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Shaping Agendas in Civil Wars. Can International Criminal Law Help?

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Introduction

Civil armed conflicts are nasty, brutish, peculiarly intractable and, these days, often long, even where one side is vastly stronger than the other. In earlier times, power asymmetries translated more readily into slavish submission, expulsion or extermination of the weaker party. Today, the universalization of human rights as a kind of secular faith and a spreading (albeit by no means universal) conviction that gross violence within a country threatens the interests of other countries combine to inhibit that translation. But it may nevertheless occur. Ask the Tutsis of Rwanda, that is to say, ask the remnant who survived.

Normative restraints on the exterminating use of force rise amidst a necropolis of losers. The dead are thereby honored, but just as dead. If they are susceptible to comfort, then comfort they may have in the thought that their unintended sacrifice inspired the struggle to limit the play of ruthless power.

Today the structure of constraining rules and principles is largely complete. It bans, admittedly with somewhat varying degrees of clarity, brute repression as a means for resolving group conflict. The great remaining task, far more arduous than norm-building, is enforcement. Over the decade, regional organizations and the United Nations, as well as ad hoc coalitions and individual states, have episodically tried to narrow the gap between norms and behavior by threatening or employing military and economic sanctions against pitiless governments and factions.

During the past decade, champions of a normative order informed by commitment to protect the weak and foment peaceful settlement have begun to invest hope in another enforcement vehicle, namely criminal punishment of those who lead or serve delinquent forces. Its threat, were it to appear real, could affect the behavior of the agents of civil conflict regardless of whether greed or grievance drive them. The current extradition battle over Augusto Pinochet, the long-time Chilean dictator, and the recent treaty establishing a permanent International Criminal Court are milestones in the accelerating effort to add penal sanctions to the humanitarians' armory. My task, I take it, is to describe, analyze, identify the obstacles to and anticipate the consequences of this admirable yet problematical initiative.

Why Penal Sanctions?

The purposes of penal sanctions in international law are largely coextensive with those in national legal orders. In both, sanctions are presumed generally to deter criminal acts, to protect society against confirmed delinquents by isolating them, to reinforce the authority of violated norms and of the rule of law generally, to comfort victims and their kin, and, by doing public justice, to reduce recourse to the private variety. "[It has become] an article of faith in the human rights community," an American Professor wrote in 1993, "that judicial processes are a critical tool in ending and preventing violations of international law ... [and as providing] catharsis, honoring victims, stigmatizing tyranny, restoring legality, 'bearing witness,' or otherwise having dignitary functions."[1] Exemplifying Professor Bush's observation, the human rights scholar/activist Jelena Pejic wrote five years later, on the eve of the diplomatic conference establishing the international criminal court: "It is recognized that human rights and the protections guaranteed under international humanitarian law will not be translated into practice unless potential offenders realize that a price for violations must be paid."[2] But that is not all, she adds, for in addition to its deterrent and protective value, the criminal process plays a key role in facilitating national reconciliation following civil armed conflicts: For if there is no individual accountability for crimes, she asserts, then victims will tend to impute criminality to the entire group from whose ranks the criminals sprang.[3]

The virtuous effects identified with criminal law are more easily assumed than proven and at the margins, at least, remain controversial. Scholars and practitioners of law debate the incidence and intensity of deterrence, the relationship in terms of crime reduction between deterrence and harsher sentences, the possibility and conditions of rehabilitation, punishment's allegedly cathartic effect on victims and their kin. Less controversial are the claims that it inhibits recourse to private justice. These are old and complicated disputes. To join

them would carry me too far from the main focus of my inquiry and would offer dubious advantage. For if, as appears to be the case, Governments and humanitarians have rooted convictions about the efficacy of penal measures, convictions which scholarly debate has not altered, it would be pretentious to imagine that agnostic conclusion on my part would change anything. Moreover, these convictions spring from powerful intuitions or one might say from a collective projection by generally law abiding people of what they take to be their own or at least their neighbor's reaction to the threat of criminal sanctions. In other words, on the basis of a sub-conscious canvass of their own hearts, people assume that in the absence of credible criminal sanctions, they and therefore others would far more frequently violate the law.

The Problem of Extrapolation

Belief about the potential efficacy of penal sanctions as vehicles for enforcing international law is a fairly straightforward extrapolation from the collective appreciation of law enforcement at the national level. Confidence in this extrapolation is not universally shared. Do contextual differences between national and international enforcement make behavior in the former a doubtful basis for anticipating responses to a criminal justice system in the latter?

One widely accepted dictum of domestic law enforcement is that a high probability of punishment generally deters more effectively than a very severe sanction rarely applied or, more simply, "relative certainty trumps relative severity" as a rule of thumb for the allocation of enforcement resources. The question, then, is whether the present and foreseeable nature of the international system reduces the risk of punishment to the point where on that ground alone it is unlikely to deter, even if on occasion persons are severely punished? By their very crimes, thugs may consolidate or seize control of sovereign states and thereby establish for themselves a comfortable refuge often with little fear of foreign intervention, particularly if they have succeeded in decimating opponents who might otherwise be transformed by external aid into a law enforcement vehicle for the global community.

A second question an agnostic might pose is whether a system shaped by the human rights sensibility in its most distilled form will tolerate effective procedures and intimidating punishments. Despite pleas from the post-holocaust government in Rwanda—in effect, therefore, from the survivors—the United Nations denied its creation, the ad hoc criminal tribunal for Rwanda, the authority to impose capital punishment.[4] Even life terms, with or without the prospect of parole, are deemed "inhuman" by some European civil libertarians.[5] Moreover, those convicted by the Tribunal will serve their sentence in a state designated by the International Tribunal from a list of States that have expressed willingness to take the convicted, provided that the prisons meet internationally recognized prison conditions. At present, however, there is no prison in Rwanda that even approaches internationally recognized minimum prison conditions, raising the possibility that those convicted of masterminding the genocide will serve their sentences in country-club settings, while those convicted by Rwandan courts will serve their time in appalling prison conditions.[6]

The same sensibility may also hamper effective prosecution in those exceptional cases where the criminals fail to control the state or are seized in their own territory by a decisive intervenor or unsuccessfully risk foreign travel. Notions of due process appropriate to well developed democratic legal orders may place an insuperable burden on prosecutors when they are transferred wholesale to international criminal trials. Here too, the very extent of the crimes and brutality of their perpetrators may ironically facilitate the defense of the indefensible. For instance, if witnesses or their relations still live in territory controlled or threatened by the defendants' associates or principals, then unless the witnesses can testify anonymously, they may be reluctant and well advised not to testify at all. The ad hoc tribunal established by the Security Council in 1993 to prosecute "[p]ersons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia"[7] has in fact received anonymous testimony and promptly been criticized for doing so.[8]

