represents, many aspects of the Rome Statute "reflect the constraints of classical international law that did not yield to the forces of innovation and revolution at Rome."⁴ Observing the unsurprising nature of this fact, Sadat also agrees that "if state sovereignty (and particularly its expression as nationalism) is often blamed for the violent conduct of

world affairs, international governance is not necessarily looked upon as a superior alternative."⁵

One concurs with this observation, which leads me to clarify my view on the ICC before proceeding further. First, the ICC is an important institution in international affairs. It has the potential to fill the gap left by the reality that although credible national prosecutions are to be preferred to top-down, international approaches, in several cases national jurisdictions are unable or unwilling to investigate or prosecute mass atrocities. Second, the ICC's potential value should not result in a failure to see the political nature of the Court. Third, the establishment of the ICC is an important advance for the cosmopolitan conception of international justice, although as Sadat accepts, that world-view did not ultimately prevail in Rome to the extent its advocates had hoped. This is a *political* reality, and from it flows another one -- that many (though certainly not all) proponents of the ICC see the institution as a prelude of sorts to a world government. This would be an unhealthy outcome, for the concept of a world government, while it appeals to utopians, is one that enjoys little consensus and requires a type of centralization of police powers that poses its own unique dangers of dictatorship.⁶ This is why the most essential aspect of the ICC framework is the fact that it will *complement*, not supplant the jurisdiction of states. How this will work out in practice remains to be seen, but the likely implication is that the universalist vision and cosmopolitan ambition of some of the Court's proponents will be circumscribed by the nature of the international society.

At the Rome conference and the negotiations that preceded it states were keen to avoid extensive intrusions into their sovereignty, although transnational civil society

lobbied for an outcome in which the court would have jurisdictional primacy over states parties. The defining reality of the ICC is well summed up by Spyros Economides: "What was supposed to be a major departure from the traditional conduct of international relations was coloured by that very same method of conducting international relations".⁷ Thus states constructed a regime which denied the ICC enforcement powers to compel states to cooperate with the Court's requests for judicial cooperation and assistance.

Under the complementarity principle, the ICC cannot accept jurisdiction over a case that it is being investigated or prosecuted by the state on whose territory the crime occurred unless that state is "unwilling or unable to genuinely to carry out the investigation or prosecution", or where the state with jurisdiction has investigated the case and decides not to prosecute, unless the decision stems from an unwillingness or inability to prosecute.⁸ In determining unwillingness on the part of a state, however, the ICC will consider whether the national proceedings are designed to shield the person from the ICC's jurisdiction, there has been a kind of delay that indicates the absence of intent to bring the concerned person to justice, or the national proceedings were not independent or impartial.⁹

The ICC is thus essentially a substitute for national jurisdiction. It is a centralized institution that rests on the foundations of decentralized power in the international society, unlike the U.N. ad hoc tribunals, and thus is a contradiction in terms. Despite the apparent victory the Court's creation represents for the solidarist or universalist world view, at the heart of the ICC lies the paradox that it was created to render human justice in a world of states, on which the Court will depend to a very large degree. It will not be free from their influence. One way in which that control will be exercised is the

Assembly of States Parties that have ratified the Rome Statute. This is the organ that elects the judges, prosecutor, and registrar of the Court, approves its budget, and generally has something of an institutional oversight and policy role in the same manner in which the UN Security Council is the political parent of the ad hoc international tribunals for Rwanda and the Former Yugoslavia. Another potential source of political influence will be countries that are not party to the Rome treaty, particularly the United States. Through their absence these countries will deny the Court the universality it seeks by limiting its reach.

The complementarity provisions of the Rome statute include an explicit emphasis in its preamble that "the International Criminal Court established under this statute shall be complementary to national criminal jurisdictions". They are the most important in a framework that ripples with a constant tension between universalism and sovereignty, resulting in a Court with *international*, but not *universal* jurisdiction. That a universal cosmopolitan justice is the Court's ultimate goal is explicitly clear from a policy statement by the Court's President, the Canadian judge Phillipe Kirsch, who prior to his election to that position was the Chairman of the Preparatory Commission on the ICC established after the adoption of the Rome statute. "Universal ratification of the Rome Statute", Judge Kirsch said, "remains an essential long-term objective of the Court. Universality is necessary to establish a truly global reach in the fight against impunity."¹⁰

The Security Council, charged as it is with responsibility for international peace and security in the UN Charter, could not logically be absent from the ICC's framework. The Council can also refer a situation in which one or more of the relevant crimes have occurred to the Court under Chapter VII of the UN Charter.¹¹ In that case the principle of

universal jurisdiction is applicable because there are no geographical limits to the Council's remit. Perhaps even more important from a political standpoint, the Security Council can request a deferral of the commencement of an investigation by the ICC with a resolution to that effect adopted under its peace enforcement powers in Chapter VII of the U.N. Charter.¹² And in that case the investigation or prosecution must be deferred for 12 months, with the request renewable under the same conditions.

Few things are more indicative of the political stakes in the ICC than this provision. The provision for Security Council power to request a suspension of proceedings (the Rome Statute does not say how many times such a request can be renewed) is the "Singapore compromise" between the members of the Council that wanted a stronger role for it and states that believed it was important to preserve some distance between the Court and the UN although an institutional link between the two organizations was recognized as helpful for the ICC.¹³ Britain's agreement to this compromise proposal was critical to its adoption in the Rome Statute. China and France were also strongly opposed to the extent of the Prosecutor's powers. India wanted the Court statute to include a ban on nuclear weapons, and Sri Lanka wanted the inclusion of terrorism as one of the core crimes. Many Arab countries (with the exception of Egypt, an American ally) opposed the very creation of the Court, fearing it would serve Western agendas.¹⁴ It is doubtful that subsequent events in Iraq gave them any reason to alter their positions. But if a court could not be avoided, they wanted one that would serve *their* interests: creating a loophole to attack Israel's occupation policies in the West Bank and Gaza. And, notably, most Asian states were and have remained sceptical of the ICC. They remain the region with the lowest ratio of ratification of the Rome treaty.

The ICC's strongest attribute is that, unlike the international criminal tribunals for the Former Yugoslavia and Rwanda, it was the direct outcome of a treaty negotiated and agreed between sovereign states. To that extent, its democratic legitimacy cannot be seriously questioned. As we have seen, those states have maintained their primacy in the distribution of competences between them and the Court. But they have, at the same time, created an institution that bridges an important gap in the normative architecture of international law. To the extent they have given up a bit of sovereignty in the process, it is by mutual consent, and no one can legitimately quarrel with that.

