The Theory and Practice of International Criminal Law

Essays in Honor of M. Cherif Bassiouni

Edited by **Leila Nadya Sadat**
Michael P. Scharf

Martinus Nijhoff Publishers

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FOREWORD

TAKING AIM AT THE SKY

*Leila Nadya Sadat and Michael P. Scharf**

Few among us can claim to have shaped the course of world history. M. Cherif Bassiouni, however, is just such a man. Often referred to as the "father" of modern international criminal law, his fingerprints are upon every major international criminal law instrument of the past 45 years including the Apartheid Convention, the Torture Convention, and the Rome Statute for the International Criminal Court. An extraordinarily prolific scholar, Bassiouni has written and edited 72 books on Extradition Law, International and Comparative Criminal Law, International Human Rights, and U.S. Criminal Law. He is also the author of more than 200 publications that have appeared in Arabic, Chinese, English, Farsi, French, Georgian, German, Hungarian, Italian, and Spanish. Yet it is the extraordinary quality of this impressive corpus as well as its prolixity that has rendered it so influential. Bassiouni has received four honorary doctorates, the Order of Merits of Austria, Egypt, France, Germany, and Italy, the Special Award of the Council of Europe, the Defender of Democracy Award, the Adlai Stevenson Award of the United Nations Associations, and the Saint Vincent DePaul Humanitarian Award among others. His reputation is *sans pareil* among governments, academics, and international and domestic courts. Bassiouni's publications and expertise have been repeatedly cited as authority or sought by the International Criminal Tribunals for the former Yugoslavia and Rwanda as well as national jurisdictions including the United States and Canadian Supreme Courts.

A world citizen born with a passion to oppose injustice, Bassiouni has walked unblinking into the theater of war to document atrocities and prepare the way for prosecution of the perpetrators. He has been shot at, subjected to torture, ridiculed by critics who scoffed at his idealism, and opposed by governments who feared his scrutiny. His brilliance, his steady moral compass, his talent for organization, and his devotion to principle have overcome all objections, even if his unrelenting pursuit of

* The editors are deeply grateful to David Guinn for initiating this project and to Joseph Belisle, Christine Lille, Tom Renz, and Sonja Schiller for their assistance with its completion.

the truth and his tenacity in the face of adversity has sometimes ruffled feathers. In the 1950s, he learned of the dream of an international criminal court from his law school professors; in 1998, he helped make that idea a reality by chairing the drafting committee of the Rome Conference himself. For his work on the International Criminal Court, Bassiouni was nominated for the Nobel Peace Prize in 1999, and in 2003, the French government awarded him the Legion of Honor. On June 28, 2007, he received the coveted Hague Prize for International Law. In the words of the nominating committee:

> He [Bassiouni] is without peer when it comes to the advocacy of international criminal justice and his promotion of the establishment of an International Criminal Court and is beyond any doubt one of the most authoritative experts in the field.
>
> He has made an important contribution to the rule of law by his work in the field of international criminal justice and his unswerving dedication to the creation of the International Criminal Court.

The 15 chapters of this book detail many of Cherif Bassiouni's contributions to the modern evolution of international criminal law. They were written by leading experts in the field including some of his closest colleagues and oldest friends. The dedications written by Glen Weissenberger, Louise Arbour, El Hassan bin Talal, and Ved P. Nanda testify to the greatness of this scholar-practitioner who transformed international criminal law though his perseverance, sense of duty, and inexhaustible compassion. As for the general editors of this collection, we were privileged to have Cherif Bassiouni as our mentor, to have worked with him on many projects over the years, and to have been invited to put together this book to honor a courageous, creative, and brilliant scholar-practitioner. We acknowledge at once that this collection is hopelessly incomplete, for hundreds of people could and would have liked to contribute to this volume. Yet we offer it nevertheless, in all humility, as an impressive, if incomplete, tribute to an extraordinary man.

To understand Bassiouni's work, it is necessary to take a brief look at his personal history. Born in Egypt as the only child of a politically and socially prominent family, Bassiouni traveled with his parents as a young child and spoke six languages by the time he was ten years old. Although raised in material comfort, he was instilled with a sense of responsibility to defend those less fortunate and with a profound faith in God. In his words:

> [W]e are all creatures of the Almighty and we will one day have to be accountable to Him. In the meantime, while on earth, we must do as much good as we can, and as little evil as we can; and we must act with dignity, honor and honesty. We must use our good fortune to commit to something bigger and better than the pursuit of personal interests and pleasures."[1]

He took this creed with him to law school in Dijon, France, where he added to it the ideals of the French Revolution and the liberal thought of France. He returned home briefly in 1956 during the Suez crisis, and served in the Egyptian army, receiving four military ribbons for his service during the war. He then returned to Europe to continue his legal studies at the University of Geneva, where he had the good fortune to study with, among others, Professor Jean Graven at the University of Geneva. Graven was President of the International Association of Penal Law (AIDP), a learned society advocating the establishment of a Permanent International Criminal Court. Bassiouni not only embraced the idea of the Court, but went on to assume the Presidency of the AIDP later on his career.

While still a law student, Bassiouni returned to Cairo one summer and found himself embroiled in controversy, a recurrent theme in his life. He was held under house arrest for seven months because he had complained about abuses and protected Jews targeted by the Nasser regime. He was confined in darkness in his apartment, the wooden shutters nailed shut, the electricity cut off, the radio and the telephone eliminated. He received food once a day and lived in constant fear of being shot or sent to a detention camp to be tortured. The experience haunted him for years, fueling his relentless drive to seek justice and demand accountability. He sought healing and rest at his family farm and emerged from the experience with, in his words, a "confirmed belief in two things:"

> One is that there are good people and there are bad people, and the question is how to keep the bad people from doing bad things to good people. The other is that I saw legal institutions as being the only things that would stand in the way of bad people doing bad things to good people.[2]

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[1] M. Cherif Bassiouni, *Bearing Witness, in* PIONEERS OF GENOCIDE STUDIES 315, 328 (Samuel Totten & Steven L. Jacobs eds., 2002).

[2] Mike Sula, *On Top of the World*, CHICAGO READER, Mar. 5, 1999, at 18.

He later emigrated to the United States where his mother was already living and attended Indiana University at Indianapolis where the tuition was affordable. He was offered a job at DePaul University College of Law immediately upon graduation in 1964, and has remained there ever since, becoming a Chicagoan in the process as well as a distinguished member of the law school's faculty and President of the Human Rights Institute he founded there. During his first years in Chicago, while focusing his scholarship on international human rights, he devoted hundreds of hours to doing pro bono work for victims of domestic civil rights violations. Bassiouni soon became known worldwide as a prolific international law scholar and humanitarian. In 1974, he was elected Secretary-General of the International Association of Penal Law. After being reelected twice he was elevated to the post of President of the 3,000 member international organization for a 15-year term. His involvement was integral to establishing the International Institute of Higher Studies in Criminal Science in Siracusa, Italy, over which he still presides. Under Bassiouni's guiding hand, the Institute has trained nearly 20,000 jurists from more than 140 countries.

One of very few Arab Americans in law teaching in the United States, and an early champion of peace and interfaith understanding between Jews, Christians, and Muslims, Bassiouni has been involved in various efforts to promote peace in the Middle East ever since the 1967 war. Indeed, along with Professor Morton Kaplan of the University of Chicago, he drafted a plan for peace in the Middle East in 1975 that was the precursor for the agreement ultimately entered into by Israel and Egypt in 1979. Bassiouni's proposal was personally reviewed by Jimmy Carter during the run-up to the Camp David Accords, and Bassiouni had frequent meetings with the late President Anwar Sadat, the late King Hussein of Jordan, as well as senior officials from Egypt, Israel, and the United States. President Carter called on Bassiouni again in 1979 when American diplomats were taken hostage at the U.S. embassy in Tehran, requesting that Bassiouni serve as legal counsel for the hostages in the event they were subject to a trial in Iran. Bassiouni continues to work for peace and the elimination of weapons of mass destruction in the Middle East, coordinating the development of a regional security regime to that end, as well as more recently involving himself in the conflicts in Afghanistan and Iraq. In 2004, the United Nations named Bassiouni the Independent Expert for Human Rights in Afghanistan, where his work contributed to the release of 856 POWs who had been detained for 30 months. He trained 450 Afghan judges and worked to have 50 female judges appointed.

A year later, Bassiouni turned his attention to Iraq, working under a $3.8 million contract by the U.S. Agency for International Development to help further Iraqi legal education, which had been decimated by years of totalitarian rule as well as the invasion of Iraq by coalition forces in 2003. Under Bassiouni's leadership, the law libraries in Baghdad, Basra, and Sulaimaniya were rebuilt. He also worked to draft the new Constitution, and continues to work extensively on rule of law initiatives in the Arab world.

While still teaching at DePaul, Bassiouni began to devote a great deal of time to his work for the United Nations, and was appointed to co-chair the Committee of Experts charged with drafting an anti-torture treaty. His personal experience, combined with his legal expertise, made him a natural to lead on this issue, and in 1984, his draft was adopted as the International Convention Against Torture, Cruel, Inhuman and Degrading Treatment.

Bassiouni continued his work with the United Nations and was consistently tapped to lead major international efforts to promote accountability and human rights. Indeed, he eventually became the Chair of the Commission of Experts established in 1992 pursuant to Resolution 780 to investigate atrocities in the former Yugoslavia. Upon his discovery that the Commission had been given a skeletal staff by the United Nations and an office in Geneva, but no money for investigations, Bassiouni raised money from private foundations to create a documentation center with a computerized database to collect and organize information gathered regarding the atrocities. DePaul Law School donated space for the Commission's activities and Bassiouni proceeded to commute between Geneva and Chicago to oversee the Commission's work. Under Bassiouni's leadership, the 780 Commission, as it became known, issued a 3,300-page report detailing the ethnic cleansing, genocide, and crimes against humanity committed during the war. Bassiouni himself traveled all over the former Yugoslavia, exhuming mass graves, interviewing victims and witnesses, determined to uncover and publicize the truth.

One of his most powerful investigations was uncovering the mass rapes that had occurred during the war. The Commission identified over 150 mass graves where as many as 3,000 bodies were found, many of whom had been tortured or raped. In April of 1993, Bassiouni interviewed the first two rape victims he had ever met. One of the victims was a young girl, about 12 years of age, who was isolated in a dingy medical bed where she remained locked in a fetal position. Bassiouni learned that

the girl had been traumatized by giving birth to a dead baby that had resulted from a rape. Bassiouni says that at that moment he resolved to do everything possible to bring to the world's attention the sexual atrocities that had been committed in Bosnia.

Another story that stands out among many involved a Bosnian Muslim man who told Bassiouni of the sadistic rapes and murders of his wife and children. The husband, forlorn and choking back his tears, said: "I have lived until the day I could tell this story to the world. It is on your shoulders." Two days later he committed suicide.[3] Bassiouni carried this victim's story and those of many others in his heart as he went about his work on the 780 Commission and his later work to establish the ICTY and the ICC.

Turning to the chapters in this collection, we find a reprise of Bassiouni's extraordinary life and career. The authors of the first four take up questions related to the general theory of international criminal law and the principle of accountability for the commission of atrocities. All four contributors evince faith in law and legal institutions as an antidote to impunity for human rights violations, but to varying degrees. In Chapter 1, Mark Drumbl describes Bassiouni as having "the gift of being the catalyst behind the creation of international criminal law and a true enthusiast of the discipline without succumbing to the easy path of naïve partisanship." Bassiouni, he notes, believes that "events" rather than legal doctrine will drive the growth of international law for the foreseeable future. Drumbl disagrees, calling for international criminal law to develop "greater doctrinal independence." Drumbl's deeply skeptical study of modern international criminal law calls for increased use of group sanctions and "bottom up" heterogeneous methods as a substitute for what he labels "homogenous adversarial criminal justice."

Drs. Anja and Bronik Matwijkiw, in Chapter 2, explore Bassiouni's position that the right to accountability is a "natural right." They examine *The Chicago Principles on Post-Conflict Justice*,[4] formulated by Bassiouni and published by the Chicago Council on Foreign Relations, the International Association of Penal Law in Paris, and the International Institute of Criminal Science in Siracusa. They then examine the theory underscoring the *Principles*, and offer a nuanced perspective on what

[3] Bassiouni, *supra* note 1, at 325–26.

[4] The Chicago Principles on Post-Conflict Justice (M. Cherif Bassiouni ed., 2007).

Drumbl implies is improper "partisanship" in favor of transitional justice mechanisms. They admit that transitional justice is inherently biased given that it takes sides *for* the victims of atrocities; but they underscore that the alternative would be worse—victims would be bereft of rights simply because they had been subjected to the very violations complained of.

In Chapter 3, Bartram Brown reviews Bassiouni's legacy of promoting the depoliticization of international criminal responsibility and human rights. He explores the relationship between law and politics and their joint applicability to international law and institutions. Brown's chapter goes to the core of Bassiouni's life work: to challenge the sovereigntist claim that decisions to go to war or to commit atrocities are nonjusticiable political affairs. Brown argues that politicization should not prevail over basic international principles, particularly when *jus cogens* norms have been violated. Rather, he contends that it is both legally and morally required to depoliticize the situation and encourage state action based on justiciable principles.

Chapter 4 turns from general theory to one specific legal manifestation of the accountability principle: the question of universal jurisdiction. As both idealist and pragmatist, Bassiouni situates universal jurisdiction in a morally ambiguous world where the welfare of humanity looms large but not alone. Moreover, as a matter of strategy, Bassiouni believes it is necessary to acknowledge states' concerns regarding the principle of universal jurisdiction and its exercise. Diane Orentlicher, in Chapter 4, documents the advances in the area of universal jurisdiction that are a product of Cherif Bassiouni's life work. He led the creation of the *Princeton Principles on Universal Jurisdiction*[5] and co-authored the United Nations *Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.*[6] By defining specific limits of its use and insisting on rigorous legal methodology, Bassiouni gives the principle of universal jurisdiction a solid foundation. Yet Orentlicher, in her chapter, argues that Bassiouni's interpretation of

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[5] THE PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION 25 (Princeton University Program in Law and Public Affairs ed., 2001).

[6] Basic Principles and Guidelines on the Right to a Remedy and Reparation for Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, G.A. Res. 60/147, Annex, U.N. Doc. A/RES/60/147 (Mar. 21, 2006).

universal jurisdiction may be overly restrictive and that recent practice provides support for more ambitious uses of universal jurisdiction and its growing place in international law.

Just as Eleanor Roosevelt wrote that human rights begin at home, so does the application of the principle of accountability for serious violations of human rights. Bassiouni fled Egypt and sought refuge in the United States, and he has worked not only for the application of human rights principles abroad, but in his now dearly adopted country, the United States. Three chapters in this book focus upon the question of torture and how the principles advocated by Bassiouni's work apply in the context of the U.S. War on Terror. Christopher Blakesley, in Chapter 5, explores the history of prosecution and punishment for war crimes, crimes against humanity, torture, and terrorism. He reflects upon war and terrorism as institutions of punishment, and he argues that studying the history and concepts of war and terrorism facilitates a deeper understanding of terrorism and illegal and "legal" wars. He explores the concepts of prosecution and punishment (including torture) in relation to war and terrorism from antiquity to the present time.

In Chapter 6, Christopher Joyner considers the permissibility of torture, specifically whether "terrorizing the terrorists" by U.S. agents is acceptable. Joyner concludes that torture by anyone, anywhere, at all times is unlawful as a breach of fundamental human rights. Along similar lines, Jordan Paust, in Chapter 7, writes about the secret detentions, renditions, and forced disappearances that have occurred during the Bush administration's war on terror. Paust discusses how forced disappearances and secret detentions are prohibited by international law. Drawing upon Bassiouni's work, he argues that the Bush administration's program is in violation of conventional and customary international law.

As the common law maxim provides—*ubi jus, ibi remedium*—rights are of little utility without remedies, and five chapters in this volume address Bassiouni's work, and one of his most enduring legacies, to establish mechanisms to bring the perpetrators of atrocities to justice. Chapters 8 and 9 address Bassiouni's contribution to the establishment of the ICTY, and Chapters 10, 11, and 12 address the establishment and potential operation of the International Criminal Court. Chapter 13 discusses the Iraqi High Tribunal, a domestic court applying international law under extraordinarily trying circumstances.

In Chapter 8, Michael Scharf recounts the history of the 780 Commission and its role ushering in the modern era of accountability. The

Commission set the stage for the establishment of the Yugoslavia Tribunal, the first international war crimes tribunal since Nuremberg and Tokyo. The Yugoslavia Tribunal, in turn, paved the way for the Rwanda Tribunal, the East Timor Tribunal, the Special Court for Sierra Leone, the Cambodia Tribunal, and, ultimately, the permanent International Criminal Court.

In Chapter 9, Brigitte Stern and Isabelle Fouchard discuss two important ways that the Commission made meaningful contributions: the establishment of the Yugoslavia Tribunal and the definition of rape and sexual violence in international law. They also document how the Commission made significant contributions to the evolution of international law relating to the characterization of international conflicts and the definitions of crimes against humanity and command responsibility.

In Chapter 10, Leila Sadat discusses Bassiouni's efforts to create the permanent international court as well as his and the new Court's potential contribution to international law. She highlights several of Bassiouni's many contributions including definitional, jurisdictional, and operational provisions. She also warns that the adoption of the Statute, over the objection of the United States of America, constituted an "uneasy revolution" with the potential to reshape international law. Finally, she considers some of the Court's first cases and future directions of international criminal justice.

Chapter 11, authored by Mahnoush H. Arsanjani and W. Michael Reisman, discusses the potential problems that "ex ante tribunals" such as the ICC (tribunals that are established *before* an international security problem has been resolved) may create by imposing conflicting pressures on those responsible for resolving the conflicts. They argue that prosecutors and judges must consider the social and political consequences of their actions, and that without "statutory" guidelines, the ICC may be drawn into political decisions, potentially tarnishing the image of a neutral criminal court.

William Schabas, in Chapter 12, takes up the question of the meaning of the crimes against humanity provision in the ICC Statute, in regard to the question whether Article 7(2) permits a crime against humanity to be committed by a "non-State actor." This question arose after the September 11 attacks, with respect to whether al-Qaeda falls within Article 7(2)'s reference to the policy of a "state or *organizational* group." Schabas argues that Bassiouni believes that al-Qaeda does not qualify within the meaning of Article 7 because the words "organisational policy" refer only to the policy of a state, not non-state actors. As the

author of the leading monograph on the subject of crimes against humanity and chair of the drafting committee at the Rome Conference that finalized the text of Article 7(2), Schabas opines that Bassiouni's views on the state plan or policy element of crimes against humanity are entitled to great weight as experts and jurists continue to debate this question.

In Chapter 13, Diane Amann examines the "impartiality deficit" in international justice, or the imbalance between retribution and fairness, focusing her critique on the Iraqi High Tribunal. (Although Bassiouni helped to plan the IHT, many of his most important recommendations were ignored.) Her article sets out several concerns, in particular that the IHT was implemented without regard for basic guarantees of due process, with little likelihood of fair trials. Moreover, the Court faced the challenge of negotiating the tension between due process and the human desire for vengeance while operating in an active theater of hostilities. Her chapter underscores the pivotal role that international courts can play in assisting with the return of the rule of law during and immediately following hostilities.

The final two contributions to this volume address Bassiouni's work on trafficking and his long-standing collaboration with the International Committee of the Red Cross. In 2002, Bassiouni completed a major research project examining the international trafficking of women and children in the Americas, the findings of which were published in a seminal report entitled *In Modern Bondage: Sex Trafficking in the Americas.*[7] Bassiouni's early activism regarding trafficking and research into enslavement as an international crime were instrumental in getting international law, and international lawyers, to view trafficking as a serious crime. Chapter 14, written by Anne Gallagher, describes an indisputable link between trafficking and international human rights law as a quintessential example of what human rights law is trying to prevent. She notes that the prohibitions on slavery, the slave trade, servitude, forced labor, and debt bondage are among the oldest and clearest provisions of international law, and that recent legal and political developments provide a solid foundation for the application of these prohibitions to trafficking.

Yves Sandoz, in Chapter 15, reflects upon some of the interactions he has had with Cherif Bassiouni while working for the International

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[7] In Modern Bondage: Sex Trafficking in the Americas: Central America and the Caribbean (DePaul University College of Law International Human Rights Law Institute ed., 2002).

Committee of the Red Cross. For example, he recalls Bassiouni's involvement in the development and dissemination of international humanitarian law, the creation of the International Criminal Court, and contribution to the Rome Statute. Sandoz also details some of Bassiouni's significant work in the field, particularly in Afghanistan.

Bassiouni has written that "the pursuit of truth and justice requires, among other things, moral courage, at times physical courage, the strength to overcome fear, and fighting off the temptations of reward for ignoring wrongs. It also requires determination, willingness to sacrifice, a sense of honor and dignity, and perseverance when things seem impossible."[8] A large framed print of the "Man of La Mancha" adorns the wall above his desk in his office at DePaul, and tilting at his own windmills, Bassiouni has fought for many decades against great odds armed with little more than his sense of justice.

When Bassiouni was seven years old, the Germans were flying air raids over Cairo. In the middle of one night he escaped the usually watchful eye of his mother and stood outside in the darkness. He drew his toy gun and pointed it up to the sky. When his mother rushed out to find him, he told her that he was going to shoot down Hitler. Even at seven, Bassiouni thought he could stop the world's tyrants. Bassiouni has said that his work is inspired by the following Talmudic guidance, which we believe should serve as motivation for all legal scholars, humanitarians, and those taking aim at the sky: "The world rests on three pillars: on truth, on justice and on peace." The Talmudic commentary adds, "the three are really one: If justice is realized, truth is vindicated and peace results."[9]

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[8] Bassiouni, *supra* note 1, at 361.

[9] Rabban Simeon ben Gamaliel (1 Abot 18).

DEDICATIONS

I.
Louise Arbour
United Nations High Commissioner for Human Rights

I am delighted, both personally and in my professional capacity, to add my voice to those of the many other friends assembled here to celebrate Cherif's career.

M. Cherif Bassiouni has lived a life of distinguished service in the cause of justice. As a jurist, scholar, author, teacher, and U.N. expert, he has improved the lot of victims, enhanced accountability for perpetrators, defended the rule of law, and struggled against impunity.

Professor Bassiouni has tirelessly defended the essential truths of our age. Peace without justice is unsustainable. Security without human rights is illusory. Force without humanity is impermissible. Life without the protection of law is unacceptable.

From Chicago to Siracusa, from the former Yugoslavia to Afghanistan, from Geneva to the Hague, Cherif Bassiouni has left an indelible mark on the international system of laws and institutions that are humanity's best hope for a more dignified world. For that, we all owe him a debt of gratitude.

I am pleased to join countless beneficiaries around the globe—the jurists and the scholars, the victims and the vindicated—in honoring the work, the contribution, and the life of M. Cherif Bassiouni.

II.
His Royal Highness Prince El Hassan bin Talal

I would like to thank you for inviting me to pay tribute to a gallant man—a man who is a dear and cherished friend. His distinguished legal and teaching career spans over four decades. As a prominent figure in the international legal sphere, Professor Bassiouni has indeed con-

tributed extensively to the progress and enforcement of international law. To honor such an eminent figure cannot be given the justice it truly deserves in the short space I have here.

On a personal note, I would like to thank you, Cherif, for the valor with which you have championed human rights, for the compassion towards humanitarian causes, and for your endurance in ensuring that international humanitarian principles are upheld.

As a long time advocate of international peace, Professor Bassiouni will agree that there is no substitute for just and sustainable peace. We regard international law as the necessary supra-national framework for the pursuit of state policy interests. It is the benchmark for intra- and inter-state relationships. Such minimum standards remain essential to underpinning international and regional stability, peaceful co-existence, and human dignity.

Unfortunately, unilateral state practice and policy measures that persist in operating outside the international legal system could fundamentally alter modern international jurisprudence, as well as undermine the multilateral characteristic of this post-1945 system. There exists a rising need to realign states with their obligation to uphold the central tenants of international law. In 1981, the U.N. General Assembly adopted by consensus a "New International Humanitarian Order" in the hope of rebalancing the political world order factor. Since then, efforts have been made to encourage the General Assembly to adopt an Action Plan for this Humanitarian Order. As I speak to you today, we still await its materialization. In fact, at its 61st session in December 2006, the resolution adopted by the General Assembly provided little enlightenment towards such an agenda.

In today's militarized climate and constant "state of high alert," we find ourselves legitimizing countries' derogation from universally accepted international legal norms as a pretext for serving the greater good. The emerging culture of indifference towards individuals and populations are condemning societies to a life of deprivation and suffering. For human rights to be afforded the universal recognition they merit, the world's governments have a responsibility to act with integrity and to comply with that which they have endorsed. Governments that pay lip service to humanitarian ideals, produce nothing but cynicism and resentment among their own and other peoples.

What I aspire to achieve is an environment of perennial *modus vivendi*, in the context of a "law of peace." There is an urgent need to depoliticize human rights. This is why the work of the U.N. Office for Coordination of Humanitarian Affairs (OCHA) and the Independent Bureau for Humanitarian Issues (IBHI), which seeks to ensure the effective implementation of existing international humanitarian and human rights law, by the promotion of a culture of compliance,[1] is important for people to feel that there is justice, that the law is the final arbiter and not a hegemonic power. "Each time a violation of international law is tolerated, it sets a dangerous precedent that makes it more likely that similar abuses will be repeated."[2]

It was Professor Mircea Malitza who expressed that "we are one civilization with ten thousand cultures,"[3] built on the exchange and encounter of different cultural traditions. "Some of the worlds richest cultural traditions are the legacy of the interaction of several faiths."[4]

This region is an intricately woven tapestry of religions and ethnicity. The Levant and Mesopotamia is an open museum where layers of culture have been manifested in the multitude of churches, mosques, synagogues, and temples. However, the Middle East remains a region—undefined both in terms of geography and, in what ought to be, its pluralist richness. This region stretching from Casablanca to Calcutta, Marrakech to Bangladesh, is the poorest, the most conflicted, and most populated region in the world (even more so than China).

The West and Islam—although somewhat like comparing apples and oranges, as the West denotes geography, and Islam a system of values—has been a frequent subject of conferences, lectures, and publications. But this dichotomy ignores the intimate relations and the historical antecedents of both.

The principles within Islam are based on the "recognition of the inherent dignity and of the equal and inalienable rights of all members of the

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[1] OCHA and IBHI, *Project Proposal: "Relating to the Problems of Implementation and Compliance in the field of International Humanitarian and Human Rights Law"* (June 2000).

[2] *"Winning the Human Race?" The Report of the Independent Commission on International Humanitarian Issues* 6 (1985).

[3] Professor Mircea Malitza, Black Sea University, Romania.

[4] MADELEINE BUNTING, TRADITION THAT RIDICULES THE CLASH OF CIVILIZATIONS (2006).

human family." God declares in the Qur'an "*We have honoured the children of Adam*" [17:70]—the *children of all* humanity. Not Arab humanity, or American humanity, or European humanity, but *all* humanity.

Furthermore, democratic practices such as الإجماع (consensus), الشورى (consultation), and المصلحة (public good) are all prevalent within Islam. I would like to emphasize that Shari'a law, in my home country of Jordan at least, deals with family law and not criminal law. The civil law is influenced by Islam and also in a juridical sense, Napoleonic law. Jordan is a country that is constitutionally Muslim and one that gave voting rights to women before other Western states. Jordan may thus be considered conservative, yet it can hardly be described as non-progressive.

Professor Bassiouni is highly regarded as a beacon for Arabs and Muslims. Among his volume of work for international law and humanity, he has worked tirelessly in bridging the mindset between cultures and faiths. Understanding and respect for one another, and for each other, is the spirit of the traditional teachings of all religions. I speak as an Arab and a Muslim, from the birthplace of the Abrahamic faiths. Judaism, Christianity, and Islam stem from the same roots, and we are all the children of God. Mother Theresa once said, "if we have no peace, it is because we have forgotten that we belong to each other." At the heart of my work, I have tried to promote an analytical concordance of human values and an ethic of human solidarity.

During a visit to the Bakaa camp for Palestinian refugees with a group from the World Conference of Religions for Peace, including the former Chief Rabbi of France, Rabbin René-Samuel Sirat, three years ago, we visited a classroom in the boys' school. In French, Rabbin Sirat told the little boys that he too was a refugee. He said that he was just a boy of five years when he and his family fled to Paris from Algeria. I translated into Arabic. The little Palestinian boys looked so sad on hearing this story and one said, "Ya haraam," which means "how terrible, how sad." It is through the innocence of a child that reminds us that we are brothers in faith and partners in humanity.

I am saddened to see that our region, the "cradle of civilization," has become an "arc of crisis," engulfed in political strife.

In July 2003, at the international workshop for "Restarting the Dialogue in International law," I discussed the lack of foresight of military

intervention.[5] Already into the fifth year of the conflict, no comprehensive plan has been put into place to resolve the Iraq question. Building a stable order remains our chief concern and an immense challenge.

Cherif eloquently articulates that "as history has taught us, reconciliation among people and societies never occurs by happenstance. It is shaped by a vision and it is based on specific moral and material undertakings that help bring closure to a conflict."[6] "A vision" built on moral bedrock is what is lacking in our region. Lack of vision and strategic planning has created an environment of despair that has fostered intolerance and aggression.

The populations of the Middle East have been deprived of their human character and forced to occupy a desolate middle ground between polar fanaticisms. Denying the inalienable rights of people creates an alienable populous. When people are excluded from the political process, denied their economic livelihoods, or their rights to cultural expression, then alternative markets emerge to fill the vacuum. According to the polling survey "The Palestinian Pulse," 75 percent of Palestinians over the age of 18 are "depressed," with 48 percent attributing their feelings of depression to the lack of security. Religion or fundamentalism have little to do with the root causes of conflict. I cannot emphasize enough the need to empower the powerless and reengage the marginalized and silenced majority.

"Selectivity is becoming an inhabiting factor for preventive and curative measures by the international community just as conditionality is becoming a handicap for humanitarian aid to victims."[7] Disenfranchised Muslims ask whether there is one law for them and another for everyone else, or whether we are all equal citizens?

I ask you, what is being done for the children in and outside of Iraq. Those that remain in the heart of the conflict are prevented from going to school for fear of their lives. For those that are displaced in neighboring countries, access to education remains even more elusive. The

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[5] Keynote Address of "Restarting the Dialogue in International law—The Necessity of Bridge Building," International workshop held in Amman, Jordan, Konrad Adenauer Foundation (2006).

[6] International Human Rights Law Institute, IHRLI Global Reach Book 1990–2006, at 35 (De Paul University School of Law).

[7] OCHA and IBHI, *supra* note 1, at para. 3.

UNHCR estimates that out of the 1 million displaced persons in my home country of Jordan, approximately 230,000 are children of school age. Education is an important factor in the psychological and emotional development of the child. But the neighboring countries have already outstretched their resources and are unable to assist further. To put this in context, Jordan is a country with a population of only 6 million—the influx of 1 million Iraqi refugees is the equivalent of 30 million people flooding the shores of America. Where is the international community and what is it doing? With the end to the conflict nowhere in sight, if this humanitarian crisis is allowed to continue, our omissions will have created a new illiterate generation.

I would like to remind you that the Marshall Plan was in the process of formulation as early as 1941, before the Second World War, to ensure that peacetime would follow war. The start of the end to the conflict in the Balkans commenced with the engineering of a CSC—Conference on Security and Cooperation—followed by the deployment of peace-keeping troops to ensure the implementation of the accords. I have continually called for a CSC for the Middle East, the creation of an all-encompassing regional stability charter, and the establishment of a cohesion fund for development.

Last year I had the honor to be invited by Professor Bassiouni to speak at a conference in Amman on Criminal Justice in Iraq. The participants included representatives from the government, the judiciary of both Iraqi and Kurdish descent. "Security without peace will not be accomplished, just as peace without justice cannot be achieved; but peace and justice must be predicated on the reconciliation of those who have fought each other for so long and whose animosity has been allowed to develop in such profound ways."[8] Dear friend, your vision is ahead of our time, it is my hope that such wisdom can be truly realized in our lifetime for the benefit of succeeding generations. I have often spoken on the need for dialogue to include the total sum of all parts within a civilized framework for disagreement.

The Helsinki Process, of which I have long been a member, has suggested that successful human development should occur within three interconnected baskets: security, economy, and culture. This is to highlight the importance of culture in establishing a nation's integrity, in reinforcing national cohesiveness, and in development. As an amalgam of a

[8] IHRLI, *supra* note 6.

society's beliefs, shared values, traditions, and acceptable norms, culture must form the foundation of informed policy making and post-conflict planning.

The diversity of cultures is a principal characteristic of our diverse human society and the driving force for our development. As the recent U.N. Report on the Alliance of Civilizations states, "cultures reflect the great wealth and heritage of humankind; [its] nature is to overlap, interact and evolve in relationship to one another. There is no hierarchy among cultures" just in the levels of acceptance of each other's enriching diversities.

I believe in a "clash" of civilizations no more than I believe in a "clash" of morals. It seems to me that today we are in a position to realize that we are one civilization, sharing basic human values; and our cultural and traditional variety and diversity do not prevent us from enjoying those shared values.

Ibn al Arabi, a famous zahirite who lived in Spain between 1165–1240, wrote:[9]

My heart is open to all the winds:
It is a pasture for gazelles
And a home for Christian monks,
A temple for idols,
The Black Stone of the Mecca pilgrim,
The table of the Torah,
And the book of the Koran.
Mine is the religion of love.
Wherever God's caravans turn,
The religion of love
Shall be my religion
And my Faith

(ابن العربي)

I would like to end by once again congratulating my dear friend, Cherif, for his lifetime achievements. A world of human peace, cooperation, and mutual interchange beyond boundaries is one to which he has

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[9] Muhyiddin ibn al-Arabi, *No: XI, in* TARJUMAN AL-ASHWAQ: A COLLECTION OF MYSTICAL ODES 66–67 (R.A. Nicholson trans., London 1911; reprinted 1978).

dedicated his life. Striving for a world beyond discrimination, in which each and every individual has the right and the chance to develop free from fear, free from prejudice, free from intolerance and oppression of every kind, has made him a pride not just for Arabs and Muslims around the world, but for all humanity. Cherif, your endeavors are an example to us all.

III.
Glen Weissenberger
Dean of DePaul College of Law

The strength of the College of Law at DePaul University is based on the work of its extremely talented faculty—as teachers, as scholars, and as participants in the legal community. Here, there is no question that we are honoring one of our most distinguished faculty—an individual who has had an immeasurable impact on generations of DePaul students and on the world in which we live.

In 1990, Professor Bassiouni founded the International Human Rights Law Institute (IHRLI) in response to a growing awareness at DePaul of the need for a coordinated institutional response to new global opportunities to advance human rights and strengthen domestic and international legal institutions. During these years the Institute's work and impact in the world has been significant. In particular, IHRLI served as the location for the U.N. Security Council's Commission to investigate war crimes in the former Yugoslavia, which Bassiouni chaired from 1992–94. DePaul offered the fourth floor of O'Malley as the facility for the database, whose work involved over 140 students and young lawyers, mostly from DePaul. In fact, it was the IHRLI staff working under the direction of Bassiouni that compiled the 3,500-page report that became the longest published report in the history of the U.N. Security Council. As a result of this seminal work, the United Nations established first the Yugoslavia tribunal in The Hague and then the Rwanda tribunal in Arusha.

IHRLI has also worked extensively in El Salvador and in Central America, as well as in other parts of the world such as Central and Eastern Europe and the Middle East. Its focus has been on training lawyers, judges, and human rights advocates, as well as training our own DePaul students to be the next generation of human rights defenders. Many of them have gone into such careers.

Contemporaneously, Bassiouni has served as President of the International Institute for Higher Studies in Criminal Sciences (ISISC) in Siracusa, Italy, where he has, for the last 35 years, organized and directed educational programs involving over 24,000 jurists from 140 countries in the world. It is the multiplier effect of these programs, as well as his teaching at DePaul through which he has exposed hundreds of students to human rights and international criminal justice that have had such a great impact.

Furthermore, Professor Bassiouni's human rights work in the Arab world has been seminal. He has directed training programs for over 2,100 Arab law professors, judges, prosecutors, police officers, and jurists, thus as a result launching the human rights movement in the Arab world over two decades ago.

More recently, Professor Bassiouni has been directly involved in human rights and criminal justice education in both Afghanistan and Iraq through ISISC and IHRLI. Recently he oversaw the training of 450 judges in Afghanistan and is currently overseeing the training of 300 prosecutors. In Iraq, from 2003 to 2005, he oversaw a project on restructuring legal education in that war-torn country. Since then, he has been chairing a high-level group of Iraqi government officials in developing a Comprehensive Strategic Plan for Criminal Justice in Iraq. That effort culminated, in March 2007, in the approval of the plan and its presentation to the Iraqi parliament and cabinet.

A prolific writer, he is the author and editor of nearly 70 books and the author of over 230 law review articles on international criminal law, comparative criminal law, and human rights. These publications have appeared in ten languages and have been cited by the highest courts in the world, including the International Court of Justice, the International Criminal Tribunals for the former Yugoslavia and Rwanda, and the U.S. Supreme Court.

His influence in the field of human rights is also evident in the various U.N. positions he has occupied over the years, some of which include:

- Chairman of the Drafting Committee at the 1998 U.N. Diplomatic Conference Establishing the International Criminal Court;
- Chairman of the U.N. Commission of Experts Established to Investigate Violations of International Humanitarian Law in the Former Yugoslavia;

- Co-chairman of the Committee of Experts, which prepared the U.N. Convention on the Prevention and Suppression of Torture;
- Independent Expert on Human Rights in Afghanistan; and
- The Commission on Human Rights' Independent Expert on the Rights to Restitution, Compensation, and Rehabilitation for Victims of Grave Violations of Human Rights and Fundamental Freedoms.

In recognition for his lifelong work, he has received many awards and distinctions, the most important of which was the Nomination to the Nobel Peace Prize in 1999. Also deserving of mention are: the Hague Prize in International Law; the Special Award of the Council of Europe; the Defender of Democracy Award from Parliamentarians for Global Action; the Adlai Stevenson Award of the United Nations Association; and the St. Vincent DePaul Humanitarian Award.

He has also received honorary doctorates from universities in France, Ireland, Italy, and the United States, and a number of high decorations, including Orders of Merit from Egypt, Austria, France, Italy, Germany, and the United States.

IV.

Ved P. Nanda
Vice Provost and John Evans University Professor, University of Denver; Thompson G. Marsh Professor of Law and Director, International Legal Studies Program, University of Denver Sturm College of Law

I vividly recall the first time I met Professor Bassiouni. It was a chilly Chicago morning when my teacher from Yale, Professor Myres McDougal, introduced us, expressing his desire and hope that we would work together. We were all attending the Association of American Law Schools recruiting meeting that used to be held in Chicago—Cherif Bassiouni was already teaching at DePaul, I was aspiring to be a rookie law teacher, and Professor McDougal was mentoring and helping me to find a suitable teaching position. Little did I know at that time that this coincidental and happenstance meeting would result in an enduring and enriching lifelong friendship, which I have always cherished.

Early in my career Cherif invited me to co-edit the two-volume treatise on international criminal law, which was published in 1973.

Subsequently, we also co-edited a treatise on international criminal procedure and jointly wrote a law review piece on slavery. Over the years I have been the beneficiary of Professor Bassiouni's gracious invitations to several conferences and experts' meetings he organized as President of the International Institute of Higher Studies in Criminal Studies, Siracusa, Italy.

Professor Bassiouni is a man of vision with a highly creative mind, and also a man of action, an extraordinarily productive scholar, a revered teacher, and one who does not shy away from taking a firm stand on a cause he holds dear. And the causes he has espoused all his life and to which he has indeed devoted his life center on human rights and human dignity. As a foremost expert on international criminal law, Cherif has served with distinction for the United Nations, the U.S. Department of State and Justice, and several scholarly organizations and NGOs in various official and unofficial capacities and also as a special consultant. In the Myres McDougal Distinguished Lecture he delivered at the University of Denver Sturm College of Law, his touching account of his experiences as Chair of the U.N. Commission of experts to investigate violations of international humanitarian law in the former Yugoslavia had a profound impact on everyone in the audience.

Cherif eminently deserves the countless national and international academic and civic medals, awards, and honors he has received. On this special occasion, I pay tribute to him for his illustrious career and outstanding accomplishments. Equally important in my eyes, Cherif is an exceptionally warm human being and is a role model for those aspiring to be public servants. I especially prize his personal friendship and have been deeply honored to know and work with him.

CHAPTER 1

A HARD LOOK AT THE SOFT THEORY OF INTERNATIONAL CRIMINAL LAW

*Mark A. Drumbl**

Cherif Bassiouni has promoted international criminal justice in innumerable ways. He has helped design its institutions, including the International Criminal Court (ICC),[1] and he has shaped the elements of its crimes. He has taught its values through his diverse faculty appointments; motivated rule of law in places marked by impunity; and worked tirelessly to build political consensus in favor of accountability. What is more, Bassiouni has thought long and hard about the theoretical framework and jurisprudential base of international criminal law. It is this latter aspect of Bassiouni's work that I discuss in this chapter.

I recently had the honor of being invited to review Bassiouni's *Introduction to International Criminal Law* for the *American Journal of International Law*. After weaving my way through more than 700 pages of tightly woven and doctrinally sophisticated text, I was struck by the maturity of the work. As I wrote in the *Journal*, Bassiouni has the gift of being a catalyst behind the creation of international criminal law and a true enthusiast of the discipline without succumbing to the easy path of the naïve partisan. This self-discipline is reflected in his assessment that international criminal law

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[1] *See* Rome Statute of the International Criminal Court, U.N. Doc. A/CONF. 183/9, *adopted* July 17, 1998, *as corrected* Jan. 16, 2002, http://www.un.org/law/icc/statute/romefra.htm. The ICC, which entered into force on July 1, 2002, is a permanent institution mandated to investigate and prosecute the most serious crimes of international concern, namely genocide, crimes against humanity, and war crimes. *Id.* arts. 1, 4–8. One hundred five nations have become parties to the Rome Statute. *See* U.N. Treaty Collection, Ratification Status, *available at* http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty10.asp. One hundred thirty-nine nations have signed the Rome Statute. *Id.*

has not developed its own independent theoretical foundation.[2] To be sure, Bassiouni notes that the discipline certainly is functional. But he hastens to add that it is not yet cohesive or coherent[3] and in fact depends on other areas of legal theory and doctrine, including municipal criminal law and human rights law,[4] notwithstanding the difficulties that inhere in transferring experiences at the national level to that of the international.[5] Bassiouni is wise to ascribe this dependence to the essentially reactive nature of international criminal law,[6] which results in its evolution in a manner that is not "linear, cohesive, consistent, or logical."[7]

Looking ahead, though, Bassiouni still predicts that "events"—as opposed to legal doctrine—will continue to drive international criminal law.[8] However, this does not have to be the case. With Bassiouni's prompting in mind, younger scholars confidently can push the field toward greater doctrinal independence. This is an important challenge that constitutes much more than merely an academic exercise, insofar as such an endeavor could enhance the effectiveness of international criminal justice institutions within communities roiled by systemic violence. This is the direction I pursue in this chapter, which reflects some of my ongoing second-generation scholarly initiatives and reflections in the field.

I set out to accomplish three goals in the discussion that ensues:

1. identify an incoherence—let's say a gap—in the international criminal law literature;
2. suggest that this gap accounts in some measure for shortcomings in the output and effectiveness of international criminal justice institutions; and
3. posit new directions to enhance the theory, doctrine, and *praxis* of these institutions.

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[2] M. Cherif Bassiouni, Introduction to International Criminal Law 588, 658 (2003).

[3] *Id.* at 1.

[4] *Id.* at 626–27, 686, 689.

[5] *Id.* at 585.

[6] *Id.* at 583, 588.

[7] *Id.* at 23.

[8] *Id.* at xxxvi.

Let's begin with the gap within the dominant narrative of international criminal law. This narrative traces to the aftermath of World War II. Following this conflict, an influential vision emerged. This vision, which soon became paradigmatic in scope, posits massive human rights abuses as conduct that is extraordinarily violative of universal norms and of concern to humanity as a whole.[9] This paradigm casts this conduct as so wicked that it can only be described as "radical evil."[10] This radical evil, in turn, was deemed to merit stigmatization through specific categories of criminality such as genocide,[11] crimes against humanity,[12] and war crimes.[13]

Because of humanity's shared concern in repudiating radical evil, these categories of criminality, each specifically concerned with the judicialization of atrocity, collectively became identified as "international criminal law."[14] Because of their declared international nature, it logically

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[9] *See, e.g.*, KENNETH J. CAMPBELL, GENOCIDE AND THE GLOBAL VILLAGE 28 (2001) (citing U.N. Secretary General Annan as stating that "the crime of genocide against one people truly is an assault on us all").

[10] David Luban, *A Theory of Crimes Against Humanity*, 29 YALE J. INT'L L. 85 (2004); CARLOS SANTIAGO NINO, RADICAL EVIL ON TRIAL vii, ix (1996); HANNAH ARENDT, THE HUMAN CONDITION 241 (1958).

[11] Genocide means a number of acts (including killing and causing serious bodily or mental harm) committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such. Rome Statute, *supra* note 1, art. 6.

[12] Crimes against humanity include a number of acts (such as murder, enslavement, extermination, deportation, persecution, rape, torture, sexual slavery, enforced prostitution, and forced pregnancy or other form of sexual violence of comparable gravity) "when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack." *See id.* art. 7.

[13] Basically, war crimes constitute conduct that falls outside of the ordinary scope of activities undertaken by soldiers during armed conflict. Whereas killing the enemy is part of the ordinary activity of a soldier, willful murder of civilians, torture, or inhumane treatment is not. Launching attacks that are disproportionate, that fail to discriminate between military or civilian targets, or that are not necessary to secure a military advantage also may constitute war crimes. War crimes cover two sorts of activities: crimes committed in international armed conflict and violations of the laws and customs of war, a residual category applicable to internal armed conflicts. *Id.* art. 8.

[14] Aggression is the fourth core international crime. Although within the jurisdiction of the ICC, see id. art. 5, it has neither been defined nor prescribed for the ICC, and therefore remains incapable of being prosecuted. Nor has the ICTY or ICTR charged the crime of aggression. Interestingly, following the 9/11 attacks there may be a resuscitation of aggression insofar as acts of terrorism have been declared to infringe the *jus ad bellum* entirely, and certain states have advocated that terrorist actors have no claim to the protections of international humanitarian law owing to the unjust

followed that the prosecution and punishment of these crimes could legitimately be carried out by international institutions putatively representative of the global community.[15] Assuredly, it is often the case that domestic institutions in places scarred by mass atrocity simply lack the will or capacity to prosecute anyone. This creates a functional justification for building new institutions to prosecute those responsible. But the theoretical construction of these crimes as targeted against the international community as a whole justified the development of international institutions to prosecute and punish, instead of only imposing obligations on the international community to build institutions at the local level to shore up devastated national judiciaries. This construct of the international community as victim legitimated international institutions as conduits to dispense justice and inflict punishment,[16] even in cases where the atrocity may have been largely a matter internal to one state in which citizens of the state killed their fellow citizens.

A number of such institutions have been created to operationalize atrocity law. These include the ICC (2002),[17] *ad hoc* tribunals for Rwanda (International Criminal Tribunal for Rwanda, ICTR, 1994)[18] and the former Yugoslavia (International Criminal Tribunal for the former Yugoslavia, ICTY, 1993),[19] special courts (such as Sierra Leone,

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nature of their war. This harkens back to the approaches of war-as-crime that partly served as a basis for prosecution at Nuremberg and largely served as a basis for prosecution at the Tokyo Tribunal.

[15] It also is possible for these heinous extraordinary international crimes to be adjudicated by national courts exercising universal jurisdiction. As Leila Sadat notes: "Application of the theory of universal jurisdiction in these cases is predicated largely on the notion that some crimes are so heinous that they offend the interest of all humanity, and, indeed, imperial civilization itself." Leila Sadat, *Exile, Amnesty and International Law* 23 (2005) (manuscript on file with the author).

[16] HANNAH ARENDT, EICHMANN IN JERUSALEM 254, 269 (1965).

[17] *See supra* note 1.

[18] Statute of the ICTR, U.N. SCOR, 49th Sess., 3453d mtg. at 15, U.N. Doc. S/Res/955 (1994). The ICTR, an *ad hoc* institution created by the Security Council, investigates and prosecutes 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 other such violations committed in the territory of neighboring states, between January 1, 1994, and December 31, 1994. *Id.*, para. 1. In 1994, an extremist government headed by members of the Hutu ethnic group fostered a populist genocide that resulted in the murder of 500,000 to 800,000 members of the Tutsi ethnic group.

[19] Statute of the ICTY, S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg. at 29,

2000),[20] and hybrid panels or chambers (Kosovo, 2000,[21] East Timor, 2000,[22] and Cambodia, 2003).[23]

U.N. Doc. S/Res/827 (1993). The ICTY, an *ad hoc* institution created by the Security Council, investigates and prosecutes persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991. *Id.*, para. 1. These conflicts involved internecine fighting among Serbs, Croats, Bosnian Muslims, and Kosovo Albanians. In total, approximately 250,000 individuals have been murdered in this fighting.

[20] The Sierra Leone Special Court was established jointly by the government of Sierra Leone and the United Nations to prosecute those who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since November 30, 1996. Statute of the Special Court for Sierra Leone art. 1, *available at* http://www.sc-sl.org/scsl-statute.html; S.C. Res. 1315 U.N. SCOR, 55th Sess., 4186th mtg. at 1, U.N. Doc. S/Res/1315 (2000).

[21] Special hybrid panels within the Kosovo legal system implicate international judges and prosecutors. *See* United Nations Interim Administration Mission in Kosovo, Reg. 2000/64 (Dec. 15, 2000). These special panels (also called "Regulation 64 panels") adjudicate violations of domestic criminal law that took place from May 1998 to June 1999 in the course of the armed conflict then ongoing in Kosovo between Kosovo separatists and the forces of the Federal Republic of Yugoslavia, but they do not have exclusive jurisdiction over such crimes. Many of the crimes within the jurisdiction of the panels are international crimes that have been enacted in domestic law. These include genocide, crimes against humanity, and war crimes.