Convicting senior figures, like Milosevic of

Yugoslavia, who may give oral orders or nothing more than winks and nods and leave no paper trail, will be difficult unless courts shift the burden of proof to them, at least on the issue of intent, where their forces have perpetrated atrocities. This is not mere speculation. The New York Times, citing a senior American official as its source, reports that "from the beginning, Mr. Milosevic sought to build a fire wall around himself, to distance himself from indictable criminal acts carried out against Muslims during the war in Bosnia."[9] According to American intelligence, "Mr Milosevic has been in meetings where brutal operations against civilians were discussed, but he has allowed his underlings to do the talking, apparently fearing that the conversations might be monitored by sophisticated listening devices."[10]

The discussion of Milosevic's efforts to evade indictment occurred in the context of a news report that the US State Department had issued warnings about possible prosecution to the named commanders of nine Yugoslavian army units operating in Kosovo. The US spokesperson declared that "Commanders can be indicted, prosecuted and, if found guilty, imprisoned not only for crimes they themselves commit, but also for failing to prevent crimes occurring or for failure to prosecute those who commit crimes." He went on to say that "much of the evidence that the United States has against the nine commanders comes from interviews with refugees [who] are often able to identify military units operating in [areas from which they have fled]."

But on the following day, persons connected to the Tribunal told another New York Times reporter that

> *[p]rosecutors require more than names of military commanders or even witness accounts about cruelty and killing. To build their case against commanders, they need to link those responsible for crimes directly to the events and to present proof of who gave orders and who knew about the atrocities.*[11]

To import wholesale into war crimes prosecutions, prosecutions of persons who have been driving the juggernaut of the state, the safeguards developed to protect the poor and defenseless against the juggernaut of the state may fairly be seen as the exercise of an addled will to fail. Once the prosecutor demonstrates that a determinate unit commanded by the defendant had operational responsibility for the territory where atrocities were committed, the burden of proof should shift to the defendant to show that he or she could not reasonably have known of the atrocities or could not have prevented them. Similarly, when the prosecutors demonstrate a pattern of violations by the armed forces (including paramilitaries) of a government or faction, the head of government and all ministers with responsibilities related to the conflict (or repression) and the most senior officers of the armed forces should be required to establish by a preponderance of the evidence that they were unaware of the atrocities or tried and failed to prevent them from occurring.

Civil libertarians in common law countries and lawyers generally in civil law countries may object to plea bargains, a controversial but powerful instrument of prosecutors in the United States and are almost certain to rail against broad conspiracy counts in the indictment which are alien to the civil law but have been used effectively against criminal organizations in the United States. They will also resist employing the Nuremberg Charter tool of prosecuting for membership in elite organizations specializing in systematic torture and massacre, organizations like the Nazi SD and Gestapo.

Civil libertarians will also tend to oppose trials in absentia. Yet such trials are the only means of reaching perpetrators who remain in control of or protected by the states in whose names they have slaughtered. Conviction after a trial in absentia is much more than a symbolic exercise. In the first place, it permanently limits the perpetrator's movements. That itself should inflict some modest degree of unpleasantness. In addition, it places the defendants permanently at risk from a change in local power balances. Moreover, if they are functionaries rather than masters of the state, they must live with the oppressive knowledge that those actually in command of the state may find it convenient to trade them for a reciprocal benefit.

A second and possibly more compelling virtue of trial in absentia is its implications for the economic agendas of latent delinquents. Convic-

tion could facilitate worldwide confiscation of the delinquents' assets, assuming confiscation were one of the sanctions at the disposal of an international criminal tribunal, as it should be. National governments would, of course, have to adopt legislation requiring the executive branch to assist in the identification of assets attributable to the convicted person and requiring the judicial one to enforce the tribunal's confiscation orders.

A third source of unease about the extrapolation is the presence in the international sphere of both national and multinational community interests that will often compete powerfully against the interest in enforcing penal sanctions. Economic and environmental interdependence, porous borders, weapons of mass destruction: All are prominent among the contextual feature of the present international system that lend governments and often the insurgents in minor states a sharply higher level of systematically disruptive power than, in general, they have previously enjoyed. They may drive hordes of refugees across borders, destroy great tracts of rain forest, or credibly threaten terrorist attacks on nuclear power plants, dams or commercial air line systems. Imagine the disruptive effect on economy and society in Europe or the United States (or a host of other places for that matter) if it were believed that a few terrorists with hand-held anti-aircraft missiles were in position to attack civilian planes. The havoc inflicted on Colombia for half a decade by the Medellin cocaine cartel led by Pablo Escobar, a cartel with no more than a few hundred core operatives, suggests the rising nihilistic power even of relatively small but well organized criminal groups. In short, potential defendants may neither control a powerful state nor enjoy this support in order to discourage law enforcement by their perceived capacity both to escalate and to expand their delinquencies. In that way they may confront law-supporting states with the grim choice of flinching and thereby undermining the international rule of law or plunging ahead possibly at huge costs to the public interest.

A fourth barrier to easy extrapolation is the inchoate character of the "global community." A legal order is a set of norms and supporting institutions that shape expectations about how one should and how others probably will behave most of the time. Because the international legal order is very decentralized, self-declared "realists" dismiss it as nothing more than a cosmetic thinly concealing the pocked face of power. Their premise, of course, is that law regulates behavior only where it is backed by intimidating force. In the absence of police and troops to execute their orders, courts are impotent and law a dangerous illusion.

The evident flaw in the realists' argument is its reliance on a cramped view of legal order and of the means available for its enforcement. They rely on a criminal-law paradigm, a hellish vision of society in which all of us are latent criminals restrained from villainy by fear of punishment alone. And they correspondingly ignore the facilitative dimension of law: Law as a means of enabling persons to cooperate over time by embodying their collective goals in a body of rules, principles and policies. Imagine, for instance, a group of steelworkers who become the joint-owners of a bankrupt company in the hope of restoring its viability. Having no bosses, they can, indeed they must decide on work rules that will express their common interest in producing steel efficiently and safely.

Of course the image is too pretty. Character and energy being distributed unequally, the "free-rider" problem will no doubt insinuate itself into this Elysium. We can anticipate that some workers will be tempted to substitute recreational diversions for work assignments. But particularly where the number of workers are few and cooperation is highly integrated and so clandestine rule evasion is difficult, the threats both of enterprise failure and of the collective exclusion of malingerers from this system of cooperation may suffice to keep cheating to a workable minimum. These are precisely the types of threats or sanctions that operate in the international system of sovereign states, complicated, of course, by the fact that though the number of states is small, unlike the individual steelworkers none of them possesses a single consciousness and will. Instead their policies are determined in part by internal concerns and parochial politics which may often take little account of external commitments.