This democratic legitimacy runs into problems only to the extent that the Rome Statute seeks to confer on the Court jurisdiction over states not parties to the Statute, or which have not otherwise accepted its jurisdiction. Just as concerns exist about "imperial overstretch" by the great powers, so is it appropriate to caution against what could be termed "universalist overreach" by the ICC.

The United States and the ICC

All we need from the United States is benign neglect. Is that asking for too much?
 - International Criminal Court official, *The Economist*

Official policy in the United States towards the establishment of an *independent*, permanent international penal tribunal has always been at best ambivalent and at most, as now, that of visceral opposition. The reasons for this are not hard to see. Several lawyers and diplomats who work or have worked for the executive arm of the U.S. government have carefully considered the pros and cons of U.S. participation in such a court, seeking assurances that will protect American strategic interests. They were generally supportive of the Court if the necessary safeguards for their national interest were obtained. But

often, that level of engagement is disconnected from the less informed "main street USA" in which a majority of politicians are reflexively opposed to subjecting U.S. citizens to such a sensitive act of international governance as international criminal justice under *any* circumstances. And, on such major matters of national interest at least, it is these elected political leaders, not the diplomats who negotiate on America's behalf, that influence the foreign policy decisions of the President of the United States who has constitutional responsibility for foreign relations.

The fundamental ambivalence I have referred to is evident in the fact that the kind of court the U.S. wanted was precisely the kind that a majority of other states did not - an *explicitly* politically controlled one. This ambivalence and eventual opposition is rooted in an attitude of historical exceptionalism, a fundamental commitment to its sovereignty, and a view of international law that flows from that worldview. How the last two factors are *interpreted* - a matter of style, if not of substance - largely depends on which American political party occupies the White House at any given time. But a significant pointer to the reality that the interpretation of U.S. attitudes to international law is more a matter of style (or rhetoric) than substance is the fact that, in recent years foreign policy and military actions that are controversial in international law have been taken by Democratic and Republican Presidents - the NATO bombing of Kosovo in 1999 and the invasion of Iraq in 2003 are the most famous examples. Both military interventions were undertaken in the course of "upholding our values"¹⁵. Similarly, there has been more or less bipartisan consistency of opposition to U.S. participation in an independent ICC under Presidents Bill Clinton and George W. Bush.

To understand the U.S. position on the ICC at a normative level it is helpful to refer to Robert Jackson's discussion of "national responsibility" as one of four traditions in theories of international relations.¹⁶ According to Jackson, the national responsibility is one in which values such as national self-interest, national security and national welfare are the guiding lights of state action. The normative basis of this approach is that the state -- however formed -- is prior to any international associations it may form or join, and its citizens can have a prior claim to defining the responsibilities of their national leaders, who are actually their servants:

According to that domestic-focused way of thinking, international law and international organization are instrumental arrangements which are justified by how well they serve the national interests of states. This is the thinking that inclines many Americans to believe that their laws always trump international law when they come in conflict...¹⁷

As Jackson explains, this idea of national responsibility is rooted in classical realism, which is nevertheless based on values and value judgement -- contrary to much conventional thinking, one might add. But the values on which the idea of national responsibility is based are certainly not those of liberal internationalism. In Jackson's words:

National responsibility is an authentic morality, however, and should not be confused with narrow self-interest. Realism as classically understood is an ethical theory: it conceives of the state as a moral community; it involves defending the national interest, which is a moral idea. The national interest is one of the most important justifications of pluralist world politics, perhaps the most important...¹⁸

Similarly, Jason Ralph has illuminated the basis of American opposition to the ICC, this time from the perspective of the cultural dimensions of the country's democracy. The cultural value of that method of governance, by which the United States was born, also defines in the eyes of Americans who they are, and has led it to be distrustful of any institution that threatens to subject the country's actions to the decisions of foreign judges in ways that are not controllable by Washington. The fundamental reason for this policy position is that the United States interprets the internationalization of democracy as the idea of an international society of democratic (sovereign) states, and not that of a world society without borders represented by an independent prosecutor for the ICC.¹⁹

Against this backdrop, we can now proceed to examine -- and perhaps better understand -- the "clash of the titans" in the politics of the International Criminal Court. As the Rome Conference drew to an end, David Scheffer, then U.S. Ambassador at Large for War Crimes Issues and head of the American delegation, rose and made a final intervention. He was clearly faced with a looming defeat for the key U.S. proposals for an amendment of the draft statute before the vote. "I deeply regret, Mr. Chairman", Scheffer said, "That we face the end of this Conference and the past four years of work with such profound misgivings and objections as we have today", and noted that the Rome Statute would create "a court that we and others warned of in the opening days - strong on paper but weak in reality."²⁰ He proposed an amendment that would effectively place U.S. troops beyond the Court's jurisdiction, but the U.S. lost the vote 113 to 17, with 25 abstentions²¹.

Despite its disagreements with the Rome Statute, the Clinton administration continued negotiations in the Preparatory Commission established after the Rome Conference, hoping to obtain concessions that would make U.S. participation in the Court possible. By mid-2000, however, its efforts became complicated by a piece of draft legislation in the U.S. Congress that rendered the possibility of U.S. participation a lost cause. The "American Servicemembers Protection Act", popularly known as the "Hague Invasion Act" was introduced by Senator Jesse Helms (Republican - North Carolina) in the U.S. Senate on 10 May 2001 and introduced in the House of Representatives by Representative Tom Delay (Republican - Texas) the same day. Adopted by Congress and signed into law by President Bush on 2 August 2002, the legislation prohibits cooperation with the ICC, the exercise of jurisdiction by the Court over U.S. citizens and "Allied Persons", and the provision of U.S. military aid to any country that has ratified the ICC Treaty, but exempted NATO countries and key non-NATO American Allies.²² It required the UN Security Council to grant immunity from prosecution by the ICC to American personnel in UN peacekeeping operations. Most dramatically, it authorized the U.S. President to "use all means necessary and appropriate" (a phrase that encompasses the use of force) to obtain the release of members of the U.S. Armed Forces detained or imprisoned by or on behalf of the ICC.

The Clinton administration had signed the Rome Statute just before leaving office in December 2000 but announced that the treaty would not be submitted to the Senate for ratification.²³ The Bush administration subsequently "unsigned" the treaty by a letter to UN Secretary-General on 6 May 2002 nullifying the earlier U.S. signature.²⁴ These measures were followed up by a diplomatic campaign to sign bilateral agreements with

individual states exempting U.S. citizens from the possibility of ICC prosecution for crimes committed on their territories.²⁵ As of this writing, the U.S. has signed Bilateral Immunity Agreements (BIAs), dubbed "bilateral impunity agreements" by critics, with 80 countries. These agreements have been signed in the context of Article 98 of the Rome Statute. Article 98 provides that the ICC cannot request for surrender or assistance which would require the requested state to act inconsistently with its treaty obligations to a third state. It was included in the Rome Statute at American insistence. Among the 80 states that have signed bilateral immunity agreements, several are from the developing world, heavily dependent on U.S. aid, and those among them that are candidates for future membership of NATO were threatened with shaky prospects for their candidacy should they fail to sign on the dotted line²⁶.