[22] Courts have been organized in East Timor with the assistance of United Nations Transitional Administration in East Timor (UNTAET). *On the Organization of Courts in East Timor*, U.N. Transnational Administration in East Timor, U.N. Doc. UNTAET/REG/2000/11 (Mar. 6, 2000), *available at* http://www.un.org/peace/etimor/untaetR/Reg11.pdf, amended by U.N. Doc. UNTAET Regulation 2001/25 (Sept. 14, 2001), *available at* http://www.un.org/peace/etimor/untaetR/2001-25.pdf. One district court has two Special Panels for Serious Crimes with exclusive jurisdiction over "serious criminal offenses," namely genocide, war crimes, crimes against humanity, murder, sexual offenses, and torture committed between January 1 and October 25, 1999. *Id.*, art. 10; *On the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences*, U.N. Transnational Administration in East Timor § 1.3, U.N. Doc. UNTAET/REG/2000/15 (June 6, 2000), http://www.un.org/peace/etimor/untaetR/Reg0015E.pdf. The East Timor hybrid panels therefore prosecute both core international crimes and ordinary domestic crimes. The applicable law is both international criminal law and national criminal law. UNTAET Regulation 15, §§ 4–9. In 1999, militia forces supported by the Indonesian army massacred over 1,000 East Timorese civilians and engaged in a widespread campaign of deportation, property destruction, and sexual violence following a plebiscite in favor of the region's independence.

[23] *Khmer Rouge Trials, Annex Draft Agreement between the United Nations and the Royal Government of Cambodia*, G.A. Res. 57/223, U.N. Doc. A/RES/57/223 (May 22, 2003); Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea,

Significant celebration has accompanied the creation of these institutions. To be sure, few, if any, legal scholars believe criminal trials should be the only or entire response to mass atrocity; that said, many do ascribe considerable transformative potential to such trials.[24] This potential echoes in other constituencies—from academics to practitioners—such as historians, moral philosophers, and international human rights activists.[25] Political actors, such as states and international organizations, including the United Nations, endorse international criminal justice institutions.[26] Foreign policy decisionmakers, non-governmental organizers, and international development financiers mostly are quite supportive as well.

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available at http://www.derechos.org/human-rights/seasia/doc/krlaw.html. From 1975 to 1979, the Khmer Rouge massacred approximately 1.7 million Cambodians. The Cambodia-U.N. agreement contemplates the formation of extraordinary legal chambers in the Cambodian judicial system responsible for the prosecution of Khmer Rouge leaders and others most responsible for serious violations of Cambodian penal law, international humanitarian law and custom (including genocide), and international conventions recognized by Cambodia committed during the period April 17, 1975, to January 6, 1979.

[24] Payam Akhavan, *The International Criminal Court in Context: Mediating the Global and Local in the Age of Accountability*, 97 AM. J. INT'L L. 712, 712 (2003) (noting that the "euphoria" surrounding the ICC's establishment creates a "sympathetic posture" that "obscures a more critical discourse on the efficacy of managing massive atrocities in distant lands within the rarified confines of international legal process"); Jan Klabbers, *Just Revenge? The Deterrence Argument in International Criminal Law*, 12 FINNISH Y.B. INT'L L. 249, 250 (Martti Koskenniemi ed., 2001) (noting that "we have all fallen under the spell of international criminal law and the beauty of bringing an end to the culture of impunity").

[25] LAWRENCE DOUGLAS, THE MEMORY OF JUDGMENT: MAKING LAW AND HISTORY IN THE TRIALS OF THE HOLOCAUST (2001) (insisting that the legal response to crimes as extraordinary as the Holocaust must take the form of a show trial that can serve both the interest of justice as conventionally conceived and also a broader didactic purpose serving the interests of history and memory); John M. Czarnetzky & Ronald J. Rychlak, *An Empire of Law? Legalism and the International Criminal Court*, 79 NOTRE DAME L. REV. 55, 62 (2003) (noting that "faith in the ICC" is "held quite strongly in Western intellectual circles").

[26] The U.S. government conceptually supports prosecution, punishment, and incarceration for individual perpetrators of mass atrocity. U.S. opposition to the ICC does not focus on the appropriateness of its paradigm, but, rather, on the prospect that U.S. soldiers, officials, or top leaders may become its targets. Rupert Cornwell, *US Will Deny Aid to Countries that Refuse Court Immunity Deals*, INDEPENDENT UK, Nov. 4, 2003 (reporting official statements made by U.S. Undersecretary of State John Bolton). In fact, the United States has supported international criminal tribunals from Nuremberg in 1945 to the ICTR and ICTY today. *Hearing Before the House Comm. on Int'l Relations*, 107th Cong. (Feb. 28, 2002) ("The United States remains proud of its leadership in

This celebration, however, may have drowned out revealing discussion that pertains to an important paradox: despite the extraordinary nature of the criminality of mass atrocity, its methods, modalities, and methodologies remain disappointingly ordinary. The process and punishment embodied in all of these extraordinary institutions takes the form of third-party trial adjudication followed by incarceration. Essentially, the "enemy of all of humankind"[27] is tried and punished no differently than a car thief, armed robber, or cop killer under municipal criminal law. The reasons international criminal justice institutions punish, namely retribution, deterrence and, to a much lesser extent, reconciliation, also are borrowed from municipal criminal law. Despite the fact that the punishment of extraordinary human rights abusers ought to promote didactic and expressive functions that reflect the differences inherent between such punishment and that meted out to ordinary common criminals, this potentially *sui generis* aspect of a penology for international crime remains underdeveloped.

Although legal scholars have demarcated normative differences between extraordinary crimes against the world community and ordinary crimes against the local community, these same scholars largely are content to subject both to identical processes. These methodologies are based on an assumption—and herein lies a blatant theoretical gap—of the suitability of ordinary domestic criminal law—designed with the ordinary deviant criminal in mind—to the perpetrator of mass atrocity, who really is not so deviant.

Whereas Bassiouni's immediate concern is one in which international criminal law must strive to develop its own voice given its currently blended doctrinal nature, a different set of concerns—ones that I hope to bring to the discussion—attach to a central figure of international

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supporting the two *ad hoc* tribunals and will continue to do so in the future") (statement of Pierre Prosper, U.S. Ambassador at Large for War Crime Issues); GARY JONATHAN BASS, STAY THE HAND OF VENGEANCE: THE POLITICS OF WAR CRIMES TRIBUNALS 24 (2000) (discussing U.S. involvement in promoting due process for Nazi war criminals). This does not deny that, at present, the United Nations is pressuring the *ad hoc* tribunals to complete their work by 2008. S.C. Res. 1503, U.N. SCOR, 58th Sess., 4817th mtg., U.N. Doc. S/Res/1503 (2003); Nancy Amoury Combs, *International Decisions*, 97 AM. J. INT'L L. 923, 935 (2003). Although U.S. responses to terrorism may foreshadow growing reserve on its part regarding the merits of criminal punishment as a response to this kind of mass violence, the United States remains quite supportive of the role of criminal process and punishment in Iraq's political transition.

[27] Luban, *supra* note 10, at 85, 90.

criminal law—the enemy of all humankind sitting in the dock. The perpetrator of mass atrocity may differ fundamentally from the common criminal since the extraordinary crimes may support a social norm in the places where they are committed. In some cases, this may be a massive national norm legitimated through the legislative and judicial apparatus of the state. Whereas for the most part ordinary crime deviates from generally accepted social norms in the place and at the time it was committed, extraordinary crime has an organic and group component that makes it not so obviously deviant in place and time (although it certainly deviates from *jus cogens* norms and basic conceptions of human decency and, thereby, becomes manifestly illegal). Perpetrators of serious international crimes generally belong to a collective that shares a mythology of ethnic, national, racial, or religious superiority, perhaps even messianism.[28] In fact, in certain circumstances, those who commit extraordinary international crimes are the ones conforming to social norms, whereas those who refuse to commit the crimes choose to act deviantly.[29] David Luban writes that "we judge right and wrong against the baseline of whatever we have come to consider 'normal' behavior, and if the norm shifts in the direction of violence, we will come to tolerate and accept violence as a normal response."[30] This does not suggest that the perpetrator of banal violence should be exonerated—quite the contrary—but, rather, that imaginative, wide-ranging, and innovative modalities to secure accountability ought to be considered.

To be sure, not all ordinary crime is viewed as deviant by all people. Many scholars rightly feel that certain behavior that is criminalized in national contexts—for example, hate crime, drug offenses, white-collar crime, gang activity, and organized crime—correspond rather closely with the social norms prevalent in certain sub-statal communities and might suggest that life within these communities bears some resemblance to the contexts of extraordinary violence I explore. I'm certainly open to this line of thinking; in any event, my purpose here is not to revisit the suitability of deviance theory to ground all criminal sanction in domestic contexts. That said, I firmly believe that brutalities such as murder, tor-

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[28] Immi Tallgren, *The Sensibility and Sense of International Criminal Law*, 13 EUR. J. INT'L L. 561, 573 (2002).

[29] *Id.* at 575.

[30] David Luban, *Liberalism and the Unpleasant Question of Torture* 28 (2005) (manuscript on file with the author).

ture, and sexual violence deviate materially more from social norms in ordinary polities than they deviate from social norms in places afflicted by breakdown and mobilization such as in genocidal societies or other places where the state or ethnicity mandates, legalizes, or normalizes violence, thereby making it banal, vulgar, and popular. In those few areas of domestic activity where individual deviance may be obfuscated by group ordering, I certainly would welcome criminological, preventative, and penological developments that recognize the influence of the group as a social agent and the structural nature of criminogenic conditions.

To recapitulate, international criminal law disappointingly borrows from and transplants the rationalities of domestic criminal law to a context that is materially different.

I argue that the dependent nature of international criminal justice accounts for some of its shortcomings. In this specific chapter, I focus on the difficulties it experiences in attaining its penological goals. These goals, too, are borrowed from the familiar, namely the domestic: principally, they are retribution and general deterrence.[31] These rationales emerge from

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[31] Prosecutor v. Blagoje Simic et al., Case No. IT-95-9 (ICTY Trial Chamber, para. 1059 (Oct. 17, 2003) ("The jurisprudence of the Tribunal [ICTY] emphasizes deterrence and retribution as the main general sentencing factors."); Judgment and Sentence, Prosecutor v. Rutaganda, Case No. ICTR-96-3, para. 456 (Feb. 2, 1999), *aff'd*, ICTR Appeals Chamber, May 26, 2003 (Int'l Crim. Trib. for Rwanda) ("[I]t is clear that the penalties imposed on accused persons found guilty by the Tribunal must be directed, on the one hand, at retribution of the said accused, who must see their crimes punished, and over and above that, on the other hand, at deterrence, namely to dissuade forever, others who may be tempted in the future to perpetrate such atrocities by showing them that the international community shall not tolerate the serious violations of international humanitarian law and human rights."); Prosecutor v. Joni Marques et al. (Los Palos Case), Case No. 09/2000 (Dec. 11, 2001), Dili District Court, Special Panel for Serious Crimes, Short Version of Judgment para. 342 ("The penalties imposed on accused persons found guilty by the Panel are intended, on the one hand, as retribution against the said accused, whose crimes must be seen to be punished (*punitur quia peccatur*). They are also intended to act as deterrence; namely, to dissuade forever, others who may be tempted in the future to perpetrate such atrocities by showing them that the international community shall not tolerate such serious violations of law and human rights (*punitur ne peccetur.*")). For further treatment of deterrence and retribution as the two major motivations behind sentencing perpetrators of mass atrocity, see Prosecutor v. Krstic Case No. IT-98-33-T, para. 693 (Aug. 2, 2001); Prosecutor v. Serushago, Case No. ICTR-98-39-S, para. 20 (Feb. 5, 1999); Judgment and Sentence, Prosecutor v. Kambanda, Case No. ICTR-97-23-S, para. 28 (Sept. 4, 1998); Prosecutor v. Furundzija, ICTY Trial Chamber, Case No. IT-95-17/1-T, para. 288 (Dec. 10, 1998); Prosecutor v. Musema, Case No. ICTR-96-13-T, para. 986 (Jan. 27, 2000); Prosecutor v. Todorovic, Case No. IT-95-9/1, paras. 28–29 (July 31,

the positive law and jurisprudence of international criminal justice institutions and are offered to justify incarceration as punishment.

It may be helpful at this point to clarify exactly how these institutions punish those deemed to be enemies of all humankind. Essentially, under international criminal law, punishment entails incarceration in prison facilities of those countries that agree to host such prisoners. As for length of sentence, I have conducted a survey of the sentences of those institutions currently convicting offenders.[32] At the time of writing, the ICTR has sentenced about 20 individuals. There have been 11 life sentences, six sentences of over 25 years' imprisonment, and three sentences of between ten and 15 years. The ICTY has issued approximately 50 convictions, 30 of which are final and 20 subject to appeal (by both the defendant and the prosecution). The mean sentence among finalized sentences is 13.9 years; the median is 12 years. Both the current mean and median are shorter than what they were in 2002 and 2003. The Special Panels adjudicating atrocity in East Timor have issued a mean sentence of 14.2 years for the international crimes within their jurisdiction. Here, too, there has been a decline in the mean length of sentence since 2003.

Let me add an important observation that I draw from this empirical survey. There are significant inconsistencies—both cardinally and ordinally—in terms of punishing similarly situated offenders within institutions and also among institutions. As I have argued elsewhere, these inconsistencies arise from the fusion of judicial discretion and a lack of a sentencing framework or heuristic in either the positive law or the jurisprudence.[33] Although there is some indication that the sentencing jurisprudence of international criminal justice institutions is deepening in depth and rigor, it still remains confusing, unoriginal, and unpredictable.

This, then, sets the stage for this chapter to engage with its second theme, namely how does this under-theorizing affect the ability of inter-

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2001); Prosecutor v. Krnojelac, Case No. IT-97-25, para. 508 (Sept. 17, 2003); Prosecutor v. Mateus Tilman, Case No. 08/2000 (Aug. 24, 2001), Prosecutor v. Joni Marques et al., *supra*, at para. 68.

[32] Mark A. Drumbl, *Collective Violence and Individual Punishment: The Criminality of Mass Atrocity*, 99 NW. U. L. REV. 25–26 (2005). I do not include the Kosovo Panel sentences in this chapter (they are included in the broader empirical survey, in Drumbl, *supra*) as there have been few convictions for international crimes, many of those convictions remain subject to appeal, and the data is incomplete.

[33] *Id.* at 27.

national criminal justice institutions to attain the goals they—and international criminal law doctrinally—ascribe to punishment? The results are vexing. Let us begin with the primary of the two goals, retribution, and then move on to the second, general deterrence.[34]

For the retributivist, criminals are to be punished because they deserve it.[35] Punishment rectifies the moral balance and, consequently, it is to be proportionate to the gravity and nature of the offense.[36] The retributive aspirations of international criminal justice institutions are problematized in a number of ways. I count six, to be specific.

First, the punishment of extraordinary multiple international crimes is often less severe than the punishment levied for a single ordinary crime (i.e., murder, aggravated assault, sexual violence) in many municipal jurisdictions.

Second, the sentences levied for extraordinary international crimes by international tribunals often in practice are shorter in duration and severity than the sentences levied for extraordinary international crimes by national courts in cases where there is overlapping jurisdiction. Rwanda provides a stark example. Whereas leaders of the genocide in the ICTR docket face a maximum term of life imprisonment, lower-level offenders facing prosecution in Rwanda can (and have been) sentenced to death. Moreover, the conditions of imprisonment at ICTR-approved facilities are significantly higher than those within Rwandan correctional

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[34] International criminal law evidences a preference for retributive motivations. Ralph Henham, *The Philosophical Foundations of International Sentencing*, 1(1) J. INT'L CRIM. JUST. 64, 69, 72 (2003); BASSIOUNI, *supra* note 2, at 689. Retributive concerns dominate the factors international criminal law institutions view as "aggravating" or "mitigating" in the imposition of sentence. These factors mostly attach to the extent of the wrongdoer's culpability, blameworthiness, immorality, and desert. In fact, when counsel for one defendant urged the ICTY Appeals Chamber to reconsider a Trial Chamber sentence based on a "trend in international law" away from retribution, the Appeals Chamber sharply disagreed. Prosecutor v. Kunarac, Case No. IT 96-23/1-A, para. 385 (June 12, 2002). The Appeals Chamber found this "alleged" trend to be unsubstantiated and instead underscored the importance of retribution as a general sentencing factor. *Id.*

[35] IMMANUEL KANT, THE METAPHYSICAL ELEMENTS OF JUSTICE (John Lord trans., 1965).

[36] Prosecutor v. Akayesu, Sentencing judgment, Case No. ICTR-96-4-S, para. 40 (Oct. 2, 1998) ("a sentence must reflect the predominant standard of proportionality between the gravity of the offence and the degree of responsibility of the offender.")

facilities. On a related note, many perpetrators of violence in Rwanda are HIV-positive. So too are many of the victims, who often were deliberately infected. At the ICTR, prisoners who are HIV-positive receive an excellent level of health care and access to medication that few, if any, of the victims can claim.[37] Although punishing these perpetrators is supposed to voice retribution, this same punishment keeps perpetrators alive to enjoy a quality of life that exceeds that of victims and might well exceed that which they would experience were they not to be punished at all. There is a similar concern regarding the retributive value of the pain and punishment inflicted by the ICTY. In the recent plea bargain sentence of Biljana Plavsic, a senior Bosnian Serb leader known as the Serbian Iron Lady, "victims reacted with predictable outrage" at the fact that "Plavsic was sent to serve her term in a posh Swedish prison that reportedly provides prisoners with use of a sauna, solarium, massage room, and horse-riding paddock, among other amenities."[38]

Third, retribution can become redundant: the massive nature of crime cannot be reflected in punishment owing to the existence of human rights standards, which form an important part of international criminal law. If international criminal law proportionately were to fulfill its retributive aspirations it would likely impair other normative aspirations, in particular those adumbrated by international human rights law.

Fourth, assigning retributive blame can quickly take the sentencer down the road of hairsplitting. Is Eichmann more worthy of punishment than Pol Pot, and is Pol Pot more worthy of punishment than Slobodan Milosevic or than Foday Sankoh? Is the violence in Rwanda more worthy of punishment than the violence in the former Yugoslavia or in East Timor? It seems difficult to differentiate these shades of evil, yet this is precisely what international criminal justice institutions have done by punishing perpetrators of violence in Rwanda more harshly than those in the former Yugoslavia and those in East Timor slightly more harshly than those in the former Yugoslavia but considerably less so than those in Rwanda. To this end, the *praxis* of international institutions reveals a problematic inter-conflict assessment of the various gravity of each conflict. Moreover, there is vagueness and indecision regarding various levels of desert within specific conflicts. Even in the one area in which there would seem to be a basis for retributive differentiation, namely one's

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[37] David Chuter, War Crimes: Confronting Atrocity in the Modern World 222 (2003).

[38] *See* Combs, *supra* note 26, at 936.

position within the chain of command (i.e., the leader is more deserving of punishment than the lower-level thug), there is no consistent pattern of sentencing that views subordinate position as a mitigating factor affecting the quantum of sentence. In principle, international criminal tribunals have not staked out a consistent penological position when it comes to sentencing leaders as opposed to subordinates. In fact, an ICTY Trial Chamber noted that the case law "does not evidence a discernible pattern of . . . imposing sentences on subordinates that differ greatly from those imposed on their superiors."[39]

The retributive value of punishment by international tribunals, fifthly, is undermined by the intractable contingency, discretion, and selectivity of international legal process. This leads to a result where so little of that which deserves punishment actually is punished. There are a number of reasons for this. They include power politics: namely, why is atrocity in the Congo and Rwanda judicialized but not in Chechnya or Tibet? They include resource management constraints facing international institutions, which lead to an exercise of prosecutorial discretion in favor of pursuing cases on the basis of the likelihood of conviction, or on the minimization of negative political fall-out, instead of the gravity of the offense charged.[40] Political contingency also is manifested in the often arbitrary timelines selected as the temporal jurisdiction of the various tribunals, in particular the *ad hoc* or specialized tribunals, that may not be tied to the gravity of the harm but the politics of judicialization.[41] Large numbers of killers and killings are therefore left unexamined. In the end, so few who deserve punishment ever are punished. Although these forms of politicization plague all legal systems—and prevail upon even the most sophisticated domestic systems—they are particularly acute in the international context.

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[39] Prosecutor v. Krstic, Case No. IT-98-33-T, para. 709 (Aug. 2, 2001) (conclusion left undisturbed on appeal).

[40] *See generally* Drumbl, *supra* note 32, at 60–64 (discussing politicization and the exercise of prosecutorial discretion at the ICC).

[41] *See* Jose E. Alvarez, *Crimes of States/Crimes of Hate: Lessons from Rwanda*, 24 YALE J. INT'L L. 365, 397–99 (1999) (discussing Rwanda); Suzanne Katzenstein, *Hybrid Tribunals: Searching for Justice in East Timor*, 16 HARV. HUM. RTS. J. 245, 274 (2003) (discussing East Timor). Katzenstein specifically concludes that "limiting the investigations exclusively to referendum-related violence of 1999, despite a mandate that provides for jurisdiction over acts committed during a much broader time frame, was not simply a decision based upon resource constraints. Rather, it was also motivated by a concern that a more expansive inquiry could lead to the indictment of U.S. officials who countenanced the Indonesian invasion and helped to equip and train the Indonesian military both prior to and throughout the occupation"). *Id.*

Finally, there is the growing recourse to the plea bargain. Here, punishment becomes disconnected from desert or gravity and contingent upon what you know and who you're willing to testify against. This is most pronounced in the practice, quite *au courant* at the ICTY, of charge bargaining, which Ralph Henham and I explore in greater detail elsewhere and which impedes the penological aspirations of the ICTY while addressing certain managerial or bureaucratic imperatives.[42]

Let us now consider general deterrence as a justification for the punishment currently inflicted by international criminal justice institutions. General deterrence suggests that the purpose of prosecuting and punishing those who commit mass atrocity is to dissuade others from doing so in the future.[43] From a deterrence perspective, punishment is inflicted not because the offender deserves it, but because punishment has a consequential or utilitarian value, in this case the value of minimizing recidivism. Assuredly, there are other consequentialist rationales to punishment. These include rehabilitation, incapacitation, and reconciliation. However, the place of these within the practice of international sentencing, although growing, still remains marginal.

General deterrence as a punishment rationale suffers from a number of important challenges. First is the acutely low chance of a perpetrator ever getting caught. This chance is much more remote for a perpetrator of extraordinary international crime than it is for a perpetrator of ordinary domestic crime. Although the probability that enemies of humankind will get caught are higher today than they were preceding the operationalization of the international criminal justice infrastructure, they still remain tiny. As criminologists have taught us, it is the likelihood of getting caught, rather than the severity of sentence or ostracism that results from being punished, that truly influences behavior.

Second, and much more problematic, is the unproven assumption of perpetrator rationality in the context of mass violence. This is so for

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[42] Ralph Henham & Mark Drumbl, *Plea Bargaining at the International Criminal Tribunal for the former Yugoslavia*, 16 CRIM. L.F. 49 (2005).

[43] Specific deterrence implies that punishing the offender will deter that offender from reoffending in the future. The international criminal tribunals do not ascribe much importance to this sentencing rationale. *See, e.g.*, Prosecutor v. Kunarac and others, Case No. IT-96-23-T, para. 840 (Feb. 22, 2001) (holding that "the likelihood of persons convicted here ever again being faced with an opportunity to commit war crimes, crimes against humanity, genocide or grave breaches is so remote as to render its consideration in this way unreasonable and unfair").

two reasons: one affective, the other utilitarian. Let's look at the affective reason first. In many places where conflict is actual or imminent, perpetrators want to belong to a group movement. As Robert Kaplan notes, violence may invoke meaning and liberation for such individuals.[44] They want the movement to succeed and often believe that they are doing good by committing evil. In terms of the utilitarian reason, in many places where there is societal breakdown and mobilization (which generally are conditions precedent to massive violence) it is reasonable to join a side, because if a person chooses not to do so that person will have no group to turn to for protection. In this context, the prospect that fear of eventual punishment by an international criminal tribunal will trump the short-term need for self-preservation is dubious at best.

Last, only a handful of individuals ever face prosecution for their individual criminal responsibility, thereby leaving the masses unaccountable. This strikes me as odd since participation by and acquiescence of the masses is the singularly most determinative condition precedent to mass atrocity. There are cases such as Nazi Germany, Rwanda, and Sierra Leone where conflict entrepreneurs publicly exhorted violence and substantial numbers of ordinary people ordinarily disconnected from the political process actively committed the acts in question with the acquiescence or complicity of many more individuals. Violence truly becomes massive only when neighbors draw the shades, citizens avert their gaze, co-workers unquestioningly assume suddenly vacant positions, people cross the street to avoid piles of corpses, and sycophants move into newly emptied apartments. Although broad participation is a condition precedent to mass violence, this level of responsibility is ignored by the criminal law.

In fact, application of international criminal justice to situations where massacre is civic duty, and elimination an ecology, perpetrates one myth and one deception. The myth is that a handful of people are responsible for endemic levels of violence. The deception is the submerging of the role of international agents, foreign governments, and colonial interventions in creating conditions precedent to violence.

The third step of this chapter is a prescriptive one, namely, where do we go from here? I offer a number of modest suggestions for the theory and *praxis* of international criminal law.

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[44] Robert D. Kaplan, The Coming Anarchy 44–45 (2000).

It is my belief that collective violence cannot be rigorously analyzed without considering the effects of the collective on the individual. Participants may be captives of social norms; at a minimum, they certainly are captivated by those norms. The breadth of these norms may be such that the violence itself, as Hannah Arendt provocatively noted, may be nothing more than banal in the time and place where it is committed.[45] Paradoxically, persons with a weakened sense of individual responsibility and independence commit crimes that international criminal justice institutions call more serious than ordinary domestic crimes.[46] Does this not contradict the criminology of ordinary crime that international criminal law adopts as a self-rationalization insofar as culpability in ordinary crime derives from the extent of the perpetrator's voluntary independent participation in the crime?

International lawyers would do well to actively debate broader approaches to collective responsibility, including those envisioned by social norm theorists, who posit that group sanctions work insofar as group members are in an advantageous position to identify and monitor the behavior of conflict entrepreneurs and control their own responses to this behavior.[47] Since the criminal law does not reach acquiescent group members, they have little incentive to cabin the behavior of conflict entrepreneurs or their reactions thereto, particularly in the preconflict stage. Group members therefore become unaccountable beneficiaries of the violence instead of potential gatekeepers. On the other hand, collective sanction incentivizes group members to monitor and marginalize the conduct of conflict entrepreneurs.

This may open the door to a fruitful consideration whether we would be well-served by a move beyond liberalism's preference on the individual as the determinative unit of action in group behavior and, more specifically, revisit international criminal law's assumption of the individual as the preferred unit of action,[48] an assumption that Bassiouni

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[45] Arendt, *supra* note 16, at 252.

[46] An East Timor panel recognized this nuance but then sentenced the individual perpetrator (a head of a militia contingent) to seven years of imprisonment for abduction and murder as a crime against humanity. Prosecutor v. Agustinho Atolan, Case No. 3/2003, para.23 (Dili Dist. Ct. Serious Crimes Spec. Panel, June 9, 2003).

[47] Daryl J. Levinson, *Collective Sanctions*, 56 STAN. L. REV. 345, 348 (2003).

[48] International criminal law adopts what George Fletcher calls the "liberal idea that the only true units of action in the world are individuals, not groups." George P. Fletcher, *Collective Guilt and Collective Punishment*, 5 THEORETICAL INQUIRIES L. 163, 163 (2004).

(among many others) supports.[49] This inquiry could be undertaken within the context of interrogating broader forms of accountability that encompass restorative, reparative, and collective justice, along with a necessary review of the actions and omissions of international organizations and state governments. These accountability methods, although perhaps casting a shadow of collective guilt that many international lawyers find discomfiting, may also serve as modalities that could facilitate the development of the didactic and expressive values of prosecution and punishment of extraordinary international crimes. Expressivism, in particular, could become a more important aspiration for international criminal law and justification for punishment but has not garnered much traction in the jurisprudence of international criminal justice institutions.[50] Encouraging heterogeneous remedies might diversify the participants in the transitional justice endeavor, thereby promoting other goals essential to combating impunity. In addition to narrating the history of violence and authenticating the record (the didactic value of punishment) and affirming the importance of stigmatizing evil even when evil becomes banal (an expressive function), these diverse remedies can promote victims' rights to know what happened to them, their loved ones, and their fellow citizens and also engage in providing reparations, commemorations, and, among those responsible, a sense of remorse.[51] These multi-faceted responses also may facilitate the incorporation of the local and, thereby, help build international justice from the bottom up through diffuse heterogeneous methods instead of top down through homogenous adversarial criminal justice.

In conclusion, as atrocity law matures, the time is ripe to shed its borrowed doctrinal stilts and transcend the trap of deviance. A sustained process of critique and renewal may provide international criminal punishment with its own conceptual and philosophical foundations. The goal of the international lawyer should not be to blindly protect fledgling international institutions out of a sense of bureaucratic territoriality or loyalty to international governance. Rather, the goal should be to improve extant institutions so that they are more relevant to lives lived locally while admitting that the value of the international is not necessarily better than that of the domestic or local.

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[49] BASSIOUNI, *supra* note 2, at 685.

[50] Drumbl, *supra* note 32, at 68–73 (discussing expressivism).

[51] Stephanos Bibas & Richard A. Bierschbach, *Integrating Remorse and Apology into Criminal Procedure*, 114 YALE L.J. 101 (2005) (positing that remorse and apology should me more explicitly and actively incorporated into the criminal law).

It is completely understandable that international criminal law is not yet fully its own discipline. After all, the field is young and, as Bassiouni notes, in a nascent stage.[52] By informing itself from an eclectic variety of sources that reflect the complexity of mass atrocity, international criminal law can move beyond its youthfulness. To fail to grow runs the risk that, to draw from Bassiouni's own words, international criminal law over time amounts to little more than superficial "Potemkin justice."[53]

[52] BASSIOUNI, *supra* note 2, at 685.

[53] *Id.* at 703.

CHAPTER 2

A MODERN PERSPECTIVE ON INTERNATIONAL CRIMINAL LAW: ACCOUNTABILITY AS A META-RIGHT

Anja Matwijkiw and Bronik Matwijkiw***

This chapter is an attempt to identify the various parameters that are needed in order to make sense of M. Cherif Bassiouni's interpretation of the right to accountability as a derivative *meta*-right, that is, a right that follows from the existing body of legally binding norms and that, at the same time, manifests itself as an aspiration and a requirement that adds an extra-systematic and normative content to international criminal law. As accountability originates, in the final analysis, in the idea of an implied social contract, it can be said to crisscross the traditional distinction, if not dichotomy, between legal positivism and natural law theory.

One recent example of Bassiouni's visionary jurisprudence is *the Chicago Principles on Post-Conflict Justice*, which he drafted together with scholars and experts from International Human Rights Law Institute (Chicago, USA), Chicago Council on Foreign Relations (Chicago, USA), Instituto Superiore Internazionale di Scienze Criminali (Siracusa, Italy), and Association Internationale de Droit Pénal (Paris, France).[1] The doc-

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[1] *The Chicago Principles on Post-Conflict Justice*, International Human Rights Law Institute (Chicago, USA), Chicago Council on Foreign Relations (Chicago, USA), Instituto Superiore Internazionale di Scienze Criminali (Siracusa, Italy), and Association Internationale de Droit Pénal (Paris, France), draft revision (Mar. 1, 2005), (M. Cherif Bassiouni & Daniel Rothenberg eds.) (on file with editors). In addition to this, M. Cherif Bassiouni and Daniel Rothenberg are co-authors of the Introduction and Related Text.

Reviewing the earlier drafts of *the Chicago Principles on Post-Conflict Justice*, it is noticeable that the latest draft revision is substantially less legalistic, thus adding significantly to its practical application value.

ument in question can be interpreted as a guideline, in the first instance, a moral or prescriptive norm for individual states, as well as the United Nations. The reason for this owes to the fact that the most comparable alternative, produced under the auspices of the United Nations, is less adequate than the independent document. The Commission on Human Rights and the Economic and Social Council have approved various steps by the Sub-Commission on Prevention of Discrimination and Protection of Minorities, steps taken between 1985 and 1997, toward the adoption, by the General Assembly, of *the Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*.[2] Because of the historical link between *the Set of Principles* and the Vienna Declaration and Program of Action (1993), which refers to impunity and the need to combat it, the perspective of the relevant U.N. document is narrow by virtue of a lack of due consideration of the notion of post-conflict justice in a context of accountability—*as opposed to* impunity. Furthermore, the independent study that Professor Diane Orentlicher conducted in 2004, in an effort to assess *the Set of Principles* as standards and, if necessary, offer recommendations in the light of practical application needs, explicitly cites Bassiouni as a source of "recent jurisprudence" on the right to reparation.[3] Having served as an independent expert of the Commission on Human Rights on that same matter, the reference to Bassiouni and his scholarly work may not seem surprising, especially since he is also a co-architect of the International Criminal Court (ICC).[4] Nevertheless, there is a difference between making available one's expertise and, on the other hand, enjoying trust to the extent where one's scholarly work is

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[2] U.N. Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Question of the Impunity of Perpetrators of Violations of Human Rights (Civil and Political): Revised Final Report*, 49th Sess., Item 9, U.N. Doc. E/CN.4/Sub.2/1997/20/Rev.1 (Oct. 2, 1997). This document is sometimes referred to as: *the Set of Principles*.

It should be noted that, in 1997, *the Set of Principles* was submitted to the Commission on Human Rights by Louis Joinet in his capacity as Special Rapporteur of the Sub-Commission on Prevention of Discrimination and protection of Minorities on the question of impunity of perpetrators of human rights (civil and political).

[3] U.N. Commission on Human Rights, *Independent Study on Best Practices, Including Recommendations, to Assist States in Strengthening their Domestic Capacity to Combat All Aspects of Impunity*, 60th Sess., Item 17, at 5, 19, U.N. Doc. E/CN.4/2004/88 (Feb. 27, 2004).

[4] U.N. Commission on Human Rights, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of [Gross] Violations of International Human Rights Law and [Serious] Violations of International Humanitarian Law*, 60th Sess., Item 11, Appendix I, at 15, U.N. Doc. E/CN.4/2004/57 (Oct. 24, 2003).

perceived as authoritative for the purpose of directing, developing, and making new law.

Some theorists might claim that there is an element of competition between *the Chicago Principles on Post-Conflict Justice* and the U.N. *Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*. Others might reply, and the authors of this article concur, that talk about competition misses the essential point, which is that the two documents in question take two different perspectives. Like the U.N. document, the independent document is the outcome of an evolution of ideas that have been processed and tested in reality, for example, truth commissions. However, unlike the U.N. document, *the Chicago Principles on Post-Conflict Justice* takes a (more) progressive perspective, with a view to securing a new kind of society or state, one that is willing to go beyond the notion of combating impunity defined as "the impossibility, *de jure* or *de facto*, of bringing the perpetrators of human rights violations to account—whether in criminal, civil, administrative, or disciplinary proceedings" to political account of needs that were not addressed appropriately by the former rule or system.[5] Whereas *the Set of Principles* supports a broad notion of action to combat impunity, *the Chicago Principles on Post-Conflict Justice* does not reduce accountability to a "no impunity" policy, although it certainly embraces the implied broad notion of action to combat impunity. The point is (once again) that, as a notion of accountability, a "no impunity" policy is too narrow. Following the independent document, accountability is a broad notion that, as a principle, encompasses any aspect of post-conflict (re-)construction that is necessary in order to create a responsible society, a society that makes it impossible to put basic human rights at risk in the first instance. That is the real measure of adequacy.

Pragmatically speaking, the United Nations has every reason to be in favor of *the Chicago Principles on Post-Conflict Justice*. However, first, the U.N. has to correct its own perspective, from combating impunity to accountability. This is not to say that the United Nations has no individual representatives who take a perspective that emphasizes accountability. As it happens, the Secretary-General, Kofi Annan's 2004 report to the Security Council proves that the very top of the hierarchy is in search of "a common language of justice for the United Nations" and that, furthermore, the best language, so his report assumes, is accountability.[6] Annan's

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[5] *Supra* note 2, at 16.

[6] Kofi Annan, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Report of the Secretary-General to the Security Council*, at 2, U.N. Doc. S/2004/616 (Aug. 3, 2004).

notion of accountability begins before anything has gone wrong in that he requires "accountability to the law," a notion that is so broad that it can be replaced with "the rule of law" defined as a substantive and formal human rights system.[7] To secure accountability is, first and foremost, to secure that states recognize human rights and, if these are violated, a "victim-centered approach" or perspective should be taken so as to maximize justice.[8] In this way, Annan agrees with Bassiouni that the right to accountability is for the sake of the victims while he may not necessarily share his view on the theoretical foundation for that same right. Whether he does or does not, Bassiouni's general jurisprudence is characterized by a strong emphasis on practical application and, therefore, his overall interest is to see justice done. However, it takes a certain kind of theory to secure that a rule of law is also a rule of justice. It is true to say that, in order to accomplish the best outcome, theory matters. Although there are a number of significant overlaps between Annan and Bassiouni's perspectives, the additional step that Bassiouni takes, namely his contribution to general jurisprudence, means that his broad pro-accountability perspective is guided by parameters that must also be given due consideration for the purpose of assessing *the Chicago Principles on Post-Conflict Justice*.

I. PARAMETERS FROM GENERAL JURISPRUDENCE

At the level of general jurisprudence, there is a difference of substance between the two main positions that guide Bassiouni's analysis of international criminal law, that is, legal positivism and natural law theory, as mentioned in the introduction. It is particularly important to pay attention to certain key issues that pertain to the philosophical, logical, and abstract aspects of the analysis in question, such as defining the notion of law proper; formulating criteria for different types of rights; determining what counts as the ultimate source of validity; and, last but not least, conceptualizing justice in terms of an immanent and relative or, alternatively, a transcendental and universal phenomenon. All of these issues are of direct relevance and importance for a clear comprehension of Bassiouni's parameters.

Legal positivism is the theory that says that there exists only one law, namely the legal law, the binding force of which is established through

[7] *Id.* at 4.

[8] *Id.* at 2, 17.

convention. Hence, only legal law has status as law proper.[9] The validity of this is derived from the human or man-made system of norms, in the first instance, from the judicially posited norms (compare legal rules or laws) and, ultimately, from the political system, that is, the official ideology, democratic or non-democratic, that prevails in a place, P, where P traditionally and typically stands for a particular nation-state.[10] Therefore, a rule of law is, in one important sense, identical with a rule of might. That granted, modern and moderate versions of legal positivism, which are characterized by their willingness to incorporate a certain minimum of natural law components,[11] contrary to realism,[12] as well as classical and

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[9] Subject to certain qualifications outside of the realm of convention, for example, natural laws such as the law of gravity.

[10] Democratic if the convention results from majority consensus; non-democratic if the convention results from a one-man command (compare autocracy) or a one-class edict (compare oligarchy).

[11] This is true of both M. Cherif Bassiouni and Herbert L.A. Hart, whose positions are analyzed and compared in this article.

[12] Throughout this article, "realism" stands for the international law analogy to legal realism, which was designed for national law. As an analogy, realism presents some important differences by virtue of Otto von Bismarck, Hans Morgenthau, and Henry Kissinger's influence, especially pertaining to the incorporation of power politics. *See* Siegfried Wiessner & Andrew R. Willard, *Policy-Oriented Jurisprudence* 44 GERMAN Y.B. INT'L L. 99 (2001). As power politics is reality politics or *realpolitik*, realism is first and foremost an analogy to this phenomenon, which, incidentally, inspired Friedrich Nietzsche's criticism of the right is might *dictum*—although it is also true that his theory has often been misused by realism. *See* FRIEDRICH NIETZSCHE, BEYOND GOOD AND EVIL 76 (Marion Faber trans., 1999).

The distinction between American legal realism and Scandinavian legal realism, which is recognized by experts on general jurisprudence, does not apply to the broader points that are made in this chapter. That said, Scandinavian legal realism is somewhat under-represented in American jurisprudential discourse.

One of the leading proponents of Scandinavian legal realism, Alf Ross, is best known for his theory of prognosis whereby the characteristic features of legal statements are analogized to the natural sciences. Theoretically, Ross's line of reasoning is much more speculative and logical than the concept of predictions that, for example, Oliver Wendell Holmes (compare American legal realism) accommodates.

For an account of some of the main problems and challenges pertaining to Scandinavian legal realism, see Bronik Matwijkiw, *The Liar in Constitutional Law, in* PLURALISM AND LAW 88 (Arend Soeterman ed., 2004). *See also* Bronik Matwijkiw, *Self Amendment*, 5 JURISTEN [THE LAWYER] 200 (2000) (also Web publication by the Danish Archive on National Law, http://www.themis.dk/synopsis/docs/statsret.html). *See also* Bronik Matwijkiw, *The Controversy of Predictions*, 5 TIDSSKRIFT FOR RETTSVITENSKAP [JOURNAL OF LEGAL SCIENCE] 874 (1998). For a commentary on Bronik Matwijkiw's position, see ALF ROSS: KRITISKE GENSYN 28–30 (Jacob Holtermann & Jesper Ryberg eds., 2006).

radical versions of legal positivism, claim that if right *de jure* (or, more generally, the law) "is" merely a matter of might, then right *de jure* (or the law) "is not," for the same reason, legitimate. What is meant by "legitimate" is "moral" or "just." Furthermore, if right *de jure* (or the law) is deemed or judged "not legitimate," then it follows that it ought not exist although it actually exists here and now—in place P—in the real world. Legal *cum* immoral or unjust norms that exist as facts have descriptive but not prescriptive force. This is to say that they cannot be recommended and, since they function as regulations anyway (compare rules or laws), there is a good and strong incentive by virtue of the implied legitimacy issue to revise or replace the relevant (legal) norms. Consequently, right *de jure* (or the law) ought not, ideally speaking, be reduced to a source or a series of arbitrary commands defined, for example, as the whims of a dictator or tyrant, so as to make it true to say that right "is" right (or law "is" law) *simply because* right (or law) is backed up by force, including the state's monopolized use of physical violence. Only realism embraces such a construct, which leads to what is best described as a rule of fear in that there is no reason—beyond a well-founded expectation of victimization if one does not conform—to obey or comply with the legal and political system. Together with the notion of the strongest will to rule, the current distribution of political power, influence, size of geographical territory, and capacity to exercise control over other states, serve as demarcation criteria for what counts as law proper. Furthermore, like classical and radical versions of legal positivism, realism equates legality and legitimacy. In this manner, there cannot be a competition between legal(ly) right and so-called "moral(ly) right" for right *is*—by definition—might.

As for norms that confer rights, recognition presents itself as an instance of immanent validation. Determining the sources of law, however, realism and legal positivism differ. Legal positivism prefers to point to what actually, meaning empirically-objectively and therefore verifiably applies *expressis verbis* here and now in place P (compare written law as a source of (national) law), although it also incorporates—in addition to finding or discovering the law as a fact that must be enforced—a more creative, that is, a dynamic legislative notion in (recognizing as law proper) the new law that judges make in a courtroom (compare precedents as a source). Realism, on the other hand, views written law as secondary or less real whereupon it emphasizes precedents and, with this, the (law-making) decisions or rulings of judges. In doing so, realism expects that judges be willing to embrace reality, that is, to be carriers of the values, ideas, and beliefs that underpin the *status quo*. Consequently, judges become instruments of the system, however tyrannical and bar-

baric. As already explained, radical versions of legal positivism also endorse the right is might dictum. But, unlike realism, the implications are not putting accountability at an absolute risk, at least not legally speaking. Radical versions of legal positivism do not maximize the freedom of the judges to the extent where they—in practice—are not bound by the law but, instead, are above it for reasons to do, ultimately, with the nature of the game. Realistically speaking, the first rule (of the game) is that the ruler is owed loyalty on the basis of his sovereignty, superiority, or strength. In legal positivism, on the other hand, legality *per se* is taken more seriously. It is not possible to overrule the law without, at the same time, violating it (which is wrong!), especially if such action entails revolutionary changes of society's basic structures and institutions, that is, extra-systematic changes that discord with the constitutional, parliamentary, and other conditions for political transitions. In other words, revolutions or analogies to these, for example, military coups, are incompatible with the requirements of legal positivism. Only reforms (i.e., changes within the system) are acceptable or legitimate. There must be order. The law that "is" is also, according to radical versions of legal positivism, the law that "ought" to be (thus making legality and legitimacy overlap), but this is a politically conservative, if not reactionary point about means and ends, rather than an invitation to uncritically and, worse still, illegally, enforce the power of the political ruler(s). There is always something that stands: the law. The law must be respected, and this is an expectation, if not a duty, which is first and foremost directed at the class of judges. Paradoxically enough, therefore, the office of judges, as defined by legal positivism, affords—in comparison with realism—more protection of the establishment, at least if "the establishment" is narrowed down to "law and legal institutions." As for a comparison of radical and moderate versions of legal positivism, furthermore, it should be noted that the last-mentioned entail distinctions between, respectively, a rule of law/a rule of might, right/might, and legitimacy/legality, just as a pro-law attitude is not perceived as a categorical imperative, a must. While a transition from, say, a Nazi regime to a democratic rule logically and ideologically extinguishes, borrowing Hans Kelsen's terminology, the basic norm of the existing law, moderate legal positivism may nevertheless argue that the law that is ought to give way to a better rule, so as to ascribe primacy to legitimacy.[13]

As for judicial rule application, legal positivism requires that rules or laws be applied consistently, impartially, and neutrally, that is, objectively

[13] Hans Kelsen, Pure Theory of Law (1967).

as opposed to subjectively, in order to secure formal fairness that, in turn, constitutes justice.[14] Justice is a one-dimensional notion, a purely legal and procedural matter; subject to one qualification that pertains to modern and moderate versions of legal positivism. Following the single most influential of these, namely the general jurisprudence of Herbert L.A. Hart, it makes perfect sense to talk not only about the real existence of moral and even natural rights—in addition to legal rights—(so as to move beyond the legally posited norms—to moral norms or laws) but also to talk about justice outside of the legal system.[15] This is to say that justice exists, according to Hart, as a moral notion or principle, which can be applied to the law. If so, the distinction between law and morality must still be acknowledged however; and, for the same reason, morality is not something that has the power to stop the law, to nullify it simply because it can be shown to be morally unjust or illegitimate. At best, morality can be used as part of a rational discussion and criticism of the law; but the law stands regardless of what accusations are made, the gravity of these, even the undeniable truth of these. That granted, Hart's position is sufficiently inspired by natural law theory to make it the case that morally unjust (legal) rules or norms ought not exist and that, furthermore, serious crimes, especially violations of fundamental rights, ought to be punished retroactively. At the same time, this act (compare retroactive punishment) ought also to be recognized as a sacrifice of justice, a wrong in other words from the point of view of the law, however necessary and (morally) right in the circumstances.

The above kind of reasoning and argument is incompatible with natural law theory. According to this position, morality matters more than legally positive law because there exists a law that is above or higher than legally positive law, namely the so-called "law of nature" or "natural law,"

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[14] Wiessner and Willard perceive the elimination of the subject as a causal element of legal positivism's "futile quest for 'certainty' of law." Legal positivism idealizes the methodology of the natural sciences to the extent where it "eschews any creative or prescriptive function." In Wiessner and Willard's opinion, this is the main theoretical weakness because the consequence is that legal positivism "does not properly reflect the reality of how law is made, applied and changed." *See supra* note 12, at 101–02. However, as legal positivism requires that judges apply the existing rules, its alleged non-normative approach is best described as an indirect attempt to reproduce the status quo. Thus, it holds, once again, that the existing law is also the law that ought to be; legality and legitimacy overlap (rules or laws as) ; facts overlap with (political or ideological) norms.

[15] Herbert H.L. Hart, The Concept of Law (1961).

or, using Bassiouni's terminology, the "law of humanity."[16] Because this exists *de facto* as the law that is inseparable from morality, it is also the law that ought to be and, in this sense, it is the ideal (law) for any place P in the real world. Comparatively speaking, it is The Law, and so any conflict between legal and moral law must be resolved by using moral law or morality as a test for legal law, meaning that legal law must accord or conform in order to be said to have status as law proper, that is, as a rule of law—as opposed to a rule of mere might. The more it conforms, the more the law acquires, rightfully and proportionally, the status it ought to have. The law that is legal but not moral (or legitimate, or just, or good), is so improper that it does not deserve to be recognized and respected. There is a difference of substance, of course, between the statement that "the law that is counts as real law—regardless" (compare legal positivism) and the alternative statement whereby it holds that "in order to count as law in the first instance, certain conditions pertaining to morality must be fulfilled" (compare natural law theory). In Hart's case, there is a distinction between (formal) justice defined as procedural and legal fairness and, on the other hand, substantive justice, which is identical with morality. The essential point is that it is possible for judges to apply rules that are (morally) unjust while being (legally) just judges because they apply the rules consistently, impartially, etc. That granted, Hart does not overcome the problem with the status of the law itself. This is to say that if the law is immoral, he never takes the extra-systematic step to de-law it, that is, to declare it null and void and, therefore, his position is more compatible with legal positivism than natural law theory.[17]

For radical versions of natural law theory, there is, ultimately, only one real law, namely the natural law. However, exponents of moderate versions agree that the legal law exists as a body of factual *cum* conventional norms. At the same time, they have to admit that if the legal law is in conflict with the natural law, then it is not morally valid and, consequently, it cannot be said to fulfill the condition for status as law in the strict and proper sense. It follows that immoral law "is not" law, although it makes no sense to de-law the legal law empirically, to deny that it exists as a body of factual *cum* conventional norms. Notwithstanding, the hierarchy must be respected. And, concerning the highest law, this operates

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[16] M. Cherif Bassiouni, *Searching for Peace and Achieving Justice: The Need for Accountability*, 59 LAW & CONTEMP. PROBS. 9, 25 (1996).