Whether at the international or the village level of social life, the law-as-a-system-of-cooperation paradigm fits when there is in fact a consensus about means and ends. In certain areas of inter-

national life—such as ocean navigation and commercial air flight and diplomatic intercourse—consensus is high and compliance with the rules embodying it predictable. The question relevant to this paper is whether the same can be said for the rules limiting the power of governments to repress challenges to their authority. Skeptics about the potential influence of international criminal sanctions might argue that consensus is not universal and is particularly weak among elites with a fragile grip on power or running countries with restless minorities. For such elites, treaties may well be little more than scraps of paper.

Dissent from the application of criminal sanctions to hooligan leaders, skeptics might fairly argue, is not limited to hooligan leaders. It can be spied at the very heart of the Western World. One need only recall the recent decision of Great Britain's Law Lords in the Pinochet case. There we had the spectacle of five out of seven successfully straining, like people finishing a difficult stool, to so construe the law of extradition as to narrow maximally the basis and hence prospects for extraditing the unrepentant butcher even as they purported to uphold the humanitarian claim that ex heads of state are not immune. Similarly, in Spain the government itself sought to insulate Pinochet from prosecution by appealing over the head of the examining magistrate, Baltasar Garzon, for a ruling that Spain had no jurisdiction to try the general for crimes committed outside the country.[12]

The gravity of the interests at stake is a final source of skepticism about the ability of criminal sanctions to influence the behavior of parties in a civil armed conflict. By the time tensions between groups turn violent, they normally have demonized each other and convinced themselves that defeat, unlike the loss of most inter-state conflicts, means the utter physical destruction of their respective communities. Moreover, civil conflict is by definition coterminous with the collapse of public order. The remote threat of criminal sanctions, it could be argued, will not resonate in the paranoid world of domestic armed conflict.

The predictive value of these various caveats about reliance on penal sanctions is likely to depend to some degree on the character of the international criminal justice system that gets put in place. Certainly they deserve a place among the concerns of the system's architects and those who assess their work. It is with those caveats in mind that I turn now to the system that is beginning to appear.

The Norms

The authors of the draft treaty submitted in the summer of 1998 to the diplomatic representatives gathered in Rome to negotiate the terms of an International Criminal Court had proposed three categories of crime. They essentially reiterate those contained in the Charter of the post World War II Nuremberg Tribunal which specified crimes against the humanitarian laws of war (i.e. "war crimes"), crimes, against peace and against humanity.

War Crimes: For the most part codified in the Hague Conventions on Land Warfare, the Geneva Conventions of 1949 and the Two Protocols Additional of 1977, they function primarily to protect civilians and soldiers who have surrendered or been rendered hors de combat, broadly speaking all non-combatants. In addition, through the norm prohibiting gratuitously cruel weapons and the treaties prohibiting use of bacteriological and chemical weapons, they offer limited protection even to combatants.

This corpus of norms comprehensively covers inter-state war scenarios and, in that context, commands a broad international consensus. Its application in civil conflicts is more problematic. The almost universally adopted Geneva Conventions contain a common Article three which alone applies to such conflicts. It prohibits torture, summary execution and, more generally, cruel treatment. But under the convention, it applies only in the case of "armed conflicts not of an international character." And it has been the consistent practice of governments struggling with insurgents to deny Article three's applicability on the grounds that they are merely conducting police operations rather than a true armed conflict, as if the latter could be said to exist only where insurgents control and govern a large swathe of territory like the Confederacy in the American Civil War. Protocol Additional II goes well beyond Article Three in detailing humanitarian norms applicable to civil conflicts. But not only does it enjoy less widespread acceptance than the

Geneva Conventions, in addition it too is subject to the claim that it applies only in the instance of full-scale civil war.[13]

Without any international tribunal available to assess such claims, governments have, until recently, been far freer to make them with reasonable expectation of acquiescence from the many states whose governing elites can envision themselves some day engaged in a similar sort of struggle and hence inclined to keep their options open. Until recently, rigid conceptions of sovereignty as a high wall blocking external appreciation of a state's internal behavior (conceptions that developed several centuries ago) reinforced a state's freedom to define internal struggles out of the reach of the Article Three. Any advantage in so doing has, however, fallen in conjunction with the rise of human rights norms some of which are generally conceded to be non-derogable, that is, not subject to suspension in time of emergency. In addition, by making effective their core claim that a state's treatment of people within its territory is subject to international standards, human rights norms have transformed ideas about the prerogatives of sovereignty and hence, inevitably, views about the conditions in which the laws of war are applicable.

Crimes Against Humanity:[14]The authors of the Nuremberg Tribunal's charter included this category of criminality in order to cover the slaughter of Jews and other targets of the Nazis who were citizens of Germany or its allies, since German troops and paramilitary units operating on the territory of allied states were not *occupiers* within the meaning of the applicable convention. Yet they were sensitive to the anticipatable charge that convicting the senior Nazis for committing this newly defined crime would violate the fundamental principle *sine lege*.[15] Hence they limited its applicability to slaughter that occurred in the course of aggressive war, as if by doing so they might make it almost indistinguishable from traditional war crimes.[16] Moreover, they could argue that during the war, the allied powers had issued warnings that German leaders would be held responsible for all inhuman acts violating the conscience of mankind and therefore they had sufficient notice to satisfy the rationale of the *sine lege* principle. Professor Paust has enumerated various uses of the term long before Nuremberg, for instance in the 1915 condemnation by Great Britain, France and Russia of the Armenian massacres in Turkey.[17] The defendants, and some legal pundits with a presumably more objective perspective, nevertheless insisted that even if the acts charged violated customary international law, responsibility for them had hitherto been attributable to states only. To satisfy the *sine lege* principle they therefore argued, it would have been necessary to have precedents for individual criminal responsibility. In short, while the defendants might have had full knowledge that they were committing grave violations of international law, they had a right to rely on the historical practice of states to treat each other as the sole subjects of international law. Of course they made the same claim in connection with the charges of conspiring to wage and waging aggressive war.[18] Even today, legal thought is not entirely immune to this sort of formalism.

The Nuremberg convictions and developments since then have, I believe, knocked the struts from under this shaky claim. If Nuremberg were the only precedent for individual criminal responsibility, then one might dismiss it as an aberration. But it is not. The 1948 Genocide Convention, which enjoys virtually universal adherence, envisions criminal liability for perpetrators and makes prosecution an international obligation of countries with specified jurisdiction. So does the much more recent convention prohibiting torture. So even those odd legal positivists who think it unjust to punish mass murderers if there is no penal system in place at the time of their crimes would have to concede that the genocidists of Rwanda and the assorted criminals who rampage through ex-Yugoslavia had sufficient notice that they risked criminal punishment.