Even traditional Western allies have not been immune from U.S. pressure. U.S. diplomats have noted, in defence of their arm twisting other countries into signed Article 98 agreements, that countries in Europe that were recently admitted into the European Union declined to sign the agreements precisely because they faced a similar threat to their candidacies for EU membership by the Union's older members.²⁷ This, in other words, is a *tu quoque* defence.

In the UN Security Council the U.S. government threatened to shut down UN peacekeeping missions by vetoing their renewal if US troops were not granted immunity by the Council. It backed up its threats by vetoing the renewal of a UN peacekeeping operation in Bosnia-Herzegovina on 30 June 2002, overriding opposition from the European Union, NATO, and the Bosnian government²⁸. Kofi Annan sent a letter to US Secretary of State Colin Powell criticizing the U.S. demands as a threat to the legitimacy

of the Security Council that "flies in the face of international treaty law". In short order, the European parliament adopted a resolution in which it "deeply deplored" the U.S. veto, noted that the "Hague Invasion Act" went well beyond the exercise of the U.S.'s sovereign right not to participate in the ICC, and noted that the legislation denied the U.S. itself the very military intelligence and cooperation it needed to fight terrorism²⁹.

Nevertheless, on 12 July, following two weeks on debate, the Council balked in the face of U.S. demands and adopted resolution 1422 (2002) which granted immunity to U.S. members of UN peacekeeping missions and those of other non-state parties to the ICC for 12 months. Legalism had precipitated, yet again, tensions between cosmopolitan notions of justice and international order. It was certainly possible that the closure of the UN mission, or the possible unravelling of other peace operations as a result of the double standards in liability of peacekeepers from different countries to criminal prosecution, could have led to renewed conflict in these conflict zones. In a trenchant criticism of resolution 1422, Kai Ambos, a German participant in the negotiations of the Rome Statute, commented on its anomalous nature:

In light of the Council's resolution, the [ICC] becomes itself a threat to peace, because only under this condition can the Security Council adopt a resolution under Chapter VII of the UN Charter. Let us pause to assess this truly grotesque logic: a resolution as it was adopted by the Security Council on July 12th presupposes that the ICC must be labelled as a threat to the peace, which can only be averted by granting immunity before the Court!³⁰

When the U.S. sought a renewal of the immunity upon the expiry of its 12-month time frame in 2003, it ran into the determined opposition of several members of the Security Council and Secretary-General Annan.³¹ "Blanket exemption is wrong", Annan wrote. "It is of dubious judicial value, and I don't think it should be encouraged by the Council."³² For the states that were wavering once again in the face American pressure, Annan's letter was a welcome intervention that tipped their views firmly into opposition mode. The letter was also one instance of a clear departure from the epiphenomenal status that realists grant to international institutions. With the Secretary-General having gone on record on the legality of the exemptions, it is doubtful that the members of the Security Council would have liked to be caught on the wrong side of the law as it were. It is a demonstration as well of the limits of power in its relation to international law and how the latter feeds back to international relations.

Meanwhile, China was threatening to veto the renewal resolution, and more than 40 countries requested a public debate on it. A major scandal had erupted in this period as abuses of Iraqi prisoners by U.S. troops in Baghdad's Abu Ghraib prison were revealed, further undercutting U.S. ability to sway the debate. China pointedly noted that it could not support a resolution that could shield U.S. troops from culpability for abuses such as those at Abu Ghraib.³³ Faced with the backlash from Iraq, China's opposition and that of Annan, the U.S. withdrew the draft resolution. Of China's opposition, U.S. officials noted that the Asian power, which had similarly voted against the ICC treaty and had previously supported U.S. efforts to limit its reach, was really engaged in brinksmanship on other issues. "They don't care about the ICC", one diplomat reportedly said. "It all has to do with Taiwan".³⁴ A solidarist international community? Not so. The

divergent and shifting tendencies demonstrate the dominance of Hedley Bull's concept of an anarchical society, one in which the cosmopolitan and realist perspectives co-exist in a state of constant friction.

I now turn to other substantive bases for U.S. opposition to the ICC's jurisdiction. The Rome Statute provides that when a person commits a crime under the statute, the state where the crime was committed *or* the state of nationality of the offender would have to assent to the trial of the offender by the ICC.³⁵ This means that the Court can prosecute a national of a state not party to the Rome Treaty, where the offender is a national of the non-state party but the state on whose territory the crimes is committed gives its consent to prosecution by the Court. Scheffer had attempted to change this provision to require the agreement of the state of territorial state *and* that of the nationality of the defendant, but failed. This is the most important reason why the U.S. is adamantly opposed to the ICC, for the American position is that it cannot allow its citizens to be prosecuted by an international tribunal under a treaty to which it is not a party. Interestingly, the U.S. Surrender Agreements with the ICTY and the ICTR, in theory at least if not in practice, allowed for the surrender of U.S. citizens as well as those of other countries, from that country.

U.S. resistance to the ICC's jurisdiction stands on two legs, one political, the other legal. Its overall political response is that of the peculiarity of the U.S. role in international order. Given U.S. troop deployments in various trouble spots around the world and its position as the lone superpower, the U.S. position is that American troops offer a tempting target for malicious, politically motivated prosecution by the ICC. More than 300,000 American troops are deployed in about 140 countries. Discounting

the 140,000 troops in Iraq as of 2004, the vast majority of these troops is stationed in Europe and Asia. Because America shoulders unequal responsibility, it should not, from its national perspective, be liable to equal accountability. Despite the arguments put forward by supporters of the Court - the remote prospect of an American being indicted by the Court, and the option of relying on the complementarity principle to try its own national in that scenario - the U.S. remains unmoved. America's distrust of the good faith of other nations is understandable, because its role in world politics has earned it deep resentment in some quarters. And there are those who oppose America simply on ideological grounds. These foes would exploit any loophole to embarrass or humiliate it. As of mid-2004 more than 100 complaints have already been filed at the ICC against Americans.³⁶ In a telling point, *The Christian Science Monitor*, justifying U.S. wariness of the ICC, wrote: ".....the chief prosecutor, Luis Moreno-Ocampo, wants to go after corporate officials who do business with nations that have committed mass atrocities."³⁷ This is another classic illustration of the anarchical nature of the international society and the self interest that motivates its members. The *Monitor* editorial is a pointer to a national interest in shielding the amoral activities of some corporations from international scrutiny. It is all the more telling coming from a newspaper that has long espoused liberal ideals at home and abroad.