[17] For an elaboration of the reasons for this, see Anja Matwijkiw, *A Philosophical Perspective on Rights, Accountability and Post-Conflict Justice: Setting up the Premises, in* POST-CONFLICT JUSTICE 162–63 (M. Cherif Bassiouni ed., 2001).

as a double notion. The natural law is something that describes an actual order or state of affairs and, furthermore, prescribes a norm that functions as a principle of substantive justice.

Traditionally, the natural law notion rests on a set of metaphysical assumptions about the absolute and objective reality of a God-given law or, following secular versions of natural law theory, a morality with origin and residence in human nature, unwritten and non-judicially established. Irrespective of the genetic aspect, man can come to know and understand the law and its authoritative bindingness by virtue of his cognitive capacities. The implied link between rationality and morality signifies that the unintelligent or unenlightened person is at serious risk of engaging in acts of wrong-doing, whereas the man who is able to access the truth will be more likely to do the right, just, or good thing. However, the ability to use rationality or reason is not sufficient for moral agency. For this purpose, the agent must be willing to use reason *in accordance with* principles, thus making him a reasonable man. Furthermore, the natural law also expresses itself emotionally in man's conscience. Consequently, a wrong-doer will feel guilt or remorse (compare a guilty or bad conscience), at least if he is normal by the general norm for being human. However, a sociopath cannot be expected to be affected in this way. As an uncaring person, the sociopath cannot access the moral territory, although he may be rational in the sense that he can communicate with others, calculate the consequences of his actions with a view to his own benefit, and even make cause-and-effect sense pertaining to ends and means, as in "I killed them because they were in my way." The ability and/or willingness to care is a prerequisite for due consideration while relating to others. Without such consideration, people are not perceived as stakeholders. In other words, they do not count.

In addition to the key notion, namely law, there is a theoretical natural law sub-terminology that also reflects a duality that translates a given term into a double notion of both-fact-and-norm. According to Bassiouni, for example, "humanity" reflects: (1) the fact that the human person is a member of *homo sapiens* (compare "This 'is' a human being"); and (2) at the same time and for the exact same reason, he possesses a special dignity that naturally entitles him to respectful treatment. The kind of respectful treatment Bassiouni has in mind is (human) rights-conferment (compare "Because and simply because he is a human being (humanity as a fact), he 'ought' to be treated humanely, *viz.*, as a right-holder" (humanity as a norm)). If agents are reasonable, then they will recognize that it is true that they owe all fellow human beings respect, and that they must—in order to

continue as moral agents—relate to others on the basis of the link between being human and being a right-holder.

Following Bassiouni's account, dignity is theoretically paired with Immanuel Kant's Principle of Respect: "Treat other people as ends in themselves, and not merely as means." As a natural law thinker, Kant defines ends in terms of possession of rationality and autonomy, whereas Basssiouni's reinterpretation makes humanity *simpliciter* the criterion. We have to keep these theorists separate while adding that Bassiouni's reinterpretation is, *de jure*, indispensable for a correct reading of international human rights norms.[18] Unmediated by particular qualities, human rights include everybody everywhere as long as the relevant criterion is satisfied. It only takes membership in the human species to qualify as a stakeholder and *not* rationality and autonomy, however distinct for the human species (compare humanity *simpliciter*). At the same time, members of non-human species are excluded, however similar to human beings in other respects.

As a counterpart to humanity, Bassiouni also advances an evolutionary notion of civilization as something that both describes and-prescribes what is "normal."[19] Once again, there is a dual usage in play. "Normal" serves as a factual guide whereby we can obtain knowledge of the actual level of progress our own species has made or, vice versa, not made. The main questions are: "Has humankind evolved (into a better species)?" and "Are humans more or less civilized at this point in time?" Rather than using the majority of people or states and their choices and actions as standards (which, if applied to morality, would lead to a rigid version of conformism), the notion of normalcy rests on a deeper foundation, a norm that instructs or, more rationalistically, enlightens humankind of what ought to be done or avoided, as the case may be. The important point is that the "ought" may very well be contrary to what "is" the normal thing to do in the real world. Even if it "is" normal for the majority of states to, say, violate human rights, it nevertheless counts as primitive and barbaric conduct and, for the same reason, wrong-doing seen from the point of view of civilization as a (moral) parameter or norm.

Historically speaking, our species seems to have taken one step forward and two steps back. Our human world is more civilized today

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[18] *Id.* at 170–71. *See also* Anja Matwijkiw, *The Right-Holder as an End in Himself*, 3–4 TIDSSKRIFT FOR RETSVITENSKAP [JOURNAL OF LEGAL SCIENCE] 738, 757 (2000).

[19] *Supra* note 16.

because human rights norms have been formally recognized in international criminal law. At the same time, however, our world is a less civilized place because (1) since World War II, the number of conflicts and resulting human rights victimizations have increased substantially;[20] and (2) *realpolitik* (which is a version of realism), is the domineering doctrine in the political arena. This means that the rulers *cum* politicians' willingness to barter away post-conflict justice for peace is prevailing (compare norm as a fact).[21] The public policy goal is to obtain peace for the sake of obtaining peace, although this cannot be deemed sufficiently civilized to warrant defense because (a) the choice is an expression of moral indifference toward the victims; and (b) the consequences for the victims themselves will include non-fulfillment of their needs for recognition, for justice, and for redemption,[22] thus creating an imbalance that can only be expected to lead to acts of revenge and, on a larger scale, a new vicious circle of violence and, with this, new conflict. Lastly and thirdly (3), because impunity is the *de facto* and *de jure* norm, accountability is the exception, thus making it an ideal that cannot be realized until the political will, both as a world community and a nation-state phenomenon, has been transformed into a good one, defined as a pro-accountability and, with this, a pro-justice will.[23] Pessimism is bound to reign supreme as long as it is true that we are at the mercy of politicians who normally (factually speaking) sacrifice justice, however irrational and wrong. The only source or real optimism is to be found in the Hegelian (and natural law theory inspired) notion of necessary *cum* inevitable and irreversible development and progress. According to Bassiouni, the ICC illustrates such a step in the right direction.[24]

Diagnostically speaking, it is the political will to enforce (compare rights-protection) human rights norms that is The Big Issue or, more to

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[20] *Id.* at 9–10.

[21] M. Cherif Bassiouni, *Accountability for Violations of International Humanitarian Law and Other Serious Violations of Human Rights, in* POST-CONFLICT JUSTICE 38 (M. Cherif Bassiouni ed., 2001).

[22] *Supra* note 16, at 24, 26. *See also supra* note 21, at 52.

[23] *Supra* note 16, at 11–12.

[24] M. Cherif Bassiouni, *The Philosophy and Policy of International Criminal Justice, in* MAN'S INHUMANITY TO MAN. ESSAYS IN INTERNATIONAL LAW IN HONOR OF ANTONIO CASSESE 76–95 (L.C. Vorah & Michael Bohlander eds., 2003).

In this way, Bassiouni can predict "the ultimate triumph of accountability over impunity."

the point, The Big Problem.[25] For this reason, Bassiouni concludes that accountability is not just a legal matter; it is also a moral and ethical consideration.[26] The rationale behind this thesis can be put on the following Warning Formula: if facts about the real world were our parameter or, more concretely, if legality were our sole or highest parameter for "right," then right would necessarily be synonymous with might, leaving no room for interpolating justice because legitimacy would be the same as legality, and so we would end up with radical legal positivism and realism. This is unacceptable. It is the wrong jurisprudential direction or goal. What is more, Bassiouni maintains that realism is a strategy for the generation of bad excuses pertaining to rights-protection or enforcement. While exponents of realism claim that every conflict is *sui generis*, Bassiouni counterclaims that specific situation-dependent variables or relatives "cannot exclude the application of existing international legal norms."[27] A reality of conflict *sui generis* is not powerful enough to dethrone the reality of human rights, whereas the last-mentioned is in fact powerful enough, if recognized, respected, and protected in good faith, to bring about post-conflict justice.[28]

In his substantiation of this, Bassiouni emphasizes the primacy of morality by defending the theory of universal jurisdiction pertaining to criminal justice.[29] In this way, he requires equal and universal application of *jus cogens* norms. Without global protection, we cannot make full sense of human rights. The means for this end consist in compliance with the correlative enforcement duties, which will be explicated in Section II. It should be added that universal jurisdiction is itself a means, namely a means for the Highest End or public policy goal, to maximize justice. Here it should be observed that Bassiouni's theory of universal justice entails, logically, the requirement of equal and universal enforcement. More precisely, universal justice is based, philosophically, on Cicero's natural law theory (compare morality) and "its corollary," which is equal and universal and legal application of *jus cogens* norms (compare law).[30] Like the theory of jurisdiction, the natural law theory of justice accentuates

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[25] *Supra* note 16, at 18.

[26] *Id.* at 23.

[27] *Id.* at 13.

[28] *Supra* note 21, at 9–10.

[29] *Supra* note 16, at 17. *See also supra* note 21, at 13–26.

[30] *Supra* note 24, at 116–17.

practical application of norms. Unlike the first-mentioned, however, the natural law theory of justice is a broader or wider theory that encompasses not only the end goal of universal jurisdiction, namely accountability regardless of time, T, and place, P (at least ideally), but also the various theoretical premises, assumptions, and ideals that ultimately transcend the legal sphere, such as, for example, the notion of human rights per se, and the link between accountability and the theory of an implied social contract.

As for the status of human rights, Bassiouni advances the multi-component thesis that equal and universal human rights: (1) constitute basic or fundamental rights; (2) that human rights have status as moral rights in the first instance; (3) that moral rights are primary, that is, (a) override legal rights in the event of a conflict, and (b) count as good and strong reasons (compare rationality) for making them legal rights (compare conformity with the moral law); and (4) that the most basic human rights are inherent and inalienable and, *ipso facto*, count as natural rights.

As an exponent of liberalism, Bassiouni focuses attention on a small class of human rights (norms), which he believes ought to be prioritized. Among these, we find accountability, defined as just desert and retribution as opposed to (barbaric, primitive and therefore uncivilized) revenge. The right to accountability emerged in the transition from the state of nature to the state of civilized society. This is where the theory of an implied social contract plays an explanatory role. The philosophical idea is that a bargain or contract, either historically or hypothetically-abstractly, was and is being (re-)signed (at each general election in a democracy) by the citizens and the government or state. In return for a prohibition of individual vengeance, the government or state (compare the ruler) promises—as a tacit (compare implied) part of the agreement—to punish violations, that is, to pursue and secure the goal of accountability in the case of, first and foremost, *jus cogens* crimes. Once the criminal has restored the imbalance, paid his dues, he ought to be free to reenter the (civilized) society on condition, of course, that he ceases to breach the contract in the future. In the final analysis, however, the right to accountability belongs to the victim, *qua* an individual; it exists for his sake.[31]

This is also true of four other rights, which enjoy the same natural law status as the right to accountability. In Bassiouni's opinion, the rights

[31] M. Cherif Bassioni, Introduction to International Criminal Law 691–98 (2003).

to, respectively, life, liberty, personal security, and physical integrity ought to be added to the list of the most basic rights.[32] Furthermore, he states that, comparatively, the right to life is supreme because deprivation of life "is the ultimate denial of human dignity."[33] Utilizing Bassiouni's civilization norm, we can conclude that the five rights, all of which belong to the class of civil and political rights, constitute Primary Regulators of the notions of "civilized law" and "civilized society." In other words, they function as paradigms as well as normative parameters from natural law theory.

A law void of human rights does not count as law proper. If the law does not recognize human rights, then it is illegitimate, although still legal in Bassiouni's opinion. But the ultimate source of validity is morality. It is more important, therefore, to determine whether the law is just or right, or per Bassiouni, civilized or humane than to know whether it is binding in a merely formalistic sense. As for the realness of human rights, this coincides with the realness of their subjects. Existing prior to any legal system, judicial decisionmaking, or application of legal rules, Bassiouni does not hesitate to acknowledge human rights even if they have not been conferred *expressis verbis*, and even if there is no court to enforce them.[34] In this way, he disassociates himself from both legal positivism and realism. Recognition is *unconditional* in that human rights continue as (at least moral) norms as long as humanity exists. That granted, protection (compare enforcement) of human rights also functions as a parameter in that it holds that a lack of accountability ultimately amounts to immorality. Therefore, while theory is important (compare formal recognition of human rights), practice (compare application of the relevant norms) determines whether states and individuals are taking human rights seriously. If they are not, then they are not doing the right thing. Morally, it is not good enough to declare, for example as politicians, that "We are sympathetic to human rights. It is just that . . . we have to make peace our goal here and now. That's important (. . . *for*

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[32] M. Cherif Bassiouni, The Protection of Human Rights in the Administration of Criminal Justice: A Compendium of United Nations Norms and Standards xxvi (1994).

[33] *Id.* at 20.

[34] *Supra* note 21, at 11–12.

For a defense of the assumption that rights and duties that are derived from *jus cogens* norms entail a sharp and significant distinction between, on the one hand, law and right reason and, on the other hand, the power interests of nation-states, see M. Cherif Bassiouni, *International Criminal Justice in the Era of Globalization: Rising Expectations, in* Global Community: Yearbook of International Law and Jurisprudence 4, 7 (G. Ziccardi Calapdo ed., 2006).

them, the politicians, who often follow a specific hidden agenda: to gain control/stay in power)." Something *must* be done, something *must* be added to the (alleged) intention, namely action so as to enable people to enjoy or exercise their rights, together with consequences for violations, so as to enable victims to have justice. On Bassiouni's account, practice, sincerely engaging in pro-human rights conduct and behavior (rather than exploiting the human rights vocabulary for rhetorical purposes), is a parameter that serves as an antidote to *realpolitik*. In a broader or wider perspective, the parameter expresses an aspiration and a requirement to close any gap between theory and practice and, in this way, Bassiouni reemphasizes the application aspect, which is intended to globalize or, alternatively, universalize the justice project. If successful, the nation-state will disintegrate as a relativist entity that can explain away or cover up illegitimate acts under the pretext of moral, political, religious, etc., dissent while referring to the collective rights to national self-determination and sovereignty.[35]

The ideal state of affairs or order can be summarized borrowing Siegfried Wiessner and Andrew Willard's goal for their policy-oriented jurisprudence: "to foster a commonwealth of human dignity."[36] The achievement of a world order founded on the recognition of equal and universal human dignity would lead to a universalist rule at the highest value level, whereas the lower value level(s) may be opened up to relativist choice.[37] Universalism would be linked with globalism and relativism with (at least typically) non-basic rights under a given state's national law. Following Bassiouni's premises, we can say that the freedom to make (relativist) law would be restricted by the Kantian Respect Principle and, furthermore, the Harm Principle whereby categories like right and duty are regulated on the basis of the seriousness of the harm that would be inflicted if legislators chose to be unreasonable. The nation-state is the most common arrangement of political territory and, consequently, the power to confer and/or withhold rights belongs to the nation-state, but it is nevertheless true that limits exist for that same power. Unprincipled legislators, that is, agents who refuse to use reason in accordance with morality (compare the Kantian Respect Principle and the Harm Principle) should not be permitted to function in the relevant capacity.

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[35] Conferred as hard law in The International Covenant on Civil and Political Human Rights, Dec. 16, 1966, 999, U.N.T.S. 171, at 173 [hereinafter ICCPR].

[36] *Supra* note 12, at 103.

[37] *Id.* at 108–09.

In the light of the previous account, we can conclude tentatively that Bassiouni takes, as far as general jurisprudence is concerned, a pro-natural law theory approach. In doing so, notions like "law," "justice," and "rights" are mediated, in content and scope, by morality. It holds that legal rights that discord with morality or, using an alternative and traditional terminology, "the conscience of humanity"[38] or, stressing rationality and cognition, the principles of "an enlightened conscience,"[39] must be disqualified as rights in the strict and proper sense, for the reasons already explained (compare the primacy of morality). For example, if the rule in South Africa were to reintroduce *de jure* Apartheid norms, then Bassiouni would de-law—from the natural law perspective—all white supremacy rights on the basis of their immorality, thus declaring that the rights are pseudo-rights.

Here it should be observed that radical versions of natural law theory would even deem immoral rights invalid as legal rights. The inference from immoral to illegal is found in, among others, Gustav Radbruch's scholarly work.[40] According to all versions of legal positivism and realism, this stance amounts to a denial of reality. As such, it can be construed as a reversal of the idea whereby right (legality = legitimacy) is might (power). For Radbruch, it holds that might (immorality) is non-right (illegality).[41] What is more, it could be argued that his jurisprudential maneuver is unfortunate in that it either erases or blurs the distinction between law and morality, thus making human agents incapable of describing the actual state of affairs and, worse still, improving it. Since the law "is not," it is an ontological and epistemological error to believe that it "is" in the first instance.

That granted, radical versions of natural law theory often refer to real-world experiences in order to clarify what is at stake and why the various premises and conclusions are operationalized. This is true in Radbruch's case. He converted from legal positivism to natural law theory as a direct consequence of having witnessed the horrors of World

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[38] *Supra* note 21, at 21.

[39] Joel Feinberg, Social Philosophy 67 (1973).

[40] Gustav Radbruch, Rechtsphilosophie 120 (1973).

[41] For Radbruch, therefore, it holds not only (as in the case with moderate versions of natural law theory) that (1) the actual level of conformity determines the level of legitimacy (compare right); it also holds that (2) the level of legitimacy determines the level of legality.

War II. To put the wrong right again, law had to be approached essentialistically. A reversal of the order of things was necessary. This is to say that morality had to reign supreme, not the so-called (legal) law. In Radbruch's view, Nazi Germany (Hitler's rule from 1933–1945) had provided the world community with sufficient evidence against the sanctity and infallibility of the legal "law." The essential *cum* real law was to be found or (re-)discovered elsewhere, namely where justice existed, and justice—so Radbruch argued—existed outside of the legal realm. With justice as the highest goal, Radbruch believed it made perfect sense to cancel or nullify legal law that "is not" also just, that is, immoral "law." In this way, he tried to resurrect a one-law notion while making this incompatible with human rights abuses that involved blatant discrimination, if not genocide, on the basis of race, as in the case with the Jews and the Holocaust. Only natural law theory could equip him with the jurisprudential tools for his project. However, Radbruch was not alone. The Nuremberg Tribunal,[42] which is one of the first instances of "a direct enforcement" system,"[43] can be interpreted as a consensus to embrace natural law theory in order to eradicate The Evil that had penetrated, polluted, and corrupted the legal and political system during the Nazi era. The leading Nazi officers, who were accused and prosecuted, were perceived as guilty of the most serious kinds of wrong-doing in spite of the (legal) fact that their actions or omissions had not counted as (legal) crimes under the system they had served. Nevertheless, morality required, so most of the judges thought, that they be treated and tried as criminals, the worst sort—those who had committed crimes against humanity. To prosecute and punish them was an instance of what might be called the "Justice Must Be Done" Principle. Critics counter-argued that the Nuremberg Tribunal was merely "Victor's Revenge," the exact opposite of justice. Realists and legal positivists, at least radical ones, belonged to this group.[44]

Radbruch's premises pertaining to validity and reality (compare the idea that legitimacy determines legality) is a step that is too radical for

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[42] An abbreviation for The International Military Tribunal to Prosecute the Major War Criminals of the European Theater, sitting at Nuremberg. This was established by the London Treaty of August 8 1945. *See supra* note 24, at 83.

[43] *Id.* at 85.

[44] The issue of retroactive punishment and legislation will not be pursued in this chapter. However, if substantive justice is primary, it follows that any (lack of) formal fairness must give way to a correction, that is, restoration of balance, in circumstances where heinous human rights violations have been committed.

Bassiouni. His position falls under the moderate version of natural law theory. However, what all natural law theories have in common, as far as general jurisprudence is concerned, is the view that justice ultimately overlaps with legitimacy (and, for Bassiouni, right reason) as opposed to legality. What causes the disagreement is the issue of what to make of an empirical gap or overlap between morality and law. According to moderate versions of natural law theory, we have to separate (*not* conflate, like radical natural law theory) the moral law or morality (compare legitimacy) and the legal law (compare legality). In other words, moderate natural law theorists agree with legal positivists that there is a distinction between law, defined as the legal law, on the one hand, and, on the other hand, morality. To support their interpretation, they argue that the two kinds of law are different because they have different sources (compare the genetic aspect) and that the kinds of sanctions that follow from possible breaches are different too: punishment in the form of imprisonment, fines, or loss of life *versus* disapproval, ostracism, banishment or ex-communication (compare the systematic aspect).

Morality introduces normative requirements. That granted, theorists like Bassiouni do not endorse a reversal of Radbruch's reductionism. In other words, moderate versions of natural law theory disagree with legal positivism that law "is" legal law. As they see things, morality is a real law, however metaphysical or non-scientific from an empirical perspective. Furthermore, they disagree that justice can be reduced to a judicial notion, and even if they encounter combination doctrines, such as Hart's position, which includes natural law components, *consistent* natural law theorists will claim that justice, in essence, functions as an objective and absolute demarcation criterion whereby the degree of proper or strict lawfulness and/or rightfulness can be measured. Consistent legal positivists, on the other hand, have to attach proper or strict lawfulness (as well as legal validity and reality) to legal law regardless of how absolutely unjust/illegitimate it is. To accept the idea that legal law loses its status as law proper/strict through immorality is to adopt a line of argument or reasoning that is only compatible with natural law theory. Conceptually and normatively, the distinction between natural law theory and legal positivism stands as meaningful as well as significant for the purpose of jurisprudential classification.

Unlike Hart, Bassiouni concludes that something can exist as a legally valid rule without, at the same time, counting as law in the strict and proper sense. For Hart, on the other hand, this step amounts to a

denial of reality because, ultimately, a fact is a fact (i.e., legal law), and what ought to exist counts (merely) as what ought to exist meaning, once again, that the judgment or verdict "morally improper" cannot de-law (legal) law. In other words, morality (compare justice) can function as a test for "good law" as opposed to "bad law." However, it does not follow that "bad law" is less law than "good law. Instead, it follows that "good law" refers to a morally superior system, which thus entitles and/or obligates us, qua agents, to overturn the existing rule. The deeper philosophical point is that "bad law" is not cancelled simply because it is what it is. Although Bassiouni agrees with this, he still thinks that legal law, which is disqualified as law in the strict and proper sense, loses its force as law, however valid and real in the formal sense. Furthermore, if it loses its force, it also loses it capacity to bind its subjects, thus freeing them from its illegitimate permissions and/or prohibitions. Needless to say, the (bad) law may still be enforced in spite of the fact that it cannot, objectively speaking,[45] be recognized as law in the strict and proper sense, which is also why there would be no reason for agents to comply with it. Unlike Hart, Bassiouni's draws a distinction between enforcement and recognition.

The disagreement between Bassiouni and Hart can be further evidenced by their theoretical dispute over international law as falling, correctly or incorrectly, under the notion of real law. Because legal positivism reapplies national law as a paradigm or model, it almost automatically undermines the status of international law, relegating it to the realm of either inferior law, pre-law or no law, whereas natural law theory extends the notion of proper, strict, and/or real law to any normative realm that secures sufficient correspondence or conformity with human rights and the substantive notion of justice, including international law. In Bassiouni's case, international criminal law cannot, for example, be disqualified as law simply by referring to its customary nature. In other words, law that is not codified positivistically as hard law is still law (proper). At the same time, however, he seems to acknowledge that a certain predicament may arise by virtue of the legal expectation that norms should not be recognized as "established" until ratified or acceded to in a treaty.[46] It is unclear if the predicament in question stems from

[45] Objectively means morally-objectively or naturally-objectively, that is, the commissions or omissions that conform/discord with the law of humanity—as opposed to the commissions or omissions that conform/discord, empirically, with the legal law. *See supra* note 24, at 87.

[46] Note that a legal expectation is different from a legal reality. *See supra* note 21, at 18.

Bassiouni's own requirement that enforcement must be effective or the factual lack of relevant and adequate legal norms or even the normal non-compliance practice of states.[47] However, one thing is clear: Bassiouni believes it is possible to bridge the gap "somewhat" by scholarly writings, such as his own pro-human rights advocacy.[48] What makes his idealism, which transforms legal experts into sources of law (in agreement with Orentlicher), particularly interesting is his hesitation to depositivize the notion of bindingness (compareeffective enforcement in a court of law).

If the predicament is real, there is a problem. This would then be enhanced by the paradox, at least apparently, that accountability, according to Bassiouni, has to do with a certain morally normative condition or requirement of an enforcement practice that imposes duties that are correlative to the rights "established," as it were, in the implied social contract and that, *ipso facto*, are binding regardless of the specific time and place coordinates. In the event of non-performance, therefore, that is, commission of natural law injustice, we are confronted with a wrong that stands; neither time nor place can relativize its inherent criminality. Similarly, a right action remains morally intact, that is, preserves its properties as being reasonable by virtue of being just (not an action that inflicts serious harm or disrespects others) regardless of external variables. As already pointed out, right- and/or wrong-doing, manifests itself objectively as something that is independent of the individual's subjective beliefs.[49] Furthermore, morality applies absolutely inasmuch as there is no competition, qualitatively, between right and wrong and, consequently, right is right and wrong is wrong regardless of relativism's denial of this. From the point of view of natural law (theory), everybody everywhere (universally) is subject to the law, which can adjudicate, using our common reason and conscience as means of communication, in the event of grievances or disputes. The action, choice, or conduct that (best) conforms with the natural law is the one that is objectively right or just. In the event of doubt or insecurity, we have to reapply our human capacities, say, by engaging in dialogue, discourse and discussion, until we are in fact able to determine with a high degree of certainty (ideally, with the discovery of a truth) that a particular choice is superior to its

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[47] If this is treated as an expectation, we can disassociate it from Bassiouni and defeat the (realist) idea that norms, for their bindingness, depend upon the political will to enforce these as facts.

[48] *Supra* note 46.

[49] *See supra* note 45.

alternative. If agents find X (rather than Y) to be right but still feel that something is wrong, then they must consult their consciences, for they may not have been willing to give due consideration to certain interests that are at stake, and, if this is the case, they are guilty of not having cared enough about the people who are otherwise deserving. It takes a good will to get things right. And, ultimately, a will cannot be good unless it extends sympathy to mankind as such.[50] Theoretically, it is important to note that Bassiouni's position, as far as the notion of due consideration is concerned, can be construed as an instance of the broad stakeholder theory. This is to say that, as a starting point, the different interests of different stakeholders deserve impartial consideration, and this is why the party that is responsible for the decision-making process should, according to *the Chicago Principles on Post-Conflict Justice*, "balance" these.[51] Furthermore, Annan agrees with this while emphasizing that all individuals or groups have something fundamental at stake through the fact that their interests will be substantially affected by the outcome.[52]

The duties that correspond directly to equal and universal human rights concern non-intervention. In order to be able to secure the basic interests that are involved in the rights to life, liberty, personal security, and physical integrity, other people have to abstain from certain actions. Given that the impositions boil down to omissions, the correlative duties in question are negative. It is in the event of non-performance of these that secondary duties must be imposed. In practice, these obligate other people to take positive action to enforce the primary duties and, given their content and nature, they should fall under one particular institution: the court. This brings us back to the apparent paradox.

Because legal justice in the form of prosecution in a court of law, national or international, *ad hoc* or permanent, is a condition (it is necessary) and a requirement (it ought to be a reality, because it is necessary) for accountability, at least in the case of the most serious types of *jus cogens* crimes, namely (1) genocide, (2) crimes against (the law of) humanity,[53] (3) war crimes, and (4) torture, it seems true to claim that there is jurisprudential tension between the two main positions involved in

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[50] Bernard Williams, Morality: An Introduction to Ethics 11–12 (2000).

[51] *Supra* note 1, at 4.

[52] *Supra* note 6, at 6–7, 9.

[53] M. Cherif Bassiouni, Crimes Against Humanity in International Criminal Law 123, 124–76 (2d rev. ed. 1999).

Bassiouni's analysis of international criminal law, respectively, natural law theory and legal positivism. Furthermore, it seems to be the case that the tension, ultimately, favors legal positivism rather than natural law theory.

The rationale can be formulated along the following theoretical lines: on the one hand, Bassiouni takes seriously international criminal law's explicit recognition of human rights norms while concluding that enforcement *must* follow (compare legal justice as a condition/requirement)—otherwise impunity does (and that is wrong!)—whenever violators have dehumanized and thus victimized fellow human beings. Hence, there can be no accountability without legal justice and, furthermore, no substantive justice without accountability. On the other hand, he does not take the relationship between law and morality for granted, meaning that he does not expect, uncritically and unrealistically, that the law will always accord with morality that is, in turn, the reason why his position incorporates (a consistent version of) natural law theory's notion of universal justice as a transcendental trump for legally positive law.

That said, we do not, in fact, have to infer any philosophical first-order inconsistency from Bassiouni's combination of the two sets of theoretical elements, which have traditionally been treated as antagonisms. Instead, we can point to the law that is, i.e., the system of legally positive norms as a factual expression of the law that ought to be and that, for the same reason, serves as a direction post to what (ultimately) constitutes a good order and, furthermore, what is owed to right-holders, qua victims, on the basis of their dignity. If victims of serious human rights violations were deprived of accountability, the law would negate *de jure* and *de facto* humanity and civilization, and, consequently, the law would degenerate into a rule of might, as opposed to a rule of law.

Making the various jurisprudential pieces fall into place will be the aim of the next section. It will become evident that at the level of general jurisprudence, there is really harmony and not conflict.

II. ACCOUNTABILITY AS A POST-CONFLICT JUSTICE ISSUE

As one of the most prominent post-conflict justice experts, Bassiouni is (as mentioned earlier) a co-architect of the ICC, which entered into force on July 1, 2002.[54] In his capacity as an international lawyer, he mas-

[54] Rome Statute of the International Criminal Court, U.N. Doc. A/Conf.183/9* (July 17, 1998), as corrected by the *procès-verbaux* of Nov. 10, 1998 and July 12, 1999, U.N. Doc. PCNICC/1999/INF/3 (Aug. 17, 1999).

ters the judicial, technical, and diplomatic skills, which are necessary for the engaged and, some would add, conscientious part of the legal profession that works for pro-human rights reforms at the inter-state level. However, as we saw in the previous section, Bassiouni also makes a contribution to pure theory and, with this, to general jurisprudence and broader moral and ethical considerations. This part of Bassiouni's work continues the cross-cultural and global negotiations in a philosophical—but no less political—context, in the final analysis, aiming at securing universal human rights with correlative and equally universal duties to enforce the rights in question. The ICC plays an important role for this goal inasmuch as it is seen as a natural forum and medium for achieving the kind of justice which Bassiouni wishes to promote.

The following paragraphs offer an account of the secondary and positive duties that are correlative to the right to accountability and, furthermore, the instrumentality of accountability itself. Analytically, accountability has a double status. Accountability is an end in itself, but it is also a means for various other goals, including: (1) deterrence of future violations (the preventive goal, which is the traditional criminal law goal); (2) recognition of victimization (the modern international criminal law goal, which focuses on integrity as a philosophical-ethical-epistemological notion of restoration of wholeness that, for its realization, includes decrying the wrong); (3) reparation (which includes restitution, compensation, rehabilitation, and satisfaction and non-repetition); (4) truth; (5) pluralistic democracy; (6) reconciliation (as a national, regional, international, and indeed, at least hypothetically, a global goal); and (7) peace. All of these public policy goals, it should be observed, are also defined in terms of duties.[55]

Even as an end in itself, accountability is intended to achieve a certain goal, namely the punitive goal that overlaps with legal justice and, at the same time, substantive justice. The means for this goal consist of a list of duties among which some are so essential that they are deemed "necessary."[56] That said, the term (necessary) transcends the instrumentality of the various actions and steps. The deeper philosophical point is that the duties are necessary *because* they are owed to the victims who possess the right to accountability. In other words, there is a natural debt to victims on account of their loss of dignity, which tilts the weight-scales of

[55] *Supra* note 31, at 724. *See also supra* note 16, at 13, 15–19, 22, 26–27.

[56] *Supra* note 16, at 26.

humanity itself. In order to, at least in one sense, reenter the species, the balance must be restored; that is, the individual victim must be recognized as a right-holder.[57] And, the right to accountability per se exists in order to protect the victim in this capacity, as an end in himself. As accountability puts a wrong, the omission of which the victim already has a right to, right again, part of its goal is to (re-)assert the original right. Functionally, accountability is a *meta*-right, and this status also holds at the deepest logical and analytical level. Normatively, furthermore, accountability is something that ought to be secured because it is the just thing to do. So, First Things First—as a matter of principle.

Commissions of *jus cogens* crimes such as genocide, crimes against humanity, war crimes and torture, as defined by international criminal law, impose duties as necessary consequences. Ranking among the most serious crimes, these violations of *jus cogens* prohibitions are also violations of two of the main ethical principles, namely the Harm Principle and the Kantian Respect Principle. Whereas torture results in loss of personal security and physical as well as mental integrity (if the torture also affects the victims psychologically), genocide, crimes against humanity, and (at least typically) war crimes unrightfully deprive fellow human beings of their life. Freedom and liberty may also come on the list of values or core rights, which are taken from victims, perhaps together with their property and, ultimately, their human dignity. There can be no harm greater than this. And, the more the deprivation serves an end goal or purpose that does not involve any consideration of the victim's individual well-being or good, the more the victim is treated as merely a means, subjecting him to the risk of absolute *de*valuation, *de*gradation or *de*humanization; being "recognized" as nothing, not human; and so there no longer is a reason to impose limits as to what can be done against him or, simply and brutally and primitively, "it." Consequently, the living creature in question loses all his rights, leaving him without protections of his most fundamental or basic interests. In this way, there is an overlap between the Harm Principle and the Kantian Respect Principle. The relationship between these two principles, at least in the context of international criminal law, is that of functioning as mutual cause and effect. Given that Bassionui's universalism, to be consistent, must guide his general normative theory, an analysis of cause and effect precludes all

[57] This goal and duty is logically prior to the goal/duty to recognize the victim's right to integrity because recognition of humanity constitutes the rationale for explaining, however indirectly, victimization as a separation from one's original source or kind of being.

attempts to apply concentric-circle morality.[58] No particular individual or group can be primary, meaning that Bassiouni requires that principles and norms (1) apply equally, so as to say that (as a minimum) *the basic interests* of people ought to be considered on an equal footing, and that principles and norms (2) ought to apply universally, that is, the concept of "people" must be defined as "everybody everywhere." To comply with these requirements is, in effect, to obtain authority as a moral or, *mutatis mutandis*, legal agent. To give less than equal consideration is to disrespect the people who are left out of the moral/legal equation, as if they do not count the same from the point of view of human dignity. However, on the weight-scales of the species, no human can "lose" by being found too light: everybody everywhere possesses the same (amount or degree of) humanity. There is, in one fundamental or basic sense, a natural balance. Those who deny this reality, betray humanity itself. Those who take the extra step to act on their misconceptions about humanity and, for this reason, mistreat a human being (because they see him) as nothing but, say, "an inferior creature" or "an unworthy enemy" or "an animal," turn into human rights violators.

In the context of stakeholder theory, as applied to *the Chicago Principles on Post-Conflict Justice*, the notion of human dignity does not end with the death of particular victims or groups of victims. According to Principle 24, mechanisms of memorialization "should be designed to preserve and honor the dignity of victims and their families."[59] As part of the commitment to memorialization, education is included. More precisely, the state "should integrate the documentation and analysis of past political violence into the *curriculum* of the national educational system and otherwise seek a broad popular engagement with the legacy of past violations" (compare Principle 23).[60] In the case of *the Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, the state is perceived as being under a duty of remembrance "aimed at restoring victims' dignity."[61] This duty is correlative to the right to repa-

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[58] HENRY SHUE, BASIC RIGHTS. SUBSISTENCE, AFFLUENCE, AND U.S. FOREIGN POLICY 134–39, 146–50 (1980).

Shue distances himself from concentric-circle morality arguing that human rights ethics is incompatible with the kind of reasoning that makes insiders, so-called First Circle People, one's primary moral end.

[59] *Supra* note 1, at 16.

[60] *Id.* at 16–17.

[61] *Supra* note 2, at 4, 9, 14.

ration. Although the state is also bound by that same duty, to assume the burden of guarding against "the perversions of history that go under the names of revisionism or negationism,"[62] there is no mentioning of the right to truth in terms of a broader educational right. That said, *the Set of Principles* is unique by conferring the right to know (compare Principle 3) which implies the right to truth (compare Principle 1), although the first mention is restricted to the circumstances and outcomes of particular rights violations, whereas the right to truth encompasses access to all relevant facts that explain the reasons for past and systematic violations. The right to truth is also declared in *the Chicago Principles on Post-Conflict Justice* and, once again, as a right that is oriented toward the past (compare Principle 4). As the "truth of past violations" is part of the right to education, the full right is a right to truthful education about the past (compare Principles 23 and 24). While Annan does not address the issue of truthful education in his 2004 report to the Security Council, his ideological perspective would, if a right were declared, favor inclusion of structural violence, in addition to political violence. Concerning the interpretation of violence, *the Chicago Principles on Post-Conflict Justice* is narrow in comparison. On the other hand, Annan takes the step from the bad "ism" that typically underlies an authoritarian regime, for example, racism, as was the case in Nazi Germany and the Holocaust as well as South Africa and its Apartheid system, to the mal-distribution of wealth, which describes the core of structural violence.[63] However, it still holds that the main emphasis, for the purpose of providing an account of accountability, is on *jus cogens* crimes, all of which fall under the notion of political violence.

According to Bassiouni, the paradigm cases of *jus cogens* victimization result in at least six main sets of international criminal duties, namely: (1) to prosecute or extradite accused perpetrators; (2) to provide legal assistance to investigating and prosecuting bodies, whether international or national; (3) to resort to international jurisdiction whenever other bases of jurisdiction are insufficient to secure the goals of prosecution or extradition; (4) to punish—subsequent to prosecution that results in guilty convictions—perpetrators; (5) to eliminate immunities of superiors up to and including heads of states; and (6) to abstain from applying statutes of limitations. All the listed duties, from (1) to (6), are absolute enforcement duties and, *ipso facto, not* extinguishable.[64] Therefore, the First

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[62] *Id.* at 4, 16.

[63] *Supra* note 6, at 3–4.

[64] *Supra* note 24, at 69–70. *See also supra* note 16, at 17.

Things First Principle encompasses (1) through (6), although the duties are not always equally necessary in real-world cases. For example, if two superiors have been arrested and charged with crimes that present one of these, namely a state leader, as substantially more culpable than the other, say, a senior executive, who may even have access to crucial information about his higher-ranking fellow criminal, then the circumstances may make it more necessary to plea bargain than to prosecute, especially since this may prove counter-productive (the worst offender may not be convicted as a result of a non-discriminatory practice, thus maintaining rather than restoring the imbalance that was originally introduced through the human rights violations[65]). That said, all the listed duties have one characteristic in common: they require, for their fulfillment, a legal court system.

In principle, the listed duties or obligations count as *obligatio ergo omnes*, which means that impunity cannot be granted. Maximization of accountability and, with this, justice, depends upon enforcement, that is, a practice of consistent and predictable compliance with the duties in question.[66] Duties are means. And, as means of protection, they are required by rights, in the final analysis, to minimal decent treatment, to the restoration of dignity, and to expect that the legal order, whether national or international, shall judge and punish violators (of *jus cogens* norms) and provide the victims with the right to seek and, where meritorious, to obtain civil redress.[67] Rights constitute the condition and indeed the conceptual and normative foundation for accountability. Without prior rights, we would have no reason to talk about accountability *versus* impunity in the first place. As Bassiouni explains: "It is precisely because of the nature of these norms and their inderrogability that certain legal consequences attach," in other words, that duties to prosecute, punish, etc., must follow if and when *jus cogens* crimes have been committed.[68] It holds, as a general principle: "If *jus cogens* crimes have been committed, then it is necessary to restore the imbalance."

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[65] *Supra* note 16, at 20.

Note that a full implementation of the legal maxim *aut dedere aut judicare* entails, *inter alia*, recognition of foreign penal judgments, and increasing inter-state cooperation in the freezing and seizing of assets that derive from criminal activity, transfer of sentenced persons, and the incorporation of these procedural modalities into domestic codes of criminal procedure. *See supra* note 24, at 104.

[66] The question is if the relevant rule-application is impartial, *stricto sensu*, since the duty to eliminate immunities holds only for a small power elite?

[67] *Supra* note 31, at 693–94.

[68] *Id.* at 701.

Concerning the origin of rights and correlative duties, there are two important points to make. First, accountability is rights derivative in a double sense. Because violations of *jus cogens* norms amount to violations of the rights to life, liberty, personal security, and physical integrity, these constitute what is best described as "deeper rights," that is, rights that exist at a level prior to the right to accountability. Secondly, addressing accountability as a human rights issue commits Bassiouni to emphasize the rights to minimal decent treatment, to the restoration of dignity, and to expect that the legal order, whether national or international, shall judge and punish violators of *jus cogens* norms and provide the victims with the right to seek and, where meritorious, to obtain civil redress. As rights, they have the same function as life, liberty, personal security, and physical integrity. This is to say that they are "mother rights;" they are, logically and analytically speaking, the reasons why accountability is and ought to be conferred as a right, thus establishing accountability as a *meta*-right. In comparison to life, liberty, personal security, and physical integrity, however, the more general social contract theory rights are the deepest ones. The two most general rights to minimal decent treatment and the restoration of dignity, respectively, are particularly important because they overlap with the Harm Principle and the Kantian Respect Principle. Minimal decent treatment means that agents ought to avoid inflicting serious harm on fellow human beings and, furthermore, ought to treat these with respect. Fellow human beings deserve to be treated as ends in themselves. If they are reduced to means merely for other individuals' ends, or alternatively, for the purpose of promoting the good of a specific group or society as a whole (compare utilitarianism), then the wrong ought to be put right again (punished, redressed, etc.). Why? Because the victims have equal rights to be treated with decency and respect on the basis of their humanity. *Qua* and only *qua* human beings, they possess dignity, and this is the Ultimate Source or Origin of Entitlement; the reason for all the rights, including the right to accountability. From the point of view of human rights law, legal or moral, we cannot go any deeper.

Rights violations have, like rights, their origin. According to Bassiouni, the origin of *jus cogens* crimes is societal. It may be due either to international, non-national, or purely internal armed conflict, or alternatively,

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It should be noted that Bassiouni tries to accommodate the general uncertainty in international criminal law pertaining to the relationship between duties and rights. *See supra* note 21, at 25. Given Bassiouni's own theoretical emphasis on the consequences that flow from *jus cogens* crimes, the authors of this chapter choose the most logical approach. If there are no human rights prior to non-derogable duties, then the legislation itself seems misleading.

political violence as a result of a tyrannical regime. A society without *jus cogens* victimization through armed conflict or, as is the case with political violence, institutionalized oppression that withholds even the most basic rights from one or more classes or sub-groups of people simply because they are members of these, constitutes Bassiouni's minimum condition for post-conflict legitimacy. In the context of the implied social contract theory, we can say that the political ruler's right to rule, together with his credibility and good will, depends on his compliance with the promise to protect people against the most serious types of human rights-violations. The insanity *cum* inhumanity, which demands the pain and suffering, if not the premature and undignified death, of innocent people (be they non-combatants or, more generally, citizens or fellow human beings with the "wrong" characteristics pertaining to race, nationality, gender, age, religion, culture and language, and so forth) must stop therefore in the name of humanity and civilization. Where the most basic human rights have gone unprotected, where it was (made) impossible for people to enjoy or exercise their natural entitlements, or alternatively, where they were deprived of rights enforcement, only an excuse or apology is possible, conceptually and normatively. The proper use of this category implies that a wrong has been committed, whereas a justification rests on the assumption that the alleged "violation" was right in the circumstances. In the case of *jus cogens* crimes, a justification is excluded beforehand. In other words, *jus cogens* crimes can never be right. Never! This is why the international criminal duties are as absolute as the correlative rights, which are anchored in the notion of human dignity. What is more, the status of basic human rights is recognized in conceptual and normative abstraction from the categories of "duties" as well as "powers," and "remedies." In this way, Bassiouni can be read as drawing a distinction between, respectively, rights recognition and rights protection.[69]

Theoretically, Bassiouni must, to maintain consistency, side with non-positivist thinkers like, for example, Neil MacCormick in his view of the nature of the relationship between rights on the one hand, and, on the other hand, correlative duties, powers, and remedies. Turning against Jeremy Bentham and Hart, MacCormick shows that rights *stricto sensu*, namely claim rights, are logically prior to the duties, powers, and remedies correlative thereto. It follows that the doctrine of logical correlativity whereby it holds that in order for A to have a claim right, there must exist—as a logically necessary condition—at least one other person, B,

[69] This follows from the previous distinction between enforcement and recognition, which is applied to the status of the law itself.

who has a correlative duty toward A, is false. In Hart's case, MacCormick also disconfirms the assumption that discretionary powers constitute a minimum condition for rights possession meaning that absolute duties do not result in correlative rights. Consequently, it is not true that rights result from powers to control correlative duties and/or duties to fulfill rights so as to make the right-holder either a beneficiary from duty-performance (compare Bentham) or a duty sovereign (compare Hart)). It is the other way around: powers and/or duties result from rights. By reversing the relationship between rights and duties, theorists like MacCormick and Bassiouni are, unlike Hart, able to argue that the criminal law—which is best described as the realm of duties (not to kill, rape, rob, etc.) that are non-derogable or *not* extinguishable through the individual's choice—confers rights. It should be observed that the exclusion of duty assumptions as rights explanations is the single most significant difference between, respectively, the Choice Theory (compare Hart's position) and the Reversal Doctrine (compare MacCormick and Bassiouni's view). Furthermore, explanations that serve as rights inclusions should be given attention on account of the fact that claim rights belong to the core of the class of rights.[70] In Joel Feinberg's homage to their special status, some of the features that Bassiouni highlights, are repeated:

> Legal claim-rights are indispensable valuable possessions. A world without claim-rights, no matter how full of benevolence and devotion to duty, would suffer an immense moral impoverishment. Persons would no longer hope for decent treatment from others on the ground of desert or rightful claim. Indeed, they would come to think of themselves as having no special claim to kindness or consideration from others, so that whenever even minimally decent treatment is forthcoming they would think themselves lucky rather than inherently deserving, and their benefactors extraordinarily virtuous and worthy of great gratitude. The harm to individual self-esteem and character development would be incalculable.[71]

It is interesting to see how Feinberg's characterization closely matches Bassiouni's interpretation of *jus cogens* norms as holding "the highest hierarchical position among all other norms."[72]

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[70] *Supra* note 17, at 177.

[71] *Supra* note 39, at 58.

[72] *Supra* note 21, at 18.

Looking at international criminal law from Bassiouni's point of view, a theory that declares "no rights!" in the case of *jus cogens* crimes, which include—in addition to genocide, crimes against humanity, war crimes, and torture—slavery and slave-related practices, systematic and widespread rape, and extra-judicial executions, can only be said to be radically defective.[73] These serious wrongs constitute violations of human rights, as recognized or conferred *expressis verbis* by—to list some of the legal paradigms—the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Discrimination Against Women, the International Labor Conference Convention Concerning Indigenous and Tribal Peoples in Independent Countries, and the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities. A theory that cannot make room for the most fundamental rights in terms of proper or strict rights amounts to a blatant denial of reality. After all, the use of the rights-terminology is indisputably indispensable because of the very nature of the subject matter.

The above point is of paramount significance. If duties correlative to rights are legal consequences of those same rights, then rights are primary (in addition to being logically prior) in the sense that rights function as energy constants that emit normative stimuli, *in principium ad infinitum*, to duty-bearers who are hooked into place as "must performers" in accordance with the circumstances. Realistic explanations for duty omission are excluded as bad excuses because the criterion of fulfillability does *not* depend on good *versus* bad will but, on the other hand, on whether it is or is not—as a matter of objective (be it objective-economic, objective-social, and so forth) fact—practically possible to provide or to do the things that are needed. Philosophically speaking, this position makes most sense of duties. Certainly, exponents of the Choice Theory (compare Hart) have difficulties explaining the existence of duties. Why impose duties in the first place? They cannot answer this crucial question because the doctrine of logical correlativity, to which they subscribe, boils down to a dogmatic "duties first" axiom. The "rights first" advocates, on the other hand, can explain duties adequately (namely as norms that follow from rights) as well as rights per se (namely as means of treating the

[73] A complete list makes room for piracy "for historical reasons." Furthermore, terrorism and drug trafficking are on the list of possible future norms. *See supra* note 31, at 701.

individual as an end in himself (compare the notion of dignity). Regardless of what Hart maintains (that criminal and absolute duties do not result in correlative rights because they deprive the right-holder of choice), there are *de jure* individual human rights (because they protect fundamental or basic interests), *inter alia*, to not be killed as a civilian in internal or international conflicts, to not be victimized in ethnic cleansings, to not be subjected to torture, etc., correlative to the duties in question (compare international *expressis verbis* rights recognition). Thus, duties play a consequentialist role. This conclusion extends to directly correlative, primary, and negative duties to fulfill the negative requirement to omit action, to not interfere, to not intervene, to not attempt to regulate behavior but, instead, leave the right-holder alone so that he is free to enjoy or exercise his rights in practice.

Bassiouni's link between the positive and absolute duties of enforcement and a court of law is necessary (at least in the case of the most serious types of *jus cogens* crimes) because it is The Only Way to secure the kind of accountability that he perceives as a condition and a requirement for proper legal and/or moral reaction to violations. Judicial accountability must be implemented as a no-choice step toward a Good Order post-conflict society. A compromise would testify to the opposite of consideration, namely indifference toward the victims of harm and disrespect. Strictly, there is no acceptable alternative to taking action *for* the victims and *against* the perpetrators in a court of law. In terms of priority, therefore, the First Public Policy Goal is "No Impunity!" and this is not and ought not be open for further discussion or dialogue in the case of genocide, crimes against humanity, war crimes, and torture. In light of the fact that *jus cogens* victimization has increased in intensity, together with the number of conflicts since World War II, there is an accumulative harm factor, which proportionally reinforces the need to secure accountability.[74] The logic of justice is as follows: the more serious the harm is (empirically), the more it ought (morally) to be the case that (legal) enforcement of human rights norms, that is, prosecution and punishment of perpetrators in a court of law, takes place.