Waging Aggressive War: The Nuremberg prosecutors and later the Tribunal in finding culpability relied primarily on the 1928 Treaty for the Renunciation of War as an Instrument of National Policy, the so-called Kellogg-Briand Pact. In reviewing a book on Nuremberg, Professor Jonathan Bush claims that prior to Nuremberg, "[i]nternational law had long defined and condemned aggression."[19] If so, there is special irony in the fact that for some three decades after Nuremberg and despite or literally because of endless debate, the United Nations

failed to discover a definition that summoned broad agreement among its members. Although conceived until now as a delinquency peculiar to inter-state relations, the crime (however defined) is relevant in a number of ways to our discussion of internal conflict.

In the first place, if, as many governments and scholars have claimed since the adoption of the UN Charter, force used for any purpose other than self defense against an armed attack by another state is aggression, then humanitarian interventions to halt genocide and arrest its perpetrators would itself be criminal. Supporters of this confining definition organize the universe of force into three categories: aggression, self-defense and enforcement measures authorized or ordered by the Security Council under Chapter VII of the UN Charter. During the Cold War, the US championed a more nuanced set of categories. It upheld the power of regional and sub-regional organizations to legitimize forceful measures without Security Council approval. And it claimed lawful authority to initiate reprisals against a state for terrorist attack or sustained "low-intensity" belligerence.

Governments and scholars remain divided about the conditions for the legitimate employment of force. Some scholars have claimed there exists legal authority for unilateral intervention as a last recourse to prevent gross violations of human rights, even to restore democracy.[20] But the stricter view, resting on the most straightforward reading of the Charter, still enjoys considerable support and, particularly in light of the World Court's opinion in the Nicaragua case, that view might prevail in the opinions of the ICC. Concern about this risk shaped US opposition to including aggression among the crimes over which the ICC would exercise jurisdiction.

The concept of aggression might, however, be re-conceived to make it a tool against rather than a potential shield for mass murderers and ethnic cleansers. Rather than being limited to inter-state wars, it might be conscripted for service in internal conflicts and used there to criminalize violent repression and the initiation of armed conflict by one faction, government or insurgent. This would have to be done, of course, with due regard for the right of properly constituted authorities to maintain order and territorial integrity. Otherwise it would be a license for terrorism and secession.

It is not hard to imagine a set of manageable criteria, manageable in the sense that they could be applied consistently by courts. One might start with the proposition that governments have a right to use force, within the bounds of international humanitarian and human rights law, to maintain territorial integrity. On the other hand, they have obligations to respect the rights of minorities, rights that are increasingly well defined in international instruments. The sustained failure to respect those rights would, then, lead to forfeiture of the right to employ force against secessionists. Once that right were forfeit, use of force would be "aggression." Aggression could also be found where one party to an internal conflict disregards a call for cease fire issuing from the Security Council or, perhaps, the General Assembly or a relevant regional organization.

Institutions

For the foreseeable future, national criminal justice systems must serve as the principal executors of international penal law. That was as clear to the architects of the Nuremberg Tribunal as it is to their contemporary successors. The former reserved the International Tribunal for trial of the senior officials of Nazidom. The tens, indeed hundreds of thousands who had executed their commands were left to national trials of which there were many and which continue to this day.[21] Any other course would have required the construction of a huge bureaucratic apparatus at great cost and delay.

Today there are no fewer candidates for indictment. Tens of thousands joined to make the Rwandan holocaust possible. And they are only a small fraction of those who, in purlieus as widely spaced as Chile and the Sudan, have during the past thirty years committed crimes against humanity. Not only would it take years and vast sums to produce a criminal justice apparatus—judges, prosecutors, bailiffs, marshals, investigators—able to cope with the potential catch, in addition the system could not function independently without a broad permission to exercise its functions, including its investigative activities, within states. Such permission would constitute a cession of sovereign rights that is not

yet thinkable within the political cultures of many states. After all, one of the oldest and clearest and most fiercely defended rules of international law prohibits one state from exercising any judicial function within the territory of another without its permission. Permission has very rarely been granted, for a monopoly of law enforcement authority is accurately seen as a defining feature of national independence. One need only recall the furious reaction of the Mexican Congress in 1998 to the scam conducted by US agents operating under cover on both sides of the border which exposed the money-laundering activities of Mexican bankers.

In authorizing establishment of the ad hoc tribunals for international crimes committed in former Yugoslavia and in Rwanda, the Security Council took account of these realities in that it made no effort to give the tribunals exclusive jurisdiction. It did, however, give them a superior status in the sense that, once they choose to hear a particular case, the national courts are required to defer. The treaty establishing the ICC reverses the order of precedence. The ICC is supposed to "complement" national courts. Its statute "explicitly establishes that a case will, *inter alia*, be inadmissible before the ICC whenever it is being investigated or prosecuted by a state which has jurisdiction, unless the state is 'unwilling or unable genuinely' to carry out the investigation or prosecution.[22] Consistent with the logic of complementarity, a case is inadmissible when it has been investigated by a state with jurisdiction which has decided not to prosecute the accused, unless the international prosecutor can convince the ICC that the state's decision resulted from "unwillingness or inability genuinely" to investigate or prosecute.

The effort to construct an effective system for applying penal law at the international level raises many of the same issues encountered in domestic jurisdictions. All criminal tribunals require means for investigating alleged crimes, compelling the accused's appearance, conducting fair trials (which is normally deemed to include a right of appeal) and executing sentences. Since most UN member states appear unready to concede to any international institution a general authority to arrest and detain persons wanted as defendants or material witnesses or to enter premises and seize pertinent documents, any now imaginable international tribunal must rely on states to perform these functions for it. The ad hoc tribunals for ex-Yugoslavia and Rwanda enjoy the formal authority to command cooperation granted to them by the Security Council acting under Chapter VII. In theory, then, where national authorities refuse a request, the tribunals can apply to the Council for sanctions against the obdurate government. The Council's readiness to enforce the demands of its creation has not yet been tested but could soon be if, for instance, Croatia persistently refuses to deliver to the Yugoslavia Tribunal one or another of its nationals who has been indicted for war crimes.

The International Criminal Court, should it actually materialize, will be less well armed, at least in theory. Being a creature of treaty, its legal authority will be limited in most respects to those states that ratify it.[23] And it will have no formal right of appeal to the Security Council in the event of non-performance by a treaty party. At best, the Tribunal's president or prosecutor could persuade a sympathetic state to bring an instance of non-compliance to the Security Council's attention if it could be plausibly associated with a threat to international peace.

Despite the Pinochet case, it is fair to note a growing readiness at least of liberal democratic states to cooperate in punishing violators of international criminal law. The Euro-Canadian push to establish the ICC testifies to a changing political and moral sensibility. In a paradoxical way, so does the Pinochet case taken in all its parts: Its initiation within the Spanish judicial system; the ambivalence rather than focused hostility of Spain's executive branch (while its Attorney-General was fighting to abort, its Foreign Minister was claiming that his government would take no action to block extradition); even the House of Lords' judgment to the extent it rejected the view that former heads of state enjoyed immunity for crimes committed by them when in office. One reasonably can, therefore, anticipate a growing measure of compliance by governments with their obligations to cooperate in global law enforcement. How extensive are their extant obligations, particularly their obligations under customary international law that is binding irrespective of applicable treaties? In particular, do

their obligations extend to the key task of actively seeking and arresting accused persons and extraditing them for trial (where the arresting state does not itself choose to prosecute?