Let us now examine six politico-legal reasons for U.S. opposition to the ICC. First, if U.S. determination to put its nationals beyond the reach of the ICC on the basis of political inequality before the law is unacceptable to many, the *legal* basis for its position, dispassionately examined, is on rather solid ground. The United States maintains that the exercising of jurisdiction over its nationals by the ICC would violate the international law

principle that a treaty cannot bind a state that is not a party to it without that state's consent.³⁸ This rule of customary international law is codified in Article 34 of the Vienna Convention on the Law of Treaties.³⁹ While the U.S. is not a party to this Convention, it can find justification in the customary law norm. Although this position is opposed by some commentators⁴⁰ on the basis of the well known principle that a state has jurisdiction over crimes committed on its territory regardless of the offender's nationality, the U.S. position is well founded, for the following reasons. First, a multilateral treaty is a democratic process of international society. It is profoundly undemocratic to seek to bind by a treaty agreed by mutual consent of states one that has chosen *not* to be party to such a treaty. Second, the principle of territorial jurisdiction of a state would be applicable if that state chose to try an offender under its domestic laws. The U.S. does not dispute this legal fact of life⁴¹. But that is not the case here. The Rome Statute empowers parties to it to hand over to an *international* court a national of a non-state party for trial over a *treaty* based crime. The U.S. position hinges on this subtle but fundamental point. It argues that absent state consent or a UN Security Council mandate, an international organization to which it does not belong has no such legal powers. This position would hold true not just for the United States, but for any other non-state party as well. The ICC provision in question is an attempt to import into the Court's remit the controversial doctrine of universal jurisdiction. Of course, in the international society, in which dispersed power is a fact of life, this universalist overreach has greater implications for international order in the case of US, which is better placed to rebuff such an intrusion on its sovereignty than a weaker nation. But the ICC statute is on weak ground here all the same.

It has been argued that "defenders of this position have attempted to analogize the establishment of the court to the creation of a mechanism to settle inter-state disputes", and that the argument confuses the concepts of state responsibility and individual responsibility.⁴² This very argument itself is confused, for the exercise of treaty-making power by a state does not depend on whether the subjects of that treaty are states or individuals. The bottom line is that treaties are entered into by states in the exercise of their sovereignty, which encompasses their citizens. Individuals do not make treaties in international law. Thus, we can see that Article 12 of the Rome Statute clashes with a standing principle in international law and to that extent cannot bind a non-state party.

The second reason for the U.S. antagonism towards the ICC is simply because, as noted earlier, it wanted a political court dominated by the Security Council, where the U.S. would be reassured by the comfort of its veto power. It did not achieve this outcome, though the political constraints on the Court as it was actually established, made to assuage U.S. anxieties, are obvious. Put simply, the U.S. does not wish to be bound by externally enforced international law on issues that involve the use of force. This position is reinforced by America's view of its national identity, based in turn on what Paul Kahn has described as "its myth of popular sovereignty"⁴³. From this perspective the prosecution of *one* American soldier would be one too many. As Scheffer told a journalist in the hallways of the Rome Conference, "bland assurances of the unlikelihood of any given outcome simply don't move the mail back where I come from."⁴⁴ Scheffer was evidently committed to the ICC project, but his hands were tied by the domestic political reality in his country. The conservative Senator Jesse Helms, who headed the U.S. Senate Foreign Relations Committee that handles treaty ratification, had warned that,

absent a complete U.S. veto over what cases the Court would take up, the Rome Statute would be "dead on arrival" at the U.S. Senate if submitted it for ratification.⁴⁵

A third U.S. objection was that a ten-year "opt-out" clause was not included in the Rome Statute, whereby a state party can opt out of the Court's jurisdiction for war crimes and crimes against humanity. The U.S. made this proposal because it is more likely to be accused of war crimes and crimes against humanity, as an active military power, than the crime of genocide. An obvious reason for this position, other than the U.S. strategic design to create a court weak enough to conform to its national interest, is that of the significant differences between America's "forward-leaning" war-fighting doctrines in relation to international humanitarian law, and those of several other countries.⁴⁶ One example of this divergence in doctrines of military necessary is American military doctrine regarding the targeting of electrical power systems during a war.⁴⁷ U.S. military doctrine considers the bombardment of national power systems an essential component of an effective military engagement. But this kind of military activity effectively targets civilian populations, an "unspoken but known result" of such bombardment⁴⁸. This is the concept of collateral damage - civilian deaths as an unavoidable consequence of war. In the modern world in which armies no longer charge at each other across expansive open fields, but powerful states bomb their adversaries from high altitudes with "precision bombs" that are not always so precise, debate rages about the necessity and proportionality of this kind of targeting.

That civilians should not be military targets is a well accepted notion in customary international law. Yet the bombing of electrical power grids was systematically utilized in the 1991 Gulf War. The argument for bombing electric grids is

that they are potent sources of support for the armies of the adversary. But the humanitarian perspective is that bombing electrical grids usually has a greater impact on civilian life and population than on military objectives. In other words, collateral damage is so severe that such military activity could amount to a direct targeting of civilians. This dilemma of war is captured when, say, an American bomber pilot about to drop a precision bomb in this age of virtual warfare and “embedded” journalists, and looking at his presumed target on the monitor of his cockpit, brags: “I’ve got the target on my nose”. Meanwhile, the pictures of the destruction his bombing has wrought as shown in graphic detail on our television sets are not what would be called military targets. Rather, the images are frequently ones of civilian casualties in hospital wards.

Protocol I Additional to the 1949 Geneva Conventions, which codified the nature of non-combatant immunity, provides that civilian populations as well as individual civilians should not be the object of attack, and that acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.⁴⁹ Even more to the point of the present discussion, the Protocol has offered a clear definition of what would amount to indiscriminate attacks, including: “Those which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated”.⁵⁰

The United States has not ratified Protocol I, citing “fundamental and irreconcilable flaws”.⁵¹ U.S. military manuals in international law adopt language that is similar and sometimes identical to Protocol I.⁵² The U.S. was a major influence behind the formulation of Protocol I and signed it on the first day it was opened for signature.