The majority of post-conflict justice experts and scholars support the ICC as an international court that is geared to the special task of achieving judicial justice in a forum that is ideologically dedicated to universalism and humanism. In comparison to other post-World War II tribunals and institutions, the ICC's advantage consists in its ability to

[74] *Supra* note 24, at 89.

provide a more logistically and legally effective accountability-securing system. In addition to being a permanent court, the ICC takes the principle of universal jurisdiction seriously. In connection with *jus cogens* crimes, this means that any state with custody of an offender who is accused of genocide, war crimes, and crimes against humanity can (or, *mutatis mutandis*, ought to) try him simply because of the gravity of the commissions in question regardless of nationality and regardless of the fact that crimes against humanity fall under customary law. As for genocide, furthermore, the ICC's power implies a mandate to exercise inherent jurisdiction whenever a party to the statute is also a party to the 1948 Genocide Convention.

As a co-architect, Bassiouni's goal is to end *realpolitik* and begin a New No Impunity Era that maximizes justice. Legal inadequacy, either through ineffective enforcement or through a complete lack of measures, mechanisms or strategies for rights protection, is something that adversely affects rights. Having rights, which are formally recognized but which are not backed up by legitimate might or force, that is, enforcement in the event of violations is, in one important sense, pointless. As alluded to earlier, if the victims stand powerless, then this means that a new wrong has been committed against them. While they "have" rights, the rights are without practical value or worth. It is, in fact, justice that is sacrificed, and this can never be right because of the very nature of what is at stake. What is more, Bassiouni extends his No Impunity Policy so that it holds that "neither *de jure* nor *de facto* impunity can be provided to the transgressors of these *jus cogens* international crimes."[75] Despite its jurisprudential ambiguity, the statement provides a clear political guideline to action against perpetrators. There is not and ought not be any escape possible from accountability. This is to say that the state has a duty to enforce the enforcement duties. In other words, the state must provide the remedies. Without these, rights are allowed to exist without proper protection, which counts as a crime too. Analytically and logically, therefore, it follows that the duty to enforce the enforcement duties is a *meta*-duty that matches accountability at the deepest philosophical level of the implied social contract theory, namely where the ultimate norms and/or principles are outlined, decency, dignity, the Harm Principle, the Kantian Respect Principle, humanity, civilization, etc. The duty to enforce the enforcement duties may and may not be part of written law; it may "only" be a tacit convention that is as soft as morality but that is nevertheless complied with in practice, thus establishing an analogy with customary

[75] *Supra* note 31, at 730.

law. If *de facto* is construed as extra-systematic, the *meta*-duty in question has to be considered binding even if it may "only" be substantiated and supported by the ultimate norms and/or principles without a behavior that translates into a normal state practice. The point is that morality, however pure, has more weight than normal state practice, however real.

Partly for the reasons stated above and partly as a pragmatic outcome of the ICC's specialized responsibilities, first and foremost its focus on prosecution and punishment of superiors, it is crucial to rehabilitate the national legal system. This public policy goal, which is also presented as a duty, can be fulfilled either by reforming or radically restructuring the system in order to secure an independent and effective judiciary, which is a pre-condition for a rule of law, as opposed to a rule of mere might. In reality, therefore, there are two goals rather than one. The national legal system must be geared to (1) the task of securing accountability at the state level so as to be able to convict lower-ranking criminals, who constitute the numerically larger group of human rights-violators. Furthermore, it is necessary to (2) secure formal justice because, without this, a fair trial is not possible.

The question is, however, whether Bassiouni's position whereby the existence of remedies means that we are taking human rights as seriously as is possible clashes with the Reversal Doctrine and, instead, introduces a point of consensus with Hart's more traditional and positivist view on rights and remedies.

Hart's definition of claim rights in the full sense pre-supposes the existence of a court system. Like Hart, Bassiouni is a pro-court theorist. Furthermore, like Hart, Bassiouni presents traditional arguments such as, deterrence, which is, as mentioned earlier, listed as both a public policy goal and a duty. From the point of view of general jurisprudence, however, we have to be very careful not to link law and remedy too closely in Bassiouni's case. There is a substantial difference between saying, with the Choice Theory, that remedies are required analytically in order to grant A status as a right-holder and, with the Reversal Doctrine, that remedies are required normatively or, per Bassiouni, legally because they are necessary means of protecting the right-holder, A, as an end in himself. It holds, therefore, that remedies are not redundant. In actual fact, it can be argued that the more fundamental rights are, the more remedies for their protection does (or, *mutatis mutandis*, ought) the law provide for. The ICC has, in its present operational form, introduced a historically unprecedented set of remedies and yet, and this is the single

most essential point, there is no basis for arguing, for example, that "the realm of international human rights was not law proper prior to the ICC" (compare positivism). What the existence of the ICC signifies is that the whole parameter of correlative duties will, at least ideally, be enforced in a court of law. In other words, rights protection is intended to reach the top level of what Bassiouni describes as "Stage 5—The Criminalization Stage"[76] where the law transcends not only geographical borders but also national sovereignty, where the *locus standi* of individuals is secured, and where human rights violations are penalized in a proportionate relationship with their gravity, that is, inhumanity. However, unlike the Nuremberg Tribunal, the ICC will not impose the death penalty because it leads to (1) a moral contradiction that adversely affects the level of civilization, and because of its lack of (2) effectiveness as a legal deterrent.[77] In return as it were, international criminal law applies directly to individuals, by analogy to national law. Thus, institutions like the ICC help make the international system less state-centric (compare non-positivism) by providing the measures for prosecution and punishment of individual criminals.

While Bassiouni agrees with MacComick's general line of thought in regard to the nature of the relationship between rights and duties, his approach to duties and remedies is different. Analytically, he treats them as two distinct categories. The duty, which is correlative to the right to accountability, does not necessarily translate into a remedy, which, in turn, can take the form of different modalities. The duty can be subdivided into redressing all aspects of the wrong committed, be they moral, mental, or material, such as a duty to an apology and to compensation. Whether or not the duty translates into a remedy, depends on the external circumstances—what is and is not practically possible in the real world. If, and only if, the duty to undo the wrong does in fact translate into a remedy is it true, in Bassiouni's opinion, to say that the right to accountability is (properly) protected.

Although the real world ultimately determines what remedies are possible, the ICC offers avenues whereby economic wrongs can be redressed through reparation, restitution, or compensation—public policy goals that also count as duties—and these make it correct to draw an analogy between the international court in question and the Hartian

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[76] *Supra* note 32, at xxv.

[77] *Supra* note 24, at 100.

national and civil suit model.[78] Given that Bassiouni does not individualize the relevant legal categories in an absolute sense but takes an untraditional step by introducing a notion of shared social solidarity, which corresponds to accountability as a *collective* right of a larger group of victims, certain qualifications must be made, though. As a norm, the right to collective accountability is particularly relevant for a description of violations that originate in political violence, as was the case with, for example, the former Apartheid regime in South Africa. Here the majority of the population suffered and therefore the right to accountability was held by the many, whereas the correlative duty befell the few. It is probably facts like these that prompt Bassiouni to take a new approach to the class of economic human rights. Unlike national law, the ICC should not, according to Bassiouni, operate on the basis of a "first come, first served" principle, which may exhaust the available resources after only one trial. Instead, the ICC should implement provisions for a more egalitarian policy so that the various benefits are distributed democratically, in accordance with need-based standards. This does not suggest that the ICC will be prepared to sacrifice justice on behalf of individuals. To the contrary, the intention is the exact opposite. Certainly, the more basic and urgent material or economic needs are, the truer it is to say that justice has been served if the available resources reach many individuals rather than only a few, who—because they came first—might even enrich themselves, at least in comparative terms. In the context of human rights, no individual counts more than another and this entails a commitment, if not a duty, to count as many as possible as equally worthy of consideration. In this manner, Bassiouni is also trying to find a remedy for the traditional imbalance, from the point of view of rights protection, between the class of civil/political human rights and, on the other hand, social/economic/cultural human rights, per Annan, between political and structural violence. Loss of life is the ultimate denial of dignity. The notion of "human life," however, is not exhausted by a reference to physical life. So much more is at stake, including fair opportunities on the basis of merit or, in the case of institutionalized deprivation, access to the things that are monopolized by particular individuals or groups, for example, education.

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[78] In distinguishing between a crime and its liability to punishment and, on the other hand, a civil wrong and its liability to pay compensation for harm done—*per* Bassiouni punitive damages (punishment) *versus* actual damages (compensation)—Hart points out that some actions, for example, assault, cut through the same distinction. *See* H.L.A. Hart, *Bentham on Legal Rights, in* OXFORD ESSAYS IN JURISPRUDENCE 191 (Alfred W.B. Simpson ed., 1973).

While using effective enforcement as a general criterion, Bassiouni warns against misleading analogies between "domestic legal systems and the international legal system . . . particularly if they lead to assumptions that certain functions of the former can be effectively carried out by the latter."[79] Therefore, it holds, as a principle, that the duties that can be performed (most) *effectively* by the national legal system ought to be handled by this; and vice versa, the duties that can be (most) *effectively* performed by the international legal system ought to be handled by this. The goal is to practice complementarity so as to maximize rule application in favor of *jus cogens* accountability.[80] The formal difference between the two systems is that whereas the ICC's role is that of direct enforcement of international criminal law norms,[81] the national criminal justice system assumes the responsibility of securing indirect enforcement, either because the state is treaty-bound or by reason of an obligation arising out of customary international law. It follows, once again, that Bassiouni's notion of bindingness does not reduce to the (positivist) presupposition that international law (proper) requires a hard law commitment subsequent to a voluntary surrender of national sovereignty. At the same time, however, customary international law does rest on a notion of normal practice, which pre-supposes at least a temporarily prior good will. Thus, it must, as a minimum condition, have been a fact at some earlier point in time that a sufficient number of nation-states agreed to comply with *jus cogens* norms; to apply theory to practice. The more of a reality this practice is, the more "established" the norms can be said to be, thus giving rise to binding law that all other states, which are either indifferent, anti-human rights, and/or indignant to receive orders, must follow, although it is, from their nationalist and relativist perspective, an alien will that has been wrongly and unfairly imposed on them. But, because the community of norm-establishing states exercises its power for the sake of right, and not might, the notion of a normal *jus cogens* practice excludes a realist interpretation.

As for Bassiouni's emphasis on effectiveness, we can say that this reflects the public policy goal to provide (proper) protection of human rights and, regarding general jurisprudence, the recognition of international courts, including the ICC, as sources of law.[82] Thus, international

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[79] *Supra* note 24, at 65.

[80] *Id.* at 69.

[81] *See Id.*

[82] *Id.* at 68 n.12, 90.

rule application legitimately creates precedents and new norms[83] that (1) reinforce the values that underlie the set of *jus cogens* norms, and (2) further binds individual nation-states to follow the Good Way. Once again, the essential point is that national sovereignty is not and ought not to be a boundary for what is right, as opposed to what is wrong. The Good Way is a Universalist Way, the Human Rights Way.

The double paradox is that Bassiouni invokes various principles of legality, which originate in national law, particularly *aut dedere aut judicare*,[84] as sources of international criminal law.[85] In this manner, he uses, like Hart, national law for the purpose of defining what should count as law proper. Furthermore, Bassiouni believes that the "relative newness" of the international legal justice system makes it necessary to use national law as the paradigm,[86] and this extends to formal fairness.[87] More importantly perhaps, the incorporation doctrine, which Bassiouni advocates, will give the nation-state a certain measure of power to co-define the most central notion, namely accountability.[88] Consequently, universal *cum* natural and objective justice may come into conflict with relativist *cum* social and conventional justice. While a nation-state can enhance or weaken accountability through its specific forms of provision of penalty, in fact, help facilitate escape from accountability, it cannot undo the very value foundation for international criminal law. The nation-state does not possess the power or right to develop international criminal norms.[89]

In the light of this, the jurisprudential tension, alluded to in the introduction, seems optimal. Nevertheless, it is possible to ease it enough to resolve it completely. We can accomplish this by taking seriously Bassiouni's deep theory commitments. The recognition of humanity and civilization as sources of law[90] establish the two single most important parameters because they constitute the ultimate reasons for the primacy of substantial justice and, with this, morality that, in turn, requires legal

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[83] *Id.* at 99.

[84] *Id.* at 66, 69, 76, 95.

[85] *Id.* at 66.

[86] *Id.* at 77.

[87] *Id.* at 94.

[88] *Id.* at 77.

[89] *Id.* at 102.

[90] *Id.* at 74, 79.

accountability. Furthermore, there cannot be (proper) legal accountability without formal fairness, which is also required by morality. As effective enforcement is not just a means for rights protection or, more precisely, the maximization of accountability, but also for formal fairness,[91] effective enforcement per se is something that is required by justice and morality. All these logical links and inferences have a common connection point: basic human rights.

So, like Hart, Bassiouni emphasizes enforcement. Unlike Hart, however, Bassiouni works on the assumption, stronger still, requirement that the norms, which are enforced, fall under law in the strict and proper sense. Enforcement is a goal *if and only if* the norms are of the right kind (compare human rights), and, it should be added, Annan agrees by stating, in the context of international assistance, that "enhanced efficiency alone," without regard for the commitment to human rights, does not qualify as a legitimate criterion.[92] If the norms are of the right kind, then idealism, that is, human rights recognition is (and *mutatis mutandis* should be) coupled with pragmatism, that is, the pursuit of enforcement that is as effective as possible, and this goal should comply with the norm of usefulness. Furthermore, enforcement as a (pragmatic) goal must be distinguished from enforcement as a criterion or condition for what counts as law in the first instance, which is Hart's position. According to this, it holds that strict and proper law is determined by the degree of effective enforcement. It should be observed that this holds for the content of the law itself,[93] and not just formal fairness as an aspect of the notion of "a rule of law." The less norms are enforced in practice, the less true it is to claim that they are recognized as valid and real regardless of whether they ought to exist. It could be concluded that this is a point about consistency, transparency, and, less diplomatically, avoidance of hypocrisy. If people "have" rights but cannot enjoy or exercise these and,

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[91] *Id.* at 125.

[92] *Supra* note 6, at 8.

[93] Although Hart's version of legal positivism is methodologically compatible with prioritizing legitimacy at the expense of legality so as to discontinue, for example, the unjust rule of a despotic tyrant, his general jurisprudence nevertheless takes this possibility back to the extent that his notion of legal validity entails equality of law. The centerpiece of Hart's theory, the so-called "rule of recognition" is elastic and open-ended and, consequently, any given order may qualify as a rule of law. *See supra* note 17, at 160–62.

The importance of this cannot be exaggerated. It is the dividing line between Hart and Bassiouni, who does not describe an unjust legal system as a rule of law.

if violated, enforcement is either ineffective or lacking all together, then it does not make sense to say that "people have rights" in the first instance. For Hart, recognition and enforcement are inseparable. For the same reason, people may be rendered absolutely powerless. Without rights recognition, they do not even have a meaningful claim to membership of humanity.

For Bassiouni, norm recognition is unconditional in the case of human rights. But, this does not mean, of course, that subjects can, for that reason, enjoy or exercise their rights, however deserving or entitled they are thereto. Consequently, the law/human rights must be backed up by legitimate force or might. Enforcement is a means. This is a crucial statement, the philosophical and logical implications of which should be clear by now. In Bassiouni's opinion, human rights may matter the most when it is also truest—for Hart—to declare that "people do not have rights." More precisely, rights may go unprotected and, consequently, the right-holders are also deprived of the *meta*-right to accountability that, in practice, entails enforcement of the (secondary and positive duties correlative to the) original rights. Non-enforcement is an offense to the dignity of the victim. Ultimately, it causes a further loss of humanity—as if man does not count when it most matters for him to receive proof of his (proper) place within the human community or, per international law, full membership of "the human family."[94] However, a situation of non-enforcement functions as an incentive to insist on justice, to stress the urgent need for enforcement, to refer to the role of human rights themselves—that they are expressions of humanity and civilization, and that these principles ought not be sacrificed because they constitute The Limit, the Minimum Law (compare morality). Thus, we are back to the claim that law void of human rights "is not" law in the strict and proper sense. And this is why morality (ultimately) trumps the law. If legal enforcement is, in fact, practically impossible, the relevant *jus cogens* norms continue to stand (compare the distinction between rights-recognition and rights-protection). The thesis of the primacy of morality is so powerful as to make it true to claim that the norms would continue to stand even if no legal recognition were afforded because, in the first instance, the Harm Principle and the Kantian Respect Principle would require their recognition and, in the final analysis, humanity and civi-

[94] Soft as well as hard international human rights law applies this notion. For the latter, see ICCPR, *supra* note 35, at 172. *See also* International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3, at 4.

lization function as the ultimate normative and moral value foundation for these. That is what The Deep Law says.

As a good (national and international) order also entails—in addition to justice and a rule of law—democracy, peace, reconciliation, and civilian continuity, Bassiouni's list of accountability-securing measures includes provisions of lustration and truth commissions. In contra-distinction to war crime investigations and prosecution of perpetrators of genocide, crimes against humanity, etc., things like lustration and truth commissions represent a lower degree of necessity, measured by morality as a standard, meaning that the particular circumstances, be they economic, social, cultural, political, or psychological, make room for a more relativistic notion of "what ought to be done" in a particular society. All additional measures vary in accordance with the nature of the crimes,[95] thus permitting a higher degree of *sui generis*. Nevertheless, they are intended to end the victimization while, at the same time, correcting the cause(s) and making up for at least some of the harm done. Relativizing practical parameters, therefore, is a means for maximizing human rights protection with a special view to securing accountability in situations where *jus cogens* norms are not at stake. Deep level post-conflict justice must be treated as a First Priority Goal in a transitional society that sincerely attempts to heed the "Never Again!" motto. The reason is logical. It is about the Right Order of Things. Without having first secured legal accountability in a court of law for *jus cogens* crimes, there cannot be stable and lasting peace, because peace that lasts is peace that rests on a (moral/legal) valid and, *ipso facto*, solid foundation. The harm victims have suffered must end in a humane and civilized manner in order to end the conflict, which originally gave rise to the harm.

That granted, it may be best not to require legal justice as an analogy to a categorical imperative and instead make do with an account of the crimes, in which case a post-conflict society takes the step from the right to social retribution to the right to truth. On condition that no blanket amnesty is granted, Bassiouni deems it acceptable to resort to a truth commission, as an alternative to a court of law, although this type of accountability-securing modality must comply with certain guidelines for limitations of pardons in order to conform with the theory of universal justice. These include: (1) pardons should only be granted after conviction and sentencing; (2) pardons should be for specific crimes; and (3) pardons should be justified with reasons.[96] As a principle, criminals

[95] *Supra* note 31, at 702.

[96] *Id.* at 731.

should be treated in accordance with desert so as to secure justice, which is the opposite of revenge. Invoking two additional principles of legality, namely necessity and proportionality, which originated in national law, we can conclude that it is not possible to restore *jus cogens* balance with an account of the truth. Judgment must be passed even if this is, in fact, merely symbolic because the perpetrators are going to escape the penalty that would normally follow. Ignoring the context-specific reasons for pardon(s) and, with this, amnesty, the right to truth depends, for its successful fulfillment, upon the duty to recognize the victim. While excuses or apologies can be made, they cannot be bad ones, that is, ones that present the commissions as, for example, accidents by analogy to floods and earthquakes. The perpetrators have to assume either part or full responsibility for the crimes as wrongful violations that, if committed intentionally, add to their individual culpability. Even if they were committed while "just following orders," the seriousness of the harmful consequences mitigates against a reduction of the degree of criminalization. Many different issues may have to be addressed, negotiated, and resolved before the various parties can achieve post-conflict reconciliation and peace. For this purpose, consideration on the basis of duties may be extended to the offenders in that rehabilitation may be a means of, for example, avoiding the unfair scenario where ex-criminals continue to be punished after having paid their dues to society, although they "only" paid with truth-telling. If their former victims refuse to forgive and forget, believing the price is too low, then they will be doomed to, in one sense at least, stand trial forever.

Typologically, rehabilitation is a responsibility that technically falls under the duty to reparation, which is, at least as a paradigm, owed to the victim or his heirs and which is correlative to the right to a remedy. Reparation includes: (1) restitution (in the form of restoration or return of all the things that the victim had in the original situation, including rights, property, status, etc.); (2) compensation for all the things that the victim lost, which may be of a material, economical, or social kind, or concern human capacities, for example, psychological or physical, or ones to do with reputation; (3) rehabilitation, which includes various sorts of help and assistance, be it medical or legal; and (4) satisfaction and non-repetition, which involves a guarantee of the cessation of the violations, apology, remembrance, and access to factual information and verification of the crimes.[97] It should be observed that the right to a remedy per se encompasses three main types of entitlement to: (1) justice, that is, access to a court of law to secure accountability; (2) reparation for

[97] *Id.* at 694 n.98.

the harm suffered; and (3) truth. These three rights are repeated by *the Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity.*[98] As a rights-approach, the U.N. document in question overlaps with *the Chicago Principles on Post-Conflict Justice* while adding, unlike the last-mentioned, principles for, among other things, measures to disband unofficial armed groups and measures repealing emergency provisions.

The law criminalizes victimization and harm independently of the liberal distinction between accountability and rational and autonomous personhood. If the law focused merely on the intention or motivation as a criterion, accountability would be reduced to an individual right. Accommodating consequences and, furthermore, a broader perspective on the relationship between the individual and society, and the reasons for owing a certain treatment to other people, makes it possible to talk about accountability as a collective right. The law even disconfirms the liberal interpretation of the Doctrine of Acts and Omissions for civil and political rights. This is to say that it not only makes individuals and states responsible for acts, but also for omissions of acts that proved harmful, just as it imputes blame for these and, consequently, demands redress. As for the latter, international criminal law follows the Ring in the Water Model for both victims and perpetrators. The law assumes, as a starting point, that those directly guilty of offenses, should—where appropriate—make fair restitution to victims, their families, or dependents.[99] In other words, if the victims themselves have either perished or been incapacitated because of the harm suffered, then restitution is owed, as a duty, to the closest circle of people around them. Similarly, in the case of perpetrators, duty performance is transferred in accordance with what might be called the Behavorist Genesis Rule of Accountability. Following this, duties to return property, pay losses, reimburse expenses, and provide services to victims pass through the hierarchy of people who were responsible for the harm infliction until duty bearers are hooked into place. For example, if an offender cannot pay for the necessary medical treatment and rehabilitation of his victim, then third parties should be made liable and thus held accountable; and if that is not possible, then the state should assume responsibility for rights protection; and if that is not possible, then the state should negotiate international treaties so as to obtain the help and assistance that is necessary in order to end the victimiza-

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[98] *Supra* note 2, at 4.

[99] *Supra* note 32, at 278.

tion.[100] In principle, therefore, collective accountability may describe duties and responsibilities of the global society or community, although the initiative is taken by the nation-state. Furthermore, states that are in fact non-parties to the crimes themselves may choose not to respond to the request. If so, the omission must be justified with good reasons, say, scarcity of the resources that are needed for rights fulfillment. Otherwise, a new wrong has been committed. Given that consequences are made to count, a foreign government cannot argue, for example, that: "We did not cause the unfortunate situation. Thus, we do not owe you help." What can be done ought to be done. However impersonal and band-aid-like collective accountability may seem, impunity remains its opposite and therefore the law expects agents to deliver, to undo the wrong, to the maximum extent possible, by giving victims their due, that is, what is owed to them in accordance with their rights, which includes the right to a remedy as well as the right to accountability.

As the right to a remedy depends on the circumstances, it is vulnerable to conflicts and exceptions from the point of view of fulfillment. As a post-violation right, the right to a remedy enjoys status as an absolute right at the level of rights recognition, by analogy to the right to accountability. The difference is one that cuts through the content or object of the right. The right to a remedy is broader, involving more things *cum* remedies than legal justice. (The right to accountability is really a sub-right of the right to a remedy). Theoretically, basicness is the criterion for absoluteness. Basic rights and correlative duties are absolute in that the rights are inalienable and the correlative duties non-derogable. But, in the case of social and economic human rights and correlative duties, Bassiouni exempts those that are not need-based, for example, things like periodic holidays with pay. Using humanity as the general direction post, only those things that are necessary in order to avoid serious harm will appear on the list of rights, as valid instances of the Harm Principle. Furthermore, Bassiouni's emphasis on legal justice does give rise to a Priority Principle whereby alternative accountability measures ought to give way if put to the choice.

Because of its broadness, the conditionality, from the point of view of fulfillment, must be taken seriously. At the level of general jurisprudence, this is to say that Bassiouni's consequentialism (the remedy is a consequence of prior rights-recognition, primarily the rights to life, lib-

[100] Note that victims should receive restitution directly from the state if their offenders are public officials. *See id.* at 276–80.

erty, personal security, and physical integrity) depends on the notion of what is practically possible in the real world. As pointed out previously, duties precede rights, and, while doing so, they may or may not translate into remedies. Even if duties are too weak or imperfect to translate into remedies, they do not decide the destiny of rights. Fulfillable or not, both they and the rights continue to be normatively required, legally and morally. Circumstances cannot abrogate or extinguish them, although circumstances that amount to a scarce supply of the recourses that are needed for fulfillment can postpone performance as a must, a categorical imperative, something that is binding without further discussion. Meanwhile, agents ought to try to make things possible in terms of a *meta*-duty. There is no escape from accountability as long as it is true that something can be done. Whatever can be done will become the object of the remedy. For the same reason, it is true that norms always hook human agents into some type of action regardless of what the real world is like here and now at time T.[101] Any basic rights violation deprives the victim of his status as an end (because the commission of a *jus cogens* crime pushes him out of the image of the species), which is tantamount to intolerable disrespect. Each and every time something like this happens, everybody everywhere is affected (because all human agents have a stake in (loss of) humanity), and this is why there is always a good reason to act in conformity with the principles and/or norms that confirm our common dignity.

The main point is that there is a distinction between human rights law and human rights remedy, which obeys the same jurisprudential premises as the previous general distinctions between, respectively, effective enforcement and recognition of strict and proper law, and rights recognition and protection. Lack of enforcement cannot negate conferment (compare non-positivism). Any means for rights protection, including the ICC, the judges that serve on this court, and their rule application, are exactly that—means as well as consequences of rights recognition and *not* conditions for rights recognition (compare non-positivism and non-realism). What further substantiates this conclusion is the absurdity that follows from the thought experiment of making rights protection a criterion or condition for rights recognition. If this were correct, then only human beings who already enjoyed protection under the Kantian Respect Principle, the Harm Principle, humanity, dignity, and civilization would qualify as candidates with an

[101] Needless to say, this feature makes accountability a rather radical notion. Given the nature of what is at stake in human rights, this probably has to be.

entitlement to human rights recognition. The more it was the case that human rights in place, P, went unprotected, the truer it would be to say that people in place, P, did not have rights in the first instance, that they therefore fall outside of the privileged and exclusive class of human rights-holders. This is absurd. The people in question are those who most need to be recognized as human rights-holders; they are the victims! If victims were beyond rights simply because they had been subjected to violations (compare lack of rights protection), simply because they were victimized, then there would be no room for post-conflict justice. Although Annan prefers to talk about transitional justice, rather than post-conflict justice, he certainly requires a victim-centered approach, as alluded to previously. Transitional justice is a notion that implies taking sides, namely *for* the victims. Once human rights violators have disrespected the original starting point for stakeholders, due consideration becomes synonymous with such partiality. The balance must be restored.

III. A CRITICAL APPRAISAL OF BASSOIUNI'S COMBINATION THEORY

Different theorists have different preferences regarding the use of the notions of, respectively, post-conflict justice and transitional justice. In essence, they overlap in their normative content, meaning that they both imply recognition and protection of the rights to justice, truth, and reparation. Furthermore, they are both ideologically wedded to a pro-democracy perspective. Formal fairness entails a number of rights that are deemed fundamental in a democracy, for example, the right to due process and the right to equality before the law. More generally, the right to participation is one of the core rights, and this too is advocated by *the Chicago Principles on Post-Conflict Justice* in that Principle 3 emphasizes inclusion of all groups of society, just as "a democratic social order is premised upon respect for the rule of law" (compare Principle 5).[102] Concerning *the Set of Principles for the Promotion and Protection of Human Rights through Action to Combat Impunity*, the emphasis is put on transitional justice defined either as "restoration of or transition to democracy and/or peace" (compare Principles 17, 30, 38 et seq.).[103] Therefore, there is no pre-commitment to democracy, although this does not make sense in the case of formal fairness, which is otherwise required under the right to justice. Given the possibility of choosing between democracy and/or peace, a choice that is also repeated in connection with Principle

[102] *Supra* note 1, at 6.

[103] *Supra* note 2, at 5, 21, 25, 27.

40, which addresses implementation of administrative measures,[104] the risk of *realpolitik* presents itself. This introduces a significant difference between *the Set of Principles and the Chicago Principles on Post-Conflict Justice*, which does not allow such a choice (compare Principle 26).

At a superficial glance, the two documents, the U.N. and the independent document, look similar. However, upon scrutiny, a disanalogy is unavoidable. Concerning *the Chicago Principles on Post-Conflict Justice*, the conclusions that summarize Bassiouni's view on accountability can be extended to the document in question without necessarily extending the philosophical and general jurisprudence premises that prompt him to draw the conclusions. Very briefly, every principle that is declared in *the Chicago Principles on Post-Conflict Justice* is also one that Bassiouni advocates as an integral part of his own position. There is full compatibility. To give an account of *the Chicago Principles on Post-Conflict Justice* is also to give an account of Bassiouni's own position. This was one of the main objectives in the previous sections, especially because an account of Bassiouni's position brings out the conceptual and normative framework that constitutes the set of theoretical axioms in the case of *the Chicago Principles on Post-Conflict Justice*.

One clear example is the emphasis on the state's obligation to prosecute or extradite, first and foremost in connection with *jus cogens* crimes, such as genocide, war crimes, and crimes against humanity (compare Principle 13). In the United Nation's *Set of Principles for the Promotion and Protection of Human Rights through Action to Combat Impunity*, there is an overlap in all important respects, including the state's obligation, the view on *jus cogens* crimes, the impermissibility of blanket amnesties for *jus cogens* crimes, the impermissibility of the death penalty, the view on basic rights, the principle of complementarity, universal jurisdiction, in essence, all the measures that fall under "Action to Combat Impunity." This is exactly why it is paradoxical, to say the least, that the same document includes a "democracy and/or peace" choice that penetrates the entire document. If possible, it is even more paradoxical in lieu of the fact that the Special Rapporteur, Louis Joinet, proposes that the so-called "broad" notion of action to combat impunity should serve as "a decision-making aid to peace agreement negotiators."[105] As pointed out by Bassiouni, there can be no long-term peace without accountability and, once again, Annan agrees with him.[106]

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[104] *Id.* at 27–28.

[105] *Id.* at 10.

[106] *Supra* note 6, at 3.

Annan's position is much closer to that of Bassiouni and *the Chicago Principles on Post-Conflict Justice* than to that of the U.N. document. In actual fact, there are no major differences. In some areas, Annan adds public policy explanations that clarify the context within which relevant norms and facts operate. For example, he states that "human rights and the rule of law cannot be deferred" because "lawlessness can seriously undermine the efforts of an entire peace operation," and this is one of the United Nation's own findings.[107] In other words, *realpolitik* should not be allowed. He continues, "no one, including peacekeepers, is above the law."[108] This goes back, of course, to Annan's more general thesis about accountability to the law, which clearly requires democracy. Otherwise, right (compare the law) will be based upon might (compare political power).

For a final remark, Annan's perspective emphasizes, like Bassiouni's and *the Chicago Principles on Post-Conflict Justice*, accountability. Although this notion includes legal accountability, it cannot be reduced to legal criminal justice. As Principle 7 explicitly states "accountability extends beyond criminal sanctions."[109] To the extent that impunity means—in the case of *the Set of Principles*—"the impossibility, *de jure* or *de facto*, of bringing the perpetrators of human rights to account—whether in criminal, civil, administrative or disciplinary proceedings,"[110] it is correct to say that the U.N. document has a broad notion of action to combat impunity. In comparison to the notion of accountability, as advocated by Annan, Bassiouni, and *the Chicago Principles on Post-Conflict Justice*, however, it is too narrow to do justice to what is at stake. Not only is it true that accountability is broader than a "no impunity" policy, whether criminal, civil, administrative or disciplinary, it is also the case that accountability falls under post-conflict justice as a "multidisciplinary" notion.[111] In this way, accountability encompasses any idea or practice that make possible recognition and protection of fundamental human rights, including progressive ways of addressing what Annan describes as the "root causes" of unequal distribution of wealth (compare structural violence), which are also incompatible with peace as well as democracy.[112]

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[107] *Id.* at 10.

[108] *Id.* at 11.

[109] *Supra* note 1, at 6.

[110] *Supra* note 5.

[111] *Supra* note 1, Introduction, at 2.

[112] *Supra* note 5, at, 3–4.

Returning to Bassiouni's general jurisprudence, the (deep theory) perspective is on accountability as a *meta*-right. While this perspective is part of the spirit of *the Chicago Principles on Post-Conflict Justice*, it should be kept separate, as a scholarly contribution, from any document that Bassiouni has drafted.

For a critical appraisal of Bassiouni's analysis of the right to accountability in the context of international criminal law, it is necessary to accommodate all the parameters, theoretical as well as practical ones.

Because the parameters came from two different positions within general jurisprudence, namely natural law theory and legal positivism (which originally seemed to be favored by Bassiouni), the problem of the possibility of combining these presented itself. To avoid antagonisms that either introduced conceptual and normative confusion or, worse still, contradiction, the most significant parameters had to be ones that involved choices, taking sides, in connection with the notion of law proper and the nature of the relationship between law and morality. If any jurisprudential tension existed at this level, it could not but be true to conclude that the alternatives were as incompatible as A and non-A.

Historically, we only have to study the famous discussion between Hart and Lon L. Fuller to verify this.[113] For the natural law theorist, Fuller, there is no distinction between law proper and morality. For Hart, there is because, according to legal positivism, there is a difference of substance between legal law and morality. The disagreement between Fuller and Hart shows how and why theorists commit themselves to one particular position, either legal positivism or natural law theory. The fact that Hart uses natural law theory as a way of softening legal positivism is sufficient to introduce a distinction between his own moderate version and, on the other hand, radical versions, but it is not something that can eliminate the distinction between legal positivism as a general position and natural law theory. To do this, Hart would have had to acknowledge, as a minimum, the distinction between validity, existence and strict and proper law, a step he does not take.

Regarding Bassiouni, the co-existence of parameters from different positions did not result in the kind of jurisprudential tension that could weaken the foundation of the conceptual and normative framework. The

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[113] H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 599 (1957–58); and Lon L. Fuller, *Fidelity to Law*, 71 HARV. L. REV. 630, 660 (1957–58).

parameters that guided Bassiouni's deep theory were not mutually exclusive because, upon examination, they did not compete. No attempt was made to combine natural law theory and legal positivism where they are at risk of negating each other. Instead, Bassiouni opted for natural law theory. His analysis of international criminal law maintained its jurisprudential clarity, coherence, and consistency, however complex the various issues became. Because international criminal law is undergoing an evolutionary process, is still very much law in the making, interpretation sometimes became a theoretically challenging enterprise, once again, presenting crossroads rather than conclusive answers. That is the nature of the law as it stands here and now at time T. Hermeneutically, the challenge was optimal for distinctions pertaining to rights and correlative duties. The story of human rights—the ethics of our own modern era—could have had several sad endings, which would also have extinguished the rights themselves as logical phenomena. Bassiouni's Combination Theory, however, was so sophisticated as to secure not only the unconditional recognition of human rights in accordance with natural law theory, but also to bring the implications to bear on rights protection while utilizing positivist methodology and strategy. Bassiouni complied with the law in both cases, the legal law that is. At the same time, he provided direction posts both for description (compare factual account of norms), prescription (compare normative morality), and justification (compare philosophical ethics). As a source of law, Bassiouni's scholarship could very well help distill the essence of human rights in the future. If so, his contribution will certainly put him among The Great Humanists because his work is at the cutting edge when it comes to practical application. Every theoretical reflection is also a preparation for action in the real world, for pragmatism.

Without denying that there is a distinction between legal law and morality, Bassiouni's parameters ascribed primacy to morality so as to make it possible to argue that bad law is not law in the strict and proper sense, thus de-lawing the relevant system of norms in question. The facts that the law is positivistically real, legally valid, and binding, and therefore can be confirmed empirically as in existence and in force, are not qualities or features that ultimately determine the status of that same law as a rule of law. If a rule of law is merely a rule of might, then it "is" exactly that—a rule of might (and *not* law proper!). For Hart, on the other hand, such a rule is law proper as long as it is effectively enforced. For Bassiouni, enforcement is important, even a parameter, but only *on condition* that the law itself is just. As international criminal law received the "good law" predicative judgment beforehand, the issue pertaining to

enforcement was one about backing up right with legitimate might,[114] for even might cannot be merely so. In other words, Bassiouni used legal positivism as a means for the same purpose that he used any other theoretical or practical parameter—to realize his vision: a World Order of Human Dignity; a Global Human Rights Rule. Once again, legal positivism acted as a means for rights protection whereas natural law theory served as a means for (primary) rights recognition.

All the central notions, which operate at the level of general jurisprudence, namely "law," "rights" and "justice" are double notions in that they describe both the legal reality as well as the moral ideal. Although the procedures for rank ordering (the same notions) were pregnant with parameters from natural law theory, they were neither simplistic nor reductionistic. Even the highest ranking normative component, namely the notion of justice, made this obvious. Justice functioned as the mediator between law and morality (thus establishing law proper as just law, that is, a rule of human rights law). But Bassiouni also accommodated an immanent and relative notion of justice, whereby a given national legal system is entitled to follow its own ways pertaining to values and norms (political, ideological, religious, and so forth) as long as these do not come into conflict with the core of international criminal law (compare *jus cogens* norms). The rationale for this is that the parameters that determine justice and legitimacy and, *ipso facto*, the notion of a rule of law, reside or exist within the body of norms that make up international criminal law. The same conclusion is true of the relationship between legal and moral rights, at least those rights that have status as basic human rights. The law has already taken sides because rights like the right to life and the right to personal security are recognized *expressis verbis* as "inherent and "inalienable"[115] and, *ipso facto*, as natural rights. Unlike radical versions of legal positivism, as espoused by, for example, Bentham, who declares natural rights "nonsense upon stilts,"[116] Bassiouni accepts the existence of a Higher Authority or Norm, although the law of humanity does not have to be construed as religious or divine in order to substantiate the main claim that there exists a universal law that transcends the

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[114] The implication, namely that law and morality overlap in the case of international criminal law, that there is no separation between fact and norm, may nourish the impression that Bassiouni first and foremost is a legal positivist. Used as a theoretical premise or assumption, however, it is ill-founded.

[115] *Supra* note 35; *see also supra* note 94.

[116] 2 Jeremy Bentham, The Works of Jeremy Bentham 501 (John Bowring ed., 1843).

legal law and that ought to enlighten and, if necessary, correct its rules and regulations. The primacy of morality has to be addressed and assessed on the basis of Bassiouni's own premise that the law that is, the existing international criminal law, accords—in theory—with the most fundamental principles. The problem is practice. Furthermore, looking at practice, the problem is about consistency. More precisely, it has to do with the fact that norm application is inadequate from the point of view of justice. The ICC is an attempt to remedy this sad state of affairs, but even optimistic post-conflict experts, like Bassiouni himself, assume that the court in question can only be expected to deal with the top of the iceberg. If (allowed—by nation-states—to be) efficient, the ICC can secure accountability for the comparatively small number of people who have committed heinous crimes and atrocities while occupying (illegitimately) high positions of power and trust. The main burden befalls national legal law, which is why the public policy goal *cum* duty to rehabilitate a corrupt and unfair system should not be underestimated. But while doing so, another goal, which is listed as something that ought to be secured, namely pluralistic democracy, creates normative freedom to define the legal rules. The restriction or limit on this freedom overlaps with the distinction between relativism for non-basic rights recognition and universalism for basic rights-recognition.

The key to understanding the distinction between rights recognition and rights protection is the relationship between rights duties and remedies. Human rights stand *regardless* of their possible correlatives. Furthermore, duties (must) follow where rights are recognized, although they cannot be considered binding—from the point of view of actual fulfillment—if the circumstances disallow (read: make impossible) performance in the real world. That is not fair. That said, duties are still binding in a derivative sense in that the rights *always obligate* other people to try to make things practically possible, that is, to at least attempt to create the conditions that will eventually make a difference; change the current circumstances; change the world into a (better) place where duty fulfillment is practically possible and, consequently, required because the resources or means are (now made) available. Availability or access to resources synthesizes facts and norms so that duties can result in remedies. If and when they do, the practical application parameter, with which Bassiouni credited Cicero, enters into force, something that it ought to do. Here it is relevant to observe that the emphasis on practical application is something that constitutes an important component of the most dominating tradition within natural law theory, the one that is closely linked, at least as a principle, with (morally justified and/or required)

protest, resistance, rebellion, even war against the (legal and political) status quo, thus excluding obedience as a virtue in its own right. Furthermore, the incorporation of practice as a parameter is a means for avoiding double standards (compare *realpolitik*) and, more positively, secure actual conformity with the Good Law. If legal law accords with the ideal, meaning that its rules, norms, and principles reflect morality, then there will also be, so Bassiouni argues, avenues for protection in the event of violations. In practice, this means two things: (1) individuals or states that violate *jus cogens* norms are recognized as criminals under the law and (2) victims are recognized as deserving of justice through accountability and redress, which, as a means of rights restoration, may be, at least in one sense, more necessary. The paradigm pertaining to serious international crimes is the type of breach or violation where the perpetrator takes something from his victim that he is probably never going to be able to return, in particular values such as life and health. The ideal is to return that which is owed, but where reality is an obstruction for such complete or perfect justice, reparation is transferred to other things, for example, remembrance, which hopefully can make up for some of the harm done. That granted, the victim or his heirs may perceive any imperfect match between duty and remedy as nothing but a consolation prize that adds to the original humiliation and degradation.

Since the relationship between duty and remedy is mediated by external factors and circumstances, including time and place, relativization is unavoidable. Even the right to accountability may fail to result in a duty that binds its bearer to provide the remedy that otherwise matches the right most perfectly, namely justice in a court of law. It holds, as a general principle, that "what can be done ought to be done" but since it is ultimately the real world that determines the nature of the remedy, accountability itself is put at risk. Victims will get as much accountability as can be afforded. Without sufficient resources for a court, it becomes necessary to move on to alternative remedies. In theory, the primacy of morality stands. In practice, however, a gap between ethics and economics may open up. Although Bassiouni dismisses the view that the level of wealth determines what rights there can be, he nevertheless supports a position that says that the availability of resources serves as a criterion for determining the actual bindingness of correlative duties. In other words, if a duty cannot translate into a remedy, then we ought not blame the individual or state that does not deliver or provide the things that otherwise count as necessary for rights restoration. It is not reasonable to ask the impossible. But, objectively, the outcome is not just either because the victims are now forced to tolerate the continuation of the imbalance

through remedy deprivation. From their perspective, it is difficult not to translate reality into a leap hole for accountability.

Distinctions matter, including the one between reality and ideal. The more perfect the match between (legal/descriptive) fact and (moral/prescriptive) norm, the closer human agents are to the ideal state of affairs. While approaching this as a global goal, agents need to acknowledge the whole set of distinctions that characterizes natural law theory (and moderate versions of legal positivism), namely the distinctions between, respectively, a rule of law/a rule of might; right/might; legal rights/moral *cum* natural rights; legitimacy/legality; formal and procedural fairness/substantive justice; and (reserved for natural law theory!) validity/strict and proper law. Ultimately, it is the primacy of morality that necessitates all these distinctions. In theory, moral norms rank higher than legal norms, which are given or conferred by the Principle of Kantian Respect, the Harm Principle, decency, civilization, humanity, dignity, and the theory of the implied social contract. In the case of *jus cogens* norms, there is, *de jure*, an overlap between the ideal and the real and legal norms, as conferred by international criminal law. In the opposite case, the legal law would have been judged inadequate. Furthermore, the closer its approximation to "bad law," the higher the certainty of having to declare the law null and void from the point of view of human rights.

A comparative analysis of natural law theory and legal positivism with a special view to human rights would have to turn out in favor of the first-mentioned. The reason for this is that, historically and traditionally, any version of legal positivism, moderate or radical, endorses ethical relativism, in addition to conventionalism and nationalism.[117]

For Bassiouni, it is true to say, relativistically, that there are differences pertaining to national legal law, judicial norms, institutionalized values, political government, and so forth. At the same time, however, justice as a non-relative constant transcends the differences in question, because they are "merely" real world facts that, furthermore, often protect the interests of states at the expense of individual human rights. More precisely, *realpolitik* feeds on references to "our different norms," although the parties who exploit such references, politicians, policymakers and legislators, betray mankind.

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[117] In the first analysis, this follows as an empirical rather than a political implication of the nation-state's monopolized power to confer and enforce rights. Once the "ought" (as in the principle "we ought to respect cultural differences") is added to the "is," however, there is an overlap between the logical and ideological aspects.

Relativism is first and foremost an anthropological discipline. It provides us with a map of the factual differences *cum* variables that observers discover, record, report, and describe with the goal of gleaning information and knowledge (compare fact-finding mission). As an ethical doctrine, however, relativism has very restricted validity. Bassiouni does not propose that "we ought to respect cultural differences" as a matter of duty and regardless of the nature of the differences because "we ought to show tolerance," again as a matter of duty and regardless of the nature of the differences. If we refuse to show such respect and tolerance, relativism will classify our judgments as instances of cultural imperialism. However, the fear of this stigma is outweighed by the risk of minimizing the class of human rights subjects. Therefore, Bassiouni's position is pro-relativist to the extent that the differences that exist in different cultures, societies, or sub-groups within societies *do not come into conflict* with justice, defined as a common and global goal for humanity. We have to acknowledge universalism as the only doctrine or position that is compatible with the requirements of (moral) natural law and (legal) universal justice.[118] Before society, there is nature-as-dignity; and nature-as-dignity is the constant that points to the non-relative feature we all share—humanity. And, humanity as a normative notion is paired with civilization, so as to say that what our species ought to do is to apply the same norms to everybody everywhere, that is, recognize human rights as well as impose correlative duties that, given the status of the prior rights, ought to repeat the same logic, that is, ought to apply equally and universally.

Following Bassiouni's analysis, it appears that propositions such as "we must have accountability for wrong-doing" and "the more serious the wrong-doing is, the truer it is to say that there must be accountability" are ideas, beliefs, or values that are held universally. This is to say that they transcend the culturally determined differences that apply as (relative) variables. This is to say, in turn, that irrespective of the laws that are recognized and/or enforced by the national legal system in place P, there is an in-built (compare immanent) and Higher Directive to secure accountability in a proportionate relationship to the seriousness of the relevant crimes. Therefore, legal justice per se, having a socially organized system for rights protection, is a fundamental value and, furthermore, a cross-cultural constant, which characterizes civilized societies.[119] The very nature of civilized society commits it, binds it, to comply with justice at

[118] *Supra* note 31, at 698–99.

[119] *Supra* note 24, at 71.

the level of practical application. This point is important. It introduces a mechanism for self-censorship in connection with full accountability and, with this, penal sanctions against human rights perpetrators who are prosecuted and punished under the national legal system. If a state or government lets criminals off the hook, then its representatives (political leaders, public officials, judges, etc.) still have to look at themselves in the Universalist Mirror, which will not reflect the image of the species but instead cast them out. As traitors of humanity, they have not only failed their own citizens; they have also lost the trust of the world community. Without legitimacy as rulers or representatives, they ought to be replaced (compare. lustration or vetting), if necessary, through international humanistic intervention, an idea that is particularly typical of modern natural (human rights) law theory, as espoused by, for example, Hersch Lauterpacht.[120]

As human rights are international *cum* global, relativist respect for national sovereignty, self-determination, together with factual statements about "our" or "their" peculiar ways cannot function as immunities against cross-cultural responsibilities to secure accountability in the event of violations of the most basic human rights. This is a logical point about the status of the norms in question. Its ideological implication is clear, namely that *realpolitik* is an offense against universalism. But, its main purpose is to highlight the non-relative goals that are at stake and that, unfortunately, are also at risk—humanity and civilization, that to which any state or government ought to aspire and that will be lost if the species does not collectively choose to self-subject to the Common Rule of Human Rights. There will be no mercy for anybody anywhere in a world that puts cynicism, apathy, and indifference on its political agenda. At the end of the day, the sun that Bassiouni talks about,[121] will go down and the species will self-destruct, which is irrational of course. The essential point is that everybody is affected by wrong-doing in the form of *jus cogens* crimes, wherever it takes place, be it the perpetrator who committed an inhumane misdeed, the prosecutor who does not succeed in restoring the imbalance because the system is corrupt, the victim whose needs go unmet, the witness who feels powerless—they will all (come to) suffer. It is not possible to transfer goodness as a task to other people. To push the logical point, there is nobody to transfer it to.

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120 HERSCH LAUTERPACHT, INTERNATIONAL LAW AND HUMAN RIGHTS (1950).

121 *Supra* note 24, at 117.

The wider philosophical issue and challenge is whether Bassiouni's universalism leads to a lack of respect and tolerance, as ethical relativism would claim, or alternatively, if relativism lacks sincerity, as universalism would counter-claim, because it does not have a reason to share norms, however fundamental or basic they may appear to be, ultimately, because all value or norm systems are perceived as equally valid.

The above issue and challenge, posed by Bernard Williams,[122] will remain so in this chapter. However, if consequences matter in ethics, universalism can be supported by using the Harm Principle as an adjudicator. If universalists believe, for example, that "It is wrong to kill fellow human beings simply because they belong to an ethnic minority," then they *mean that* this is wrong regardless of time, place, and circumstances. It can never be right to kill Jews, Muslims, etc., simply because they are who they are. Consequently, so-called (relativist) respect and tolerance for, say, ethnic genocide is wrong too. Such types of violations of *jus cogens* norms ought not to be respected and tolerated.