A growing number of legal scholars answer the second question affirmatively. They stand on reasonably firm ground. The notion of such an obligation is hardly novel. It is foreshadowed in Common Article 49 of the 1949 Geneva Conventions which provides that

> *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 *case.*[24]

The grave breaches to which it refers—including wilful killing and torture or inhuman treatment—are unfortunately limited to inter-state conflicts; they do not include violations of common article three's regulations for civil wars. Nevertheless, in that they impose an obligation on states to seize, detain and prosecute or extradite persons who may not be their own nationals or have committed crimes against their nationals, the Conventions are a milestone in the development of the procedural side of international criminal law. With respect to internal violence, the almost coincident milestone is the 1948 Genocide Convention. While it looked primarily to prosecution by the state where a perpetrator was found, it gave the arresting state the future option of transferring the accused to an international tribunal should one be established. Since the late 1940's, conventions criminalizing various acts as threats to the general interest of peoples and states and requiring prosecution or extradition have multiplied.[25] Enumerating some sixty-four of them, at least one scholar concludes that their cumulative evidentiary weight confirms the evolution of a rule of customary law.[26]

Whether acting from a sense of legal or of moral obligation, most states willing to cooperate with the ICC need correspondingly to alter or modify national laws and regulations. This is particularly true for a country like Great Britain—where the courts refuse to apply international norms until they are formally incorporated by Parliamentary Act into domestic law—or the United States where customary international law is subordinate to Congressional acts (and, arguably, Executive decrees), even if earlier in time, and treaties are rarely deemed self-executing. Moreover, whatever the actual status of international obligations in domestic law and their theoretical applicability to a given case, the United States experience is that lower court judges and many lawyers lack awareness of international norms and when made aware, may still ignore or misconstrue them on behalf of personal agendas. Elaboration and clarification at the highest level of government of the commitment to collaborate with international tribunals should heighten awareness and inhibit evasion and distortion of international law.

The commitment to cooperation entails at a minimum the following elements. First, effective provision for extradition. Countries with well developed legal systems generally do not recognize in the executive power a unilateral right to extradite[27]. They require either legislative authorization or a preexisting international agreement. Some standard elements of extradition treaties will require modification. For instance, such agreements often specifically exclude nationals from their reach, that is most of the people over whom any state has jurisdiction. In addition, they generally contain exceptions for so-called "political crimes" which some US judges have defined as crimes of any kind committed by members of organized groups for political reasons.[28] Virtually all of the potential defendants in international criminal trials could shelter under that construction. Furthermore, states would need to eliminate the standard double criminality requirement—the offense charged must be a crime in both countries at the time of the extradition request[29]—if they were unwilling to include international crimes in their own criminal codes.

Secondly, effective cooperation entails providing international courts with access to witnesses both at the investigative and trial stages of a pro-

ceeding. Providing access to those who are willing to meet with international tribunal prosecutors requires nothing more than permission for the latter to enter and exercise judicial functions, permission the executive can doubtless grant. Unwilling witnesses provide a considerably more challenging set of procedural and political problems. Compelling their appearance for interrogation by agents of the ICC's Prosecutor within the country and subject to all of its constitutional protections would obviously be less problematical than attempting to compel their presence before the Tribunal where, if they remain obdurate, they might be found in contempt and imprisoned. The domestic political reverberations of this scenario could be considerable. Whether it raises serious constitutional issues under provisions comparable to the US due process clause is less clear; but surely constitutional issues would be argued in a suit to block coerced removal of a citizen to another jurisdiction without any showing or even claim that the citizen was him or herself criminally responsible for the acts charged in the foreign trial.

International tribunals will also require assistance in securing documentary evidence whether through judicial compulsion or searches and seizures conducted by the executive. There is both precedent and experience in this area as a result of the mutual legal assistance treaties that have begun to proliferate largely in response to the globalization of organized crime.[30] But the treaties themselves and practice thereunder reveal at least one common defect, namely their frequent failure to secure cooperation in the pursuit of the assets of delinquents or of proof that such assets exist.[31]

Armed conflict—with its murky and repressive ambience— often provides unusual opportunities and incentives for corruption, indeed wholesale asset stripping by government officials and leaders of armed factions. Its risks encourage export of financial assets (whether acquired during or before the conflict) to one or another venue in the global archipelago of financial safe havens generally located in picturesque and sunny places with good cuisine. Criminal penalties can and should include confiscation of assets. Indeed, the credible threat of confiscation may surpass the threat of imprisonment as an instrument of influence for external actors attempting to promote peaceful settlement and to restrain atrocity. Military victory, howsoever secured, provides the winners with a safe haven from prosecution, but cannot by itself protect resources previously shipped to foreign venues.

War crimes prosecutions, whether occurring in national courts or international tribunals, should be able to reach, initially freeze and ultimately confiscate the assets of delinquents. In prosecuting its war against drug traffickers, the United States has had fair success in pressuring and persuading foreign governments to cooperate with searches for drug-trafficking proceeds. But haven states have resisted lowering the bank secrecy bar with respect to investigations into other crimes.

To be maximally effective, an assault on externally-held assets requires all states with jurisdiction over financial havens to adopt a legislative package with the following features: First, it must authorize or, preferably, require the executive and judicial branches to cooperate with investigations conducted by foreign national and international tribunals; secondly, it must modify laws imposing criminal or civil penalties on employees of financial institutions who reveal information about the transactions of their institutions; thirdly (and perhaps most controversially), it must require financial institutions to make good faith efforts to identify and thereafter to maintain records concerning the real identity of ultimate parties in interest. The difficulties successor governments have encountered in trying to track the plunderings of notorious dictators underscore the need to increase transparency in global financial centers and tax havens. Obviously the competition among financial centers for "hot money" will inhibit the requisite changes in law and policy unless they are done in concert. The gradual albeit slight lowering of the bars to money-laundering investigations and, more recently, to inquiries into the disposition of assets belonging to persons consumed by the European Holocaust and their survivors, attest to the power of the United States in particular, much less the Group of Seven acting together, to pry open the closed windows of other jurisdictions favored by runaway capital.

Cooperation with international tribunals, whether established by Security Council Resolution or a broadly ratified treaty, is a moral imperative. Does

the same imperative apply to the operations of national tribunals seeking assistance purportedly in order to enforce the relevant international norms? Is there not much greater danger there of inadvertently helping to advance illicit essays in revenge or sheer predation marching under the banner of humanitarianism?