But the Reagan administration subsequently received internal advice that the Protocol was inimical to U.S. strategic interests and declined to forward it to the Senate for consent and ratification.⁵³ An important reason for the U.S. position on Protocol I is that in customary international law the primary duty to protect the civilian populace rests with the defending nation, and not with the attacking one, which has a secondary duty.⁵⁴ The U.S. views Protocol I as seeking to shift that burden to the attacker, irrespective of the defending nation's actions.⁵⁵ Even weak states violate the laws of armed conflict, particularly when faced with superior firepower in a "David versus Goliath" situation, by using civilians as human shields. In such cases civilians, including women and children, are placed in the direct path of weaponry and at military installations in order to increase the numbers of civilian casualties and score propaganda points. This was the case, for example, in Iraq during the U.S. invasion of that country in 2003.

Some commentators have found the U.S. rejection of the ICC on the basis of its non-inclusion of a ten-year opt out clause for war crimes *and* crimes against humanity puzzling, because the Rome Statute includes a seven-year opt out clause in relation to war crimes.⁵⁶ But if the U.S. delegation in Rome believed that, while the prospect of its committing genocide is remote, it could very well be accused of crimes against humanity, it was not far off the mark. The prisoner abuse scandal at the Abu Ghraib prison in Iraq triggered impassioned debates about whether the treatment of Iraqi prisoners was tantamount to torture, (a crime against humanity in the Rome Statute⁵⁷). This is a classic example of U.S. actions over which international humanitarian law could implicate the superpower (Iraq is not, however, a party to the ICC treaty). At the least, the acts of sensory deprivation and the photographing of nude prisoners with U.S. troops in

menacing positions over them, could be interpreted as "inhumane acts intentionally causing great suffering or serious injury to body or to mental and physical health" - a crime against humanity under the Rome Statute.⁵⁸ Seen from this perspective, the U.S. position and its self-interested motivation become clearer. One problem with the U.S. proposal in Rome was that, from the standpoint of an effective and workable treaty, the position is a self-defeating one, for it would apply not just to the United States, but to all other parties to the Statute. A law from whose jurisdiction (or large parts thereof) its subjects can opt out for prolonged periods is obviously one of very limited effectiveness.

Fourth, the U.S. also rejected the Rome Statute because it includes the crime of aggression as one of the core crimes over which the Court has jurisdiction. This crime, however, has not yet been defined, and jurisdiction will commence if agreement is reached by state parties to the Rome Statute at a review conference to be convened seven years after the Rome Statute entered into force.⁵⁹ The point here is to note the basis of U.S. opposition to its inclusion: that aggression is a matter that ought to dwell within the purview of the UN Security Council and not the ICC. The world's pre-eminent military power, and the basis on which it undertakes the use of force should not, in its own view, be subjected to the judgement of the rest of the international society. One man's "just war" could be "aggression" in the definition of another. The U.S. pre-emptive invasion of Iraq in 2003 is the illustration of why the inclusion of aggression in the Rome Statute would be problematic for the U.S. Secretary-General Kofi Annan, in an interview with the British Broadcasting Corporation, characterized the war as "illegal"⁶⁰. This remark was no different in substance from his consistent prior position that the war was "not in compliance with the provisions of the UN Charter". But the power of the "I -word"

generated a predictable and defensive furore in Western capitals. The Secretary-General's remarks could be legal grist for the mill of a future complaint to the ICC prosecutor against members of the "Coalition of the willing", should the ambit of the crime of aggression be agreed at a Review Conference on the Rome Statute.

If the U.S. response to the inclusion of aggression was predictable, perhaps more intriguing is its rejection of the Rome treaty because it includes provisions that countenance a possible future expansion of the crimes within its remit to include terrorism and drug trafficking⁶¹ -- a fifth reason for its rejection of the Rome treaty. The explicit desire to bring the crimes within the ambit of the ICC is spelt out in the Final Act of the Rome Conference that adopted the Rome Statute.⁶² The impetus for a political decision to reconsider the statute in the future in this context of drug trafficking arose from the fact that the initiative of the Caribbean states which led to the creation of the ICC was motivated by a desire to create an international framework of accountability to fight transnational drug trafficking. It was thus ironic that the Rome treaty developed in other directions and omitted this issue.

As for terrorism, the prospect of an international enforcement mechanism for this crime has roots going as far back as 1937, when the League of Nations adopted a convention against terrorism and prepared a draft statute for an international criminal tribunal.⁶³ India was the only country that ratified the convention, which never became law. The U.S. opposition to the ICC because it might conceivably acquire jurisdiction over terrorism is contradictory. The terrorist attack on the U.S. on 11 September 2001 has turned the conflict between extremist political Islam and the West in to an existential one. There are a number of international treaties, based on a limited form of universal

jurisdiction, and several of them actively promoted by the U.S., that are aimed at fighting terrorism.⁶⁴ Although these treaties permit states to prosecute or extradite offenders, the reality is that the judicial systems of several state parties are simply too weak to cope with the political and security pressures that accompany these kinds of criminal trials. This point becomes even more germane when we consider the terrorist bombings of U.S. embassies in Kenya and Tanzania in 1998, and terrorist bombings in other countries in recent years. Henry Kissinger has aptly observed: "Terror has no fixed address; it has attacked from Bali to Singapore, Riyadh, Istanbul, Moscow, Madrid, Tunis, New York and Washington."⁶⁵ Now, does the U.S. suppose that it alone can win the "war on terror"? Its military power notwithstanding, the limitations of that power and its intelligence capabilities have become painfully apparent in recent years in light of 9/11 and the situation in Iraq. This reality, then, suggests the need for an international framework of legal accountability for these transnational crimes in addition to national ones. If ever there was a type of crime deserving the jurisdiction of an international penal tribunal, it is that of terrorist crimes.

Finally, the U.S. has argued that it cannot join the ICC because the Rome Statute prohibits reservations. There is no legal requirement in international law that a treaty must provide for reservations, but the provision is unusual when viewed in light of practice. As Sadat and Carden have observed, perhaps a more interesting question is why this was done.⁶⁶ Clearly, the states parties believed that, especially given the delicate compromises that had already been made between national jurisdiction, international jurisdiction by the Court, and the role of the Security Council, allowing reservations to the Rome Statute would have simply rendered the Court stillborn. And they were right,

in this writer's view. The statute includes a provision whereby a state party to it can withdraw - which safeguards the element of freedom of association for any party.

Was the bar to reservations a sufficiently weighty reason to justify U.S. non-participation? The question is academic, as the U.S. has the sovereign right to choose what international institutions it may or may not join. A detailed discussion of international law regarding reservations to treaties is beyond the scope of this work. Suffice to note that reservations are a complex matter, and the International Court of Justice, in the *Reservations to the Genocide Convention* case⁶⁷, stipulated that reservations must be consistent with a treaty purpose. Knowing what is known about the U.S. position on the ICC, it would be unrealistic to contemplate a U.S. reservation that would have been in conformity with the purpose of the Court.