As a conclusion, the following points need to be stressed. As a *meta*-right, accountability combines natural law theory and legal positivism in the sense that accountability covers both the moral and legal aspects, which crisscross the distinction between rights recognition and rights protection. Concerning legal positivism, Bassiouni withholds the power to confer the most important norms, such as *jus cogens* norms (compare rights recognition) whereas the power to en*force* the norms in questions, including the power to punish and the power to use physical violence, is shared (by the national and international system). Furthermore, Bassiouni's Combination Theory of accountability functions—from the point of view of natural law theory—as a set of universalist parameters that may overrule (as opposed to positivistically violate!) the law of a nation-state. Although his natural law theory entails maximization of practical application as a commitment, Bassiouni chooses to not rely solely on rationality as a guarantor of protection.[123] Therefore, legal positivism is used as a shield against the "dark side" of humanity, the side that is not compatible with enlightenment, right reason, the sun. In one sense, legal positivism operates as a version of skepticism. Some human agents will not see sense' yet others cannot, they do not possess the

[122] *Supra* note 50, at 20–25.

[123] If consistent, then an ethical/legal agent realizes that enforcement is a natural consequence of norm recognition.

capacity, but because their imperfection results in harm to fellow human beings, the world community needs a court system that can put an end to the wrong-doing; put the criminals in *their place* so as to say that they are "made to understand" that they do not deserve more consideration on the weight-scales of humanity. Prosecution and punishment, that is, rights protection is, to borrow one of Bassiouni's key terms, "necessary" for human agents who fall in this category. Their common and ill-founded belief in their own superiority is, in the final analysis, the root cause of their irrationality *cum* inhumanity.

In Bassiouni's case, the role of rationality is not just that of a byproduct of humanity and civilization. Rationality is a bridge concept between general jurisprudence and accountability insofar as it holds that right reason functions as the (1) universal and objective norm-giver (as opposed to convention as a relativist prescription) and (2) adjudicator in the event of disputes, the "human force," which can secure global consensus and order. In this manner, Bassiouni rejects the idea that normative statements can only be ascribed so-called emotive meaning. This is to say that moral, political, religious, and other normative and substantive statements do not reduce expressions of the feelings, attitudes, or beliefs of individual persons. If this were true, a statement like "The death penalty is wrong" would be a purely subjective and/or inter-subjective *cum* relative one and, consequently, human agents could not engage in a meaningful (read: rational) discussion. Furthermore, adjudication would be impossible because all normative terms like "wrong," "right," "good," etc., have to be translated into "it is wrong—for me" or "it is wrong—for us," etc. According to Bassiouni, there is more to normativity, namely right reason, and this makes it possible for us, as agents, to determine the truth value of conflicting statements. In technical (*meta*-theoretical) terms, it holds that moral, political, religious, and other types of normative statements have cognitive meaning, too. For the purposes of a comparison of the different positions within general jurisprudence, it should be stressed that Bassiouni's position is typical for a natural law theorist, as opposed to a realist or a legal positivist. For the last-mentioned, cognitive meaning is (typically) restricted to empirical propositions. The explanation for this owes to the (alleged) facts that that which is transcendental and metaphysical is also unscientific; and that that which is unscientific is also the realm to which reason per se does not apply, thus presenting normative statements, at worst, as nonsense or, at best, as means for propaganda (compare irrational means of persuasion or conversion).

Although Hart disagrees with the implicit stigmatization of natural law theory and, furthermore, extends cognitive meaning (read: reason as more than empirical verification) to normative statements, he does not take the extra step that Bassiouni does, namely to separate rights recognition and rights enforcement, which is essential in order to make full sense of the separation of law and morality, that he (Hart) otherwise endorses at the level of general jurisprudence. It could be argued that while Hart and Bassiouni agree to distinguish, for analytical purposes, between theory and practice, Hart makes practice a condition for law proper, thus in effect reducing it to a legal notion of actual validity. Bassiouni, on the other hand, treats practice as a logical consequence of theory, something that ought to follow. That granted, legal implementation, codification, and application are not demarcation criteria. Instead, they are ways of determining our sincerity, to see how good our good will really is.

In the final analysis, Hart and Bassiouni are bound to go their separate ways, conceptually and normatively, on account of their different positions on criminal law and rights. Hart requires a bilateral power as a minimum and this, in turn, entails a court, especially since the correlative duties are logically prior to claim rights in the full sense. For Bassiouni, however, this is neither necessary nor sufficient. Furthermore, a court is a means for the maximization of effective enforcement, which is a means for accountability and ultimately justice—as a more than legal matter, and *not* a pre-condition for rights. Basic human rights stand regardless. Universal justice, the principles of humanity, civilization, *etc.*, require this. Even though the ICC "is a treaty-based adjudicating body whose effectiveness depends on the degree of states' cooperation, and on a variety of factors which include resources, adequate personnel and, above all, the political will of the international community,"[124] it does not follow that Bassiouni commits himself to legal positivism. Not even his proposal to use national law as the paradigm for international law commits him. As a matter of fact, he dismisses it to the extent that non-nationalism and non-relativism are required, as a minimum, at the deep theory level where the maximization of justice takes place through recognition of the (social contract theory) rights to life, accountability, enforcement duties, etc.

Bassiouni interprets his own conception of international criminal justice as free in that it does not, in his opinion, have to marry "any one"

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[124] *Supra* note 24, at 102.

metaphysical stance, philosophy, or ideology. "In short," so Bassiouni concludes, "it is a pragmatic humanistic and social policy conception that modestly aims at the attainment of certain value-oriented goals."[125] In this way, priority ought to be given to The Cause. Human rights law and ethics exist for very concrete and specific reasons, and *any* general jurisprudence ought to accommodate these while building a bridge to the real world where human beings depend on legal scholars and philosophers to get human rights "right" in every sense of that term (conceptually, normatively, etc.). Whether modest or not, this goal requires, for its fulfillment, the cooperation and participation of everybody everywhere, who has a stake in humanity.

[125] *Id.* at 126.

CHAPTER 3

DEPOLITICIZING INDIVIDUAL CRIMINAL RESPONSIBILITY

*Bartram S. Brown**

I. CHERIF BASSIOUNI'S LEGACY: THE CONTINUING DEPOLITICIZATION OF INDIVIDUAL CRIMINAL RESPONSIBILITY

Cherif Bassiouni's intellectual legacy is vast and varied, but a key theme has been his dedication to advancing the international rule of law by promoting individual criminal responsibility for serious international crimes. He has extended the boundaries of existing international practice by advancing the simple notion that international criminal investigations and prosecutions imposing individual criminal responsibility may be appropriate even when one or more of the national governments concerned argues that the issue is somehow too "political." This marvelous effort builds upon a Bassiouni family tradition of dedication to the rule of law.[1]

After a brief review of Cherif Bassiouni's historic legacy of promoting the depoliticization of international criminal responsibility and human rights, this chapter will briefly review the basic tenets and terminology of both the politicization analysis developed by the author and the legalization analysis developed independently by other scholars. The objective is to explore both the relationship and distinction between them and their joint applicability to understanding issues of politicization and principle in international law and institutions.

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[1] His grandfather was a lawyer and politician dedicated to the proposition that "only the observance of the Rule of Law and the preservation of human rights could mediate between human enmities, and thus right and not might was the only alternative to violence." *To Mahmoud Bassiouni: In Memoriam*, Editor's Dedication, *in* INTERNATIONAL TERRORISM AND POLITICAL CRIMES v (M. Cherif Bassiouni & Ved P. Nanda eds., 1973).

This chapter concludes that an untenable situation results when politicization prevails over fundamental international principle. This is especially troubling when apparent violations of *jus cogens* norms such as the prohibition of genocide are at issue, and effective prosecution is stymied by national political opposition to a stronger, more legalized regime of international criminal law. Under such circumstances it is both necessary and appropriate to act, as Cherif Bassiouni has done, to help depoliticize the situation by building the political will to act according to principle.

His Legacy as a Scholar

His Visionary Perspective on International Criminal Law

In 1973, when Professor Bassiouni published his first treatise on International Criminal Law, the Cold War was in full swing, and few scholars saw any real prospect that international criminal law might develop into the vital and dynamic area of law that it has become today. Two decades earlier, Professor George Schwarzenberger had expressed the view that "[i]t would be unduly optimistic to assume that 'international criminal law' has now been established unequivocally as a technical term."[2] In the intervening years the prospects for the development of international criminal law had gone from bad to worse, yet Professor Bassiouni persisted in believing that stronger substantive international control would ultimately be both possible and necessary. His notions at that time about the future of international criminal law were remarkably prescient:

> It appears to me that *the future may well see two stages of development. The first one will be in the field of adjective international criminal law*, and the second state of substantive international control may only come into being after the first one has been successful in the course of the customary practice of states. *That second stage would be the elaboration of an international criminal code with an international supporting structure for its enforcement and implementation.* That stage may prove unnecessary if the first one produces satisfactory outcomes. However, since this is not likely, the second stage may prove necessary if a sufficient number of states deem it in their own best interest and in the interest of

[2] 3 CURRENT LEGAL PROBLEMS 263 (1950), *quoted in* J.M. van Bemmelen, *Reflections and Observations on International Criminal Law, in* 1 INTERNATIONAL CRIMINAL LAW 77 (M. Cherif Bassiouni & Ved P. Nanda eds., 1973).

> preserving minimum world order to abate jealously guarded concepts of sovereignty.[3]

The adjective international criminal law of which he spoke has developed a great deal since then. Most states have enacted the prohibitions of international crimes into their national penal law, and there has been considerable progress in inter-state cooperation in criminal matters. The principle *aut dedere aut judicare* has been widely codified and accepted as establishing the duty of states to extradite or prosecute those believed responsible for serious international crimes.[4] More recently, the creation of a permanent International Criminal Court (ICC) even in its present, very limited, form has taken international criminal law well into the second stage of development.

His Acknowledgement of the Practical Constraints

Despite his personal commitment to human rights and the rule of law, Professor Bassiouni has always been realistic in assessing the practical and political obstacles to a more effective system of international criminal law. Three decades ago he identified the two principal obstacles to progress in the field he would help to build:

> Two main problems seem to plague the ultimate establishment and effectiveness of international criminal law. Foremost is *the adamant refusal of nation-states to surrender or share their power* with an international organization in certain areas determined for various reasons by each nation-state to be of vital self-interest. This recalcitrance derives from a multitude of sources. The other seminal problem is *the apparent impossibility of nation-states to agree on common goals* in the areas considered part of the subject matter. Even when some consensus is reached on commonly shared goals, there is disagreement on the appropriate means to achieve them.[5]

The same two problems, the reluctance of states to surrender their freedom of action and their inability to reach consensus on their common

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[3] INTERNATIONAL TERRORISM AND POLITICAL CRIMES, *supra* note 1, at 490 (emphasis added).

[4] *See* M. CHERIF BASSIOUNI & EDWARD M. WISE, AUT DEDERE AUT JUDICARE: THE DUTY TO EXTRADITE OR PROSECUTE IN INTERNATIONAL LAW (1995).

[5] 1 INTERNATIONAL CRIMINAL LAW, *supra* note 2, preface, xii (emphasis added).

goals and means, were still the focus when the ICC Statute was negotiated in 1998. Writing specifically about international legal responses to terrorism in terms then applicable to the development of international criminal law in general, he noted in 1975 that

> the problems of enforcement and implementation which have plagued the progress of international law in general are particularly visible in this area. . . . *The contemporary approach seems to avoid the issue of an international enforcement mechanism*, and consequently the trend is moving away from the elaboration of a general treaty defining the international crime of terrorism. The direction seems to be . . . to impose upon states the duty to prosecute under municipal law or to extradite. Thus the methodological choice appears *to steer away from substantive international criminal law* to adjective (complementary) international criminal law.[6]

At the time, Professor Bassiouni frankly acknowledged that international enforcement of international criminal law could not yet be achieved, and he focused on the practical task of developing and advancing the adjective international criminal law of inter-state cooperation. Decades later, he sensed before others that the time had come for a change.

His Frank Critique of the Realpolitik Extreme

Professor Bassiouni's lectures and academic writings offer a clear analysis of the *realpolitik*[7] constraints he faced in that capacity. This analysis has been offered in numerous talks, books, and articles, but its central arguments can be formulated in a few basic propositions drawn here from one of his recent speeches. It begins with the observation that "in most cases, political considerations permit perpetrators of gross violations of human rights to operate with impunity."[8] Professor Bassiouni follows

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[6] INTERNATIONAL TERRORISM AND POLITICAL CRIMES, *supra* note 1, at 488–89 (emphasis added).

[7] He offers a concise definition of *realpolitik:* "*Realpolitik* involves the pursuit of political settlements unencumbered by moral and ethical limitations. As such, this approach often runs directly counter to the interests of justice, particularly as understood from the perspective of victims of gross violations of human rights." M. Cherif Bassiouni, *The Importance of Choosing Accountability over Realpolitik*, 35 CASE W. RES. J. INT'L L. 191 (2003).

[8] *Id.*

with a critique of the extreme *realpolitik* policy perspective as inconsistent with the principle of accountability[9] as well as with the most basic promise of international human rights.[10] Perhaps most importantly, he then argues that for the long-term good of humanity, justice and accountability should prevail over the short-term immediacy of *realpolitik*.[11]

One central insight is based upon his practical experience with the Commission of Experts, as discussed below. Although the stakes in matters of human rights can be immeasurably high, all too often the contest between the justice and *realpolitik* plays out away from the public eye.[12] This makes it easier for adherents of *realpolitik* to undermine the development and functioning of effective international legal institutions without appearing to be the enemies of principle and justice.[13]

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[9] "Impunity, at both the international and national levels, is commonly the outcome of *realpolitik* which favors expedient political ends over the more complex task of confronting responsibility. Accountability, in contrast, embodies the goals of both retributive and restorative justice. This orientation views conflict resolution as premised upon responsibility and requires sanctions for those responsible, the establishment of a clear record of truth and efforts made to provide redress to victims." *Id.*

[10] "At the end of the Second World War, the world collectively pledged 'never again.' While the intention of this global promise may have been sincere, its implementation has proved elusive." *Id.*

[11] "The pursuit of *realpolitik* may settle the more immediate problems of a conflict, but, as history reveals, its achievements are frequently at the expense of long-term peace, stability, and reconciliation. It is difficult to achieve genuine peace without addressing victims' needs and without providing a wounded society with a sense of closure. A more profound vision of peace requires accountability and often involves a series of interconnected activities including: establishing the truth of what occurred, punishing those most directly responsible for human suffering, and offering redress to victims. Peace is not merely the absence of armed conflict; it is the restoration of justice, and the use of law to mediate and resolve inter-social and inter-personal discord. The pursuit of justice and accountability fulfills fundamental human needs and expresses key values necessary for the prevention and deterrence of future conflicts. For this reason, sacrificing justice and accountability for the immediacy of *realpolitik* represents a short-term vision of expediency over more enduring human values." *Id.*

[12] "The conflict between *realpolitik* and justice seldom takes a visible form. Instead, it is generally concealed from the general public. Often, the decision to pursue *realpolitik* strategies takes place during secret negotiations or through processes and formalities designed to obfuscate the truth and manipulate public perceptions." *Id.* at 192.

[13] "Some mechanisms of concealment are formal in nature, such as introducing weak components into legal norms and judicial institutions in order to deprive them of the capacity to ensure accountability. In this way, where advocates of *realpolitik* must accept a legal norm of accountability, they often neutralize its potential and render its

Cherif Bassiouni has done much to bring this conflict into the public consciousness by exposing the *realpolitik* behind the scenes and mobilizing public shame about it. Sometimes this is the principal means available to motivate governments, and the international bodies they control, to make international justice a priority. He has been all the more effective because he works, as few can, within the multiple frameworks of academia, international organizations, and international civil society.

Thus, Professor Bassiouni's scholarship and his academic legacy supplement his work as an international official. A rejection of *realpolitik* constraints is evident in each.

His Legacy as an International Official

When the Federal Republic of Yugoslavia began to disintegrate in the early 1990s, and war and ethnic conflict broke out in the region, consistent and reliable reports of widespread atrocities against civilians failed to produce a political consensus among the permanent members of the Security Council to take direct military action. As U.N.-appointed mediators, former U.S. Secretary of State Cyrus Vance and former British Foreign Minister David Owen attempted, without success, to produce a peace settlement by mediating between the warring sides in Bosnia and Herzegovina. In October of 1992, the U.N. Security Council passed a U.S. government-sponsored resolution[14] establishing a Commission of Experts to investigate allegations that serious violations of international humanitarian law had been committed in the former Yugoslavia. In December of that same year, U.S. Secretary of State Lawrence Eagleburger proposed the establishment of an international tribunal to try those responsible for war crimes in the region.[15] At the time, many thoughtful people opposed this idea, fearing that the threat of prosecution would complicate efforts to achieve a political settlement of the conflict.[16] According to Eagleburger, U.S. allies "reacted with an awkward silence" when he publicly accused Slobodan Milosevic, Radovan Karadzic,

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impact limited and insubstantial. The goals of *realpolitik* can also be achieved by creating legal institutions with a mandate to administer justice, and then, imposing bureaucratic, logistical and financial constraints to render them ineffective or only marginally effective." *Id.*

[14] S.C. Res. 780, 972 U.N. Doc. S/RES/780 (Oct. 6, 1992).

[15] *Peace vs. Justice; DePaul Professor Fears UN Sabotaged His Inquiry into Yugoslav War Crimes*, CHI. TRIB., Sept. 2, 1994, at 1.

[16] *See* Aryeh Neier, *Watching Rights; War Crimes in the Former Yugoslavia*, NATION, Aug. 8, 1994, at 152.

and other Serb leaders of war crimes and called for a "second Nuremberg."[17]

The Commission of Experts received only minimal financial and political support from the United Nations.[18] Frits Kalshoven, the original chairman of that Commission, interpreted his mandate narrowly and publicly questioned the feasibility of establishing an international tribunal before the end of the conflict.[19] He resigned after a few months, complaining that the major powers of the Security Council had not adequately supported the Commission's work.[20] This proved to be a fortuitous development for the development of international criminal law because M. Cherif Bassiouni, already a member of the Commission, was appointed its new Chairman. He took a more expansive view of the Commission's agenda and pursued it energetically. By raising additional funds from private foundations, he supplemented the limited budget provided by the United Nations and created a vast database of information incorporating all the evidence gathered by the Commission.[21]

A dispute developed between Cherif Bassiouni and David Owen over the Commission's work. As Owen saw it, his task was to seek peace through a negotiated settlement with political leaders who themselves might be future targets of prosecution. At a time when there was still little political will within the Security Council to proceed with international prosecutions,[22] Bassiouni was determined to bring to justice those indi-

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[17] *Atrocity Docket; UN Has Done Little to Prosecute Villains in Bosnia*, CHI. TRIB., Feb. 13, 1994, at 1.

[18] As one report described it: "Bassiouni says that from the beginning it was obvious to him that certain powerful member States of the U.N.—such as Great Britain and France—had no appetite to pursue war criminals. "But I found a way to end-run the pattern of delay the U.N. was engaging in," he says. When the U.N. declined his request to set up a database collection operation in Geneva, he set one up right at his own university in Chicago. When funding dried up, he drummed up more by convincing certain countries to kick in to a voluntary trust fund he says the U.N. set up at his behest." William W. Horne, *The Real Trial of the Century*, AM. LAW., Sept., 1995, at 5.

[19] *War Crime Unit Hasn't a Clue; U.N. Setup Seems Destined to Fail*, NEWSDAY, Mar. 4, 1993, at 5.

[20] *Yugoslav War Crimes Investigator Assails U.N.*, REUTERS WORLD SERV., Mar. 18, 1994.

[21] *Peace vs. Justice, supra* note 15, at 1.

[22] "I still think there is a lack of political will. I still think that the priorities are to have peace irrespective of justice, and the trouble with that . . . is you cannot compromise justice. Politics is a field in which you can make compromises, but you can-

viduals responsible for serious international crimes regardless of their continued political importance. The Bassiouni Commission made no secret of its emerging conclusion that most of the atrocities in the former Yugoslavia had been committed by Serbs. When Owen suggested that the Commission should place more emphasis on acts by Bosnian Muslims against Serbs, Bassiouni rejected this as an attempt to impose an artificial moral equivalence.[23]

When the previous head of the Commission resigned, he specifically identified Britain and France as countries that had failed to support its investigations.[24] The British government shared Owens's apparent[25] skepticism about both the work of the Commission and the advisability of creating an international tribunal, and that government's support for the creation of the tribunal was particularly weak.[26]

Under Cherif Bassiouni's leadership, the Commission pursued its task with surprising vigor. The Security Council and the U.N. bureaucracy seemed less than enthusiastic about this fact, as illustrated by the circumstances surrounding the release of the Commission's final report. U.N. administrators insisted upon receiving the final report in April of 1994 despite the Commission's prior announcement that it would not conclude its investigation of rape crimes until July of that year. The United Nations publicly released the report late Friday afternoon on May 27, without ben-

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not make compromises in justice." M. Cherif Bassiouni, as quoted in the Transcript #35 2, DIPLOMATIC LICENSE (CNN), Aug. 14, 1994.

[23] *Peace vs. Justice, supra* note 15, at 1.

[24] *Exasperation Drives War Crimes Commission Chief to Resign*, AGENCE FRANCE PRESSE, Oct. 1, 1993.

[25] David Owen rejects the notion that he opposed the work of the Commission or the creation of the ICTY. *Id.*

[26] "The British record is quite evident in this regard. In public, Britain went on record several times in support of war crimes proceedings. Behind the scenes, the British were a brake on various proposals. They provided little money, scant personnel, and few documents to the Commission and Tribunal. British officials made known to the press that they had strong misgivings about the practicality of what they saw as a U.S. push for criminal proceedings. Several circles of British opinion knew well that their government did not really favor judicial proceedings." David P. Forsythe, *Politics and the International Tribunal for the Former Yugoslavia*, 5 CRIM. L.F. 401, 404 (1994). *See also* Patrick Bishop, *Britain "Snubbed War Crimes Team,"* DAILY TELEGRAPH, Dec. 4, 1993, at 16; Mark Tran & Hella Pick, *U.N. to Set Up Commission to Investigate Atrocities in Former Yugoslavia*, GUARDIAN (London), Oct. 7, 1992, at 8, noting that "[w]hat began as a robust American initiative was watered down by Britain, France and China."

efit of an accompanying press release,[27] strongly suggesting an attempt to minimize media coverage of the report and its contents.

The final report of the Commission of Experts[28] is a strongly worded document that carries the imprint of Cherif Bassiouni and reflects his life-long commitment to bring the rule of law to the field of international criminal justice. The report carefully details the patterns of violence in the former Yugoslavia. It concludes that approximately 200,000 Yugoslavs were killed, 50,000 tortured, and 20,000 raped, and there were reports of 700 concentration camps and 150 mass graves.[29] It also expresses shock at "the high level of victimization and the manner in which these crimes were committed."[30] The report describes the policy of "ethnic cleansing" conducted by Serbs in pursuit of a "Greater Serbia,"[31] and notes that "similar practices have been committed at certain times and places by Croatian warring factions."[32]

Rejecting the politically motivated demand for a veneer of moral equivalence, the report stresses that, while all sides have been guilty of violations, "it is clear that there is no factual basis for arguing that there is a 'moral equivalence' between the warring factions."[33] The report also takes a strong stand in favor of "effective and permanent institutions of international justice."[34] Thus, the tone of the report was in stark contrast

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[27] *Peace vs. Justice, supra* note 15, at 1.

[28] Commission of Experts Established Pursuant to Security Council Resolution 780 (1992), *Final Report* U.N. Doc. S/1994/674 (May 27, 1994).

[29] *Id.*, n.87.

[30] *Id.*, n.319.

[31] *Id.*, paras. 131–145.

[32] *Id.*, paras. 146–147.

[33] *Id.*, para. 149.

[34] "It is particularly striking to note the victims' high expectations that this Commission will establish the truth and that the International Tribunal will provide justice. All sides expect this. Thus, the conclusion is inescapable that peace in the future requires justice, and that justice starts with establishing the truth. The Commission would be remiss if it did not emphasize the high expectation of justice conveyed by the parties to the conflict, as well as by victims, intergovernmental organizations, non-governmental organizations, the media and world public opinion. Consequently, the International Tribunal must be given the necessary resources and support to meet these expectations and accomplish its task. Furthermore, popular expectations of a new world order based on the international rule of law require no less than effective and permanent institutions of international justice. The Inter-

to the ambivalence of many Security Council members towards the creation of even an *ad hoc* international criminal tribunal.

Even before the release of its final report, the work of the Bassiouni Commission established the institutional and political momentum that ultimately resulted in the creation of the International Criminal Tribunal for the former Yugoslavia (ICTY). The Commission's interim report had stated that establishing an international criminal tribunal would be "consistent with the direction of its work,"[35] and it was soon thereafter that the Security Council first decided to create the ICTY.[36] Just over a year later, the Security Council followed that precedent by creating the International Criminal Tribunal for Rwanda[37] (ICTR) in response to a separate crisis in that country.

Cherif Bassiouni played a pivotal role in this historic process that went far beyond his technical work as head of the Commission of Experts. He spoke out publicly on the issues, stressing not only the need for justice, but also the political obstacles he had encountered in the Security Council and beyond. His blunt criticisms may not have been consistent with the usual diplomatic niceties,[38] but in this case they proved effective in motivating a reluctant Security Council to act.

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national Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 must, therefore, be given the opportunity to produce the momentum for this future evolution." *Id.* para. 320.

[35] Commission of Experts Established pursuant to Security Council Resolution 780, *Interim Report* U.N. SCOR, Annex, para. 20, U.N. Doc. S/25274 (Feb. 10, 1993).

[36] The International Criminal Tribunal for the former Yugoslavia was created by U.N. Security Council Resolution 827, S.C. Res. 827, U.N. SCOR, 48th Sess., U.N. Doc. S/RES/827 (May 25, 1993) [hereinafter Resolution 827].

[37] The International Criminal Tribunal for Rwanda was created by Security Council Resolution 955, S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994) [hereinafter Resolution 955].

[38] Cherif Bassiouni paid a price, of sorts, for outspokenness when he was denied appointment as the first prosecutor of the ICTY. According to one report: "Last week in New York, the players mounted a successful, if cynical, double bill at the Security Council. First, UN Secretary-General Boutros Boutros-Ghali officially nominated a candidate for prosecutor at the Yugoslav War Crimes Tribunal to the Security Council. The British, French and Russians indicated that they would veto his suggestion, Professor Cherif Bassiouni of Chicago's De Paul University. . . . Officially, the opposition to Professor Bassiouni was based on his lack of experience as a prosecutor. In fact, diplomats candidly admit that his real problem is an excess of efficiency. He is a year

Rarely do the actions of any one individual have such a crucial effect upon the decisionmaking of the Security Council. One reason that Cherif Bassiouni was so unusually effective is because human rights non-governmental organizations (NGOs) and other elements of international civil society were mobilized in support of his goals. Professor Bassiouni was acutely aware of the potential power of these groups. Pressure from civil society had been instrumental in motivating the Security Council to establish the Commission of Experts in the first place.[39] By making public statements about the *realpolitik* political maneuvering that impeded the pursuit of international justice, he brought the influence of international civil society into play once again, this time to ultimately decisive effect.[40]

Cherif Bassiouni once stated that the tribunal was only created as a fig leaf to mask the failure of the international community to prevent atrocities in the former Yugoslavia.[41] Even so, the creation of the ICTY was a major victory for the rule of law in the international system, and a key first step leading to the establishment of the permanent ICC. Before the Bassiouni Commission and the ICTY, international criminal responsibility was the forgotten stepchild of state interests and state responsibility.[42]

When Cherif Bassiouni was appointed as the Independent Expert for Afghanistan in 2004, he once again demonstrated the same dedication to advancing international law and principle despite the political fallout.

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ahead of any other potential candidate in assembling war crimes evidence—and among the chief suspects are the 'leaders' to whom David Owen and the west are urging the Bosnians to surrender most of their country." Ian Williams, *Bosnia Let Down at U.N.*, NEW STATESMAN & SOC'Y, Sept. 17, 1993, at 10.

[39] *See Importance of Choosing Accountability, supra* note 7, at 198.

[40] "I think international civil society is the necessary countervailing force to the forces of cynicism and *realpolitik*. The presence of an international civil society makes it more difficult for the forces of cynicism and *realpolitik* to achieve their ultimate goals of compromising justice." *Id.* at 203.

[41] "The decision on war crimes trials was a convenient fig leaf." Quote from M. Cherif Bassiouni in Wilbur G. Landrey, *War Crimes Tribunal: More than a Fig Leaf?*, ST. PETERSBURG TIMES, Sept. 4, 1994, at 1A. *See also* NEW REPUBLIC, Feb. 12, 1996, at 19.

[42] The possibility of a war crimes trial for Saddam Hussein was considered by the U.S. government, but ultimately rejected, after the first Gulf War. "President Bush issued a public warning to Saddam Hussein in October 1990 that he could face a war-crimes trial . . . [b]ut senior Administration officials acknowledge that there is no enthusiasm in the Administration for initiating a complicated process like the Nuremburg trials of Nazis after World War II." Elaine Sciolino, *U.S. Is Said to Withhold Evidence of War Crimes Committed by Iraq*, N.Y. TIMES, July 6, 1992, at A6.

His mandate was to "develop . . . a programme of advisory services to ensure the full respect and protection of human rights and the promotion of the rule of law and to seek and receive information about and report on the human rights situation in Afghanistan in an effort to prevent human rights violations,"[43] and he was not inclined to interpret that mandate narrowly. His report drew attention to a number of troubling human rights issues in Afghanistan, including:

> Actions by United States-led Coalition forces that appear to be unregulated by a Status of Forces Agreement (SOFA), including arbitrary detentions under conditions commonly described as constituting gross violations of human rights law and grave breaches of international humanitarian law.[44]

The U.S. government was not pleased to be mentioned in this context, but it could hardly have been too surprised. Serious questions about U.S. practices in Afghanistan had already been raised in the U.S. media,[45] but Professor Bassiouni was once again[46] penalized for speaking truth to power. The Commission for Human Rights abruptly terminated his mandate as Independent Expert after a single year, reportedly at the behest of the U.S. government.[47]

II. POLITICIZATION AND DEPOLITICIZATION: AN ANALYTICAL FRAMEWORK BASED ON U.S. PRACTICE

Politicization and the Theory of Functionalism

Accusations of "politicization," generally refer to a dysfunction in which actions or decisions relating to technical or "non-political" matters are influenced by "political" considerations unrelated to the agreed pur-

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[43] U.N. Commission on Human Rights Res. 2003/77, para. 15(b) (Apr. 25, 2003).

[44] M. Cherif Bassiouni, *Report of the Independent Expert on the Situation of Human Rights in Afghanistan*, U.N. Doc. E/CN.4/2005/122 918(1) (Mar. 11, 2005).

[45] Human rights organizations had already protested the techniques allegedly used by the CIA on some captives at the U.S.-held Bagram air base in Afghanistan and other facilities overseas. *See* Alan Cooperman, *CIA Interrogation Under Fire; Human Rights Groups Say Techniques Could Be Torture*, WASH. POST, Dec. 28, 2002, at A9.

[46] Compare the previous situation in which Cherif Bassiouni was denied appointment as the first Prosecutor of the ICTY. *See supra* note 38 and the accompanying text.

[47] *See* Warren Hoge, *Lawyer Who Told of U.S. Abuses at Afghan Bases Loses U.N. Post*, N.Y. TIMES, Apr. 30, 2005, at A7.

poses of the organization.[48] For example, in the summer of 2005, the Chinese government criticized the United States for its "mistaken ways of politicizing economic and trade issues"[49] after Congress threatened to prevent the attempted takeover of an American oil company by a large Chinese energy firm. China argued that the take-over bid was "a normal commercial activity between enterprises and should not fall victim to political interference."[50]

In an earlier work, this author investigated the legal and practical implications of a certain type of politicization in the context of the World Bank.[51] That study focused upon the use by the United States of its voting power in these organizations in order to serve political purposes unilaterally determined by the U.S. Congress. The framework for the analysis of politicization outlined below was developed in the course of that study. Although originally developed for inter-governmental organizations (IGOs) such as the United Nation's specialized agencies this framework may also be applied to less formally organized international regimes.[52]

The concept of politicization can best be understood in relation to the functionalist theory of international organization that was prevalent in the 1940s. This theory holds that the process of international organization should logically begin with the creation of "non-political" inter-

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[48] *See* BARTRAM S. BROWN, THE UNITED STATES AND THE POLITICIZATION OF THE WORLD BANK: ISSUES OF INTERNATIONAL LAW AND POLICY 14 (1992).

[49] The Chinese Foreign Ministry said in a written statement: "We demand that the U.S. Congress correct its mistaken ways of politicizing economic and trade issues and stop interfering in the normal commercial exchanges between enterprises of the two countries. . . CNOOC's bid to take over the U.S. Unocal company is a normal commercial activity between enterprises and should not fall victim to political interference. The development of economic and trade cooperation between China and the United States conforms to the interests of both sides." Peter S. Goodman, *China Tells Congress To Back Off Businesses: Tensions Heightened by Bid to Purchase Unocal*, WASH. POST, July 5, 2005, at A1 (emphasis added).

[50] *Id.*

[51] BROWN, *supra* note 48. The International Bank for Reconstruction and Development (IBRD) is commonly referred to as the World Bank, and the cluster of affiliated organizations centered around the IBRD is often referred to as the World Bank Group. *Id.*

[52] Krasner defines a regime as "principles, norms, rules, and decision making procedures around which actors expectations convergence in a given issue-area." INTERNATIONAL REGIMES (Stephen D. Krasner ed., 1983).

national agencies dealing with specific economic, social, technical, or humanitarian functions of common interest upon which state actors can most easily agree, leaving more ambitious political goals until later.[53] According to this theory, it is only after states have developed habits of effective international cooperation on non-political matters that it will be possible for them to cooperate in resolving high-level political problems.[54] The fact that certain international organizations are sometimes referred to as non-political is a reflection of this theory.

The rules and goals of international organizations must be built upon the consensus of member states. In a few organizations, such as the World Bank, the rules explicitly exclude politicized decisionmaking and mandate that decisions should be made on technical grounds.[55] In others, there may be only an implicit understanding that decisions should be made on technical terms. Either way, there is a clear link between the agreed purposes of an IGO and the notion of politicization. This theory was well known in the years prior to the formation of most of the U.N. specialized agencies and, in effect, "[t]he conceptual basis of the specialized agencies is functionalism."[56]

While it is indeed arguable that functionalism as a strategy for international cooperation is the conceptual basis of the specialized agencies, it is clear that the theory is neither a rule nor even a principle of international law. Nonetheless, there is a considerable body of state practice relating to the politicization of international organizations. The U.S. gov-

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[53] *See* DAVID MITRANY, A WORKING PEACE SYSTEM 69–73 (4th ed. 1946).

[54] Claude calls this the "separability-priority" thesis. I. CLAUDE, JR., SWORDS INTO PLOWSHARES: THE PROBLEMS AND PROCESS OF INTERNATIONAL ORGANIZATION 384 (4th ed. 1971).

[55] The Articles of Agreement of the International Bank for Reconstruction and Development, Article IV(10), provides as follows: "The Bank and its officers shall not interfere in the political affairs of any member; nor shall they be influenced in their decisions by the political character of the member or members concerned. Only economic considerations shall be relevant to their decisions, and these considerations shall be weighed impartially in order to achieve the purposes stated in Article I."

Both the General Counsel of the Bank, and the Bank's EDs, have endorsed the view that this Section 10 "is no more than a reflection of the technical and functional character of the Bank as it is established under its articles of agreement." Letter from the IBRD General Counsel to the U.N. Secretariat (May 5, 1967), *in* U.N. JURID. Y.B. 121 (1967).

[56] Ekhart Klein, *United Nations Specialized Agencies, in* ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 366 (1983).

ernment invoked politicization as one of the justifications for its temporary withdrawal from the International Labor Organization (ILO) from 1977–1980.[57] A similar logic contributed to the decision of the United States to withdraw from the U.N. Economic Scientific and Cultural Organization (UNESCO) at the end of 1984.[58] In the course of these experiences the U.S. government outlined its view of the applicable principles. Ultimately the ILO[59] and UNESCO[60] responded by instituting major reforms to address the stated concerns of the United States, and the United States has in turn rejoined each of them. This body of practice suggests that a basic framework of legal principles applicable to the politicization of international organizations has already been accepted as part of customary international law.

Patterns and Categories of Politicization

The link between the agreed purposes of an IGO and the notion of politicization is of critical importance. The common thread detectable in various definitions of the term seems to be that politicization implies some politically motivated actions tending either to go beyond or to contradict the agreed object and purpose of the agency involved. David Kay identifies three patterns of politicization that provide a good example of this thread.[61]

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[57] *See* 30(2037) DEPT. STATE BULL., at 65–66 (Apr. 1980); Letter from Henry Kissinger, *Secretary of State of the United States of America, to Francis Blanchard, Director General of the ILO, containing notice of intent to withdraw from the ILO*, 14(6) I.L.M. 1582–84 (Nov. 5, 1975).

[58] *See* 84(2083) DEPT. STATE BULL., at 41–42 (Feb. 1984).

[59] *See* David Johnston, *Washington Talk: International Labor Organization; Goal of Cooperation, International Division*, N.Y. TIMES, Sept. 14, 1987, at B8. "The I.L.O. actually lost American support once. . . . From 1977 to 1980 the United States declined to participate, saying that the agency had deteriorated into little more than a propaganda front. . . . In 1980 the Carter Administration decided to rejoin the agency after Mr. Blanchard [the ILO Director-General] said he would use his powers to prevent politically motivated resolutions from being acted on by the group's full membership."

[60] *See* Alan Riding, *A U.N. Agency Is Revitalized by Re-entry of the U.S.*, N.Y. TIMES, Sept. 29, 2002, at 22.

[61] Kay says the following about the term "politicization": "When this term is used carefully, which is often not the case, it denotes three closely related behavior patterns: first, considering and acting on matters that lie essentially outside the specific functional domain of a given specialized agency or program; secondly, the reaching of decisions on matters within an agency's or program's functional competence through a process that is essentially political and does not reflect technical and scientific fac-

The first pattern is essentially a matter of an IGO that reviews and/or acts on matters not insufficiently related to the functional mandate of that agency. The second concerns decisions by an agency that are taken according to a procedure that may be considered flawed because it reflects "political" factors rather than the "technical" or "scientific" factors that are related to the purposes of the agency and are often considered to be its only appropriate concern. Kay's third pattern of politicization may overlap substantially with his second, but it seems in particular to involve the use of an agency's decision-making process in order to make political statements.

Kay's three patterns of politicization, like those of at least one other scholar who has written on the subject,[62] appear to be derived from an analysis of the reasons cited by the U.S. government in 1975 as the motivation for its purported withdrawal from the ILO. The U.S. notice of intent to withdraw from that organization, signed by Henry Kissinger, refers to "four matters of fundamental concern" considered to be problems by the U.S. government. As three of these four items involve politicization of a sort, it will be worthwhile to examine each of them individually here.

Involvement in Political Issues Beyond the Mandate of the Organization

One of the matters referred to is the "increasing politicization of the organization." The following is the description of this problem contained in the U.S. notice of withdrawal.

> In recent years the ILO has become increasingly *and excessively involved in political issues which are quite beyond the competence and mandate of the organization.* The ILO does have a legitimate and necessary interest in certain issues with political ramifications. It has major responsibility, for example, for international action to promote and protect fundamental human rights, particularly in respect of freedom of association, trade union rights and the abolition of forced labor. But international politics is not the

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tors in the decision process; and thirdly, the taking of specific actions on issues within an agency's or program's competence for the sole purpose of expressing a partisan political position rather than attempting to reach an objective determination of the issues." DAVID KAY, THE FUNCTIONING AND EFFECTIVENESS OF SELECTED UNITED NATIONS SYSTEM PROGRAM (1980) (Studies in Transnational Legal Policy, Series No. 18).

[62] DOUGLAS WILLIAMS, THE SPECIALIZED AGENCIES AND THE UNITED NATIONS: THE SYSTEM IN CRISIS 55–56 (1987).

> main business of the ILO. Questions of relations between states and proclamations of economic principles should be left to the United Nations and other international agencies where their consideration is more relevant to those organization's responsibilities. *Irrelevant political issues divert the attention of the ILO* from improving the conditions of workers—that is, from questions on which the tripartite structure of the ILO gives the organization a unique advantage over the other, purely governmental, organizations of the United Nations family.[63]

The concern here is with the first pattern of behavior, described by Kay above, and specifically with the fact that the attention of the ILO was being diverted by "irrelevant political issues," or issues considered by the U.S. government to be inadequately related to the specific functional domain of the ILO.

Selective Concern for Human Rights

As noted above, Kay's second and third patterns of politicization appear to overlap a great deal. Both seem to entail action or decisions by an agency on matters within its competence or mandate but according to a process that is politically rather than "technically" or "objectively" determined. One clear distinction between them is that Kay's second category involves "the reaching of decisions" (plural) and thus describes a general pattern of behavior, while his third concerns "the taking of *specific* actions on issues . . . for the sole purpose of expressing a partisan political position."

Whether one considers the distinction to be a useful one or not, it is fairly evident that the same distinction was made by Henry Kissinger in the U.S. notice of intent to withdraw from the ILO. Complaining of "selective concern for human rights" as another of the fundamental matters of concern to the U.S. government, that letter describes the problem as follows:

> The ILO Conference for some years now has shown an appallingly selective concern in the application of the ILO's basic conventions on Freedom of Association and Forced Labour. It pursues the violation of human rights in some member states. It grants immunity from such citations to others. This seriously under-

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[63] Letter from Henry Kissinger, *supra* note 57.

> mines the credibility of the ILO's support of Freedom of Association, which is central to its tripartite structure, and strengthens the proposition that these human rights are not universally applicable, but rather are subject to different interpretations for States with different political systems.[64]

This selective concern for human rights is a general pattern of behavior that the United States apparently found objectionable in a number of decisions by the ILO conference. In this way it corresponds to Kay's second category of politicization.

Disregard of Due Process

Kissinger's complaint about the alleged "disregard of due process" by the ILO conference in adopting resolutions corresponds to Kay's third pattern of politicization. Note the language used:

> The ILO once had an enviable record of objectivity and concern for due process in its examination of alleged violations of basic human rights by its member states. The constitution of the ILO provides for procedures to handle representations and complaints that a member State is not observing a convention that it has ratified. Further, it was the ILO which first established fact-finding and conciliation machinery to respond to allegations of violations of trade union rights. In recent years, however, sessions of the ILO conference increasingly have adopted resolutions *condemning particular member states* which happen to be the political target of the moment, in utter disregard of the established procedures and machinery. This trend is accelerating, and it is gravely damaging the ILO and its capacity to pursue its objectives in the human rights field.[65]

The reference here to "resolutions condemning particular member states which happen to be the political target of the moment" is more specific than the prior complaint about selective concern for human rights, just as Kay's third pattern of politicization is more specific than is his second. The distinctions between Kay's three patterns of politicization can thus be clarified by reference to the U.S. notice of withdrawal from the ILO.

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[64] *Id.*

[65] *Id.* (emphasis added).

Positive and Negative Forms of Politicization

A simpler classification distinguishes between two basic types of politicization using more or less the same criteria mentioned above. One type, essentially identical to what Victor-Yves Ghébali has referred to as "extraneity,"[66] involves an attempt to cause the resources of an international agency (its time, its financial resources, perhaps even its publicity) to be diverted to purposes beyond the competence and agreed mandate of the organization. This can be referred to as *"positive politicization."* Kay's first pattern of politicization and Henry Kissinger's complaint quoted above about the increasing politicization of the ILO would both fall under this rubric. UNESCO's efforts to promote a New World Information Order may also be considered an example of this type of politicization.

The other basic type of politicization, which can be referred to as *"negative politicization,"* occurs when an international specialized agency makes decisions (which may well be within its competence) according to "politicized" criteria that are unrelated to, or at least not adequately related to, the technical mission of the agency involved. This form of politicization is negative because it is normally directed against a certain member state, or a group of member states, targeted for political reasons. The result of negative politicization, when it is effective, can be to deprive a member state (the target) of some or all of the benefits of membership in an organization or participation in a regime.[67]

Politicization as a Legal Phenomenon

By what objective and definable criteria might one hope to identify the threshold between politicization as mere political phenomenon and politicization as a legally significant development? The latter must by definition have legal as well as political implications, that is, it must affect the rights or the duties of states under international law and not just

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[66] Victor-Yves Ghébali, *The Politicization of U.N. Specialized Agencies: A Preliminary Analysis, in* MILLENNIUM: JOURNAL OF INTERNATIONAL STUDIES 322 (1985).

[67] As we have seen above, the increasing politicization of the ILO was only one of four matters of concern referred to by the United States in its notice of withdrawal from that agency. Two of the other problems mentioned were "selective concern for human rights" by the ILO conference and "disregard of due process" by the organization in its examination of alleged violations of basic human rights by member states. In a sense, both of these involve action directed against a State or States presumably targeted for political reasons, and thus both can be classified as forms of negative politicization. *See* Letter from Henry Kissinger, *supra* note 57.

their interests as politically defined. The legal significance of politicization results from the effect that it can have upon the balance of such *rights* and *duties* applicable to individual member states.

The legal significance of politicization is most apparent when it substantially and detrimentally affects the legal rights of a state.[68] Only in the case of effective negative politicization is this likely to occur. If the negative politicization of an organization is ineffective, this will usually mean that in spite of the politicization, no decision adverse to the target's rights was ultimately taken by the organization. This is a very common result of negative politicization (especially within the World Bank context).[69]

Of course, any state is sure to resent being the target of negative politicization even if the actual legal effect upon its rights seems minimal or even nil. The target may take little comfort from the knowledge that the manner in which it has been condemned is merely symbolic, regardless of whether that condemnation comes in the form of a unilateral statement by the representative of a single member state or a resolution endorsed by a majority of the entire membership.

A condemnation or other decision by an organization that detrimentally affects the rights of a member state may be legal and appropriate if the state is targeted as a form of accountability for its activities within the purview of that agency. When, for political reasons, that agency acts selectively against certain members, it raises problems of fairness, and charges of politicization are sure to follow, but this alone cannot invalidate an otherwise valid decision.[70]

Legally significant politicization also occurs whenever a state, acting within the context of an IGO, takes politicizing actions that are in con-

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[68] The legal concept of politicization can be usefully extended well beyond this narrow state-centric usage. For example, legally significant politicization might also consist in the violation of the internationally recognized rights of non-state actors such as individuals. See the discussion of Politicization and Principle in International Criminal Law, *infra* notes 99–147 and the accompanying text.

[69] *See* BROWN, *supra* note 48, at 242–44.

[70] Thus, the unfavorable treatment that the *apartheid* government of South Africa once received in many specialized agencies could at that time be justified by the detrimental effects of *apartheid* upon the technical cooperation dealt with by those agencies. The fact that some other member states with serious human rights problems were not subjected to the same unfavorable treatment was not enough to automatically invalidate the anti-*apartheid* policies of these agencies.

flict with the constitutive treaty of that organization and that materially violate its *obligations* as a member. In many cases, such a material violation is likely to have a direct effect upon the rights of other members, but a material breach is legally significant even where there is no such immediate effect.[71]

It is difficult to say at exactly what point the *positive* politicization of an IGO becomes a legal, rather than merely political, phenomenon. When, according to the standard suggested above, are the legal rights of member states "substantially and detrimentally affected" by positive politicization? And when could this form of politicization constitute a material violation of an IGO's constitutive treaty? Positive politicization by definition refers to an attempt to cause the resources of an IGO to be diverted to or used for purposes beyond the competence and mandate of the organization. But who determines what does and what does not fall within that mandate?

How convenient it would be if this matter could always be determined objectively and according to legal principles. In reality, the charter of an IGO can be very vague about the scope of its intended mandate, and indeed these mandates often evolve.[72] States can and do disagree about how broadly or narrowly the purposes of a given organization or regime should be interpreted, and when this occurs, the dispute is likely to be resolved politically if at all. Of course, if the various member states agree that broader action by an agency is desirable, then the issue will not be controversial, and no charges of politicization will be raised. All of this suggests that it will be especially difficult to formulate a workable definition of *positive* politicization as a legal phenomenon.[73]

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[71] According to the definition found in Article 60(3)(b) of the Vienna Convention on the Law of Treaties, material breach of a treaty can consist in either the unsanctioned repudiation of the treaty or "the violation of a provision essential to the accomplishment of the object and purpose of the treaty." Article 60(2) of that convention also provides that the material breach of a multilateral treaty can in certain circumstances be invoked to justify the suspension of such a treaty. Vienna Convention on the Law of Treaties art. 60, Jan. 27, 1980, 1155 U.N.T.S. 331, 8 I.L.M. 679.

[72] *See* BROWN, *supra* note 48, at 87–155.

[73] *See* INIS L. CLAUDE JR., THE CHANGING UNITED NATIONS xvii (1967), where he asserts that the U.N. can have no purposes of its own. He goes on to state that "the political process within the organization . . . is, in essence, a continuous struggle between the advocates of conflicting purposes or between those whose conception of the proper order of priorities are different, a struggle to determine which purposes

This is not to say, however, that there is no possible loss to member states from the positive politicization of an international agency. The political interests of a state may be disserved by the unwelcome expansion of an IGO's field of activities. The United States, for example, considered that UNESCO's efforts to promote a New World Information and Communication Order were contrary to its own national interest.[74]

The interests of a member state, which does not support the positive politicization of an international agency, may be affected in a more tangible manner as well if the agency's funds, a portion of which are normally contributed by each member, are diverted to activities that are seen as going beyond the agreed purposes of the organization. This form of positive politicization may affect the pecuniary interest of member states to the extent that they are required to pay the costs of the activities or programs involved. Disputes between member states about the proper purposes of an IGO can therefore be directly linked with disputes about the budget of the organization.[75]

If positive politicization is fundamentally a political rather than a legal phenomenon, the remedy for this type of problem, from the point of view of a concerned state that objects to the politicization, is likely to

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and whose purposes the United Nations will serve. This is what politics is about, and this is the fate of political institutions."

Although Claude expresses this view only with regard to the United Nations and "political institutions," his point that the purposes of an international organization are determined by the attitudes of its members could be applied to the specialized agencies as well. According to this logic, positive politicization would only be a state of mind and could not be objectively defined at all.