Rooted in a political order of sovereign states, designed by those states to express, define and defend sovereignty, international law has served rather to separate than to universalize the sum of global authority to make and apply law. The authority of each state's duly constituted authorities to decide what behavior shall be tolerated or required on its territory or on the part of its nationals and to enforce such decisions has been a defining feature of national sovereignty. Within the tolerances of international law, states have also authorized themselves to prohibit and punish acts albeit committed by aliens in foreign venues where such acts are directed against them as in the case of a conspiracy to counterfeit their currency. And, though not without dissent, states have occasionally asserted the authority to outlaw assaults on their nationals abroad, although in doing so in effect they extend their legislative jurisdiction into the sovereign space of other states. But until very recently, they have rarely recognized a general right to legislate against and punish acts, regardless of where they occur and who is the victim, simply on the grounds that the acts in question threaten universally shared interests.

Piracy was one of the rare exceptions. Now there are, at least arguably, quite a few more. Widely ratified treaties impose "extradite or prosecute" obligations primarily in connection with terrorist acts (attacks on air lines and on diplomatic personnel, for instance) and gross violations of human rights (such as torture).[32] Wide ratification, repetition (torture, for instance, is prohibited in, among other texts, the Geneva Conventions, the International Covenant on Civil and Political Rights, regional human rights instruments and the torture convention itself), the clandestine character of violations and the absence of official defenders collectively evidence the incorporation into customary international law of certain prohibitions initially established by treaty. In the face of this development, states now have discretion to prosecute transient aliens for various crimes against human rights and humanitarian law, crimes committed abroad against other aliens, even where the state is not obligated to do so by virtue of being a party to a prosecute-or-extradite treaty.

A world swarming with police and prosecutors on the lookout for those who have killed, maimed, raped, tortured and ethnically cleansed and with courts ready to try the villains might well seem rather more intimidating to prospective Pinochets and Idi Amins than one marked by a solitary tribunal in the Hague or wherever. How might this happy prospect come about in a world where past or present high ranking villains have become accustomed to traveling or even settling here or there without great difficulty much less fear of incarceration? Perhaps the first few instances of vigorous national enforcement of international criminal law might generate powerful pressures on other governments to follow suit or at the very least to deny safe havens to murderous former heads of state like the ones provided for Idi Amin in Saudi Arabia and Mengistu Haile Mariam in Zimbabwe. There could be a general ripping aside of the veil of immunity for government officials.

Quite apart from the plausibility of this scenario, does it provide grounds for concern no less than for anticipatory jubilation? One ground for concern is possible abuse of loosened restraints on national jurisdiction. The risk of contestable use and incontestable abuse should grow in rough proportion to the variety of delinquencies seen to justify the assertion of universal jurisdiction. Consider, for instance, the crime of "aggression" conditionally included in the Statute for the new International Criminal Court.[33] Its position buttressed by the Statute's recognition that such a crime exists, a state might include the crime in its penal code, exclude statutes of limitations, make jurisdiction limitless and adopt the view that any use of force for purposes other than defense against an armed attack or execution of a Security Council mandate or license under Chapter VII of the Charter constitutes the crime. Since that definition would embrace the current NATO operation against the Milosevic and his colleagues, senior civilian and military officials in all nineteen NATO countries would be

liable to prosecution in country X as long as they live. Moreover, as notions about the legitimacy of universal jurisdictional assertions by national courts gain currency, in future years country X might be able to secure their arrest and extradition by third countries.

A second ground for concern is the slight measure of due process that obtains in many countries. So even one prosecuting in good faith may do so by means that could easily lead to miscarriages of justice.

Populist reactions to the prosecution of fellow citizens in far off countries with unfamiliar legal codes will push governments to protest or take strong measures even in cases where, in the eyes of neutral observers, the prosecuting state appears to be acting in good faith. It seems fair to suspect that the proliferation of international criminal trials by national courts will add to the sum total of acrimony among states. One way of reducing the risk of abuse and the certainty of acrimony would be to achieve an international consensus that judgments in national trials must be appealable to the International Criminal Court. That would, of course, require an amendment to the Court's statute and probably an expansion in its numbers. Achieving consensus is not likely to prove easy particularly since what I am proposing constitutes ceding ultimate power away from national judiciaries, a concession that could raise constitutional no less than political issues in many states.

Individual Criminal Responsibility, Peace Processes and Transitions to Democracy

One ground for concern which applies to international as well as national enforcement of international criminal law is the impact of threatened criminal prosecutions on efforts to negotiate the settlement of civil armed conflicts and transitions from authoritarian to democratic regimes. In recent years, immunity from prosecution has been a prominent and contentious issue particularly in democratic transitions.[34] Among scholars and activists, debate has swirled around the ethical and legal propriety of blanket amnesties. Exposure without punishment, once championed as a means of reconciling antagonists without derailing peaceful settlement or transition, has disappointed, at least in the former respect. Still, in some cases, impunity (with or without exposure) has probably been essential to democratic transitions and peace.

One might argue that the combination of an international criminal tribunal and national tribunals with jurisdiction to punish humanitarian crimes committed abroad allows a necessary measure of flexibility in managing transitions or peace negotiations without sacrificing all the imagined and probably to some degree real virtues of criminal sanctions. Negotiators, after all, can give no more than they have. They can guarantee Pinochet's ilk impunity at home, but cannot assure their freedom to take tea abroad with honorable and right honorable persons or to exercise their human right to shop at Gucci in Miami. If the ICC stood alone as a threat to the pleasures of retirement, sociopathic leaders in states that had become parties (presumably during some earlier democratic interlude) could simply withdraw from the treaty establishing the court prior to relinquishing power or agreeing to autonomy for or power sharing with some insurgent group. The beauty of national tribunals enforcing international criminal law is their immunity to such ploys. They would not be providing merely a forum to enforce foreign law, civil or criminal. For in that event, normally[35] they would apply the substantive law of the foreign jurisdiction, hence the law granting immunity. No, they would be applying international law and it would not be affected by arrangements between the contending parties.

To me it seems implausible that the risk of prosecution in a foreign jurisdiction or an international tribunal would weigh heavily on the issue of democratic transition or domestic peace. Moreover, if national and international law conspire to treat state terrorists no better than the private sort, then it should not weigh at all, since, in terms of the opportunities to cavort abroad, state killers would gain nothing of formal value. To be sure, they might conceivably calculate that by retaining power, they retain ways to extract concessions, including de facto immunity, from states that need to deal with them concerning one or another of the many issues (from global warming to transnational crime) that crowd the contemporary diplomatic agenda. Still, conceding the other and far larger

stakes on the table in negotiations to end a conflict or effect a transition, it is hard to believe that this one could matter very much.