To conclude this review of the United States and the International Criminal Court, the six main reasons why the U.S. wants no part of the ICC, in a sense amount to one: the U.S., while espousing the rule of law abroad, does not wish to see its military power and strategic scope for manoeuvre fettered by that notion and does not want to suffer the "indignity" of seeing its service personnel being tried in an international court. It supports ad hoc international criminal justice by special courts and tribunals on an ad hoc basis, but is fundamentally opposed to the cosmopolitan aspirations of a standing court with global reach. For better or worse, that decision is well within its rights as a sovereign state. In the frequently emotional tenor of the ICC debate this fact is frequently forgotten.

There are those who wistfully believe that this situation exists because President George Bush is widely seen as distrustful of international institutions. But it should not

be forgotten that America's positions were staked out at the Rome negotiations during the presidency of William Jefferson Clinton who had earlier lent his voice at the UN General Assembly in 1997 in the hope that the world would one day have a permanent International Criminal Court. Even as his government signed the Rome treaty just before he left office, it appeared as if the signature was appended more to justify years of efforts expended by the U.S. negotiating team, led by the dedicated David Scheffer, than for any other reason. Even had the signature not been subsequently "unsigned" by President Bush, the treaty would have been one of several others that the U.S. had signed without ratifying. The chances that any U.S. government will join the ICC are bleak. The story demonstrates once again the strength of the international society approach towards international criminal justice. That approach looks at how states actually behave, not only at what they say or how we wish them to act.

Going a bit further along what states actually do, a clear majority within the society of states *decided* to establish the ICC in its current form over U.S. objections. That is also a significant development in international relations. It demonstrated that, subject to the protection of their sovereignty through the complementarity principle, those states share a value of international cooperation for international justice through a mechanism that the U.S. did not. It is indicative of the tendency, seen as well during UN Security Council debates and negotiations over the use of force in Iraq in 2003, where some states are increasingly able to stand up to the United States. What this suggests is that the extent of U.S. power may be overrated.

The key to the defeat of the U.S. position in Rome was the united front of the European states, several of whom have positioned themselves in world politics as

champions of human rights and liberal justice and have greater experience with supranational human rights oversight. These states project military power in the international realm mostly in the context of consensually agreed peacekeeping operations, and rarely in a unilateral manner⁶⁸. This is a reflection of the "soft power" of those states compared to the "hard power" of the U.S. Clearly, the U.S. overrated its own power in relation to the Court, believing during the Rome negotiations that a Court without U.S. participation in terms of political muscle and financing was doomed to failure. There is no evidence that this will be the case -- that the Court will go the way of the League of Nations. Should the ICC fail, it will more probably be attributable more to a failure by its states parties to live up to their obligations in the area of judicial cooperation with the Court than to America's absence from the Court.

Conclusion

The International Criminal Court, then, is as much a political as a legal institution. The process of its creation was one in which politics and law played a role. It was an exercise in plenipotentiary treaty-making by the political and diplomatic representatives of states, and, as we have seen, all parties were fully aware that their decisions and negotiating positions had political implications. It is precisely because of those implications that the United States and some other states have opted not to join the Court. But the delegates also argued their positions on the basis of international law, demonstrating the impact of international norms on international politics⁶⁹. On balance, though, politics clearly prevailed. This should surprise no one, for virtually all law is

indeed political insofar as it comes into being through political acts aimed at ordering national or international society.

From the outset the ICC has become as much a political symbol as a legal one. It is the symbol, even before Iraq, of the rift in the transatlantic relationship between Europe and the United States that occurred at the beginning of the 21st century. Perhaps that rift can be healed, perhaps not. But insofar as the U.S. will not join the Court in the foreseeable future, it is indicative of a deeply divergent view of world politics — and its legalization — between Europe, on the one hand, and America, China and other non-ICC states on the other. It is the most profound demonstration of the rise of Europe's soft power in world politics.

The Court's universalist aspirations, though, will not be realized, stymied as it will be by the international society's anarchical nature. The fact that the U.S. and a number of states in war zones — Iraq, for instance — are not members of the ICC has important implications for the Court's potential reach. One of those is that national or mixed national-international tribunals, and even on the odd occasion the pure Yugoslavia or Rwanda — type tribunals directly created by the U.N. Security Council, could be used in future in such places.

And, despite the arguments for such a court in the international society's architecture, its centralization in the Hague will deny it of an important component of legitimacy — psychological proximity and impact on the societies its work hopes to affect — as seen from the experience of the U.N. ad hoc tribunals for Yugoslavia and Rwanda. That a number of states have passed domestic legislation to place their laws in line with the Rome statute is not the same as internalizing human rights norms. The latter outcome

has much to do with the socialization of norms outside legal circles, such as in domestic politics, and is best achieved in the context of physical interaction, and even more so by domestic, rather than international jurisdiction. At the very least the ICC should have some form of regional branches in Africa, Asia and Latin America, with a preponderance of judges from those regions sitting on each regional court, and with the Hague as its European headquarters or a type of appellate chamber. It is often forgotten that Nuremberg, hallowed as it is in the minds of many human rights activists, achieved political impact in Germany largely because it sat in that country amidst the ruins of war, and even then its impact was not immediate but took a generation to ossify.

The ICC is also hegemonic to the extent it will affect the internal sovereign choices of political communities, despite complementarity⁷⁰. Whether this is good or bad I cannot be certain. It is perhaps too early to say which way that principle will turn out. Madeline Morris is on strong ground when she observes: “Because of the array of overlapping but also divergent interests at stake, the meaning of the ICC’s complementarity with national courts is neither obvious nor inconsequential”⁷¹. The weak states for which the ICC will have hegemonic outcomes have allowed those outcomes by their inability to put their house in order, and so, of course, an outside influence will necessarily step into the breach, with consequences that are not automatic one way or another.

In conclusion, while the ICC fills a certain gap that would have been better plugged by domestic societies, it is important not to have expectations of the institution that would be unrealistic, such as that it will wipe out man’s inhumanity to man. It will

investigate, prosecute and punish *some* warlords, which would be a function common to all criminal law. But it will not end wars or evil.

¹ Leila Nadya Sadat and S. Richard Carden "The New International Criminal Court: An Uneasy Revolution", *Georgetown Law Journal*, March 2000.

² See Barbara Crossette, "A Reality: New Global Criminal Tribunal, *International Herald Tribune*, 12 April 2002.

³ Antonio Cassese, "From Nuremberg to Rome: From Ad Hoc International Military Tribunals to the International Criminal Court", in Antonio Cassese et al. (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Vol. 1 (Oxford: Oxford University Press, 2002), 18.

⁴ Sadat and Carden, "The New International Criminal Court".

⁵ Ibid.