74 *See* Gregory D. Newell, Former Ass't U.S. Sec'y of State for Int'l Org. Affairs, Perspectives on the U.S. Withdrawal from UNESCO, Address at Stanford University (Oct. 31, 1984), *published in* DEPT. STATE BULL., at 54–55 (Jan. 1985), Newell explaining the motives behind the U.S. withdrawal from that agency:

> UNESCO programs and personnel are heavily freighted with an irresponsible political content and answer to an agenda that is consistently inimical to U.S. interests. . . .
>
> Voluble UNESCO participants are persistently hostile to U.S. political views, values, and interests. Our participation, then, in UNESCO "consensus" can, on occasion, amount to complicity in vilification of the United States—which is part of everyday life there.

75 The case of the U.S. withdrawal from UNESCO again provides a convenient example of a situation where one member state, the United States, was unhappy both with the scope the organization's activities, which it considered to be excessively broad, and with the expansion of the organization's budget. *See id.*

be political as well. One political remedy is that course of action pursued by the United States to protest what it perceived as the politicization of the ILO and of UNESCO. No state can legally be obliged to remain a member of an IGO, and this, in theory, means that they all retain the option of withdrawing. By withdrawing and "voting with their feet,"[76] member states can demonstrate their disagreement with a trend towards politicization.

It is the past practices of the U.S. government, in withdrawing from and rejoining the ILO and UNESCO, that have generated the bulk of the state practice, and evidence of *opinio juris*, contributing to the development of customary international law standards on politicization. The relevant practice also includes the response of those organizations to U.S. demands for reforms. By implementing those reforms, and effectively depoliticizing their activities, the ILO and UNESCO have themselves endorsed the legal framework for politicization discussed above.

In practice, withdrawal will be a more attractive option for some states than for others. If, for example, a developing country wanted to withdraw from the World Bank to protest the politicization of that agency, it might have a lot to lose by doing so. As a non-member, it would no longer be eligible to borrow from the Bank.[77]

Politicization as a Political Phenomenon

It is possible, and even necessary, to analyze and attempt to understand politicization both as a political phenomenon and as a legal phenomenon. Some observers, rejecting a legal approach to the question,

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[76] Leo Gross suggests that states serious about preserving the rule of law in international organizations "will have to vote, regretfully perhaps, more often 'with their feet,' as the saying goes, and with the purse, and not merely with the voice and hands." Leo Gross, *On the Degradation of the Constitutional Environment of the United Nations*, 77 AM. J. INT'L L. 583 (1983).

[77] In 1950, Poland, originally a member of the Bank, withdrew because it became clear that the Bank, which was largely under the influence of the United States, was not going to approve any loans to that state as long as it was on the other side of the East-West ideological divide. Czechoslovakia's membership in the Bank followed a similarly troubled course and was formally terminated in 1954 after a dispute about the unpaid portion of its capital subscription. *See* E.S. MASON & R.E. ASHER, THE WORLD BANK SINCE BRETTON WOODS 170–71 (1973). This demonstrates that withdrawal can be a viable option for target states in cases of negative politicization. After all, a state that has been deprived of all the benefits of membership has little to gain by remaining a member.

have noted that it seems to be nothing more than the existence of controversy within an organization that leads to charges by some of the antagonists that the organization has become politicized.[78] It is undeniable that politicization seems to be something that states are quite willing to accuse each other of doing but never seem to admit to doing themselves. While states have been known to trade legal as well as political accusations, the use of the term suggests that its primary usage may indeed be political and not legal, and that the actual meaning of the term is unclear.[79]

If a broad consensus could be achieved on international economic and political issues across the board (admittedly a highly unlikely development), then there would, in theory, be no need for any state or group of states to politicize international agencies in protest over their inability to obtain satisfaction elsewhere. In a sense then, politicization is linked to the lack of consensus and is as inevitable within the international agencies as is controversy itself.

The politicization phenomenon in the U.N. specialized agencies is indicative of the present state of development, or under-development, of the international community. There must be a certain degree of *consensus* within that community before international organizations or regimes can be formed at all, simply because their very existence depends upon the concurrence of the participating states. On the other hand, the differing viewpoints and, more fundamentally, the differing *interests* of the participating states ensure that the consensus will always be a limited one. Viewed as a political phenomenon, the politicization of an international organization or regime is a manifestation of the controversy generated by conflicts of interest both within that institutional framework and outside of it.

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[78] *See* G.M. Lyons, D.A. Baldwin & D.W. Mcnemar, *The Politicization Issue in the U.N. Specialized Agencies, in* THE CHANGING UNITED NATIONS, OPTIONS FOR THE UNITED STATES 85–86 (David A. Kay ed., 1977). In a discussion of politicization that is not limited to the phenomenon as it occurs within international agencies, Keohane and Nye once took a similar view stating that "[i]n the terminology that we will use . . . the system becomes "politicized" as controversiality increases and depoliticized as it decreases." R.O. Keohane & J.S. Nye, *World Politics and the International Economic System, in* C. FRED BERGSTEN, THE FUTURE OF THE INTERNATIONAL ECONOMIC ORDER: AN AGENDA FOR RESEARCH 117 (1973).

[79] Lyons, Baldwin, and McNemar put it this way: "the term 'politicization,' like 'exploitation,' and 'imperialism,' is so loaded with pejorative connotations that serious questions arise about its analytic utility." *Id.* at 84–85.

III. LEGALIZATION ANALYSIS

A different perspective on the depoliticization of individual criminal responsibility is revealed through analysis focusing on the "legalization" of international affairs.[80] Legalization "represents the decision in different issue-areas to impose international legal constraints on governments."[81] The relevant literature defines "legalization" as a set of institutional characteristics defined along the three dimensions of obligation, precision, and delegation.[82] *Obligation* refers to the extent to which states are legally bound, meaning that "their behavior is subject to scrutiny under the general rules, procedures, and discourse of international law."[83] *Precision* measures how far "rules unambiguously define the conduct they require, authorize, or proscribe."[84] The dimension of *delegation* charts the degree to which "agreements delegate broad authority to a neutral entity for implementation of the agreed rules . . . including their interpretation, dispute settlement, and (possibly) further rule making."[85] This definition makes it clear that this last dimension of delegation is much broader than the concept of "judicialization," which is more often the focus of legal scholars.[86]

Legalization can sometimes serve the interests of states, but it comes at a cost in that it imposes constraints on government action.[87] Governments are understandably reluctant to accept these autonomy costs.

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[80] *See* Judith Goldstein, Miles Kahler, Robert O. Keohane & Anne-Marie Slaughter, *Legalization and World Politics: An Introduction*, 54 INT'L ORG. 385 (2000); Kenneth W. Abbott, Robert O. Keohane, Andrew Moravcsik, Anne-Marie Slaughter & Duncan Snidal, *The Concept of Legalization*, 54 INT'L ORG. 401 (2000).

[81] Goldstein et al., *supra* note 80, at 386.

[82] Abbott et al., *supra* note 80.

[83] Goldstein et al., *supra* note 80, at 387.

[84] *Id.*

[85] *Id.*

[86] *Id.* at 389.

[87] "[L]egalization can help States and other actors resolve the commitment problems that are pervasive in international politics, reduce transaction costs, and expand the grounds for compromise. These benefits stem from both interest-based and norm-based processes, and they accrue to interest-based and norm-based agreements. But legalization also entails contracting costs of its own, as well as imposing constraints on government action (autonomy costs)." Goldstein et al., *supra* note 80, at 394.

Greater legalization, "[i]n creating new institutional forms, mobilizes different political actors and shapes their behavior in particular ways."[88]

The Two Possible Extremes of Legalization

It is useful at least initially, to think of the degree of legalization of international affairs as a continuum between two extremes.[89] At one extreme would be the complete primacy of *realpolitik* and state power and the absence of all legalization. At the other would be the primacy of international law and institutions in a fully legalized system making, interpreting and enforcing the global rule of law.

Although the use of military force in the service of *realpolitik* remains an all too familiar part of today's world, we are nonetheless far removed from the extreme of zero legalization. If we take as our example the field of international criminal law, there is an almost universal consensus on standards of international humanitarian law prohibiting genocide, crimes against humanity, and war crimes, as well as a growing international consensus on basic international human rights standards. The broad, effectively universal, acceptance by states of these fundamental normative restrictions means that even before the ICC and its predecessors, the ICTY and the ICTR, there was already a significant degree of *obligation* and *precision* in our still-primitive and auxiliary system of international criminal law. State power and state prerogatives are limited by treaty obligations, the rights of other states and by international human rights standards even when no effective international enforcement mechanisms are available.

At the other extreme, all important international matters might someday be regulated by a fully legalized international regime operating pursuant to agreed principles. This would require both the development of new international norms in multiple subject areas and the delegation of authority to stronger and more effective international institutions. It

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[88] Miles Kahler, *Conclusion: The Causes and Consequences of Legalization*, 54 INT'L ORG. 661 (2000).

[89] The seminal paper on legalization describes this continuum as follows: "Consequently, the concept of legalization encompasses a multidimensional continuum, ranging from the 'ideal type' of legalization, where all three properties are maximized; to 'hard' legalization, where all three (or at least obligation and delegation) are high; through multiple forms of partial or 'soft' legalization involving different combinations of attributes; and finally to the complete absence of legalization, another ideal type. None of these dimensions—far less the full spectrum of legalization—can be fully operationalized." Abbott et al., *supra* note 80, at 401–02.

is clear that we are far from this end of the spectrum as well, given the persistence of state sovereignty, the continuing primacy of state (especially U.S.) power, and the lack of international consensus on more effective international enforcement mechanisms.

There has been quite a proliferation in the *delegation* of authority to international courts and enforcement mechanisms in recent years in areas such as international trade, the law of the sea, and, of course, international criminal law. The uneven progress of this legalization,[90] and the fact that strong legalized institutions are more common in more "technical" areas than in more "political" ones, may be evidence of David Mitrany's theory of functionalism at work.

Asymmetries in the Legalization Process

Although the basic contrast between these two poles is quite clear, the present state of all international law and international institutions cannot be charted on a single axis of legalization. First, the three separate dimensions of obligation, precision, and delegation must be accounted for. Even then, varying degrees of each dimension prevail within different subject areas or regimes such as trade, human rights, the use of force, refugee affairs, or the environment. Legalization can only be achieved through consensus, and there are varying levels of consensus within each of these subject areas. The situation is not totally fragmented. For example, some limited subject-matter integration has already occurred in the legalization of the international trade and international environmental regimes.[91] On the other hand, there has been considerably less integration between fields such as human rights and the use of force.[92] Only at the highest level of legalization would full integration of all such international sub-regimes be achieved.

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[90] See the discussion of asymmetries in the legalization process, *infra* notes 91–92 and accompanying text.

[91] International trade bodies, such as those within the WTO, now consider certain international environmental standards in the context of international trade disputes. According to the WTO website: "Issues relating to trade, the environment and sustainable development more generally, have been discussed in the GATT and in the WTO for many years. Environment is a horizontal issue that cuts across different rules and disciplines in WTO. The issue has been considered by Members both in terms of the impact of environmental policies on trade, and of the impact of trade on the environment." *WTO: Trade and the Environment*, http://www.wto.org/english/tratop_e/envir_e/envir_e.htm.

[92] Compare the controversial issue of the legality of the use of force for purposes of humanitarian intervention. *See* Bartram S. Brown, *Humanitarian Intervention at a Crossroads*, 41 WM. & MARY L. REV. 1683 (2000).

Legalization and the Gap Between the Development of Norms and Their Enforcement in International Law

It is easier to reach international consensus on rules than on effective institutions to enforce them. Thus, in the present state of what is still a very weakly institutionalized international legal system, *lex lata* rules often exist without enforcement mechanisms at all, much less effective ones. The resulting gap between law and enforcement leaves states with effective freedom of action despite the obligations they have assumed. At the very least, it leaves them with a large margin of discretion in their interpretation and application of the very international legal norms intended to restrain them.[93]

The gap between law and enforcement is even greater with respect to the major political and military powers. Under the U.N. Charter, the veto permits the permanent members of the Security Council to act with only minimal concern for the Council's reaction. For example in 2003, the United States sought Council support for its invasion of Iraq without concern that the Council might instead condemn that action or declare it to be a violation of international law or threat to international peace and security. Any attempt by the Council to do so would have been met by a U.S. veto.

This is not to say that there is nothing to deter a permanent member from violating international law. Many foreign governments, the U.N. General Assembly, and the U.N. Secretary-General all condemned the Iraq invasion as illegal, but none of their pronouncements, nor even all of them together, could match the legal effect of a Security Council decision.[94] Basic balance-of-power constraints (another side of *realpolitik*) con-

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[93] "In most areas of international relations, judicial, quasi-judicial, and administrative authorities are less highly developed and infrequently used. In this thin institutional context, imprecise norms are, in practice, most often interpreted and applied by the very actors whose conduct they are intended to govern. In addition, since most international norms are created through the direct consent or practice of States, there is no centralized legislature to overturn inappropriate, self-serving interpretations. Thus, precision and elaboration are especially significant hallmarks of legalization at the international level." Abbott et al., *supra* note 80, at 414.

[94] Back in 1950, the Uniting for Peace Resolution was formulated by the United States to allow the U.N. General Assembly to take action when the Soviet Union's veto prevented the Security Council from acting to protect international peace and security. *See* Uniting for Peace Resolution, G.A. Res. 377 (V), U.N. Doc. A/377 (Nov. 3, 1950). "[B]y approving the American-sponsored Uniting for Peace Resolution, the Assembly set itself up as a substitute for the Security Council in handling crises when-

tinue to apply but may not always be effective. The balance-of-power operates best in tandem with the U.N. Charter's collective security system as it did in the 1991 Gulf War response to Iraq's invasion of Kuwait.

Legalization Analysis Distinguished from Politicization Analysis

Both legalization and politicization are concerned with the analysis of international organizations and regimes, but the two concepts are in fact quite distinct. Politicization analysis is normative in the sense that politicization is not a neutral term. Politicization is a normative anomaly that occurs when international institutions fail to comply with agreed standards in their decisionmaking and other actions. Legalization analysis is explanatory rather than normative. It attempts to explain why and how actors choose to create legalized institutions, and considers the consequences of legalization,[95] but without arguing that any legal rules or other normative standards apply to the process or taking a position for or against legalization.[96]

The debate about legalization is concerned with the varying degrees to which there is a consensus that political interaction between states should be subject to international law and institutions. Politicization analysis is about whether international decisionmaking is done according to the agreed rules despite political pressures. Thus, an international institution or regime (e.g., refugee affairs) can be at either a high or low level of politicization, regardless of its place along the continuum of legalization.[97]

Opponents of greater legalization stress the shortcomings of international law and institutions, especially including their alleged or at least

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ever the use of the veto might have blocked action by the latter body." CLAUDE, *supra* note 54, at 150. The Uniting for Peace resolution procedure has been used ten times since 1950, but not since the 1960s. Proposals to invoke it in response to the anticipated U.S. invasion of Iraq never got off the ground. *See* Thalif Deen, *U.S. Moves To Block U.N. Emergency Session on War*, IPS-INTER PRESS SERV. Mar. 27, 2003.

[95] Goldstein et al., *supra* note 80, at 386.

[96] After defining legalization, the scholars who developed legalization analysis insist that "[t]his definition does not portray legalization as a superior form of institutionalization. Nor do the contributors to this special issue adopt a teleological view that increased legalization in international relations is natural or inevitable." *Id.* at 388.

[97] A more legalized regime will tend to provide more standards on which to base later politicization analysis, but this does not necessarily mean that it will in practice be any more, or less, politicized.

potential politicization. A well-known example is the critique of the ICC that assumes it will be too easily manipulated for political (anti-American) purposes. The ICC Statute attempts to address this concern by providing a number of safeguards against politicization.[98] These safeguards could not placate the principal opponents of the ICC, however, to the extent that the safeguards themselves (and indeed the entire ICC Statute) are perceived by those opponents to constitute more undesirable legalization of international politics.

Fear of politicized international decisionmaking was offered as a rationale for opposition to the legalization which the ICC represents. In the past, U.S. charges of politicization were made only after an international organization had somehow misbehaved. In the case of the ICC, the United States launched a preemptive strike against the possibility of a politicized anti-American ICC.

IV. POLITICIZATION AND PRINCIPLE IN INTERNATIONAL CRIMINAL LAW

Extending the Concept of Politicization Beyond the Technical Realm into International Criminal Law: A Few Caveats

Traditional politicization analysis, as discussed above, is generally applied only to international institutions in more technical, non-political fields, such as the ILO, UNESCO, the World Bank, or the International Monetary Fund (IMF), and not to an organization such as the United Nations whose primary function (the maintenance of international peace and security) is fundamentally political.[99] This chapter considers, briefly and for the first time, the broader application of the concept of politicization to the issues and institutions of international criminal law.

This inquiry immediately raises a number of issues, the first of which is whether the enforcement of international criminal law should be orga-

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[98] These safeguards include pre-conditions limiting the ICC jurisdiction (unless the Security Council intervenes) to cases where either the territorial state or the state of nationality of the accused has consented in some way (ICC Statute, Article 12); especially narrow definitions of some of the crimes within the jurisdiction of the ICC, (Articles 7–8); the principle of complementarity, which limits the jurisdiction of the ICC to situations where states are unwilling or unable to prosecute (Statute, Article 17); and various procedures by which interested states or individuals can challenge any ICC investigation or prosecution before a pre-trial chamber (Articles 18–19). Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9 (July 1, 2002) [hereinafter Rome Statute].

[99] *See* BROWN, *supra* note 48, at 14.

nized primarily as a technical task or primarily as a political one. It can be organized as a technical task only if there is a strong international consensus both on the norms of international criminal law (*obligation* and *precision*) and to some extent also on mechanisms for their implementation (*delegation*). Recent years have seen tremendous progress in building this consensus as evidenced by the success of the *ad hoc* ICTY and ICTR and the creation of a permanent ICC. But the consensus is incomplete in light of the U.S. government's continuing opposition to the ICC.

By taking international criminal law farther outside of the realm of politics, the depoliticization[100] of international criminal law promotes the rule of law. The ICC now has the opportunity to prove that it can apply the norms of international criminal law fairly and without undue political bias. The 105 states ratifying the ICC Statute have committed themselves to the idea that it can. For those key states that have not accepted the ICC, its existence and functioning remain a matter of political controversy and not a mere technical issue.

But if the legalization of international criminal law is not a technical matter separable from politics, is it nonetheless appropriate to speak of the politicization of international criminal law or international criminal responsibility? My original politicization analysis applied only to international cooperation in relatively non-political subject areas. There were two reasons for this limitation. The first is that the state practice from which I first developed that framework was limited to withdrawal from two organizations of this type. A second key rationale was the separability-priority thesis from Mitrany's theory of functionalism, which holds that non-political matters should be separated from more political ones and given priority in the process of international organization. The priority aspect of this theory reflects the assumption that the rule-based cooperation of states and their agreement to the delegation of international authority are easier to achieve in non-political fields.[101]

But since separability-priority is a practical prescription and not a normative rule, the notion is not directly relevant to a legal theory of politicization centered upon compliance with agreed norms. Although the politicization framework discussed above applies best to those aspects

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[100] The term "depoliticize" means "to remove the political character of: take out of the realm of politics." The Merriam-Webster Online Dictionary, http://www.m-w.com/cgi-bin/dictionary?book=Dictionary&va=depoliticize&x=23&y=15.

[101] See the discussion of functionalism, *supra* notes 48-58 and accompanying text.

of international cooperation most easily separable from politics, a new generation of politicization analysis must recognize that principle remains a value even in fields not easily separable from politics.

Legalization, Politicization, and the ICC: Reconciling Principle and Practicality

It is important to balance international legal principle and legitimate state[102] interests in applying the concept of international criminal responsibility. The ratification of the ICC Statute by 105 states thus far demonstrates that there is a broad, if still incomplete, international consensus in favor of stronger legalization in international criminal law. The situation remains tenuous due to strong U.S. opposition to the ICC so there is need for a principled, yet pragmatic, approach.

Precision Is Essential

Individual criminal responsibility should never be imposed unless international fair trial standards have been met.[103] These standards require respect for the principles *nullum crimen sine lege* (no crime without law) and *nulla poena sine lege* (no penalty without law).[104] The *nullum crimen* principle reflects essentially the same considerations of justice as the prohibition of *ex post facto* laws under the U.S. Constitution.[105]

Individual criminal responsibility for grave breaches is clearly established by the terms of the Geneva Conventions of 1949,[106] as is interna-

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[102] Ultimately, the proper application of international criminal law must also accommodate the legitimate interests of other non-state international actors, such as individuals and international organizations.

[103] *See* International Covenant on Civil and Political Rights art. 14, Mar. 23, 1976, 999 U.N.T.S. 171, 179 (setting out the most broadly accepted formulation of international fair trial rights).

[104] The Secretary-General, *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808*, para. 34, U.N. Doc. S/25704 (1993), *reprinted in* 32 I.L.M. 1159 (1993).

[105] *See* U.S. CONST. art. I, § 9, cl. 3; § 10, cl. 1. *See also* Jordan J. Paust, *It's No Defense:* Nullum Crimen*, International Crime and the Gingerbread Man*, 60 ALBANY L. REV. 657, 664–65 (1997).

[106] Under each of the four Geneva Conventions of 1949, the parties must search for and, if successful, either prosecute or extradite those alleged to have committed the "grave breaches" they define. The following provision is typical: "*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*

tional criminal responsibility for genocide by the 1948 Genocide Convention.[107] The rule of customary international law establishing individual criminal responsibility for crimes against humanity developed from the practice of the 1945 Nuremberg Charter[108] later endorsed by a 1946 resolution of the U.N. General Assembly.[109]

But how much *precision* is appropriate in the definition of those crimes subject to international prosecution and enforcement? States may be wary of meticulous precision in formulating their obligations, especially in sensitive fields in which they prefer to maintain their freedom of action. In international criminal law, we have recently seen the opposite scenario in which a key state actor calculated that greater precision would limit the prerogatives of an international institution receiving delegated authority more than it would limit those of states. In the course of the 1998 negotiations on the Rome Statute, the U.S. government sought to minimize the delegation of authority to the ICC by insisting upon very "clear, precise, and specific definitions of each offense."[110] The effect of these definitions, as intended, was to leave the ICC as little discretion as possible in the interpretation and application of substantive international criminal law.

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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." Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 146, 12 Aug. 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 (emphasis added).

[107] Under Article 1 of the Genocide Convention, the 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." Convention on the Prevention and the Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277.

[108] Charter of the International Military Tribunal, *annexed to* The Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis art. 6(b), Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279 [hereinafter Nuremberg Charter].

[109] Affirmation of the Principles of International Law Recognized by the Charter of the Nurnberg Tribunal, G.A. Res. 95, U.N. GAOR, 1st Sess., 55th Plen. Mtg., U.N. Doc. A/64/Add.1 (1946).

[110] *See* Abbott et al., *supra* note 80, quoting *U.S. Releases Proposal on Elements of Crimes at the Rome Conference on the Establishment of an International Criminal Court*, Statement by James P. Rubin, U.S. State Department spokesperson, June 22, 1998, *available at* http://secretary.state.gov/www/briefings/statements/1998/ps980622b.html.

In highly developed national legal systems, rules are often formulated precisely, but in some areas they may be formulated in general terms to allow courts more freedom to adapt broad principles to specific facts.[111] Over time, these courts may then build up a very precise body of precedent. In international law, states are not inclined to take this approach, so "precision and elaboration are especially significant hallmarks of legalization at the international level."[112]

Prudence Is Essential

While the fatalistic extremes of lawless *realpolitik* must be rejected, some aspects of political realism should be kept in mind. Hans Morgenthau defined the realist virtue of prudence as "consideration of the political consequences of seemingly moral action [and] . . . the weighing of the consequences of alternative political actions."[113] Prudence can be as important to success in advancing the international rule of law as it is to success in power politics. It would be naïve and counter-productive to ignore the dedication of states to their own interests. As Professor Bassiouni himself has noted, "[i]t is merely stating a political fact of life that a State can be expected to act in any international organization in a manner most suited to its own interests."[114]

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[111] In highly developed legal systems, normative directives are often formulated as relatively precise "rules" ("do not drive faster than 50 miles per hour"), but many important directives are also formulated as relatively general "standards" ("do not drive recklessly"). The more "rule-like" a normative prescription, the more a community decides *ex ante* which categories of behavior are unacceptable; such decisions are typically made by legislative bodies. The more "standard-like" a prescription, the more a community makes this determination *ex post*, in relation to specific sets of facts; such decisions are usually entrusted to courts. Standards allow courts to take into account equitable factors relating to particular actors or situations, albeit at the sacrifice of some *ex ante* clarity. Domestic legal systems are able to use standards like "due care" or the Sherman Act's prohibition on "conspiracies in restraint of trade" because they include well-established courts and agencies able to interpret and apply them (high delegation), developing increasingly precise bodies of precedent. Abbott et al., *supra* note 80.

[112] *Id.* at 414.

[113] Even Hans Morgenthau, the ultimate proponent of *realpolitik*, counseled prudence as an essential aspect of rational policymaking. "There can be no political morality without prudence; that is, without consideration of the political consequences of seemingly moral action. Realism, then, considers prudence—the weighing of the consequences of alternative political actions-to be the supreme virtue in politics." HANS J. MORGENTHAU, POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER AND PEACE 10 (1978).

[114] M. CHERIF BASSIOUNI, AGGRESSION, Chapter III, *in* 1 INTERNATIONAL CRIMINAL

During the initial period of its existence, the ICC as an institution must exhibit prudence by carefully respecting the limits to its jurisdictional mandate. If it does not, it risks unduly alarming the United States and other members of the Security Council whose support for the ICC will likely be essential in the future.

The Rome negotiations resulted in a very modest institution, highly legalized and even judicialized, but with only very narrowly defined jurisdiction. A first, very substantial, limit on the ICC resulted from the decision to base its jurisdiction on the consent of either the territorial state where relevant crimes have allegedly been committed or the state of nationality of the accused.[115] If neither consents nor is a party to the ICC Statute, only a referral from the Security Council can establish ICC jurisdiction.[116] Another major limit on the jurisdiction of the ICC is the strict regime of complementarity that ensures ICC deference to national investigations or prosecutions. This limitation, as well, does not apply to cases initiated by decision of the Security Council.[117] The ICC itself will have no army, no police force, nor any power to impose economic sanctions on states. From the arrest of suspects to the production of evidence, the ICC will depend entirely upon the cooperation of states, and of the Security Council, in order to function. The Council's recent referral of the Darfur situation to the ICC is clear evidence of that dependence.

The ICTY interpreted its mandate from the Security Council broadly in finding that it had jurisdiction to prosecute violations of common Article 3 of the 1949 Geneva Conventions as violations of the laws and customs of war.[118] The ICTY's decision to impose criminal responsibility based on participation in a joint criminal enterprise was also never anticipated by the ICTY Statute. These may well have been appropriate decisions for the ICTY. But unlike the ICTY and ICTR, each of which was created *ad hoc* by decision of the U.N. Security Council, the ICC was established by multilateral treaty and is intended to be a permanent

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LAW 172 (M. Cherif Bassiouni & Ved P. Nanda eds., 1973). (After noting the differing positions of various powers on the definition of aggression, already a hot issue in 1973).

[115] Rome Statute, *supra* note 98, art. 12(2).

[116] *Id.* art. 13(b).

[117] *Id.* art. 18.

[118] *See* Prosecutor v. Tadic, Case No. IT-94-1-AR72, Appeals Decision on Jurisdiction 73–89 (Aug. 19, 1995).

international institution. As such, it must be careful not to exceed the consensus reflected in its agreed mandate. If the ICC can build a reputation for professionalism and responsible action within that narrow framework, it may eventually grow into a more broadly relevant and effective international institution. On the other hand, if it is generally perceived to be exceeding its agreed jurisdiction, it risks feeding a politicization controversy that could undermine its credibility and future development.

In any case, the reality between the ICC and the United States (one might be tempted to call it the balance-of-power between them) is that the ICC needs the support, or at least the acquiescence, of the United States, but the United States does not want or presently believe that it needs the ICC. This suggests that, as a matter of prudent policy, the ICC should avoid gratuitous conflicts with the U.S. government as these could be disastrous or even self-destructive for the still-nascent institution. Prudence, however, cannot justify special treatment for the United States, or any other country.

Neutral Principles Must Be the Basis

In any system of law, whether national or international, neutral principles must be the basis of judicial decisions. The term was popularized in a different context by Herbert Wechsler, who stressed that both in deciding to exercise jurisdiction and in deciding the merits, courts should decide based upon the law and not based on the discretion of judges.[119] This same notion, as applied to the ICC, essentially means that it should avoid decisions that are politicized in the sense of unfairly favoring or disfavoring one country or its nationals over another. Few would dispute the importance of this goal, but it is not always clear how best to achieve it.

If neutral principles are to be applied, it goes without saying that there can be no special accommodation for "American exceptionalism," the view that the United States, as the sole superpower and bearing a spe-

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[119] Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 6 (1959) (describing the judicial obligation "to decide the litigated case and to decide it in accordance with the law"). *See also* Jonathan T. Molot, *Principled Minimalism: Restriking the Balance Between Judicial Minimalism and Neutral Principles*, 90 VA. L. REV. 1753, 1773 (2004). "To Wechsler, a court's decision either to accept jurisdiction or to dismiss a case, just like the court's resolution of a case once accepted, must be based on legal principle and not left to judicial discretion."

cial burden in the international system, must be given special treatment and should not be held to the same rules as other states.[120] Former Secretary of State Madeleine Albright's statement that the United States is an "indispensable"[121] global power reflects this American exceptionalism, and it has also been invoked, directly or indirectly, as a justification for U.S. objections to the ICC Statute.[122]

But U.S. exceptionalism cannot be recognized by international law. The implied derogation from neutral principles is ethically untenable and inconsistent with the rule of law. Furthermore, this exceptionalism is likely to backfire in the long run by fueling unintended consequences such as sentiments of anti-Americanism and a trend towards the "soft-balancing"[123]

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[120] As this author has written elsewhere: "For some, the logic of U.S. indispensability justifies American exceptionalism, the idea that this country should get special treatment and remain free from the legal restraints applied to other States. According to this view, the United States should retain freedom of action, not only for its own sake but for the sake of the international community, since in many cases only the United States has the power and the will to act when necessary." Bartram S. Brown, *Unilateralism, Multilateralism and the International Criminal Court, in* MULTILATERALISM AND U.S. FOREIGN POLICY: AMBIVALENT ENGAGEMENT 334 (Stewart Patrick & Shepard Forman eds., 2002).

[121] Secretary of State Madeleine Albright has described the "indispensable" U.S. role as follows: "But if we have to use force, it is because we are America. We are the indispensable nation. We stand tall, and we see further than other countries into the future, and we see the danger here to all of us. And I know that the American men and women in uniform are always prepared to sacrifice for freedom, democracy, and the American way of life." *Secretary of State Madeleine Albright Discusses Her Visit to Ohio to Get Support from American People for Military Action Against Iraq*, NBC News Transcripts, The Today Show (Feb. 19, 1998).

[122] David Scheffer, the Clinton administration's special envoy dealing with war crimes, summed up these concerns in the following terms: "[T]he reality is that the United States is a global military power and presence . . . Our military forces are often called upon to engage overseas in conflict situations, for purposes of humanitarian intervention, to rescue hostages, to bring out American citizens from threatening environments, to deal with terrorists. We have to be extremely careful that this proposal does not limit the capacity of our armed forces to legitimately operate internationally . . . that it does not open up opportunities for endless frivolous complaints to be lodged against the United States as a global military power." Barbara Crossette, *World Criminal Court Having a Painful Birth*, N.Y. TIMES, Aug. 13, 1997, at 10A.

[123] The 18th-century philosopher de Vattel described the balance of power as an automatic system for the maintenance of order and liberty in international affairs in which the weaker states will naturally unite against the strongest. EMMERICH DE VATTEL, THE LAW OF NATIONS OR PRINCIPLES OF THE LAW OF NATURE APPLIED TO THE CONDUCT

of other states against U.S. hegemony.[124]

The Nature and Quality of the Principles Involved and Other Relevant Factors

Another consideration is the nature and quality of the principles concerned. Due to the limits of the international consensus at the present stage of development, international courts should prosecute individuals only for serious crimes of concern to the international community as a whole. If the norms allegedly violated are truly fundamental in importance, prosecution might even be a humanitarian imperative.[125] Norms of *jus cogens*[126] are so imperative that they cannot be dismissed even when reasons of state or national security are invoked. This is especially true when the norms are defined with sufficient precision to be enforced in the relevant circumstances.

Of course there may be other circumstances surrounding violations that are relevant to determining if international criminal prosecution is appropriate. Are the actions in this case manifestly illegal, or are the facts

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AND AFFAIRS OF NATIONS AND SOVEREIGNS, BOOK III, § 47 (1758). Some "soft-balancing" against the United States is already evident in the reactions of U.S. allies such as France to U.S. hegemony. Former French Foreign Minister Hubert Vedrine once described the United States as a "hyperpower. . . a country that is dominant or predominant in all categories." He suggested that this domination could best be resisted "[t]hrough steady and perservering work in favor of real multilateralism against unilateralism, for balanced multipolarism against unipolarism, for cultural diversity against uniformity." *Quoted in, To Paris, U.S. Looks Like a 'Hyperpower,'* INT'L HERALD TRIB., Feb. 5, 1999, at 5.

[124] *Compare* Detlev F. Vagts, *Hegemonic International Law*, 95 AM. J. INT'L L. 843, 843 (2001) *with* Jose E. Alvarez, *Hegemonic International Law Revisited*, 97 AM. J. INT'L L. 873, 873 (2003).

[125] The obligation of states to punish violations of *jus cogens* and other universal jurisdiction crimes is well established. States may now be in the process of accepting the duty to prevent them as well. *See* Bartram S. Brown, *The Evolving Doctrine of Universal Jurisdiction*, 35 NEW ENG. L. REV. 383, 397 (2001).

[126] The Vienna Convention on the Law of Treaties sets out a special rule for what it refers to as "Treaties Conflicting with a Peremptory Norm of General International Law": "A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." Vienna Convention on the Law of Treaties *supra* note 71, art. 53.

disputed? Are any justifications given plausible? All things considered, is international prosecution in the interest of justice?[127]

Legalization, Politicization, and the ICC

The second-stage process Cherif Bassiouni once described as "the elaboration of an international criminal code with an international supporting structure for its enforcement and implementation"[128] can only be achieved by a substantial increase in the degree of obligation, specificity, and delegation in the regime of international criminal law. This radical process has been realized, if only imperfectly and to a limited extent, by the Rome Statute of the ICC. The imperfections lie in the limits to the jurisdiction of the ICC and the failure to include the United States, and a few other key powers within the ICC consensus.

For the moment, the entire issue of the ICC remains controversial for the U.S. government, but what aspect of that controversy presents the greatest threat to politicize international criminal law? Did the very creation of the ICC improperly politicize international criminal law, or have U.S. actions in opposition to the ICC done more to politicize the field?

Creation of the ICC as Politicization

Did the creation of the ICC violate the legal rights and legitimate interests of the United States enough to qualify as legally significant politicization? One argument is that, without U.S. consent, the ICC Statute has transformed international criminal law by altering the balance between the rights and responsibilities of the United States and other non-party states. But is this truly the case? It is undeniable that the ICC Statute increases the degree of legalization within the regime of international criminal law and that legalization can alter the playing field within which states interact. But the ICC Statute does not substantially affect the legal rights and obligations of the United States.

As a non-party state, the United States has no obligations whatsoever under the ICC Statute. Like any treaty, it creates obligations for its parties: these include the obligations to comply with requests for the surrender and transfer of suspects to the Court,[129] to provide requested

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[127] The initial determination of whether prosecution would be in the interests of justice is left to the Prosecutor under the Rome Statute *supra* note 98, art. 53(2)(c).

[128] INTERNATIONAL TERRORISM AND POLITICAL CRIMES, *supra* note 1, at 490.

[129] Rome Statute, *supra* note 98, art. 89(1).

evidence,[130] to give effect to fines or forfeitures ordered by the Court,[131] and to pay assessments for the regular budget of the Court.[132] None of these obligations applies to any non-party state, nor does the exercise of criminal jurisdiction against an individual accused bind that individual's home state.

Although the prosecution of a U.S. national by the ICC might potentially affect the *interests* of the United States, the fact is that no state has the legal *right* to shield its citizens from prosecution abroad for genocide, crimes against humanity, or serious war crimes.[133] A state may refuse to extradite or surrender its nationals abroad for trial, but when their nationals are on the territory of another state, that state does not need home state consent to try them. Since the jurisdiction of the ICC is based on that of the 105 states parties to the Rome Statute,[134] the same principle, that is, that no home state consent is needed to try them, must apply to its derivative jurisdiction as well. As far as the protection of nationals from prosecution abroad is concerned, the ICC Statute does little to change the *status quo ante*.

As the ICC begins to function, it is inevitable that new problems and controversies will arise. All states will have a legal interest in ensuring that the internationally recognized fair trial rights of the accused will be protected. If the nationals of the United States or some other country were for political reasons unduly targeted for investigation or prosecution, that would undoubtedly constitute an illegal politicization of international criminal law to the detriment of that state. A major U.S. concern has been that the ICC will open the door to politicized prosecutions of U.S. nationals, but none of these potential problems has yet materialized. Although the U.S. government has launched a robust campaign of anti-

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[130] *Id.* art. 93.

[131] *Id.* art. 109(1).

[132] *Id.* art. 117.

[133] See the discussion of this issue in Bartram S. Brown, *U.S. Objections to the Statute of the International Criminal Court: A Brief Response*, 31 N.Y.U. J. INT'L L. & POL. 855, 871–73 (1999).

[134] The jurisdiction of the ICC, as set out in the Rome Statute, is built upon the unquestioned right of states to prosecute crimes committed on their territory or by their nationals. Either the territorial state or the state of nationality of the accused must consent to every case prosecuted by the ICC, except for those referred under the authority of the U.N. Security Council. *See* Rome Statute, *supra* note 98, arts. 12(2), 13.

ICC policies[135] the ICC as of the time of this writing has not yet politicized international criminal law to the detriment of any state.

The United States Acts in Response to the ICC as Politicization

In contrast, some of the actions by the U.S. government in response to the ICC do politicize international criminal law. In 1998, the final text of the ICC Statute was adopted in Rome, and immediately thereafter some policymakers suggested that the United States should embark on an active campaign against the ICC.[136] More recently, U.S. ICC policy has focused on gaining assurances from other states that they will never transfer U.S. nationals to the custody of the ICC. States can reassure the United States on this point either by declining to become parties to the ICC Statute, or by signing a so-called Article 98 agreement with the United States.[137] Article 98 of the ICC Statute[138] was intended to allow the state parties to accommodate existing agreements such as Status of Forces Agreements (SOFAs) under which states sometimes welcome foreign troops on their soil under a grant of immunity. Few people at the 1998 Rome Conference, at least outside the elite corps of international

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[135] Some of these policies are discussed further in the next section of this chapter.

[136] Former Senator Jesse Helms, speaking as Chairman of the Senate Foreign Relations Committee in 1998, stated that "[r]ejecting this treaty is not enough. . . . The United States must . . . be aggressively opposed to this court." Toni Marshall, *Helms Vows Retaliation for New World Court*, WASH. TIMES, July 24, 1998, at A1.

[137] In 2003, a State Department Press Spokesman stated the U.S. position on the ICC in the following terms: "We have been very clear with Europeans and others all around the world that we are not trying to sabotage the ICC. . . . Our efforts are geared at, first of all, protecting the integrity of international peacekeeping efforts, and we have respected the European Union's request not to attempt to influence other countries regarding their decisions to become a part of the Rome statute to join on to the ICC. . . . We certainly respect the rights of other countries to make their decisions, to become parties to the Rome statute, but, at the same time, we have asked other countries to respect our right not to do so. And so an essential element in that, in respecting our right and separating U.S. citizens from the ICC, is negotiating these Article 98 agreements." *State Department's Reeker on ICC Article 98 Agreements*, Philip T. Reeker, Deputy Spokesman, U.S. Dept. of State, Daily Press Briefing Index, June 10, 2003, 1:05 p.m. EDT, *available at* http://usinfo.state.gov/dhr/Archive_Index/icc_agreements.html.

[138] Article 98(2) of the ICC Statute provides as follows: "The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender." Rome Statute, *supra* note 98.

lawyers on the U.S. delegation, could have anticipated that the U.S. government would later craft special Article 98 agreements for the sole purpose of ensuring that U.S. personnel cannot be transferred to the ICC for trial. Although the effect of these agreements is to frustrate any future request for the surrender of U.S. nationals to the ICC, the agreements are not a violation, per se, of the ICC Statute or of any state's rights.

Unfortunately, these Article 98 agreements are only one part of a coordinated U.S. response to the ICC Statute and its states parties. U.S. federal law now mandates that "no United States military assistance may be provided to the government of a country that is a party to the International Criminal Court."[139] Countries that sign Article 98 agreements with the United States may be exempted from this prohibition, as are all NATO member countries and a short list of major non-NATO allies.[140] The current U.S. policy is thus to punish states when they ratify the ICC Statute unless they also agree to an Article 98 agreement. Pursuant to this law the United States has already shut off military aid to many countries, including 12 in the Western Hemisphere alone.[141] This policy of coercion by threat of aid cutoff may not be illegal,[142] but it politicizes international criminal law and could undermine its effectiveness.

Rejecting the Rome Statute was not an improper act of politicization because no state is obliged to consent to any treaty. But even those states declining to participate in the *delegation* of international authority to the ICC remain bound by preexisting rules of international criminal law and should refrain from acts that would defeat the object and purpose of those rules.[143] The degree of *obligation* and *precision* in the definition of

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[139] The American Servicemembers' Protection Act, 22 U.S.C.S. § 7426(a) (2005).

[140] *Id.*, § 7426(b).

[141] *See* "Article 98" Agreements and the International Criminal Court, *available at* http://ciponline.org/facts/art98.htm.

[142] Another politicizing aspect of U.S. legislative policy towards the ICC is referred to in Europe as the "Hague Invasion Act" because it authorizes the U.S. president to use force to free any U.S. personnel held by the Hague-based ICC. *See supra* note 139, at § 7427.

[143] This duty is well-established in the context of the law of treaties, and the basic logic of this norm should apply here as well. Under the Vienna Convention on the Law of Treaties "[a] State is obliged to refrain from acts which would defeat the object and purpose of a treaty when . . . [i]t has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty." Vienna

international crimes is unprecedented. The 1949 Geneva Conventions[144] and the 1984 Torture Convention[145] not only define international crimes, but also oblige states parties either to try or to extradite those believed to have committed them. Politically motivated efforts to undermine this basic normative regime, or even to prevent its implementation,[146] can properly be classified as politicization.

Convention on the Law of Treaties, *supra* note 71, art. 18(a). The United States signed the ICC Statute in December of 2000 but, in an effort to avoid even this obligation as a signatory, sent the U.N. Secretary-General the following message on May 6, 2002: "This is to inform you, in connection with the Rome Statute of the International Criminal Court adopted on July 17, 1998, that the United States does not intend to become a party to the treaty. Accordingly, the United States has no legal obligations arising from its signature on December 31, 2000. The United States requests that its intention not to become a party, as expressed in this letter, be reflected in the depositary's status lists relating to this treaty." http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty10.asp#N6.

144 Under the Geneva Conventions of 1949, the parties must search for, and if successful, either prosecute or extradite those alleged to have committed the "grave breaches" they define. The following provision is typical: "*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." Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 146, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 (emphasis added).

145 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 7(1), G.A. Res. 39/46, para. 197, U.N. GAOR, U.N. Doc. A/Res/39/51 (1984) (noting the principle of extradite or prosecute, as expressed here in the Torture Convention, has become a cornerstone of international criminal law). "The *State Party in the territory* under whose jurisdiction a person alleged to have committed any offence referred to in Article 4 is found *shall* in the cases contemplated in Article 5, *if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution.*" *Id.* (emphasis added).

146 The concept of improper politicization might perhaps be taken one step further but only if we consider international criminal law from a *teleological* perspective. The purpose of international criminal law is to enforce the standards of that law by facilitating the investigation, prosecution, and trial of those individuals responsible for serious violations. To the extent that U.S. opposition to the ICC could be seen as frustrating that purpose, it might thereby be considered an improper politicization of the principles of international criminal law. This approach is suspect in that it goes beyond narrow positivism to find impropriety based on a standard states have never explicitly consented to. In was in such a teleological vein that the ICTY Appeals Chamber considered the purpose of the Security Council in creating the ICTY as a guide to interpreting the text of the ICTY Statute. *See* Prosecutor v. Tadic, Case No. IT-94-1,

V. OBSERVATIONS AND CONCLUSIONS

A permanent ICC was supposed to depoliticize international criminal law[147] so that international investigations and prosecutions need not depend on Security Council approval, but unfortunately this vision has not yet been fully realized. The ICC is a very weak institution and will therefore depend *de facto* upon the Security Council both for more effective jurisdiction based on referrals and for enforcement of its judicial authority over recalcitrant states. Even those accused of genocide, the most grievous of all crimes, may still escape international prosecution unless the Security Council makes a political decision to intervene. The legalization of international criminal law remains trapped in an intermediate place in which politics, as opposed to principle, still holds considerable sway. This allows for continued politicization in the non-application of universally accepted standards of international criminal law.

Although many doubts remain about the ability of the ICC to enforce its jurisdiction and authority, the Security Council's recent referral of the Darfur[148] situation to the ICC demonstrates that, in a particular case, both the jurisdictional limitations of the ICC and its lack of clear enforcement authority can be remedied by decision of the Security Council.

The legalization of international criminal law began many years ago when international norms prohibiting genocide and other serious international crimes were first formulated[149] then broadly endorsed by the

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Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, paras. 72–78 (Oct. 2, 1995).

147 "The creation of a permanent International Criminal Court (ICC) is a further step down the road to impartiality." Richard Goldstone & Gary Jonathan Bass, *Lessons from the International Criminal Tribunals, in* THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT: NATIONAL SECURITY AND INTERNATIONAL LAW 52 (Sarah Sewell & Carl Kaysen eds., 2000).

148 *See* S.C. Res. 1593, para. 1, U.N. Doc. S/RES/1593 (Mar. 31, 2005).

149 The legalization of international criminal law began in 1945 when the International Military Tribunal at Nuremberg was established by an agreement between four victorious Allied Powers at the end of World War II. *See, Agreement by the Government of the United States of America, the Provisional Government of the French Republic, the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Union of Soviet Socialist Republics for the Prosecution and Punishment of the Major War Criminals of the European Axis* Charter of the International Military Tribunal, 82 U.N.T.S. 279, 59 Stat. 1544, E.A.S. No. 472 (Aug. 8, 1945) (annexed to the London Agreement).

international community.[150] Since then, Cherif Bassiouni and others have called for the creation of effective international mechanisms for the enforcement of these fundamental norms. States cannot always be expected to apply these rules uniformly or neutrally, as in practice they often seek to promote national interests. International enforcement is needed both to supplement the failure of states to enforce these rules and, on occasion, to deter the excesses of great powers as well.

A major constraint limiting the delegation of strong authority to the ICC lies in national sensitivities to the perceived loss of sovereignty involved. These sensitivities limit consensus and must therefore be taken into account, but no state has a legitimate interest in shielding its nationals from criminal responsibility for serious international crimes.[151] The principle *aut dedere aut judicare* now establishes each state's duty under international law to extradite or prosecute persons implicated in serious international crimes. Disputes abound, of course, as to whether crimes have been committed in any particular circumstance and as to who may have committed them. Ultimately it is only by depoliticizing these disputes that the interests of international criminal justice can best be served. But how is this to be accomplished?

The only way to depoliticize these issues is through a gradual process of building trust in the ICTY, the ICTR, and most importantly the ICC. These institutions can only earn that trust through their own actions, by developing a credible track record much as the ICTY and ICTR have for the most part already done. The ICC, in particular, will need to meet high professional standards and demonstrate dedication to its founding principles. It must also be prudent enough not to attempt to do too much with the limited jurisdiction that it has.

When violations of *jus cogens* norms are at issue, but political opposition stymies effective enforcement action, a fundamentally untenable situation prevails calling out for some remedy or response. Cherif Bassiouni's

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[150] The legalization process continued when the U.N. General Assembly endorsed the Nuremberg Principles in 1947. *See* Affirmation of the Principles of International Law Recognized by the Charter of the Nürnberg Tribunal, G.A. Res. 95, U.N. GAOR, 1st Sess., 55th plen. mtg., U.N. Doc. A/64/Add.1 (1946) (confirming the status of the Nuremberg Charter).

[151] *See* Brown, *supra* note 133, at 871–73.

answer has been his life-long campaign for the depoliticization of international criminal law. It is an ongoing dynamic process in which national governments, NGO activists, international officials, and scholars can all[152] play an important role.

[152] Commenting in 1995 on the success of the ICTY, the *Economist* noted that people committed to justice can sometimes make a difference:

> the nervous and the reluctant can be nudged in the right direction by energetic supporters of the idea. That role has been played in this instance by the Soros and MacArthur foundations, Physicians for Human Rights, Medecins sans Frontieres, Human Rights Watch and Messrs Bassiouni and Goldstone. They have done admirable work, and they have got results.
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> Every effort at justice in this field, from Leipzig to The Hague, builds on the previous ones, as the world gradually becomes accustomed to the thought that there should be a court to deal with those who use the machinery of State for mass murder. The idea is taking root. If a few of the world's main countries show courage and creativity, the rest may follow.

The World Tries Again, ECONOMIST, Mar. 11, 1995, at 21.

CHAPTER 4

UNIVERSAL JURISDICTION: A PRAGMATIC STRATEGY IN PURSUIT OF A MORALIST'S VISION

*Diane F. Orentlicher**

With the October 1998 arrest of former Chilean President Augusto Pinochet by British authorities acting at the behest of a Spanish magistrate, an arcane principle of international law—universal jurisdiction—became the stuff of headline news[1] and global debate. Although long recognized in principle by some scholars and courts, Cherif Bassiouni reminds us, this extraordinary basis for jurisdiction had been exercised infrequently.[2] When it came to human rights crimes, universal jurisdiction had been exercised mainly in the context of World War II-era depredations; even here, it rarely, if ever, formed the sole basis for jurisdiction.[3]

The principle of universality permits any state to prosecute individuals against whom there is serious ground for suspecting that they have committed one of a handful of crimes that are subject to universal jurisdiction, regardless of where the offense took place and the nationality of

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[1] *See, e.g.*, Clifford Krauss, *Britain Arrests Pinochet to Face Charges by Spain*, N.Y. TIMES, Oct. 18, 1998, at 1.