An obligation to punish is most likely to conflict with the strategic and humanitarian interest in the early termination of civil conflicts where powerful external actors—possibly acting at the behest of the United Nations or a regional organization—are employing armed mediation on behalf of peace. That was Bosnia and in a sense Haiti as well. Political and military leaders who feel themselves vulnerable to prosecution will then be demanding impunity from the very countries with the means to grant it de facto by refusing to deliver the miscreants to an international tribunal or to prosecute them in their national courts. Western governments with troops in Bosnia have felt the flail of public opinion for failing to arrest notorious war criminals. Even negotiating with them has been a problem.

Making Security Council permission a condition for an international court initiating investigations much less seeking the arrest of persons where investigation has led to indictment would reduce the risk of collision between the commitment to punish and the goal of peaceful settlement. It would also tend to emasculate the court at birth and assure that in such future cases as it did try to act, it would do so subject to the accusation of doing justice unequally. During the negotiations at Rome over the statute of the International Criminal Court, the United States failed in its efforts to secure such a limit on the Court's authority. The statute as approved by the great majority requires an affirmative vote of the Security Council adopted under Chapter VII of the Charter to block the initiation or continuation of an investigation or trial.

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Despite all the deductive grounds for skepticism I sketched at the outset, the reported efforts of Milosevic to conceal his responsibility for atrocities in the former Yugoslavia suggest that the risk of criminal responsibility could weigh on the decisions of the principals to internal armed conflict. How much it will weigh in the short term will be affected, I would guess, by the success of the extant ad hoc tribunals for Yugoslavia and Rwanda in trying, convicting and punishing severely a number if not a majority of the principal organizers respectively of war crimes and genocide. In the Yugoslavian case, success may require a decision by the United States and its allies to demonstrate to the Serbian officer corps and related civilian elites that they must choose between, on the one hand, losing Kosovo altogether and also the Serbian rump in Bosnia (which would then be divided between Croats and Muslims) and remaining a pariah state, or choosing, on the other hand to deliver at least Milosevic and his wife and certain paramilitary leaders like Arkan to the Tribunal. The will to impose those alternatives is not visible, in some measure, perhaps, because the moral and strategic prudence of their imposition is debatable.[36] It would, moreover, require impunity for most of the officer corps. In the longer term, the weight of criminal sanctions will be a function largely of what one cannot yet foresee, namely a robust commitment to deploy national criminal justice systems on behalf of international criminal law.

Notes

[1]Jonathan A. Bush, reviewing Telford Taylor's *The Anatomy of the Nuremberg Trials: A Personal Memoir*, 93 *Columbia Law Review* 2022 (1993), at 270.
[2]Jelena Pejic, "Creating a Permanent International Criminal Court: The Obstacles to Independence and Effectiveness," 29 *Columbia Human Rights Law Review* 291 (1998), at 292.
[3]Ibid.
[4]See the Statute of the International Criminal Tribunal for Rwanda, Art. 23, Annex, U.N. Doc S/RES/955 (1994), and Int. Crim. Trib. For Rwanda, Rules of Procedure and Evidence, Rule 101(A) stating: A convicted persons may be sentenced to imprisonment for a term up to and including the termination of his life. U.N. Doc. ITR/3/Rev.1 (1995) entered into force 29, June, 1995. Rwanda authorities initially opposed the creation of the tribunal over the issue of capital punishment. They believed that it would result in unfairness because the leaders of the genocide, who were found guilty of the most egregious crimes would be given prison sentences, while their subordinates who were tried before local courts faced the death penalty if convicted. See "Kigali agrees to cooperate with the genocide tribunal" The Irish Times, Nov. 10, 1994 at p10.
[5]While Yugoslavia has a death penalty, it does not

have a life imprisonment sentence. Yugoslav lawmakers view life imprisonment as cruel punishment. Other European States such as Norway, Spain and Portugal have done away with life imprisonment and established maximum prison terms of twenty to twenty-five years. See Jean Pradel, Droit Pénal Comparé 576 (1995).

[6]William A. Schabas, *Sentencing by International Tribunals: A Human Rights Approach*, 7 Duke J. Comp. & Int'l L. 461, 494 Spring, 1997.

[7]S.C. Res. 827, 25 May 1993, UN SCOR, *reprinted* in 32 I.L.M. 1203 (1993).

[8]See Monroe Leigh, *Witness Anonymity is Inconsistent with Due Process*, 91 Am. J. Int'l Law 80 (1997).

[9]Raymond Bonner, "9 Yugoslavs Are Warned of Liability for Atrocities," New York Times, April 8, 1999, p. A10.

[10]Ibid.

[11]Marlise Simons, "Court Calls For Evidence Not Politics," New York Times, April 9, 1999, p. A11.

[12]Marlise Simons (for The New York Times News Service), "Spanish officials quietly fight Pinochet extradition," *The Denver Post, October 21, 1998, p. 8A.*

[13]Protocol II does not apply to "situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts." Protocol II (Relating to the Protection of Victims of Non-International Armed Conflicts opened for signature Dec. 12, 1977 UN Doc. A/32/144, Annex I, II (1977).

[14]The International Military Tribunal's (IMT or Nuremberg Tribunal's) charter referred to "murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecution on political, racial or religious grounds *in execution of or in connection with any crime within the jurisdiction of the Tribunal*." The Charter of the IMT. August 8, 1945, art. 6(c), 59 Stat. 1544, 82 UNTS 279. (Italics added) Hence persecution had to be connected by the prosecution to the defendants waging or conspiring to wage aggressive war or violating the laws of war. Following the IMT, the Allies held a number of additional war crimes trials in their respective zones of occupation. These military tribunals were based on Allied Control Council Law No. 10 (Law No. 10) which omitted the nexus requirement between the crime and the waging of war. Subsequent developments in international law appeared to do away with the nexus to war requirement. See Fourth Report on the Draft law Code of Offenses Against the Peace and Security of Mankind by Mr. Doudou Thiam, Special Code Rapporteur, 38 UN GAOR C.4 at 56, UN Doc A/CN.4 398 (1986) and Diane F. Orentlicher, Yugoslavia War Crimes Tribunal, Focus, American Society of International Law at 3 (Summer 1993) where she asserts that the accepted view is that crimes against humanity do not require a nexus to war. Read literally, the Statute of the War Crimes Tribunal for former Yugoslavia appears to revive the nexus requirement by stating that the tribunal shall have the power to prosecute persons responsible for certain enumerated crimes "when committed in armed conflict, whether international or international in character., (Secretary General's report, UN Doc S/25704 May 1993). Nevertheless, the distinguished authority on international criminal law, Professor Theodore Meron, argues that the Statute for Yugoslavia affirms that crimes against humanity do not require a nexus with international wars, See Meron, Editorial Comment: *War Comes of Age*, 2 AJIL. 462 July, 1998.