⁶ See David W. Zeigler, *War, Peace and International Politics* (1997) referenced in Sadat and Carden , Note 39. See also Robert P. George, "Natural Law and International Order" in David R. Mapel and Terry Nardin, eds. *International Society: Diverse Ethical Perspectives* (Princeton: Princeton University Press, 1998), 61.

⁷ Spyros Economides, "The International Criminal Court" in Karen E. Smith and Margot Light, *Ethics and Foreign Policy* (Cambridge: Cambridge University Press, 2001), 122.

⁸ Article 17 (1) Rome Statute of the International Criminal Court (hereafter Rome Statute), www.icc-cpi.int

⁹ Article 17 (1), Rome Statute.

¹⁰ See Address by Judge Philippe Kirsch, President of the ICC, to the Third Session of the Assembly of State Parties to the Rome Statute of the International Criminal Court, The Hague, 6 September 2004, www.icc-cpi.int .

¹¹ Article 13, Rome Statute.

¹² Article 16, Rome Statute.

¹³ Yves Beigbeder, *Judging War Criminals*, 192.

¹⁴ David Wippman, "The International Criminal Court", in Christian Reus –Smit, *The Politics of International Law*, 162.

¹⁵ U.S. President Clinton, defending the NATO bombing of Yugoslavia, quoted in Jackson, 281. President Bush has frequently invoked the rhetoric of spreading "liberty and democracy" to justify the invasion of Iraq in 2003.

¹⁶ See Jackson, 170. The other traditions are international responsibility, humanitarian responsibility, and responsibility for the global commons.

¹⁷ Ibid, 171.

¹⁸ Ibid.

¹⁹ Jason Ralph, "Between Cosmopolitan and American Democracy: Understanding US Opposition to the International Criminal Court", *International Relations* Vol. 17 : 2, 2003, 196-197.

²⁰ For an illuminating journalistic account of the final days of the negotiations in Rome from a U.S. perspective see Lawrence Weschler, "Exceptional Cases in Rome: The United States and the Struggle for an ICC", in Sewall and Kaysen, *The United States and the International Criminal Court*.

²¹ Ibid,107.

²² Australia, Egypt, Israel, Japan, Jordan, Argentina, Republic of Korea, New Zealand and Taiwan.

²³ See "Contempt of Court" (Editorial) *International Herald Tribune*, 12 April 2002.

²⁴ See "International Criminal Court: Letter to UN Secretary-General Kofi Annan", U.S. Department of State Press Statement by Richard Boucher, Spokesman, Washington, DC, 6 May 2002, reproducing the text of the U.S. letter, signed by Under Secretary of State for Arms Control and International Security John Bolton. See also "U.S. Congress Passes Anti-ICC 'Hague Invasion Act'", Coalition for the International Criminal Court Press Release, New York, 26 July 2002, www.iccnw.org.

²⁵ "International Criminal Court: For US or Against US?" *The Economist*, 22 November 2003.

²⁶ Ibid.

²⁷ Interview with Pierre-Richard Prosper, United States Ambassador at Large for War Crimes Issues, in Washington, DC, 30 June 2004 (on file with author).

²⁸ Draft resolution S/2002/1420. See also "U.S. Defiant on War Crimes Court", www.cnn.com, 1 July 2002.

²⁹ European Parliament Resolution on the Draft American Service members Protection Act (ASPA), P5_TA-Prov (2002) 0367: Consequences for Transatlantic Relations of Law on the Protection of US Personnel, 4 July 2002.

³⁰ Kai Ambos, "International Criminal Law Has Lost Its Innocence", *German Law Journal*. Vol 3:10, 1 October 2002.

³¹ See Colum Lynch, "Annan Opposes Exempting U.S. From Court", *Washington Post*, 18 June 2004.

³² Ibid.

³³ Colum Lynch, "China May Veto Resolution on Criminal Court", *Washington Post*, 29 May 2004.

³⁴ Ibid.

³⁵ Rome Statute, Article 12.

³⁶ "Wary US Eye on UN Court" (Editorial), *Christian Science Monitor*, 25 June 2004.

³⁷ Ibid.

³⁸ See Rome Statute, Art. 12. See also Gerhard Hafner, Kristen Boon, Anne Rübesame and Jonathan Huston, "A response to the American View as Presented by Ruth Wedgwood", *European Journal of International Law* 10, 1999, 17.

³⁹ Gerhard Hafner et al, Ibid.

⁴⁰ Ibid. See Also Marc Weller, "Undoing the Global Constitution: UN Security Council Action on the International Criminal Court", *International Affairs* 78:4, 2002, 695."

⁴¹ See Marc Grossman, "American Foreign Policy and the International Criminal Court", Remarks to the Centre for Strategic and International Studies, Washington, DC, 6 May 2002, www.state.gov.

⁴² Marc Weller, "Undoing the Global Constitution" 78:4, 2002, 702.

⁴³ Paul W. Kahn, "American Hegemony and International Law: Speaking Law to Power: Popular Sovereignty, Human Rights and the New International Order", *Chicago Journal of International Law* 1:1, 2000, 3.

⁴⁴ Lawrence Weschler, "Exceptional Cases in Rome", *The United States and the International Criminal Court*, 97.

⁴⁵ Barbara Crossette, "Helms Vows to Make War on U.N. Court," *New York Times*, 27 March 1998.

⁴⁶ See Ruth Wedgwood, "The International Criminal Court: An American View", *European Journal of International Law* 10, 1999.

⁴⁷ See Cdr. J.W. Crawford, III, "The Law of Noncombatant Immunity and the Targeting of National Electrical Power Systems ", *The Fletcher Forum of World Affairs*, Vol 212, Summer/Fall 1997, 101-119.

⁴⁸ Ibid, 102.

⁴⁹ Protocol I, Article 51-2.

⁵⁰ Ibid, Article 51-5 (b).

⁵¹ "Letter of Transmittal from President Ronald Reagan, Protocol II Additional to the 1949 Geneva Conventions, and Relating to the Protection of Victims of Non-International Armed Conflicts", Reprinted in 81 American Journal of International Law, 1987, 910.

⁵² Cdr. J.W. Crawford, "The Law of Noncombatant Immunity",. 107.

⁵³ Ibid, note 39.

⁵⁴ Ibid, note 41.

⁵⁵ Ibid.

⁵⁶ Sadat and Carden, 26.

⁵⁷ Rome Statute, Article 7 (1) (f).

⁵⁸ Ibid, Article 7 (1) (k).

⁵⁹ Ibid, Article 2(5), Articles 121 and 123.

⁶⁰ "Iraq War is Illegal, Says Annan", BBC News, 16 September 2004, www.bbc.co.uk.