[2] *See* M. Cherif Bassiouni, *The History of Universal Jurisdiction and Its Place in International Law, in* UNIVERSAL JURISDICTION: NATIONAL COURTS AND THE PROSECUTION OF SERIOUS CRIMES UNDER INTERNATIONAL LAW 39, 44 (Stephen Macedo ed., 2004) [hereinafter Bassiouni, History of Universal Jurisdiction].

[3] *See* Diane F. Orentlicher, *Whose Justice? Reconciling Universal Jurisdiction with Democratic Principles*, 92 GEO. L.J. 1057, 1059 (2004) [hereinafter Orentlicher, Whose Justice?]. *But see* Bassiouni, History of Universal Jurisdiction, *supra* note 2, at 276–77 n.25 (asserting that most cases involving universal jurisdiction have related to piracy and that author could not locate "[s]ome cases reported by scholars" referring to post-war prosecutions).

the alleged perpetrator(s) and victim(s).[4] By its nature, universal jurisdiction represents a profound departure from core principles of sovereignty reflected in international legal principles governing the exercise of jurisdiction. Ordinarily, state courts may legitimately assert jurisdiction over conduct only when it has a significant link to their own territory or to their nationals.[5] When a national court exercises jurisdiction over a crime committed in the forum state's own territory, it exercises core prerogatives of statehood. When, instead, a court asserts jurisdiction over a foreign national for crimes committed a world away against foreign victims, it challenges bedrock principles of sovereignty.

And so it is hardly surprising that governments have often objected when a foreign court claimed jurisdiction over their own nationals for crimes committed outside the forum state's territory and against victims who have no substantial link to that state.[6] Indeed Belgium, until recently the world capital of universal jurisdiction, was forced to amend its expansive law of universal competence in the face of strenuous protests by foreign governments whose officials had been named in criminal complaints before Belgian magistrates,[7] eventually settling on legislation that significantly scaled back the reach of Belgian jurisdiction.

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[4] *See* M. Cherif Bassiouni, *Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice*, 42 VA. J. INT'L L. 81, 83 (2001) [hereinafter Bassiouni, Universal Jurisdiction].

[5] *See* History of Universal Jurisdiction, *supra* note 2, at 42, 45. *See also* M. Cherif Bassiouni, *The Sources and Content of International Criminal Law: A Theoretical Framework, in* 1 INTERNATIONAL CRIMINAL LAW 12 (M. Cherif Bassiouni, ed., 2d ed. 1999) [hereinafter Bassiouni, Theoretical Framework].

[6] *See, e.g., Israel slams general arrest bid* (Sept. 14, 2005), BBC NEWS, *available at* http://news.bbc.co.uk/2/hi/uk_news/4246848.stm (reporting that Israel's foreign minister condemned as an "outrage" a British magistrate's issuance of an arrest warrant against an Israeli military commander traveling to England alleging that the commander committed war crimes against Palestinians in Gaza).

[7] Although other governments had protested Belgium's law, the United States mounted a particularly effective campaign against it, warning that Belgium risked losing its status as the headquarters of the North Atlantic Treaty Organization (NATO) and threatening to withhold further funding for a new NATO headquarters building in Brussels. *See* Orentlicher, Whose Justice?, *supra* note 3, at 1062. The Democratic Republic of the Congo (DRC) also dealt a major blow to Belgium's exercise of universal jurisdiction through a case instituted against Belgium before the International Court of Justice (ICJ). In Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), the ICJ ruled that Belgium had violated rules of international law concerning official immunities when a Belgian magistrate issued an international arrest warrant against Abdulaye Yerodia Ndombasi, the

But if recent years have seen a backlash against the exercise of universal jurisdiction in particular cases and countries, they have also seen unprecedented recourse to extra-territorial jurisdiction over human rights crimes. In June 2005—after Belgium had revoked its more far-reaching law of universal competence—a Belgian court convicted two Rwandan businessmen of crimes relating to the 1994 genocide in Rwanda.[8] And while British authorities ultimately allowed General Pinochet to return to Chile without facing Spanish justice, the legal basis for this decision was the suspect's mental infirmity,[9] not a determination that British courts lacked legal competence to cooperate with Spanish efforts to prosecute Pinochet for crimes committed mostly in Chile. Indeed, British courts implicitly affirmed the principle of universality, if narrowly.[10] Notably, too, some governments have acquiesced in foreign courts' exercise of universal jurisdiction against their nationals.[11]

These seemingly contradictory trends raise a raft of questions about the legal status of universal jurisdiction. What is to be made of many states' ambivalence toward its use? Did some states' hostility toward Belgium's previously expansive law signify their opposition to the very principle of universality or only to its use in circumstances that extend

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incumbent foreign minister of the DRC, in a case involving alleged war crimes and crimes against humanity. 2002 I.C.J. 121 (Feb. 14, 2002) [hereinafter Yerodia Case]. Although the DRC initially challenged Belgium's exercise of universal jurisdiction itself, it did not pursue this issue at later stages in the ICJ proceedings. Accordingly, the judgment of the Court did not address the validity of the magistrate's attempted exercise of universal jurisdiction but instead ruled only on the issue of official immunity. For a critical assessment of the Court's failure to address this issue, see M. Cherif Bassiouni, *Universal Jurisdiction Unrevisited: The International Court of Justice Decision in Case Concerning the Arrest Warrant of 11 April 2000* (Democratic Republic of the Congo v. Belgium), 12 PALESTINE Y.B. INT'L L. 27 (2002/2003). Issues concerning the lawful exercise of universal jurisdiction are likely to be addressed in a case now pending before the ICJ, Certain Criminal Proceedings in France (Republic of the Congo v. France).

[8] *See Belgian court finds pair guilty over Rwandan genocide*, AGENCE FRANCE-PRESSE, June 28, 2005.

[9] *See* Clifford Krauss, *Freed by Britain, Pinochet Is Facing a Battle at Home*, N.Y. TIMES, Mar. 3, 2000, at A1.

[10] *See infra* text accompanying note 40.

[11] *See* Diane Orentlicher, *Independent study on best practices, including recommendations, to assist States in strengthening their domestic capacity to combat all aspects of impunity*, U.N. Doc. E/CN.4/2004/88, para. 50 (Feb. 27, 2004).

beyond the boundaries of established consensus? If the latter, what are those boundaries?

In several contemporary publications, Cherif Bassiouni brings a wide-angle lens to bear in addressing these questions. Drawing upon insights developed across a lifetime of immersion in the theory, practice, and development of international criminal law, Bassiouni sees recent trends as confirmation of states' longstanding hesitation to embrace universal jurisdiction. But Bassiouni is hardly content to comment from the sidelines. In a characteristic blend of idealism and pragmatism, he advances a strategy for bringing the practice of states into closer alignment with the idealist vision that informs his work.

As I explain in Section I, Bassiouni has sharply defined the methodological ground of conflict between proponents of universal jurisdiction, who find expanding support for its exercise in contemporary state practice, and opponents, who discount as evidence of state practice in support of universal jurisdiction prosecutions that are simultaneously based on universal and other types of extra-territorial jurisdiction. Perhaps ironically in light of his sympathy for the ideals embraced by those advocating greater recourse to universal jurisdiction, Bassiouni favors the restrictive methodology invoked by its critics. In fact, Bassiouni's interpretive stance leads him to discount the importance of precedents that, I argue below, ought to be seen as evidence of expanding state practice in support of universal jurisdiction.

But if Bassiouni's restrictive methodology seems to align him with critics of universal jurisdiction, his idealism leads him in a different direction. Devoted to a conception of world order rooted in our shared humanity, Bassiouni measures current legal reality against the "normative universalist position" to which he subscribes. That position recognizes the primacy of "core values . . . shared by the international community," which at times "justify overriding the usual territorial limits on the exercise of jurisdiction."[12] Above all, Bassiouni believes, the compelling force of international norms prohibiting ghastly crimes "places upon states the *obligatio erga omnes* not to grant impunity to the violators of such crimes."[13]

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[12] Bassiouni, History of Universal Jurisdiction, *supra* note 2, at 42.

[13] M. Cherif Bassiouni, *International Crimes: Jus Cogens and Obligatio Erga Omnes*, 59 LAW & CONTEMP. PROBS. 63, 66 (1996) [hereinafter Bassiouni, Jus Cogens].

Seeing a wide chasm between the idealist vision that suffuses his work and the sobering reality reflected in his assessment of contemporary law, Bassiouni fashions a pragmatic strategy for narrowing the divide. Central to his strategy is the prudent pursuit of advances in positive law—black letter texts that enshrine states' acceptance of universal jurisdiction under defined circumstances. Bassiouni knows that state support for such texts will turn on the degree to which proposed instruments reflect states' concerns about the potentially disruptive effect of "unbridled universal jurisdiction."[14] The way forward, Bassiouni believes, is to clarify legitimate usages of universal jurisdiction. In his view, consensus principles on the legitimate use of universal jurisdiction must take due account of long-established grounds of jurisdiction that are squarely grounded in bedrock principles of state sovereignty.

As anyone familiar with the field of international criminal law knows, Bassiouni has been a pioneer in the development of positive law in the field of international criminal justice, as well as in the development of non-binding principles that are capable of garnering broad consensus—and thereby laying the foundation for future advances in the law. From his leading role in developing the Princeton Principles on Universal Jurisdiction to his co-authorship of the United Nations' *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*,[15] Bassiouni has led the way in transforming the ideal of a global humanity into guiding principles for sovereign states.

I. ASSESSING STATE PRACTICE

As Bassiouni has often reminded us, international law derives not from the inherent desirability of a legal principle but from (1) the actual practice of states[16] when accompanied by a general acknowledgment that the rule reflected in practice is required by customary law and (2) obligations imposed by treaties.[17] Applying this methodology, Bassiouni finds

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[14] Bassiouni, Universal Jurisdiction, *supra* note 4, at 82.

[15] U.N. Doc. A/RES/60/147 (Dec. 16, 2005).

[16] *See, e.g.*, Bassiouni, History of Universal Jurisdiction, *supra* note 2, at 40. *Cf.* M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY 95 (2d rev. ed. 1999) (noting that most legal philosophies "distinguish between the law as it is and the law as it ought to be").

[17] *See* Bassiouni, History of Universal Jurisdiction, *supra* note 2, at 45; M. Cherif Bassiouni & Edward M. Wise, *Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute in International Law* 43 (1995) [hereinafter Bassiouni & Wise, Aut Dedere Aut Judicare].

that universal jurisdiction "is not as well established in conventional and customary international law as its ardent proponents, including major human rights organizations, profess it to be."[18]

As this statement reflects, it is difficult to identify anything approaching a consensus among international lawyers concerning the contemporary status of universal jurisdiction. Wide-ranging views on the subject are reflected, *inter alia*, in a 2002 judgment of the International Court of Justice in a case challenging Belgium's issuance of an international arrest warrant in respect of the incumbent Foreign Minister of the Democratic Republic of the Congo[19]; in a set of separate opinions, the Court's justices elaborated notably disparate positions concerning which crimes are subject to universal jurisdiction[20] and what pre-conditions attach to its lawful exercise.[21]

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[18] *Id.* at 40. *See also id.* at 39; Bassiouni, Universal Jurisdiction, *supra* note 4, at 83, 101 n.70 & 150.

[19] Yerodia Case, *supra* note 7.

[20] *See, e.g., id.*, Separate Opinion of President Guillaume, para. 13 (concluding that "international law knows only one true case of universal jurisdiction: piracy"); Joint Separate Opinion of Judges Higgins, Kooijmans & Buergenthal, paras. 61–65 (recognizing that universal jurisdiction is established in respect of piracy, war crimes, and crimes against humanity); Separate Opinion of Judge Koroma, para. 9 (expressing opinion that "together with piracy, universal jurisdiction is available for certain crimes, such as war crimes and crimes against humanity, including the slave trade and genocide"); Dissenting Opinion of Judge Oda (asserting, "Universal jurisdiction is increasingly recognized in cases of terrorism and genocide"); Dissenting Opinion of Judge Van den Wyngaert, para. 59 (asserting that international law "clearly permits universal jurisdiction for war crimes and crimes against humanity"). Compare Prosecutor v. Milan Milutinovic et al., Case No. IT-99-37-PT, Decision on Motion Challenging Jurisdiction, para. 42 (May 6, 2003), Separate Opinion of Judge Patrick Robinson (concluding that the category of crimes subject to universal jurisdiction under customary international law "does not extend beyond piracy, slavery, war crimes, crimes against humanity, genocide and torture").

[21] *See, e.g.*, Yerodia Case, *supra* note 7, Separate Opinion of President Guillaume, para. 12 (concluding that "[u]niversal jurisdication in absentia . . . is unknown to international law); *id.*, Joint Separate Opinion of Judges Higgens, Kooijmans & Buergenthal, para. 59 (expressing the views that states may exercise "a universal criminal jurisdiction in absentia," provided "certain safeguards are in place"; states contemplating exercising universal jurisdiction "must first offer to the national State of the prospective accused person the opportunity itself to act upon the charges concerned"; and there should be "some special circumstances that do require the exercise of international criminal jurisdiction" which "have been brought to the attention of the prosecutor or juge d'instruction").

And so Bassiouni rightly urges caution when it comes to characterizing contemporary practice in support of universal jurisdiction. But if some observers have overstated the degree of state support for its use, this should not obscure a crucial fact: recent years have seen unprecedented recourse to extra-territorial jurisdiction in human rights cases,[22] however fitfully practice has evolved. Further, as Bassiouni notes, "increasing numbers of states are enacting laws that provide for universal jurisdiction."[23] Any assessment of contemporary practice must account for these trends as much as for indicia of states' reticence to exercise universal jurisdiction.

The uneven nature of contemporary state practice goes a long way toward explaining why legal experts have enunciated disparate interpretations of that practice. Besides, the database itself is limited, compounding the challenges surrounding interpretation of its legal significance. Further, Bassoiuni implicitly suggests, those who see support for universal jurisdiction in contemporary state practice may be influenced by their personal predilections.[24]

Another factor, relating to the methodology associated with ascertaining customary law, has further widened the gulf between those who see growing support for universal jurisdiction and those who remain skeptical. Some commentators apparently believe that cases based simultaneously on universal and other grounds of jurisdiction do not constitute state practice in support of the former. In the strongest version of this methodology, the only persuasive instance of state practice in support of universal jurisdiction is a case exemplifying what Bassiouni and others have called "pure universal jurisdiction"—that is, a case in which universal jurisdiction provides "the sole basis for subject matter jurisdiction."[25]

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[22] *See* Orentlicher, Whose Justice?, *supra* note 3, at 1059–60; Mark Lattimer & Philippe Sands, *Introduction, in* JUSTICE FOR CRIMES AGAINST HUMANITY 1, 9 (Mark Lattimer & Philippe Sands eds., 2003).

[23] Bassiouni, History of Universal Jurisdiction, *supra* note 2, at 44.

[24] *See supra* text accompanying note 18.

[25] Commentary, *The Princeton Principles on Universal Jurisdiction, in* UNIVERSAL JURISDICTION: NATIONAL COURTS AND THE PROSECUTION OF SERIOUS CRIMES UNDER INTERNATIONAL LAW 26, 28 (Stephen Macedo ed., 2004). Professor Bassiouni played a leading role in developing the commentary to the Princeton Principles on Universal Jurisdiction, from which this quote derives. *See also* Yerodia Case, *supra* note 7, Joint Separate Opinion of Judges Higgins, Kooijmans & Buergenthal, para. 45.

As applied, this methodology excludes two significant categories of prosecution from classifications of cases in which states are deemed to have exercised universal jurisdiction. First, in its strongest version it has been invoked to exclude cases in which universal jurisdiction provided one but not the sole basis for jurisdictional authority. Bassiouni applied a version of this methodology when he wrote that universal jurisdiction "has not yet been supported by the practice of states. In fact, there are only a few cases known to scholars in which pure universal jurisdiction—in other words, without any link to the sovereignty or territoriality of the enforcing state—has been applied."[26] Second, this approach has been used to exclude from consideration or to downplay the significance of instances where domestic law requires, as a pre-condition to the exercise of universal jurisdiction, that a case involve a significant link to the forum state, such as the presence of the accused in that state. For reasons elaborated below, both approaches may be unduly restrictive.

Cases Based upon Multiple Grounds of Jurisdiction

Commentary on two well-known cases—Israel's prosecution of Adolf Eichmann and Spain's attempted prosecution of Augusto Pinochet—exemplifies the first type of restrictive methodology. After Israeli agents kidnapped Eichmann in Argentina, the Israeli government put the former Nazi on trial in Jerusalem in 1961. Eichmann, a German national, was tried for crimes committed during World War II outside the state of Israel. Although many Israeli citizens had been victims of the Holocaust, they were not citizens of Israel at the time the crimes in question occurred; indeed, the state of Israel was not created until after the war. In these circumstances, no well-established ground for asserting jurisdiction was uncontrovertibly applicable.

The district court of Jerusalem nonetheless concluded that the Israeli law establishing its jurisdiction over Eichmann "conforms to the best traditions of the law of nations."[27] In its judgment, international law

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[26] Bassiouni, History of Universal Jurisdiction, *supra* note 2, at 44. Elsewhere, however, Bassiouni writes that "the application of universal jurisdiction for certain international crimes does not necessarily mean that it should be devoid of any connection to the enforcing state, or that it has precedence over other theories of jurisdiction." *See* Bassiouni, Universal Jurisdiction, *supra* note 4, at 104.

[27] Attorney Gen. of Isr. v. Eichmann, 36 I.L.R. 18, 25, para. 11 (Isr. Dist. Ct.—Jerusalem 1961), *aff'd*, 36 I.L.R. 277 (Isr. Sup. Ct. 1962) [hereinafter Eichmann-Dist. Ct.]. This observation followed the district court's conclusion that it had "to give effect to a law of the Knesset, and [could not] entertain the contention that this Law con-

provided a basis for jurisdiction on two grounds—"the universal character of the crimes in question and their specific character as intended to exterminate the Jewish people."[28] With respect to the first ground, the court explained:

> The abhorrent crimes defined in this Law are not crimes under Israel law alone. These crimes, which struck at the whole of mankind and shocked the conscience of nations, are grave offences against the law of nations itself. . . . Therefore, so far from international law negating or limiting the jurisdiction of countries with respect to such crimes, international law is, in the absence of an International Court, in need of the judicial and legislative organs of every country to give effect to its criminal interdictions and to bring the criminals to trial. The jurisdiction to try crimes under international law is *universal*.[29]

Although the district court believed that "the international character of the crimes in question . . . offer[ed] the broadest possible . . . basis for Israel's jurisdiction according to the law of nations,"[30] it did not consider this the only basis supporting jurisdiction. In its view, its authority over Eichmann derived from "two cumulative sources."[31] In addition to universal jurisdiction, Israel could assert jurisdiction over Eichmann by virtue of "the special connection which the State of Israel has with such crimes since the people of Israel . . ., the Jewish people . . . , constituted the target and the victim of most of the said crimes."[32] In the view of the district court, this basis conformed to the protective principle,[33] pursuant to which states may assert jurisdiction over certain offenses that threaten important state interests even if the crime occurred outside the state.[34] The court also grounded its power to prosecute Eichmann on the prin-

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flicts with the principles of international law." *Id.*, para. 10, *aff'd*, 36 I.L.R. 277, 280, para. 7.

[28] *Id.* at 26, para. 11.

[29] *Id.*, para. 12 (emphasis in original).

[30] *Id.* at 49, para. 29.

[31] *Id.* at 50, para. 30.

[32] *Id.* at 49–50, para. 30.

[33] *Id.* at 50, para. 30.

[34] *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 cmt. f (1987) [hereinafter Restatement].

ciple of passive personality, which allows states to proscribe certain offenses committed against their own nationals.[35]

Considering the case on appeal, Israel's Supreme Court justified the *Eichmann* prosecution principally on the basis of universal jurisdiction,[36] devoting only one paragraph to the other grounds for jurisdiction asserted by the district court.[37] After an extended discussion of universal jurisdiction, the Court concluded:

> We sum up our views on this subject as follows. Not only do all the crimes attributed to the appellant bear an international character but their harmful and murderous effects were so embracing and widespread as to shake the international community to its very foundations. The State of Israel therefore was entitled, pursuant to the principle of universal jurisdiction and in the capacity of a guardian of international law and an agent for its enforcement, to try the applicant.[38]

It is difficult to imagine a more straightforward affirmation of universal jurisdiction than the two passages quoted above. Yet some commentators believe that *Eichmann* provides relatively weak support for universal jurisdiction.[39] In this view, the Israeli courts "really" relied on the passive personality and protective principles of jurisdiction; their views on universal jurisdiction were essentially *dicta*.

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[35] *See id.*, cmt. g. The district court only briefly cited the principle of passive personality, which it characterized as stemming from the protective principle. *See id.* at 54, para. 36, *aff'd*, Attorney Gen. of Isr. v. Eichmann, 36 I.L.R. 277, 304, para. 12 (Isr. Sup. Ct. 1962) [hereinafter Eichmann-Sup. Ct.].

[36] *See* Eichmann-Sup. Ct., *supra* note 35, at 299–304, para. 12.

[37] *See id.* at 304, para. 12.

[38] *Id.*, para. 12(f).

[39] *See, e.g.*, Lee A. Casey & David B. Rivkin Jr., *The Dangerous Myth of Universal Jurisdiction, in* A COUNTRY I DO NOT RECOGNIZE: THE LEGAL ASSAULT ON AMERICAN VALUES, 135, 150–52 (Robert Bork ed., 2005). *But see id.* at 149 (stating that Eichmann's prosecution "may well be the only instance in which a truly universal jurisdiction was exercised over the offenses . . . for which that jurisdiction is most often asserted by its proponents," even though, in the authors' view, that prosecution "was by no means a clear case"). *Cf.* Eugene Kontorovich, *The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation*, 45 HARV. INT'L L.J. 183, 197 (2004) (asserting that, even if the Israeli Supreme Court "was right about universal jurisdiction existing for Eichmann's crimes, the jurisdiction actually used by the nation that apprehended, tried, and executed him was not universal"). Although his position on this is somewhat unclear, Bassiouni may

But while legal significance surely should be attached to the fact that Israeli courts justified their jurisdiction over Eichmann on several grounds, this should not detract from *Eichmann*'s precedential import for universal jurisdiction. Notably, the crimes for which Eichmann was convicted included offenses "directed against non-Jewish groups (Poles, Slovenes, Czechs and Gypsies)."[40] As the Israeli Supreme Court made clear, these crimes could be supported *only* on the basis of universal jurisdiction.[41] Even with respect to Israeli victims, universal jurisdiction figured prominently in both the district and Supreme Courts' justification of jurisdiction over Eichmann. Indeed, in view of the fact that the state of Israel had not yet been recognized at the time of Nazi crimes, Israel's reliance on the passive personality and protective principles may have been more controversial than its reliance on universal jurisdiction.[42]

Like the *Eichmann* case, Spanish criminal proceedings against former Chilean leader Augusto Pinochet, which led to his arrest by British authorities in October 1998, relied upon multiple grounds of jurisdiction. The Spanish case was initiated by a complaint filed by seven victims possessing dual Spanish/Chilean nationality.[43] Accordingly, the criminal proceedings were initially based principally on passive personality jurisdiction. The case soon expanded, however, to include victims who possessed Chilean nationality only.[44]

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count himself among those who doubt whether the Eichmann case was based on universal jurisdiction. In a 2004 publication, Bassiouni included Israel in a list of states whose prosecutions of crimes against humanity did "not reflect the theory of universality" because they were "based on the territorial, passive personality, or active personality theories of jurisdiction." Bassiouni, History of Universal Jurisdiction, *supra* note 2, at 52. Writing in 1999, however, Bassiouni wrote that Israeli courts "relied in part upon universal jurisdiction to prosecute" Adolf Eichmann. BASSIOUNI, CRIMES AGAINST HUMANITY, *supra* note 16, at 237.

40 Eichmann-Sup. Ct., *supra* note 35, at 304.

41 *See id.*

42 *See* Gary J. Bass, *The Adolf Eichmann Case: Universal and National Jurisdiction, in* UNIVERSAL JURISDICTION: NATIONAL COURTS AND THE PROSECUTION OF SERIOUS CRIMES UNDER INTERNATIONAL LAW 77, 83 (Stephen Macedo ed., 2004) (noting, "Israel . . . spoke for a nation that had not possessed a state during World War II and in that its claim to speak for the entire Jewish people struck some as problematic").

43 *See* Orentlicher, Whose Justice?, *supra* note 3, at 1072, 1074.

44 *See id.* at 1074.

The proceedings against Pinochet eventually gave rise to decisions by both Spanish and British courts affirming universal jurisdiction under certain circumstances. On November 5, 1998, Spain's National Court Criminal Division held that Spain could try genocide and terrorism charges pursuant to universal jurisdiction, bolstered by jurisdiction based upon the passive personality principle:

> Spain has jurisdiction to hear the facts, derived from the principle of universal prosecution of certain offenses categorized in international law which has been incorporated into our domestic law. Moreover, Spain has a legitimate interest in the exercise of its jurisdiction, as more than fifty Spaniards were killed or disappeared in Chile.[45]

Similarly, the key British judgment holding that Pinochet could be extradited to Spain on torture-related charges included several opinions approving universal jurisdiction under circumstances defined in each opinion.[46]

Despite these judicial opinions, Bassiouni believes that the *Pinochet* case "does not stand for the proposition of universal jurisdiction, nor for that matter [was] the extradition request from Spain for torture based on universal jurisdiction."[47] Bassiouni's scrupulous commitment to rigorous methodology in assessing customary law sets him apart from many other scholars and advocates whose analysis seems to be driven toward a pre-determined conclusion. Even so, it is not clear that developments in the *Pinochet* case warrant the cautious conclusion he reaches.

With respect to the jurisdictional basis underlying Spain's extradition request, it is true that the Spanish case against Pinochet initially relied upon passive personality. But, as noted, the criminal case expanded to include crimes against victims possessing only Chilean nationality. Accordingly, just as Israeli jurisdiction over Adolf Eichmann could not be based solely on the passive personality principle,[48] Spain's attempted exercise of jurisdiction over Pinochet could not rest solely on this principle.

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[45] Auto de la Sala de lo Penal de la Audiencia Nacional confirmando la jurisdicción de España para conocer de los crímenes de genocidio y errorismo cometidos durante la dictadura chilena, Appeal No. 173/98, Criminal Investigation No. 1/98, *available at* http://www.derechos.org/nizkor/chile/juicio/audi.html.

[46] *See* Orentlicher, Whose Justice?, *supra* note 3, at 1078 n.119.

[47] Bassioni, History of Universal Jurisdiction, *supra* note 2, at 56.

[48] *See supra* text accompanying notes 40–41.

Turning to legal proceedings in London, the key British decision holding that Pinochet could be extradited to Spain to face certain torture-related charges implicitly affirmed universal jurisdiction, albeit under narrow circumstances. A seemingly hyper-technical question of extradition law provided the opening. Like many other countries, the United Kingdom follows the double-criminality rule: it allows extradition only in respect to offenses that are penalized both in the United Kingdom and in the law of the requesting state. Applying this rule, British law lords ruled that Pinochet could be extradited to Spain to face charges *for crimes committed outside of Spain* only if, at the time those crimes were allegedly committed, U.K. law also penalized the same crimes *when committed outside the United Kingdom.*[49] In their view, this condition was not satisfied until the United Kingdom enacted Section 134 of the Criminal Justice Act 1988, which implemented its obligations under a treaty that provides for mandatory universal jurisdiction over torture.[50] By virtue of Section 134, in the words of Lord Browne-Wilkinson, "[a]s required by the Torture Convention 'all' torture wherever committed world-wide was made criminal under United Kingdom law and triable in the United Kingdom."[51] Thus, while universal jurisdiction was scarcely the only issue in play in the *Pinochet* proceedings, it is impossible to explain key developments in that case without recourse to the principle of universality.

Suppose, however, that all of the victims seeking justice against Pinochet in Spanish courts had possessed dual Spanish/Chilean nationality. Suppose, as well, that Spanish courts still justified their right to assert jurisdiction over Pinochet explicitly on *both* universal and passive personality jurisdiction. It is hardly self-evident that a court that asserts the principle of universality as one of several relevant bases for its jurisdiction is "really" relying only on the other cited grounds. Courts exercising extra-territorial jurisdiction frequently rely upon two or more jurisdictional grounds; this has not been thought to detract from the independent relevance of each one.

At the very least, judicial statements to the effect that a national court may exercise jurisdiction on the basis, *inter alia*, of universal jurisdiction exemplify *opinio juris* in support of universal jurisdiction. But my claim goes farther: there is no obvious reason why such decisions should not be

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[49] *See* Orentlicher, Whose Justice?, *supra* note 3, at 1078 (summarizing relevant portions of R. v. Bow St. Metro). Stipendiary Magistrate, *ex parte* Pinochet Ugarte (No. 3), [2000] 1 A.C. 147 (H.L. 1999) [hereinafter Pinochet III).

[50] *See id.* at 1079.

[51] Pinochet III, *supra* note 49, at 189.

taken as best evidence of the actual grounds of jurisdiction upon which a case was based. That is, such statements make clear that the case in question constitutes state practice as well as *opinio juris* in support of universal jurisdiction.

The Significance of Pre-Conditions to States' Exercise of Universal Jurisdiction

Closely related to the methodological approach considered in the previous section is the view that cases that purportedly rely upon universal jurisdiction do not qualify as relevant state practice in support of universality when the forum state requires, as a pre-condition to its exercise of jurisdiction, that there be a significant link to that state.[52] In this view, even a legal requirement that a suspect be present in the forum state's territory before it can assert jurisdiction over him is thought to diminish a national law's relevance as state practice in support of universal jurisdiction.

In a joint separate opinion in the Yerodia Case, three judges of the International Court of Justice took this approach a step farther, suggesting that the term *universal jurisdiction* had been improperly used to characterize treaty provisions that authorize states parties to assert jurisdiction over offenders found within their territory even when the alleged

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[52] Judges Higgins, Kooijmans and Buergenthal seemed to invoke a variation on this theme in their joint separate opinion in the Yerodia Case. *See* Yerodia Case, *supra* note 7, Joint Separate Opinion of Judges Higgins, Kooijmans & Buergenthal, para. 45 (asserting, "That there is no established practice in which States exercise universal jurisdiction, properly so called, is undeniable[;] virtually all national legislation envisages links of some sort to the forum State"). *See also id.*, para. 31 (questioning whether the grave breaches provisions of the Geneva Conventions of 1949—which require High Contracting Parties to search for individuals suspected of criminal responsibility for grave breaches of the conventions, regardless of where the breaches occurred or the nationality of the perpetrator and victims, and to prosecute the suspects unless they are handed over for trial by another state—establish "a true example of universality, if the obligation to search [for offenders] is restricted to the own territory [of High Contracting States]?"

Although most relevant to the issue addressed here, presence of the accused in the territory of a forum state is not the only potential pre-condition to the exercise of universal jurisdiction that has been identified by some states in recent years. For example, Spain's Supreme Court has concluded that "the necessity of judicial intervention pursuant to the principle of universal jurisdiction remains excluded when [the territorial state] is effectively prosecuting the crime of universal character in its own country." Supreme Court (Spain), Criminal Division, Judgment in the Peruvian Genocide Case, Judgment No. 712/2003 (May 20, 2003), *reprinted in* 42 I.L.M. 1200, 1205 (2003).

offender and victims are non-nationals and the offense took place outside the forum state—circumstances that essentially define universal jurisdiction.[53] Such treaty provisions have often, and quite properly, been described as establishing a system of mandatory universal jurisdiction.[54] But in the view of these three judges, such provisions establish what is "really an obligatory territorial jurisdiction over persons, albeit in relation to acts committed elsewhere."[55] In a similar vein the three jurists suggest that a duty to ensure prosecution of individuals found within a state's territory, regardless of where the crime occurred or the nationality of the alleged perpetrator and victim, is more accurately characterized as an exercise of "territorial jurisdiction over persons for extraterritorial events" rather than "the duty to establish universal jurisdiction."[56] In this type of methodology, the only cases that would seemingly qualify as "true" instances of universal jurisdiction are ones in which the forum state seeks to prosecute either a pirate apprehended on the high seas[57] or a non-national who has not entered its territory for crimes committed against non-nationals of the forum state outside its territory.

It is a legitimate question of international law whether or under what conditions states may exercise universal jurisdiction over defendants who have not appeared in their territory.[58] If some version of a presence

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[53] *See supra* text accompanying note 4.

[54] This phrasing reflects that fact that universal jurisdiction generally permits but does not require a state to exercise jurisdiction over offenses that are encompassed in the principle of universality. In contrast, a number of treaties, including the Geneva Conventions of 1949, Additional Protocol No. I of 1977, and the Convention against Torture, require states parties to exercise universal jurisdiction over defined crimes when the offender is found within their territory unless they hand over the suspect to face trial in another jurisdiction.

[55] *See* Yerodia Case, *supra* note 7, Joint Separate Opinion of Judges Higgins, Kooijmans & Buergenthal,, para. 41.

[56] *Id.*, para. 42. *But see id.*, para. 53 (raising the question whether it is "a precondition of the assertion of universal jurisdiction that the accused be within the territory" of the forum state, thereby implying that the suspect's presence does not by definition negate the possibility of that state's exercise of universal jurisdiction).

[57] *See id.*, para. 54.

[58] Although not addressed in the Judgment of the Court in *Yerodia*, this issue evoked disparate views in separate opinions of ICJ justices who ruled in that case. *See supra* note 21. *See also* Prosecutor v. Milan Milutinovic et al., Case No. IT-99-37-PT, Decision on Motion Challenging Jurisdiction, para. 8 (May 6, 2003), Separate Opinion of Judge Patrick Robinson (asserting, "The main controversy over universal jurisdiction concerns the issue whether the presence of the suspect or accused in the forum

requirement existed, however, it would be properly characterized as a precondition to the exercise—not a negation—of universal jurisdiction.[59]

At a time when the practice of universal jurisdiction remains relatively limited and the law is still evolving, it may be premature to draw any conclusions about whether international law itself requires a "significant link" between a forum state and a particular crime, such as the presence of the accused, before that state can exercise universal jurisdiction. Indeed, a reverse modesty may be in order: just as it is appropriate to apply careful analysis in interpreting state practice that appears to *support* universal jurisdiction, it is appropriate to exercise caution in interpreting indicia of states' *restraint* in exercising universal jurisdiction.

In keeping with such an approach, an assessment of contemporary state practice points to several preliminary conclusions. First, the fact that states exercise universal jurisdiction rarely, and tend to do so only when

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State is a precondition for its exercise"); *id.*, para. 42 (asserting view that "if there is a principle of universal jurisdiction in customary international law," it entitles "any State in which the offender is found [to] prosecute him"). In a variation on this theme, the Supreme Court of Israel—which had obtained personal jurisdiction over Adolf Eichmann through his illegal abduction in Argentina—defined universal jurisdiction this way: "Its meaning is substantially that [the power to try and punish a person] is vested in every State regardless of the fact that the offence was committed outside its territory by a persons who did not belong to it, provided he is in its custody when brought to trial." Eichmann-Sup. Ct., *supra* note 35, at 298 (emphasis added).

[59] *See* Prosecutor v. Milan Milutinovic et al., Case No. IT-99-37-PT, Decision on Motion Challenging Jurisdiction, para. 11 (May 6, 2003), Separate Opinion of Judge Patrick Robinson (noting that there is more state practice in support of a requirement, before exercising universal jurisdiction, that the accused be present in the forum state than for the exercise of universal jurisdiction in absentia). Alternatively, a presence requirement may be seen as a limitation on a state's jurisdiction to adjudicate but not on its jurisdiction to prescribe. In the terminology of the *Restatement of the Foreign Relations Law of the United States*, jurisdiction to prescribe relates to the authority of a state "to make its law applicable to the activities, relations, or status of persons, or the interests of persons in things, whether by legislation, by executive act or order, by administrative rule or regulation, or by determination of a court." Restatement, *supra* note 34, § 401(a). Jurisdiction to adjudicate is defined in terms of a state's exercise of "jurisdiction through its courts to adjudicate with respect to a person or thing." *Id.*, § 421(1). The *Restatement* defines and addresses universal jurisdiction under the rubric of prescriptive, not adjudicative, jurisdiction. *See id.*, § 404. Its principal section on jurisdiction to adjudicate provides that a state's exercise of this type of jurisdiction over a person is subject to a requirement of reasonableness and "is reasonable if, at the time jurisdiction is asserted [,] the person . . . is present in the territory of the state, other than transitorily." *Id.*, § 421(1)–(2). Following the approach embodied in the *Restatement*, a presence requirement might be a pre-condition to the lawfulness

there is a significant link to the forum state,[60] does not by itself negate the right of states to assert universal jurisdiction over certain crimes. As has often been noted, states may choose to exercise less than the full extent of jurisdiction that international law permits them to exercise; indeed, it is a truism that this is the case for all countries in respect of even relatively well-established jurisdictional grounds.[61] The critical question, then, is whether state practice and *opinio juris* reflect rejection of the right of states to assert jurisdiction under the principle of universality or instead reflect states' general restraint in exercising universal jurisdiction.[62]

Second, universal jurisdiction does not override the enduring importance of particular state interests in relation to heinous crimes—or, for that matter, enduring sensibilities of state sovereignty.[63] States' preference for *universality plus*—that is, for exercising universal jurisdiction only or principally when there is a significant link between an offense and the forum state[64]—reflects these considerations. As Bassiouni has noted, "the application of universal jurisdiction for certain international crimes does not necessarily mean that it should be devoid of any connection to the enforcing state, or that it has precedence over other theories of jurisdiction[; the values advanced by universal jurisdiction do not supplant] the

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of a state's exercise of its jurisdiction to adjudicate a case whose prescriptive jurisdiction is established pursuant to the principle of universality. The key point here is that a legal requirement to the effect that a state may prosecute a foreign national for crimes committed elsewhere against foreign victims only when the alleged perpetrator is in the forum state would not undermine the claim that such a case is based on universal jurisdiction.

60 This trend is summarized in Anne-Marie Slaughter, *Defining the Limits: Universal Jurisdiction and National Courts, in* UNIVERSAL JURISDICTION: NATIONAL COURTS AND THE PROSECUTION OF SERIOUS CRIMES UNDER INTERNATIONAL LAW 169, 172–73 (Stephen Macedo ed., 2004).

61 *See* Yerodia Case, *supra* note 7, Joint Separate Opinion of Judges Higgins, Kooijmans & Buergenthal, para. 45.

62 *See id.*, paras. 45–46 (concluding that there is nothing in national case law that "evidences an opinio juris on the illegality" of universal jurisdiction and that there are "certain indications that a universal criminal jurisdiction for certain international crimes is clearly not regarded as unlawful").

63 *See* Diane F. Orentlicher, *The Future of Universal Jurisdiction in the New Architecture of Transnational Justice, in* UNIVERSAL JURISDICTION: NATIONAL COURTS AND THE PROSECUTION OF SERIOUS CRIMES UNDER INTERNATIONAL LAW 214, 236 (Stephen Macedo ed., 2004) [hereinafter Orentlicher, Future of Universal Jurisdiction].

64 *See id.*; *see also* Slaughter, *supra* note 60, at 170.

enforcing interests of other states."[65] That particular state interests continue to matter in specific cases is perfectly consistent with the principle of universality under customary law—which is, after all, permissive rather than mandatory.

States' preference for exercising *universality plus* rather than what Bassiouni and others term *pure universal jurisdiction* doubtless reflects as well an appropriate sense of caution at a time when the practice and law of universal jurisdiction are in flux. In this setting, states are understandably concerned about abusive applications of the principle of universal jurisdiction. Such anxieties are allayed by self-imposed limits on the exercise of universal jurisdiction, including requirements that a state have a significant link to an offense before its courts may assert universal jurisdiction.[66]

Concerns of this sort apparently led German courts to enunciate a "point of contact" requirement as a pre-requisite to the exercise of universal jurisdiction under a previous German law (this requirement does not appear in a more recently enacted law). In a 1998 decision, the Federal Supreme Court of Germany ruled that two Yugoslav nationals could not be prosecuted in Germany for genocide or war crimes allegedly committed in the former Yugoslavia against non-German nationals unless the suspects were present in Germany. The Court reasoned:

> Without a meaningful point of contact respect for the sovereignty of other States (non-interference principle) can hardly be assured and the municipal criminal justice system would be overloaded with the 'world wide' prosecution of offences. The only link with Germany is the plaintiff's presence. Even if he were the victim of any of the alleged crimes—which is doubtful—there would not be a sufficient connection. The presence of a crime victim is not an appropriate basis for German jurisdiction because it usually is a matter of pure coincidence with no relation to the offence and offender. If it were an adequate criterion this would lead to an endless and internationally questionable extension of national jurisdiction. German courts would have to deal with cases for which it is manifest from the start that there are very few chances to properly investigate and try them. It is

[65] Bassiouni, Universal Jurisdiction, *supra* note 4, at 104.

[66] *See* Slaughter, *supra* note 60, at 172. Indeed, this point informs Bassiouni's strategic agenda for advancing states' acceptance of universal jurisdiction.

> quite another thing when the offender is present in Germany; in that case there is an internationally undisputed linking point for the exercise of jurisdiction.[67]

Article 1 of a German law enacted in 2002, which establishes universal jurisdiction over genocide, crimes against humanity, and war crimes, seemingly eliminated the judicially developed "point of contact" requirement. Article 1 provides that the new law, the Act to Introduce the Code of Crimes against International Law of June 26, 2002, "shall apply to all criminal offences against international law designated under [the] Act, . . . even when the offence was committed abroad and bears no relation to Germany."[68] But another article provides that a prosecution might not proceed "if the accused is not present in Germany and such presence is not to be anticipated."[69]

It remains to be noted that even the specific requirement of presence of the accused as a pre-condition to exercising jurisdiction, which some see as undermining state practice in support of universal jurisdiction, can also be explained in terms that are *supportive* of universal jurisdiction. A core aim of the principle of universality is to ensure that those responsible for atrocious crimes do not escape punishment.[70] By empowering their courts to exercise universal jurisdiction when perpetrators appear in their territory, states advance this aim by ensuring that their territory does not become a safe haven for world-class criminals.[71]

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[67] Amnesty International, *Universal Jurisdiction: The Duty of States to Enact and Implement Legislation*, AI Index: IOR 53/009/2001 (Sept. 1, 2001).

[68] Bundesgesetzblatt 2002, Teil I., No. 42, at 2254–2260, art. 1 (June 29, 2002).

[69] *Id.*, art. 3(1). Pre-2002 case law had indicated that the presence of the accused would not by itself establish a sufficient nexus with Germany to justify the exercise of jurisdiction. *See* Universal Jurisdiction Information Network, *available at* http://www.u-j.info/index/127219.

[70] *See* Bassiouni, History of Universal Jurisdiction, *supra* note 2, at 62; Orentlicher, Future of Universal Jurisdiction, *supra* note 63, at 232.

[71] One of the reasons why Belgium expanded (before later contracting) its law of universal competence was to avoid becoming a haven for non-nationals believed to be responsible for the Rwandan genocide. *See* Stefaan Smis & Kim Van der Borght, *Introductory Note: Belgium: Act Concerning the Punishment of Grave Breaches of International Humanitarian Law*, 38 I.L.M. 918, 920 (1999). It should be noted, as well, that a presence requirement is not the same thing as requiring that another established basis for exercising jurisdiction, such as the nationality principle, be established. Thus, jurisdiction based solely on "universality plus presence" should be considered as relevant state practice in support of universal jurisdiction even in the calculus of commenta-

II. A STRATEGIC IDEALIST

After applying the rigorous methodology of an exceptionally learned legal scholar to assess contemporary international legal principles, Bassiouni tackles the subject of universal jurisdiction from the dual vantage points of an idealist and strategist. For Bassiouni, the two are integrally related. Deeply devoted to a conception of world order rooted in our shared humanity, Bassiouni the idealist is not content merely to render an honest reckoning of current legal reality, but rather measures that reality against his own conception of world order. Finding expansive gaps between the two, Bassiouni the strategist fashions a pragmatic strategy for narrowing them.

Bassiouni's Vision: World Order and Human Solidarity

Finding modest (though increasing) support for universal jurisdiction in state practice, Bassiouni nonetheless believes that international legal principles provide an alternative ground for sustaining it. In his view, "an independent theory of universal jurisdiction exists with respect to serious international crimes."[72] The "grounds for such a theory"[73] are twofold:

> The first is the normative universalist position, which recognizes the existence of certain core values that are shared by the international community. These values are deemed important enough to justify overriding the usual territorial limitations on the exercise of jurisdiction. The second position is a pragmatic policy-oriented one, which recognizes that occasionally there exist certain shared international interests that require an enforcement mechanism not limited to national sovereignty.[74]

Summing up the views of scholars who embrace an "independent theory of universal jurisdiction"—apparently including himself—Bassiouni writes that their underlying assumptions and goals "are that a broader jurisdic-

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tors who believe that only cases of pure universal jurisdiction provide persuasive evidence of such practice. *See supra* text accompanying notes 25–26.

[72] Bassiouni, History of Universal Jurisdiction, *supra* note 2, at 45.

[73] *Id.*

[74] *Id.* at 42.

tional mechanism can prevent, deter, punish, provide accountability, and reduce impunity, and also enhance the prospects for justice and peace."[75]

The abstract terminology that Bassiouni deploys to advance his "independent theory" may obscure the deep commitment to human worth that shapes his analysis. The preamble to the United Nations' *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*,[76] which Bassiouni co-authored, eloquently capture the primacy of humanity in Bassiouni's work:

> *Recognizing* that, in honouring the victims' right to benefit from remedies and reparation, the international community keeps faith with the plight of victims, survivors and future human generations, and reaffirms the international legal principles of accountability, justice and the rule of law,
>
> *Convinced* that, in adopting a victim-oriented perspective, the international community affirms its human solidarity with victims of violations of international law . . . as well as with humanity at large.[77]

For Bassiouni, as these passages reflect, the deepest interests of humanity occupy a central place in international law. And for Bassiouni, the concept of an international community is not an abstraction, but a moral and legal reality.

These views infuse Bassiouni's prolific work in the field of international criminal law—an enormously complex topic in which he is a towering figure. In a book that he co-authored with the late Edward Wise, *Aut Dedere Aut Judicare*, Bassiouni expressed his commitment to a world order in which humanity occupies a central role through the notion of a *civitas maxima*—a "hypothetical international community."[78] The two authors wrote that

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[75] *Id.* at 62.

[76] *See supra* note 15.

[77] *Id.*, preamble.

[78] Bassiouni & Wise, Aut Dedere Aut Judicare, *supra* note 17, at 29.

> behind arguments from a common interest in repressing crime, there is ultimately the supposition that states constitute only an intermediate level of political organization in what actually is a more general and genuine moral community comprising all humanity.
>
> The idea of the world as a . . . "community of mankind" primarily expresses a sense of human solidarity of common humanity. It postulates certain universal objects and moral imperatives that are believed, in principle, to limit the action of states and impel them to cooperate for the common good of a community of which everyone in the world is ultimately a member. . . .
>
> To a greater or less extent, it is belief in the ultimate reality of this *civitas maxima* that underlies assertions about a common interest in repressing crime wherever it occurs (and also assertions about the existence of a genuine body of international criminal law).[79]

Closely related to the values bound up in a *civitas maxima*, and even more fundamental to Bassiouni's conception of international criminal law, is the concept of *jus cogens*, a doctrine that runs like a golden thread through many of his publications.[80] As Bassiouni and Wise explained, "the term *jus cogens* usually is used to refer to a body of overriding or 'peremptory' norms of such paramount importance that they cannot be set aside by acquiescence or agreement of the parties to a treaty."[81] As I will explain shortly, however, Bassiouni's conception of *jus cogens* is infinitely richer than its core legal meaning.

In Bassiouni's view, "the following international crimes are *jus cogens:* aggression, genocide, crimes against humanity, war crimes, piracy, slavery and slave-related practices, and torture."[82] At the proverbial first blush,

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[79] *Id.* at 28–30.

[80] On the relationship between the two, see, *inter alia*, Bassiouni, Jus Cogens, *supra* note 13, at 69 (asserting that "certain crimes affect the interests of the world community as a whole because they threaten the peace and security of human kind and because they shock the conscience of humanity[; i]f both elements are present in a given crime, it can be concluded that it is part of *jus cogens*"].

[81] Bassiouni & Wise, Aut Dedere Aut Judicare, *supra* note 17, at 51. *See also* Bassiouni, Jus Cogens, *supra* note 13, at 67.

[82] Bassiouni, Jus Cogens, *supra* note 13, at 68.

the phrasing is puzzling. What, after all, could it mean to say that certain offenses "are" compelling legal norms? It is tempting to think that what Bassiouni meant to say is that the international legal norm criminalizing the enumerated offenses has the status of *jus cogens*.[83] But Bassiouni's phrasing may well have been deliberate, for the claim that these seven crimes "are *jus cogens*" naturally raises the question of what, exactly, their *jus cogens* status imports. And this is a question on which Bassiouni has much to say.

For Bassiouni, the implications of international crimes' *jus cogens* status go beyond the notion that states are not allowed to "set aside by acquiescence or agreement" the international norms proscribing these crimes:

> To this writer, the implications of *jus cogens* are those of a duty and not of optional rights; otherwise *jus cogens* would not constitute a peremptory norm of international law. . . . [R]ecognizing certain international crimes as *jus cogens* carries with it the duty to prosecute or extradite, the non-applicability of statutes of limitation for such crimes, and universality of jurisdiction over such crimes irrespective of where they were committed, by whom (including Heads of State), against what category of victims, and irrespective of the context of their occurrence (peace or war). Above all, the characterization of certain crimes as *jus cogens* places upon states the *obligatio erga omnes* not to grant impunity to the violators of such crimes.[84]

For Bassiouni, then, the *jus cogens* status of certain international crimes has *logical* implications. He readily concedes that logic leads him to a different conception of legal obligation than that produced by his

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[83] Indeed, Bassiouni and Wise used somewhat similar phrasing in a 1995 publication: "In large part, the rules prohibiting [offenses that are universally condemned] constitute *jus cogens* norms." Bassiouni & Wise, Aut Dedere Aut Judicare, *supra* note 17, at 24.