[15]The principle of nullum crimen sine lege is [t]he principle that conduct does not constitute crime unless it has previously been declared to be so by the law" Virginia Morris & M Christine Bourloyannis-Vrailas, The Work of the Sixth Committee at the Forty Eight Session of the UN General Assembly, 88 AM J. INT'L L. 343, 351 n. 43 (1994) citing A CONCISE DICTIONARY OF LAW 246 (1983)).

Justice Robert H. Jackson, the Nuremberg Tribunal's Chief Prosecutor, does not appear to have shared the doubts of the of the Charter's authors. Referring to "crimes against humanity" in a 1945 report to the President of the United States, Jackson stated that "atrocities and persecutions on racial or religious grounds" were already outlawed under general principles of domestic law of civilized states and that [these principles have been assimilated as a part of International Law at least since 1907." Report of Justice Robert H. Jackson to the President of the United States, released June 7, 1945, *reprinted* in Dep't State Bull. 1071,1076 (June 10, 1945). Professor Jordan Paust notes that "Jackson found support for the latter part of his statement in the de Martens clause of the 1907 Hague Convention No. IV Respecting the Laws and Customs of War on Land [Oct. 18, 1907, 36 Stat. 2277, TS 539] which affirmed the existence of 'principles of the law of nations' resulting 'from the laws of humanity.' Paust, *Threats to Accountability after Nuremberg: Crimes Against Humanity, Leader Responsibility and National Fora*, 12 NYL. Sch. J. Hum. Rts 5, at 6 (1995).

[16]The English translation of the relevant text of the original Charter seems to require that connection only if persecution is alleged. The broader construction narrowing the use of crimes against humanity [which in the event were virtually pushed off stage] stems from the later Berlin Protocol. For the text of

the Protocol see 1 IMT 17-18.

[17]Id. at 5.

[18]This controversial charge was omitted from the statutes of the international criminal tribunals for Rwanda and the former Yugoslavia.

[19]Bush, supra, note 1 at 2031.

[20]See, eg., Anthony D'Amato, *The Invasion of Panama Was a Lawful Response to Tyranny*, 84 Am. J. Int'l L. 516, at 520 n.16 (1990), and Anthony D'Amato, Foreword to Fernando R. Teson, Humanitarian Intervention: An Inquiry Into Law and Morality at viii (1988). But compare Tom J. Farer, *Human Rights in Law's Empire: The Jurisprudence War*, 85 Am. J. Int'l L. 117, at 121 (1991) (explaining that an interpretation of the Charter that considers any non-defensive use of force, humanitarian or otherwise, illegal is consistent with the intent of the Charters framers); See also Tom J. Farer, *A Paradigm of Legitimate Intervention,* in Enforcing Restraint, Collective Intervention in Internal Conflicts, L. Damrosch ed., (NY: Council on Foreign Relations 1993). 316, at 326 (noting "the danger to minimum world order of competitive interventions carried out by states acting in good faith").

[21]See, e.g., Sarah Lyall, "Nazi Crimes Bring Man 2 Life Terms in Britain," *The New York Times*, April 2, 1999, p. A5, describing case of first person in Britain to be tried under the country's 1991 War Crimes Act. The defendant, a 78 year old emigre from Poland, was convicted for presiding over the 1942 extermination of the Jewish population of Domachevo (now in Belarus).

[22]Pejic, supra note 2, at 309.

[23]One exception to that limit: On the complaint of a state party on whose territory crimes subject to the court's jurisdiction have occurred, it may try nationals of a non-party state. Rome Statute of the International Criminal Court UN Doc A/con.183/97 Part 2, Art. 12.

[24]Art. 49, First Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed forces in the Field, Aug 12, 1949 6 UST 3114, 75 UNTS. 31; Art. 39 Second Geneva Convention for the Amelioration of the Condition of the Wounded and Sick and Shipwrecked Members of Armed Forces at Sea, Aug 12, 1949 6 UST 3217, 75 UNTS. 85; Art. 49, Third Geneva Convention Relative to the Treatment of Prisoners of War, Aug 12, 1949 6 UST 3316, 75 UNTS. 135; Art. 49 Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug 12, 1949 6 UST 3516, 75 UNTS. 287.

[25]See, eg, The Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, in 23 INT'L LEGAL MATERIALS 1027 (1984), Articles 4-8.

[26]Michael P. Scharf, *Swapping Amnesty for Peace: Was There a Duty to Prosecute International Crimes in Haiti?* 31 TEX. INT'L LJ. 1, 28 (1996).

[27]"[T]he constitution creates no executive prerogative to dispose of the liberty of the individual." *Valentine v. United States*, 299 US 5, 7 (1936).

[28]See, e.g. *In the Matter of the Requested Extradition of James Joseph Smyth*, No. CR 92-152 MISC BAC United States District Court for the Northern District of California 863 F. Supp. 1137; 1994 US Dist. LEXIS 13087; 94 Daily Journal DAR 15821 September 15, 1994, Decided September 15, 1994, Filed.

[29]Under the precedent-shattering opinion of the majority in the Pinochet appeal, the acts charged apparently would have to have been crimes in both parties to the agreement at the time the crime was allegedly committed.

[30]See generally Tom Farer, ed., *Transnational Crime in the Americas*, (New York and London: Routledge, 1999).

[31]See Jack Blum, in Farer, supra note 30.

[32]See article 9 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, in 23 INT'L LEGAL MATERIALS 1027 (1984).

[33]37 Int'l Legal Materials 999 (1998). Article 5(2) states that the "Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to the crime." p. 1004.

[34]The volume of writing on this subject should raise serious concerns for forest preservationists. A representative sampling of work might include the following: Jaime Malamud-Goti, *Transitional Governments in the Breach: Why Punish State Criminals*? 12 HUM. RTS. Q. 1 (1990); John L. Moore, Jr. *Problems with Forgiveness: Granting Amnesty under the Arias Plan n Nicaragua and El Salvador*, 43 STAN L. REV. 733 (1991), Aryeh Neier, *What Should Be Done About the Guilty?* N.Y. Rev. of Books, Feb. 1 1990, at 32; Diane F. Orentlicher *Settling Accounts, the Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YAKE L. J. 2537 (1991); Naomi Roht-Arriaza, *State Responsibility to Investigate and Prosecute Grave Human Rights Violations In International Law*, 78 CAL. L. Rev. 451 (1990).

[35]Of course with an exception to this normality in cases where the foreign law offends what the courts regards as forum state public policy.

[36]One might plausibly argue that Milosevic commands greatest support when the country is most isolated and therefore the best strategy for effecting his ultimate removal is one of reincorporating Serbia into European society, eliminating sanctions and generally seeking

to make Serbians feel that they live in an ordinary European country. In such a country, Milosevic should appear as an anomalous malignancy requiring excision.