⁶¹ Ibid. Article 123.

⁶² Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 17 July 1998, Resolution E, U.N. Doc A/Conf 183/10.

⁶³ Jules Deschênes, "Toward International Criminal Justice", in Roger S. Clark and Madeleine Sann, eds., *The Prosecution of International Crimes* (New Brunswick and London: Transaction Publishers, 1996), 32. See also Convention for the Prevention and Punishment of Terrorism, opened for signature 16 November 1937, reprinted in 7 *International Legislation* 862 (Manley O. Hudson et, 1941); Convention for the Creation of an International Criminal Court, opened for signature 16 November 1937, reprinted in 7 *International Legislation*, supra. Art 878. This convention received not a single ratification.

⁶⁴ Ruth Wedgwood, "The Constitution and the ICC" in Sarah B. Sewall and Carl Kaysen, eds, *The United States and the International Criminal Court.*, 125. These crimes include: International Convention for the Suppression of Terrorist Bombings, G.A. Res 52/164 (December 15, 1997); International Convention Against the Taking of Hostages (December 17, 1979), G.A. Res 34/146 Convention for the Suppression of Unlawful Seizure of Aircraft, (16 December 1970) 860 United Nations Treaty Series 105; Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (Montreal Convention), (23

September 1971); 974 U.N.T.S.177; and Convention on the Prevention and Punishment Against Internationally Protected Persons, Including Diplomatic Agents (14 December 1973), 1035 U.N.T.S. 167.

⁶⁵ Henry A. Kissinger, "America's Assignment", *Newsweek*, 8 November 2004.

⁶⁶ Sadat and Carden, 25.

⁶⁷ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion of 28 May 1951, www.ic-cij.org.

⁶⁸ See David Wippman, "The International Criminal Court".

⁶⁹ *Ibid*, 155.

⁷⁰ See Noah Weisbord, "When Peace and Justice Clash", *International Herald Tribune*, 29 April 2005.

⁷¹ Madeline Morris, "Complementarity and Conflict: States, Victims and the ICC" in Sarah B. Sewall and Carl Kaysen, *The United States and the International Criminal Court*, 196.

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Minor Corrections to the Thesis

Spelling and Typographical Corrections

- Page 11: 'but became' instead of 'but become'.
- Page 21: Thucydides' *The History of the Peloponnesian War* instead of 'Thucydides' *History*'.
- Page 22 and throughout thesis: 'Rousseau' instead of 'Rosseau'.
- Page 24, first sentence: italic of 'his' cancelled.
- Page 25: 'self-interest' instead of 'self interest'.
- Page 50: 'Schact' instead of 'Schct'.
- Page 51: 'Göring' instead of 'Goering',
- Page 89: 'very' instead of 'yery'.
- Page 119: 'Britannia' instead of 'Brittania'.
- Page 160: 'Caesar' instead of 'Ceasar'.
- Page 165: Ditto
- Page 176: 'first black President' instead of 'fist black President'
- Page 221: 'contrast' instead of 'contract'.
- Page 277: 'Boutros Boutros-Ghali' instead of 'Boutros Ghali'
- Page 303: 'slaughter' instead of 'slaughter'.
- Page 322: 'a situation' instead of 'situation'.
- Page 337: 'breath' instead of 'breadth'.

Sources

Page 93: The sources for the reference to the Stimson-Morgenthau bureaucratic battle are Ann Tusa and John Tusa, *The Nuremberg Trial* (New York: Cooper Press, 2003), 51 and John W. Dower, *Embracing Defeat: Japan in the Wake of World War II* (New York: W.W. Norton & Company, 1999), 445.

Page 162-4: Reference for discussion on MacArthur's decision to pardon Hirohito is Dower, 467-468, and "Hirohito" in Wikipedia, the free encyclopedia, http://en.wikipedia.org/wiki/Emperor_Hirohito.

Page 272: The source for the reference to Thomas Paine is Thomas Paine, *Common Sense* (Philadelphia: W & T. Bradford, 1776), 5. The source for the reference George Washington is his 1796 farewell Address as reprinted in J.D. Richardson, ed., *Compilation of Messages and Papers of the Presidents*, vol. 1 (1907), 213.

Factual Corrections

Page 388, first sentence: At Rome 120 states voted to adopt the Statute of the ICC for ratification; they did not sign it there.

Correction to Chapter 9: New Introductory Paragraphs

Introduction

There are three ways in which this thesis has sought to demonstrate the tension between political and legal responses to violations of international humanitarian law, and all three merge into the politics of the International Criminal Court. The first is the frequent tension between justice and order, which I treated mostly in Chapters 4 and 5. I have sought to demonstrate that, although justice is constitutive of order, the two concepts are frequently in tension. This is the case frequently in transitional justice, where trade-offs between justice and order often occur. South Africa's transition from apartheid to majority rule and the non-prosecution of Hirohito are the most prominent examples. Just as demonstrative is the doctrine of universal jurisdiction discussed in Chapter 5, which is one of the reasons why the United States, a great power which sees itself as a guardian of international order, is opposed to attempts to make the jurisdiction of the ICC universally applicable to states not parties to the treaty establishing the Court.

This first challenge, the order-justice conundrum, inevitably leads to the second – the selectivity of legal responses as a way of maintaining the balance of the international society. This has been empirically demonstrated, I believe, by the practical inability of the chief prosecutor of the International Criminal Tribunal for Rwanda to indict members of the Rwandan Patriotic Front that now governs Rwanda for war crimes committed during the civil war in 1994. That inability is not accidental. It is a reflection of strategic calculations in influential parts of the international society – calculations that are order-based in relation to the Great Lakes region of Africa and appear to have trumped the quest for impartial justice for Rwanda. In relation to the ICC, selectivity is demonstrated

by the exemption of United States personnel from possible prosecution by the ICC in Resolution 1593 (2005) of the United Nations Security Council resolution referring the crimes in Darfur, Sudan to the Court. This selectivity is based on the role of power in world politics.

Third, I have posited that the international criminal tribunals are a political fig leaf – a convenient resort from the failure to take muscular action to prevent violations of international humanitarian law on a massive scale. The inaction over the crimes in Darfur, and the possibility of subsequent prosecutions in the ICC will serve this function.

From these perspectives, the hopes placed in the ICC as a potential ‘final solution’ to mass atrocities are misplaced. The politics of the ICC, however, while demonstrating these anarchical characteristics, also point to a more advanced international society. The chief indicator of this shift is that ethical concerns have become a greater force in international society than they once were. This is why a *permanent* international war crimes tribunal was established, overriding the objections of the United States.

It is against this background that we can now examine the politics of the establishment and jurisdiction of the ICC.