[84] Bassiouni, Jus Cogens, *supra* note 13, at 65–66 (citations omitted). *See also* Bassiouni, Theoretical Framework, *supra* note 5, at 39; *cf.* Bassiouni & Wise, Aut Dedere Aut Judicare, *supra* note 17, at 52 (asserting that the principle aut dedere aut judicare, which embodies a state's duty to extradite someone unless s/he is subjected to criminal process in that state, represents a *jus cogens* norm in respect of crimes that "are widely held to constitute rules of *jus cogens* and that this claim "is meant to underscore the crucial importance of the principle for the effective repression of international offenses").

previous account of legal duty built up from state practice. "The practice of states," Bassiouni acknowledges, "evidences that, more often than not, impunity has been allowed for *jus cogens* crimes, the theory of universality has been far from being universally recognized and applied, and the duty to prosecute or extradite is more inchoate than established, other than when it arises out of specific treaty obligations."[85] But his aim is clear—to narrow what he calls the "gap between legal expectations and legal reality."[86] Bassiouni brings to this task a strategic sensibility that is as well honed as his legal acumen.

Advancing the Law

Bassiouni's strategy for narrowing the "gap between legal expectations and legal reality" has several dimensions. To begin, his scholarly writing itself plays a key role in advancing his goals for legal reform. Bassiouni is well aware of the potential influence of jurists in shaping international law—and he has played a key role in advancing law through his learned publications.[87] A key aim of his writing is to *persuade* us through the sheer force of his analysis and encyclopedic knowledge that, in a coherent system of international criminal law, universal jurisdiction inheres in the very concept of an international crime.[88]

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[85] Bassiouni, Jus Cogens, *supra* note 13, at 66.

[86] *Id.*

[87] On the role of scholars in advancing the law, Bassiouni has written, "The gap between legal expectations and legal reality . . . may be bridged by certain legal pronouncements and scholarly writings." *Id.* at 66–67 (citations omitted); Bassiouni, Theoretical Framework, *supra* note 5, at 40. *See also* Bassiouni, Universal Jurisdiction, *supra* note 4, at 155. Bassiouni's work has been cited in major decisions on international criminal law by both national and international courts. *See, e.g.*, R v. Finta [1994] I S.C.R. 701, at 760–61, 763–64, 783–84, 811, 823, 829–31, 836, 870; Prosecutor v. Tadic, Case No. IT-94-1-T, Opinion and Judgment, paras. 620, 654, 694–95, 704 (May 7, 1997); Prosecutor v. Tadic, Case No. IT-94-1-A, Judgment, para. 35 (July 15, 1999).

[88] *See, e.g.*, Bassiouni, Universal Jurisdiction, *supra* note 4, at 150 (arguing that, although state practice is insufficient to support "an international customary practice with respect to universal jurisdiction, . . . that limited practice combined with [other factors] may constitute a sufficient legal basis to conclude that there exists at least a duty to prosecute or extradite, and, where appropriate, to punish persons accused . . . of international crimes. If that proposition is accepted, then it follows that when available jurisdictional means are ineffective, universal jurisdiction should apply. . . . I would add that it would be a valid argument to propose that the cumulative weight of international law sources and national legislation and judicial practices can be deemed sufficient to find the existence of universal jurisdiction for jus cogens and even other international crimes.").

Ultimately, however, Bassiouni hangs his proverbial hat on what he calls positive law.[89] It is here that Bassiouni's idealism links up with and loops back to his insistence that legal claims must reflect legal reality: Bassiouni has played a singular role in developing legal texts that narrow the "gap between legal expectations and legal reality." He served as Chairman of the Drafting Committee of the diplomatic conference culminating in adoption of the Statute of the International Criminal Court, one of the most important legal advances in the global struggle against impunity of our time. More recently (as already noted), Bassiouni served as one of two experts who drafted the United Nations' *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, which were adopted by the U.N. General Assembly in December 2005. Notably, these principles affirm that "States shall incorporate or otherwise implement within their domestic law appropriate provisions for universal jurisdiction" to give affect to relevant international legal obligations.[90]

Bassiouni knows better than anyone what it takes to garner state support for new legal texts, and he most assuredly knows that further advances in the law of universal jurisdiction will be possible only if initiatives in this area take account of states' concerns. The way forward, he believes, is to develop principles that clarify *legitimate* usages of universal jurisdiction.

Bassiouni has little doubt that such principles must reflect not only the interests of victims in obtaining justice, but also the legitimate concerns of sovereign states. "Unbridled universal jurisdiction," he argues, "can cause disruptions in world order and deprivation of individual human rights when used in a politically motivated manner or for vexations purposes."[91] Even when exercised in good faith, Bassiouni cautions, universal jurisdiction can "be used imprudently, creating unnecessary frictions between states, potential abuses of legal processes, and undue harassment of individuals prosecuted or pursued for prosecution."[92]

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[89] For an example of this approach, see Bassiouni, History of Universal Jurisdiction, *supra* note 2, at 63.

[90] *See supra* note 15, art. 5.

[91] Bassiouni, Universal Jurisdiction, *supra* note 4, at 82.

[92] *Id.*

A key component of Bassiouni's strategy for reconciling the interests of victims with those of states is to harmonize universal jurisdiction "with other jurisdictional theories."[93] More particularly, Bassiouni advocates the development of consensus principles on universal jurisdiction that establish "jurisdictional priorities" and provide "rules for resolving conflicts of jurisdiction" and minimize "the exposure of individuals to multiple prosecutions, abuses of process, and denial of justice."[94]

The different strands of Bassiouni's writing on the subject of universal jurisdiction come together in the Princeton Principles on Universal Jurisdiction,[95] which were drafted by a group of international legal experts, including Bassiouni and this author, under the auspices of the Princeton Project on Universal Jurisdiction. While generally affirming the important role of universal jurisdiction in ensuring justice for atrocious crimes, the Princeton Principles recognize that states that are in a position to exercise universal jurisdiction should, in deciding whether to do so, consider a range of relevant factors, including the interests of other states in asserting jurisdiction.[96] As a leading member of the expert group that drafted these principles, Bassiouni expressed the hope that they or a similar set of principles would, in time, "garner consensus among scholars and, ultimately, among governments. Then an international convention should be convened so that guidelines on universal jurisdiction can become positive international law."[97]

As an idealist, Bassiouni situates universal jurisdiction in a morally ambitious universe that is regulated in accordance with principles of world order in which the interests of humanity loom large but not alone. As a strategist, he believes it necessary to acknowledge and take account of states' principal anxieties concerning universal jurisdiction. By defining principled limits to its use, Bassiouni seeks to secure the principle of universality in the solid foundation of positive law. Along the way, Bassiouni the scholar insists on a rigorous regard for the methodology of law.

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93 *Id.*

94 *Id.* at 155.

95 *Reprinted in* UNIVERSAL JURISDICTION: NATIONAL COURTS AND THE PROSECUTION OF SERIOUS CRIMES UNDER INTERNATIONAL LAW 18 (Stephen Macedo ed., 2004).

96 *See id.*, Principle 8.

97 Bassiouni, History of Universal Jurisdiction, *supra* note 2, at 63.

Ironically in light of Bassiouni's legal aims, his reading of current state practice may be unduly restrictive. As I have argued, recent practice provides more support for universal jurisdiction and perhaps less cause for doubting its established place in international law than Bassiouni believes. On one point, however, there can be little doubt: recent advances are due, in no small measure, to the life's work of Cherif Bassiouni. By equal measure, we can be confident that future advances in this area will stand squarely on the foundation of his work.

CHAPTER 5

ACTING OUT AGAINST TERRORISM, TORTURE, AND OTHER ATROCIOUS CRIMES: CONTEMPLATING MORALITY, LAW, AND HISTORY

*Christopher L. Blakesley**

W.H. Auden, *New Year Letter* (1941)
They never forgot
That even the dreadful martyrdom must run its course
Anyhow in a corner, some untidy spot
Where the dogs go on with their doggy life and the torturer's horse
Scratches its innocent behind on a tree.
Only God can tell the saintly from the suburban,
Counterfeit values always resemble the true;
Neither in Life nor Art is honesty bohemian,
The free behave much as the respectable do.[1]

W.H. Auden, *In Time of War, Commentary, from Journey to War* (1939)
Violence shall synchronize your movements like a tune,
And Terror like a frost shall halt the flood of thinking.
Barrack and bivouac shall be your friendly refuge,

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[1] W.H. Auden, *New Year Letter* (1941), *in* W.H. AUDEN, COLLECTED POEMS 197 (Edward Mendelson ed., Vintage International 1991).

And racial pride shall tower like a public column
And confiscate for safety every private sorrow.[2]

W.H. Auden, *Epitaph on a Tyrant* (1939)
Perfection, of a kind, was what he was after,
And the poetry he invented was easy to understand;
He knew human folly like the back of his hand,
And was greatly interested in armies and fleets;
When he laughed, respectable senators burst with laughter,
And when he cried the little children died in the streets.[3]

This chapter explores the history and concepts of prosecution and punishment for war crimes, crimes against humanity, torture, and terrorism. As for punishment, I reflect on war and terrorism as institutions of punishment in their own right. That is, war or terrorism are undertaken to punish the enemy. Also, brief analysis of the history and conceptualization

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[2] From W.H. Auden, *In Time of War, Commentary, from Journey to War* (1939 *in* W.H. AUDEN, THE ENGLISH AUDEN: POEMS, ESSAYS, AND DRAMATIC WRITINGS 1927–1939 (Edward Mendelson ed., 1977), *reprinted in* STAN SMITH ED., CAMBRIDGE COMPANION TO W.H. AUDEN, at 171 (2004).

[3] W.H. Auden, *Epitaph on a Tyrant*, brought to my attention by Professor Anthony D'Amato and to him by Judy Evans. Esteban Peralta Losilla, Profesor titular de derecho internacional público y relaciones internacionales, Facultad de Derecho, Ciudad Universitaria, Zaragoza (España), recommended books on Pinochet, as follows: In my opinion, the best (Spanish) reference is ANTONIO REMIRO: EL CASO PINOCHET. LOS LIMITES DE LA IMPUNIDAD. MADRID: POLITICA EXTERIOR (1999) (focusing specifically with legal issues); TITO DRAGO: EL RETORNO DE LA ILUSION. PINOCHET: EL FIN DE LA INMUNIDAD, (1999) (providing a broader, more political point of view). Lyonette Louis-Jacques, University of Chicago Law School Faculty, recommended the following: B. PAZ ROJAS, C. VICTOR ESPINOZA, O. JULIA URQUIETA, SOTO H. HERNAN, PINOCHET FACE A LA JUSTICE ESPAGNOLE (1999); *traduction de:* PINOCHET ANTE LA JUSTICIA ESPANOLA PERO LLEGA (*Traduit de l'espagnol par Jacques Secreta* 1998); B. PAZ ROJAS, CORPORACION DE PROMOCION Y DEFENSA DE LOS DERECHOS DEL PUEBLO (CHILE); DIANA WOODHOUSE ED., THE PINOCHET CASE: A LEGAL AND CONSTITUTIONAL ANALYSIS (2000); HEIKO AHLBRECHT & KAI AMBOS EDS., DER FALL PINOCHET(S) (1999); WHEN TYRANTS TREMBLE: THE PINOCHET CASE (Human Rights Watch 1999); Sebastian Brett, *"October 1999,"* 11(1B) HUM. RTS. WATCH (1999); REED BRODY, THE PINOCHET PAPERS: THE CASE OF AUGUSTO PINOCHET UGARTE IN SPAIN AND BRITAIN (2000). Ms. Louis-Jacques also noted these related documents: U.S. releases Pinochet documents, http://www.ciponline.org/990712cl.htm, Chile Declassification Project, http://foia.state.gov/; National Security Archive Electronic Reading Room Project: Chile and the United States: Declassified Documents Relating to the Military Coup, Sept. 11, 1973, http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB8/nsaebb8i.htm. A moderated list for monitoring the criminal procedures against Pinochet, PINOWATCH@derechos.net.

of traditional punishment after a tribunal or other institution finds an individual guilty is provided.

A few major themes emerge. First, that war and terrorism may function as "institutions" of punishment, at least in the minds of those who resort to them. Second, that studying the history and concepts of war and terrorism, including aspects of war that are deemed criminal, informs interpretation of the modern "contrasting terms." This allows a deeper examination of the criminal nature of terrorism, illegal wars, and some aspects of "legal war." Thinking of war and terrorism as "institutions of punishment" (analogous to the way that punishment functions as an "institution" of law) sheds light on how war, terrorism, law, prosecution, and punishment function, for good or for ill, as strategies and institutions of conflict resolution. The other parallel thread is to study prosecution and punishment of those who engage in war crimes, crimes against humanity, or terrorism. That, of course, is what one usually thinks about when considering "institutions" of prosecution and punishment. Appreciating the relationship between war and terrorism as "institutions" of punishment along with prosecution and punishment for terrorism, war crimes, and crimes against humanity requires consideration of the basic principles of culpability and innocence. The applicability or appropriateness of justifications or excuses, such as self-defense, necessity, duress, among others, is important. Finally, over-reaction to terrorism erodes or eviscerates law, morality, and democratic constitutional systems.

In sum, I will delve into the history and current law of war, terrorism (and "anti-terrorism") and how they may function as punishment. I will explore the historical role of prosecution and punishment for wars deemed illegal and punishment for illegal aspects of legal war. My scope includes prosecution and punishment (including torture) in relation to war and terrorism from antiquity, the Middle Ages, the Enlightenment, to the present time.

In addressing the role of prosecution and punishment as institutions in the history of war, Voltaire's skeptical assessment comes to mind:

> Nothing could be smarter, more splendid, more brilliant, better drawn up than the two armies. Trumpets, fifes, haut-boys, drums, cannons, formed a harmony such as has never been heard even in hell. The cannons first of all laid flat about six thousand men on each side; then the musketry removed from the best of worlds some nine or ten thousand blackguards who infested its

> surface. The bayonet also was the sufficient reason for the death of some thousands of men. The whole might amount to thirty thousand souls. Candide, who trembled like a philosopher, hid himself as well as he could during this heroic butchery.
>
> At last, while, the two Kings each commanded a *Te Deum* in his camp, Candide decided to go elsewhere to reason about effects and causes. He clambered over heaps of dead and living men and reached a neighboring village, which was in ashes; it was [a] village which the Bulgarians had burned in accordance with international law. Here, old men dazed with blows watched the dying agonies of their murdered wives who clutched their children to their bleeding breasts; there, disemboweled girls who had been made to satisfy the natural appetites of heroes gasped their last sighs; others, half-burned, begged to be put to death. Brains were scattered on the ground dismembered arms and legs.[4]

Does Voltaire correctly assess the laws of war as consisting of righteous brutality on a grand scale and simple suffering on a human scale?[5] Voltaire's cynical assessment of the tendency of leaders, such as they are, to abuse their people—people in general—in the guise of law, is not that inapt. It even recalls our own individual and general tendency to become barbaric, when made to be fearful, insecure, or when we become filled with ideological or religious fervor. When this happens, many confuse justice with vengeance[6]—confuse self-defense with reprisal or retaliation, and confuse violence and armed conflict with prosecution and punishment. The prosecution of war, then, functions as an institution of punishment.

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[4] FRANÇOIS-MARIE AROUET DE VOLTAIRE, CANDIDE OU L'OPTIMISME (Hachette, Paris, 1913); *also in* CANDIDE OR OPTIMISM 10 (Crofts Classics 1946).

[5] *See id.*

[6] Christopher L. Blakesley, *Obstacles to the Creation of a Permanent War Crimes Tribunal*, 18 FLETCHER F. WORLD. AFF. 77 (1994); Christopher L. Blakesley, *The Modern Blood Feud: Thoughts on the Philosophy of Crimes Against Humanity and the Proper Response, in* 2 INTERNATIONAL HUMANITARIAN LAW: CHALLENGES ch. 6 (J. Carey, W.V. Dunlap & R.J. Pritchard eds., 2003); CHRISTOPHER L. BLAKESLEY, TERRORISM, DRUGS, INTERNATIONAL LAW, AND THE PROTECTION OF HUMAN LIBERTY, chs. 1 and 4 (1992). For documentation on terrorism, see M. CHERIF BASSIOUNI, INTERNATIONAL TERRORISM: A COMPILATION OF U.N. DOCUMENTS VOLS. I & II (1972–2001) (2001); POST-CONFLICT JUSTICE (Cherif Bassiouni ed., 2002) (compilation of strategies).

Consider war, prosecution, and punishment. Since September 11, 2001, the United States has been involved in the wars in Afghanistan and Iraq, and we have been faced with the claim that we are going to be involved in an ongoing unlimited and unending "war on terrorism." We have seen the creation of the indefinite detention center at *Guantanamo* and the horrific conduct that appears to have occurred there and in places like *abu Ghraib* and elsewhere. We have seen the creation of a network of secret prisons and the process of "rendering" individuals to other nations where they seem to sometimes suffer torture. We have seen U.S. citizens denied the right to be prosecuted in civilian courts, simply upon executive branch decision that they acted as terrorists or so-called "enemy combatants."[7]

Over-arching issues relating to the September 11, 2001, terrorism and its aftermath include: Does oppression provide any justification or excuse for war crimes, terrorism, or crimes against humanity? Similarly, whether that attack justifies war or armed conflict in self-defense under international law, and, if so, what constitutes self-defense in this context? Analysis requires consideration of how a state is to maintain a moral and legal system, in the face of extreme menace, especially when that menace desires its own death as the engine to slaughter "its enemy." The rhetoric of each side becomes venomous and prompts each to commit similarly vile acts as punishment. The reaction of the U.S. government

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[7] *See* Hamdan v. Rumsfeld, 126 S. Ct. 2749 (2006) (*Hamdan II*). *See also* Bruce Zagaris, *Counter-Terrorism and Int'l Human Rights Al-Marri Case Tests U.S. Ability to Designate Unlawful Enemy Combatants*, 23(3) INT'L ENFORCEMENT L. REP. 97 (Mar. 2007), discussing *Ali Saleh Kahlah Al-Marri v. Commander S.L. Wright*, 487 F.3d 160 (4th Cir. 2007); United States v. Al-Marri, 274 F. Supp. 2d 1003 (C.D. Ill. 2003). Also, the Canadian Supreme Court unanimously overturned terrorist detention procedures. Charkaoui v. Canada (Citizenship and Immigration), 2007 SCC 9; Bruce Zagaris, *Canadian Supreme Court Unanimously Overturns Terror Detention Procedures*, 23(4) INT'L ENFORCEMENT L. REP. 141 (Apr. l, 2007). *See also* Rumsfeld v. Padilla, 542 U.S. 426, 430–31 (2004) (Jose Padilla, allegedly is "the terrorist suspect detained by United States officials at Chicago's O'Hare airport and subsequently held as an enemy combatant. Because Padilla is a United States citizen, the question of temporary or local allegiance is irrelevant. He owes permanent allegiance to the United States, and thus military jurisdiction cannot extend to him."), *noted in* Carlton F.W. Larson, *The Forgotten Constitutional Law of Treason and the Enemy Combatant Problem*, 154 U. PA. L. REV. 863, 899 n.169 (2006). *See also* Padilla v. Hanft, 423 F.3d 386 (4th Cir. 2005). *Certiorari* was denied on April 3, 2006, in the *Padilla v. Hanft* case, *supra*, No. 05-533, wherein the Supreme Court was asked to review Padilla's military detention. The Court seemed to want to ensure that the office and purpose of the writ of *habeas corpus* are not compromised. *See also* Linde v. Arab Bank, PLC, 384 F. Supp. 2d 571 (E.D.N.Y. 2005); Hamdi v. Rumsfeld, 542 U.S. 507, 510 (2004).

raises the question of whether it is possible to combat terrorism or acts of war without falling into a trap of hatred or blind fear that leads to the use of terror to fight terrorism—of atrocity to fight atrocity; war crimes to fight and punish war crimes? I agree with Scott Shuger on his important point: "Let's face it: We cannot define terrorism [or war crimes, etc.] so that only the other side's military can be destroyed or so that only our weapons can be used."[8] These crimes may be committed by any group, nation, or government, including our own. Failure to recognize this ultimately condemns us to become the same or similar to those who commit atrocity against us or who fit our vision of those whom we need to punish. In addition to being seen as a means to further the cause for a revival of their vision of the "good order," one of the purposes of the perpetrators is to punish those who have profited from past wrongs. Reaction by the attacked state is often undertaken partly to punish the group that perpetrated the previous atrocity and to prosecute a war to defend against the perpetrating group or its proxies.

Prior to September 11, 2001, some of us might have been in denial about the penchant of human beings to commit such horrific violence upon others. How is it possible that leaders of nations or groups, including our own, are able to inflame hatred and fear in their people so that they are willing to participate in or accommodate horrific acts? Why are people so hopeless that they become willing to destroy themselves along with those they see as "others or enemies?" How do the institutions of punishment and prosecution play out in this context?

This chapter compares war with terrorism as institutions of punishment, and then it compares each to common crimes in the domestic context, to war crimes, and crimes against humanity. I will distinguish each type of conduct, indicating similarities and differences and analyze the applicability of justification and excuse.[9] Important and difficult legal

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[8] *See* Scott Shuger, *Off on a Terror: How to be Intellectually Honest about Terrorism*, SLATE, Feb. 19, 2002.

[9] It is important to distinguish these types of conduct or offenses if we want clarity in understanding what ought to be our action and reaction. *See* Blakesley, *The Modern Blood Feud, supra* note 6; *cf.* Michael P. Scharf, *Defining Terrorism as the Peacetime Equivalent of War Crimes: Problems and Prospects*, 36 CASE W. RES. J. INT'L L. 339 (2004); M. Cherif Bassiouni, *Legal Control of International Terrorism: A Policy-Oriented Assessment*, 43 HARV. INT'L L.J. 83, 84–85 (2002). *See also* "UN commission urges immediate release of all women, children detained in war," UN News Center Report, Mar. 13, 2006, stating:

> Condemning all violence committed against civilians during war, a United Nations commission has called for the immediate release of women and children taken hostage during armed conflict. The call came as the Commission

and moral ideas, issues, and dilemmas are considered in the context of history.

The United States' current "war on terrorism" is illustrative and helpful in trying to understand the role of punishment and prosecution as "institutions" relating to war. What dangers and criminality arise from the similarities between anti-terrorism measures and terrorism itself—or between the legal and moral justifications for these measures and war that emanate from all sides? Frighteningly, many legislators, judges, even some scholars and common people on all sides are willing to justify, or at least excuse, conduct that is morally repugnant, illegal, and dangerous to their own interests, including attempts to find a feeling of "security" and a need to punish others. Such reaction may be dangerous. For example, David Frum, a former speech-writer for President George W. Bush, credited with coining the infamous term "axis of evil," said: "In a world where there are evil governments, this is the real moral test . . . What do evil governments do? They kill. What do good governments do? They must also kill."[10] This quote represents the danger.

The institutions of prosecution and punishment in and about armed conflict provide insight. Some wars are criminal, and criminality also arises from "war" or armed conflict. Nations must defend themselves, but how this is done is crucial. One cannot react to criminal attacks with concomitant criminal conduct without being criminal one's self. Governments or groups cannot torture without being torturers. Denial and attempts to justify or to excuse war crimes and crimes against humanity, such as torture, are as dangerous to those who commit them as to those against whom they are committed. Nation-states and groups throughout history have attempted to define away their own criminality. Attempts to define away criminality, to hide it, or to claim "necessity," ultimately establishes hypocrisy and guilt.

If a nation or group allows itself, when seeking to punish "enemies," to descend to the level of simple vengeance, or to become so fearful and

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on the Status of Women wrapped up its annual session with the adoption of a resolution that also condemned the consequences of hostage-taking, particularly torture and other cruel, inhuman or degrading treatment or punishment, murder, rape, slavery, and trafficking in women and children.

Http:// www.un.org/News/Press/docs/2006/wom1551. doc.htm.

[10] *Quoted in* M. Abley, *The "Evil" Around Us,* GAZETTE (Montreal), June 11, 2003, at A4. *See also* DAVID FRUM & RICHARD PERLE, AN END TO EVIL: HOW TO WIN THE WAR ON TERRORISM (2003). Both of these are referenced and discussed in Jutta Brunnée & Stephen J. Toope, *Slouching Towards New 'Just' Wars: International Law and the Use of Force After September 11th*, 51 NETH. INT'L L. REV. 363, 366 (2004).

overwrought that they lose their legal moorings, they become criminal and may be prosecuted. Michael Ignatieff makes the point with regard to torture: "For torture, when committed by a state, expresses the state's ultimate view that human beings are expendable. This view is antithetical to the spirit of any constitutional society whose raison d'etre is the control of violence and coercion in the name of human dignity and freedom."[11] Igniatieff demonstrates the moral nihilism of torture,[12] especially as some call for its legalization and regulation.[13] I have long argued that, even if a person or leader sincerely believes that torture is necessary (say, in the ticking time-bomb hypothetical), that person must be accountable.[14] Jeffrey Addicott recently wrote that, "[even in a ticking time-bomb scenario] the interrogator [who uses torture] must face criminal liability. To approach the issue in any other manner would send the wrong signal to friends and foes alike. Those who believe that the United States can defend freedom by subverting our own values [are misguided]."[15] The

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[11] Michael Ignatieff, *Op-ed, Evil Under Interrogation: Is Torture Ever Permissible?,* FIN. TIMES, *available at* http://www.ksg.harvard.edu/news/opeds/2004/ignatieff_torture_ft_051504.htm (May 15, 2004).

[12] *Id.*

[13] *See, e.g.*, ALAN M. DERSHOWITZ, SHOUTING FIRE 477 (2002). *See also* Donald H. Wallace & Mark Kutrip, *Torture: Domestic Balancing & International Alternative and Extralegal Responses*, 42(2) CRIM. L. BULL. 2 n.1 (Mar.–Apr. 2006), referencing Oren Gross, *Are Torture Warrants Warranted? Pragmatic Absolutism and Official Disobedience*, 88 MINN. L. REV. 1481 (2004); Jonathan F. Lenzner, *From a Pakistani Stationhouse to the Federal Courthouse: A Confession's Uncertain Journey in the U.S.-Led War on Terror*, 12 CARDOZO J. INT'L & COMP. L. 297 (2004); Andrew A. Moher, *The Lesser of Two Evils?: An Argument for Judicially Sanctioned Torture in a Post-9/11 World*, 26 SAN DIEGO JUST. J. 469 (2004); John T. Parry & Welsh S. White, *Interrogating Suspected Terrorists: Should Torture Be an Option?* 63 U. PITT. L. REV. 743 (2002); Ronald J. Sievert, *War on Terrorism or Global Law Enforcement Operation?* 28 NOTRE DAME L. REV. 307 (2003); Marcy Strauss, *Torture*, 48 N.Y.L. SCH. L. REV. 201 (2003–2004).

[14] CHRISTOPHER L. BLAKESLEY, TERROR AND ANTI-TERRORISM: A NORMATIVE AND PRACTICAL ASSESSMENT (2006); BLAKESLEY, TERRORISM, DRUGS, *supra* note 6.

[15] Jeffrey F. Addicott, *Into the Star Chamber: Does the United States Engage in the Use of Torture or Similar Illegal Practices in the War on Terror?*, 92 KY. L.J. 849, 912 (2003–2004). *See* David Luban, *Liberalism, Torture, and the Ticking Time Bomb,* 91 VA. L. REV. 12 (2005); BLAKESLEY, TERROR, *supra* note 13, at 279–94 (2006); David Luban, *The Defense of Torture,* 54(4) N.Y. REV. OF BOOKS, Mar. 15, 2007; M. Cherif Bassiouni, Symposium: *"Torture and the War on Terror" The Institutionalization of Torture Under the Bush Administration*, 37 CASE W. RES. J. INT'L L. 389 (2006). *See also* George Monbiot, *Torture Is Now Part of the American Soul*, GUARDIAN (U.K.), Dec. 18, 2006, *available at* http://www.alternet.org/story/45613; Amy Goodman, *Tortured Logic*, KING FEATURES SYNDICATE, Jan. 25, 2007, *available at* http://www.alternet. org/story. *See also* Ignatieff, *supra* note 11; Seth F. Kriemer, *Too Close to the Rack and the Screw: Constitutional Constraints on Torture in the War on Terror*, 6 U. PA. J. CONST. L. 278 (2003); Chanterelle Sung, *Book Review: Torturing the Ticking*

point is important, and torture in this aspect is analogous to the use of war as punishment. It is dangerous to allow the law to accommodate moral nihilism. It is dangerous to allow those who take the decision to violate values and legality in the name of security. Security is not really enhanced and they devalue our law and morals. When the law does condone, promote, or accommodate such actions, the law itself is corrupted.

I. VIEWS FROM HISTORY: POWER, WAR, PUNISHMENT, AND EXPIATION

Sometimes, the perpetrator of a war crime, crime against humanity, or terrorism is motivated by a religious zealot's vision. Some call this a radically fundamentalist vision—having the truth and an obligation to apply any means necessary, including violence against innocents to enunciate, establish, and maintain this "vision," this "truth," this "good order." Leaders often exploit the zealot's tendencies to promote a favored political order. Just about any ideology, philosophy, or religion may be used to promote the fanaticism.[16] Sometimes these crimes are committed by groups in power simply to maintain that power and their wealth.[17] The former South African government is an example, terrorizing and oppressing its non-white population to maintain its power and the wealth of the white minority and to punish the non-white groups for trying to rebel or escape oppression. The Dirty Wars in Argentina and in Chile used these terror-based offenses as their tool to punish dissent and threats to their power and vision of the "good order."[18] The Mougabe

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Bomb Terrorist: An Analysis of Judicially Sanctioned Torture in the Context of Terrorism: Why Terrorism Works: Understanding the Threat, Responding to the Challenge, by Alan Dershowitz, 23 B.C. THIRD WORLD L.J. 193, 212 (2003) ("To resort to judicially sanctioned torture as a means of preserving national security would be to abandon the most basic principles of democracy and capitulate to the goals of terrorism. Surely, this must not be allowed."). *But see* Wallace & Kutrip, *supra* note 13, at 2, arguing that torture may sometimes be necessary and ought to be legitimated and regulated, referencing, in their footnote 7, suggesting that those opposed to torture are "absolutists."

[16] See, for example, the crimes committed by the Soviets or its allies, incident to the so-called "Brezhnev Doctrine," and those committed by the United States or its "allies" under the "Reagan Doctrine," *discussed in* CHRISTOPHER L. BLAKESLEY ET AL., THE INTERNATIONAL LEGAL SYSTEM: CASES & MATERIALS 1117–27 (5th ed. 2001).

[17] For a wonderful novel that provides insight into this and other points, pertinent to state and non-state terrorism, see MARIO VARGAS LLOSA, LA FIESTA DEL CHIVO (THE FEAST OF THE GOAT) (2001).

[18] *See, e.g.*, MARK J. OSIEL, MASS ATROCITY, ORDINARY EVIL, AND HANNAH ARENDT: CRIMINAL CONSCIOUSNESS IN ARGENTINA'S DIRTY WAR (2001); Mark Osiel, *The Banality of Good: Aligning Incentives Against Mass Atrocity*, 105 COLUM. L. REV. 1751, 1797, n.216 (2005); Daniel W. Schwartz, *Rectifying Twenty-Five Years of Material Breach: Argentina and the Legacy of the "Dirty War" in International Law*, 18 EMORY INT'L L. REV. 317, 364 n.295 (2004). *See also, e.g.*, Peter Maass, *Torture, Tough or Lite: If a Terror Suspect Won't Talk,*

Regime in Zimbabwe has run amuck to maintain itself in power.[19] The record of the Nazi, Stalinist, Maoist, Khmer Rouge, Pinochet, and Argentine Junta regimes are infamous enough in this regard that they need no citation. Sadly, the human condition from antiquity to this day provides far too many tragic examples and episodes to list.

Sometimes, war crimes, terrorism, and crimes against humanity are used a means of attempting to overthrow a regime,[20] other times to put down an insurgency or rebellion. Sometimes war crimes and crimes against humanity are used to win a war, terroristically to intimidate the enemy into capitulating, and to punish citizens who might be believed to have cooperated with the enemy. Examples of committing war crimes to terrorize a population include the United States' likely precipitation of the Khmer Rouge atrocities known as the "killing fields," where the stage was set, at least, by United States' insistence that Prince Sihanouk not remain neutral and by our saturation bombing. In addition, consider the carpet bombing of London, that of Dresden, and Tokyo, and the use of the atomic bomb on Hiroshima and Nagasaki. Nagasaki is particularly important, because it seems to have been chosen because it was an undefended city, thus, not subject at all to the claim that it was a military tar-

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Should He Be Made To?, N.Y. TIMES, Mar. 9, 2003, at D4 ("(M)any terrorism experts believe that in the long run torture is a losing strategy."); Phillip Heymann, *Torture Should Not Be Authorized*, BOSTON GLOBE, Feb. 16, 2002, at A15 ("Torture is a prescription for losing a war for support of our beliefs in the hope of reducing the casualties from relatively small battles."); Alisa Solomon, *The Case Against Torture*, VILLAGE VOICE, Dec 4, 2001, at 56 (referencing "a CIA training manual and a study of Argentina's dirty war for the proposition that torture is ineffective"), *noted in* Louis Michael Seidman, *Torture's Truth*, 72 U. CHI. L. REV. 881, 892 n.31 (2005); NAOMI ROHT-ARRIAZA, THE PINOCHET EFFECT: TRANSNATIONAL JUSTICE IN THE AGE OF HUMAN RIGHTS (2005); Christopher L. Blakesley, *Autumn of the Patriarch: The Pinochet Extradition Debacle and Beyond—Human Rights Clauses Compared to Traditional Derivative Protections Such as Double Criminality*, 91 J. CRIM. L. & CRIMINOLOGY 1 (2000).

[19] Christina Lamb, *Mugabe Policy Branded New Apartheid*, SUNDAY TIMES, WORLD, June 12, 2005, *available at* http://www.timesonline.co.uk/article/0,,2089-1650991,00.html; CNN Online News Report, *Fiery face of Mugabe shock troops*, Mar. 6, 2002, *available at* http://cnn.com/2002/WORLD/africa/03/06/zimbabwe.vets.ap/index.html [CNN]; David Plotz, *Zimbabwe's Robert Mugabe: The Scheming Survivor*, Apr. 28, 2000, *available at* http://www.slate.com/id/81386/.

[20] *See* CHARLES DICKENS, A TALE OF TWO CITIES (1859) (inspired by Thomas Carlyle's history of the revolution); ANATOLE FRANCE, LES DIEUX ONT SOIF (THE GODS ARE ATHIRST) 198 (1978), *discussed in* Section IV. *See also* GIOVANNA BORRADORI, PHILOSOPHY IN A TIME OF TERROR: DIALOGUES WITH JÜRGEN HABERMAS AND JACQUES DERRIDA 152 (2003) (on Robespierre's reign of terror). *See also generally* RUTH SCURR, FATAL PURITY: ROBESPIERRE AND THE FRENCH REVOLUTION (2006).

get—signal: we will vaporize even your innocents, unless you get your government to capitulate. Terror and slaughtering innocents was an essential aspect of the bombing. Many moral philosophers agree that these bombings were terroristic and immoral.[21] Consider the leaflets dropped over Japan, which show the terror-driven method chosen by President Truman:

Leaflets Dropped on Cities in Japan

Leaflets dropped on cities in Japan warning civilians about the atomic bomb, dropped c. August 6, 1945
(Pre-Hiroshima)

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[21] *See, e.g.*, MICHAEL WALZER, JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS ch. 13 (3d ed. 2000); Michael Walzer, *Terrorism: A Critique of Excuses, in* PROBLEMS OF INTERNATIONAL JUSTICE (Steven Luper-Foy ed. 1988); John Rawls, *Fifty Years after Hiroshima, in* COLLECTED PAPERS 565–72 (Samuel Freeman ed., 1999); Igor Primoratz, *The Morality of Terrorism*, 14 J. APPLIED PHIL. 221, 231 (1997). Walzer, Rawls, and Primoratz find these bombings to be immoral, even though they accept the idea (faulty idea in my view) that a "supreme emergency" will justify or excuse killing of innocents or non-combatants, they condemn the bombings of Hiroshima and Nagasaki, and the blanket bombing of Dresden and others, because they find that the excuse of supreme emergency did not obtain. These are cited and discussed in C.A.J. Coady, *Terrorism, Morality, and Supreme Emergency*, 114(4) ETHICS 772, 777 (July 4, 2004), who also finds these bombings to be immoral. Coady does not accept the "supreme emergency" excuse as persuasive as to the intentional or reckless killing of innocents. Nor do I.

On the other hand, protecting innocents does not appear to have been the policy consistently in philosophy and practice. On St. Augustine's views about this, Jefferson D. Reynolds notes that:

St. Augustine of Hippo was born in 354 at Thagaste, an inland city of the Roman province of Africa. He formed his principles of warfare from the Old Testament and religious leaders such as Abraham, Moses, Joshua, Samson, Gideon, David and Judas Maccabeus. COLM MCKEOG, INNOCENT CIVILIANS: THE MORALITY OF KILLING IN WAR 21 (2002). St. Augustine established a punitive model for warfare, making no distinctions between combatants and civilians. No distinction was required under this model because there is no moral difference between the two. St. Augustine's moral emphasis on the guilt of the enemy population could justify violence against it. The premise of guilt as justification for war was also justification to protect those who were not guilty. *Id.* at 28.

Jefferson D. Reynolds, *Collateral Damage on the 21st Century Battlefield: Enemy Exploitation of the Law of Armed Conflict, and the Struggle for a Moral High Ground*, 56 A.F. L. REV. 1, 4–5 n.12 (2005).

To The Japanese People:

America asks that you take immediate heed of what we say on his leaflet.

We are in possession of the most destructive explosive ever devised by man. A single one of our newly developed atomic bombs is actually the equivalent in explosive power to what 2000 of our giant B-29s can carry on a single mission. This awful act is one for you to ponder and we solemnly assure you it is grimly accurate.

We just begun to use this weapon against your homeland. If you still have any doubt, make inquiry as to what happened to Hiroshima when just one atomic bomb fell on that city.

Before using this bomb to destroy every resource of the military by which they are prolonging this useless war, we ask that you now petition the Emperor to end the war. Our president has outlined for you the thirteen consequences of an honorable surrender. We urge that you accept these consequences and begin the work of building a new, better and peace-loving Japan.

You should take steps now to cease military resistance. Otherwise, we shall resolutely employ this bomb and all out other superior weapons to promptly and forcefully end the war.

"EVACUATE YOUR CITIES"

Post-Hiroshima
ATTENTION JAPANESE PEOPLE. EVACUATE YOUR CITIES.

Because your military leaders have rejected thirteen part surrender declaration, two momentous events have occurred in the last few days.

The Soviet Union, because of this rejection on the part of the military has notified your Ambassador Sato that it has declared war on your nation. Thus, all powerful countries of the world are now at war with you.

Also, because of your leader's refusal to accept the surrender declaration that would enable Japan to honorably end this useless war, we have employed our atomic bomb.

A single one of our developed atomic bombs is actually the equivalent in explosive power to what 2000 of our giant B29s could have carried on a

single mission. Radio Tokyo has told you that with the first use if this weapon of total destruction, Hiroshima was virtually destroyed.

Before we use this bomb again and again to destroy every resource of the military by which they are prolonging this useless war, petition the emperor now to end the war. Our president has outlined for you the thirteen consequences of an honorable surrender. We urge that accept these consequences and begin the work of building a new, better, and peace-loving Japan.

EVACUATE YOUR CITIES[22]

Dropping the atomic bomb on Nagasaki, if not on Hiroshima, was terroristic and criminal. Blanket or saturation bombing and the use of certain weapons that are designed to cause massive death or unnecessary suffering, are war crimes, crimes against humanity, or terrorism, depending on the context. Dropping the bomb on Nagasaki was to cause terror, panic, and to coerce, slaughtering so many in such a horrible way, with "rags of hanging skin, wandering about . . . [and lamenting] among the dead bodies,"[23] in order to terrorize Japan's population and leadership so much that they would quit the war more quickly.[24] This is especially true of the bombing of Nagasaki, which seems to have been chosen because it was "undefended" in the legal sense of the Hague Conventions and other international law.[25] Innocent persons, not part of the war

[22] Source: Harry S. Truman Library, Miscellaneous historical document file, No. 258, *available at* http://pbs.org/ wgbh/amex/Truman/psources/ps_leaflets.html.

[23] *See* Richard A. Falk, *The Shimoda Case: A Legal Appraisal of the Atomic Attacks upon Hiroshima and Nagasaki*, 59 AM. J. INT'L L. 759, 761 (1965).

[24] *Id.*

[25] The 70,000 souls were the least number of immediate deaths in Nagasaki. Within the next five years, at least another 130,000 inhabitants of Hiroshima and Nagasaki died as a result of the atomic bombings. Elliot L. Meyrowitz, *The Laws of War and Nuclear Weapons, in* NUCLEAR WEAPONS AND LAW 19, 32 (Arthur Miller & Martin Feinrider eds., 1984). Hague Convention (IV) Respecting the Laws and Customs of War on Land, Oct. 18, 1907 [hereinafter Hague IV], art. 27, 36 Stat. 2277, 1 Bevans 631, *reprinted in* THE LAWS OF ARMED CONFLICTS 207 (Dietrich Schindler & Jiri Toman eds., 1988). With regard to Hague IV, Article 25, McCoubrey points out that in modern war, cities are often defended by anti-aircraft artillery. *Id.* But the Japanese argued in the *Shimoda* case that Hiroshima and Nagasaki were undefended before the atomic bombs. HILAIRE MCCOUBREY, INTERNATIONAL HUMANITARIAN LAW: MODERN DEVELOPMENTS IN THE LIMITATION OF WARFARE 8–17 (2d ed. 1998). *See also* A.P.V. ROGERS, LAW ON THE BATTLEFIELD 1–3 (1996). McCoubrey points out that Article 27 shows "[t]he

effort, in this undefended city, were chosen so that the shock would have sufficient impact. Still, many have considered this conduct to be "acceptable." On the other hand, that is different, perhaps, only in scale from placing a bomb on a civilian flight or at a shopping mall. Warnings of terrible consequences of not surrendering were given to Japan. The Japanese leadership was aware that the United States had the bomb and was told that the United States would use the weapon, if Japan did not submit to all the Allied demands by a certain date. Thus, the Japanese leadership was also at fault for allowing their people to be subjected to this horror. Still this does not excuse the United States for wreaking this havoc—committing this atrocity. The United States became the nation that unleashed this terrible weapon and used it against a civilian population. One might say that terror is used in all war and is part of warfare. This is clearly the case in "total war." Part of it is to punish. Part to terrorize and to win. Warnings are often given for terroristic attacks—terrorism and total war are quite similar.

II. THE TRADITIONAL LAW OF JUST WAR: *JUS AD BELLUM AND JUS AD BELLO*[26]

A brief analysis of the history of atrocity and the early evolution of what may be called "the laws of humanity" may help to understand punishment and prosecution as "institutions" in war and of war. The importance of and confusion over *jus ad bellum* and *jus in bello*,[27] is seen when these concepts are placed in jurisprudential and historical context. In addition, the role that notions of expiation and redemption play in the law of war and punishment are crucial.

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basic principle of limitation of legitimate bombardment to military objectives." McCoubrey, *supra*. The changes from Hague II to Hague IV offer more protections to non-combatants and protected property. These points are made in Herman Reinhold, *Target Lists: A 1923 Idea With Applications For the Future*, 10 Tulsa J. Comp. & Int'l L. 1, 11 n.52 (2002), *see also id.*, nn.20 and 26.

[26] Hugo Grotius, De Jure Belli ac Pacis (Francis W. Kelsey et al. trans., 1925) (1625) (noting that Grotius discussed the *jus ad bellum* in Book I, ch. 2, and the major portions of *jus in bello* discussed in Book III). This is discussed in Jan Klabbers, *The Excessive Use of Force Off Limits? International Law and the Excessive Use of Force*, 7 Theoretical Inquiries L. 59, 61, nn.8 and 23, respectively (Jan. 2006) (noting that this is the classic distinction between the right to go to war and the rules of law that limit what is legal during war). *See also* Arthur Nussbaum, *Just War—A Legal Concept?*, 42 Mich. L. Rev. 453 (1943).

[27] *See* Klabbers, *supra* note 26, at 59, 61, n.8 (Jan. 2006) (noting that this is the classic distinction between the right to go to war and the rules of law that limit what is legal during war).

Positive Strains of History

Palliating the depredations of war has been an important aspect of warfare throughout history. The great Chinese General, Sun Tzu, in his classic sixth century BCE *Art of War*,[28] insisted on many humanitarian protections and limitations on the conduct of his warriors.[29] Sometimes this purpose was promoted through the institutions of prosecution of a sort and punishment. In fact, one might say that there have been war crimes and crimes against humanity since antiquity, which were forbidden in law and conscience. For example, the ancient *Code of Manu* (around 200 BCE), Book 7, Articles 90–93, provides:

> 90. When he fights with his foes in battle, let him not strike with weapons concealed (in wood), nor with (such as are) barbed, poisoned, or the points of which are blazing with fire.
>
> 91. Let him not strike one who (in flight) has climbed on an eminence, nor a eunuch, nor one who joins the palms of his hands (in supplication), nor one who (flees) with flying hair, nor one who sits down, nor one who says 'I am thine;'
>
> 92. Nor one who sleeps, nor one who has lost his coat of mail, nor one who is naked, nor one who is disarmed, nor one who looks on without taking part in the fight, nor one who is fighting with another (foe);
>
> 93. Nor one whose weapons are broken, nor one afflicted (with sorrow), nor one who has been grievously wounded, nor one who is in fear, nor one who has turned to flight; (but in all these cases let him) remember the duty (of honourable warriors).[30]

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[28] *See* Timothy L.H. McCormack, *From Sun Tzu to the Sixth Committee: The Evolution of an International Criminal Law Regime*, ch. 2 and Gerry J. Simpson, *War Crimes: A Critical Introduction* ch. 1, *in* THE LAW OF WAR CRIMES: NATIONAL AND INTERNATIONAL APPROACHES 31, 32 (Timothy L.H. McCormack & Gerry J. Simpson eds., 1997). *See also generally* Reynolds, *supra*, note 21, at 1, 4–5.

[29] SUN TZU, THE ART OF WAR, III Offensive Strategy (S.B. Griffith trans., 1963); SUN TZU, THE NEW TRANSLATION (J.H. Huang trans., 1993). *See* McCormack, *supra* note 28 and Simpson, *supra* note 28, at 31, 32–33.

[30] THE LAWS OF MANU, ch. VII, arts. 90–93 (George Bühler trans.) *in* 25 SACRED BOOKS OF THE EAST, *available at* INTERNET SACRED TEXTS ARCHIVE, http://www.sacred-texts.com/index.htm.

Portions are also *quoted in* 1 THE LAW OF WAR: A DOCUMENTARY HISTORY 3 (Leon

The Babylonian Code of Hammurappi (1728–1686 BC), the Laws of Eshnunna (2000 BC), and the earlier Code of Ur-Nammu (circa 2100 BC) also provided rules such as these.[31]

For centuries military commanders—from Henry V of England, under his famous ordinances of war in 1419, to the U.S. military prosecutions of soldiers involved in the My Lai massacre under the U.S. Code of Military Justice, through the *ad hoc* tribunals for the former Yugoslavia and Rwanda—have enforced such laws against violators. The International Criminal Court is going to continue this positive history. In other cases, states have brought to trial captured prisoners of war for offenses committed against the customary laws of war. Thus, both the accused's own state and the captor state have standing to prosecute. None of these systems, however, has functioned with any degree of efficiency.[32]

The traditional theory of the just war covers three main topics (1) the cause of going to war; (2) the conduct of war; and (3) the consequences of war[33] termed *jus ad bellum, jus in bello*, and *jus post bellum*, respectively.[34] *Jus ad bellum* and *jus in bello* represent the classic distinction

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Friedman ed., 1972) [hereinafter DOCUMENTARY HISTORY], and in Chris af Jochnick & Roger Normand, *The Legitimation of Violence: A Critical History of the Laws of War*, 35 HARV. INT'L L.J. 49, 60 (1994). See more discussion on the topic of *jus in bello, id.* 59–62, referencing in note 37 SUN TZU, THE ART OF WAR 76 (Samuel B. Griffith trans., 1963); Deuteronomy 20:13–17 (King James); and noting that the "[a]ncient Greeks and Romans also followed customary laws of war." Jochnick & Normand, *supra*, citing DOCUMENTARY HISTORY, *supra*, at 5.

[31] It appears that these were not actual legal codes at all, but collections of royal edicts or decrees. Babylonia seems to have arisen out of a peace pact creating a union of the Akkadians and Sumerians. *See* Quartz Hill School of Theology, Babylonia, *available at* http://www.theology.edu/lec22.htm.

[32] *See* TELFORD TAYLOR, NUREMBERG AND VIETNAM 20 (1970); CHRISTOPHER L. BLAKELSEY, EDWIN B. FIRMAGE, RICHARD F. SCOTT, & SHARON WILLIAMS, THE INTERNATIONAL LEGAL SYSTEM: CASES AND MATERIALS, at 1253–67 (5th ed. 2001).

[33] Gary Wills, *What Is a Just War?*, 51(16) N.Y. REV. OF BOOKS, Nov. 18, 2004, *available at* www.nybooks.com/articles/17560 (book review of MICHAEL WALZER, ARGUING ABOUT WAR (2004) (arguing that it is not enough to argue over just wars or just conduct during war, but that discussion about just post-war is equally necessary). *See* Bartram S. Brown, *Intervention, Self-Determination, Democracy and the Residual responsibilities of the occupying Power in Iraq*, 11 U.C. DAVIS J. INT'L L. & POL'Y 23, 73 n. 82 (2004).

[34] *See also* Wills, *supra* note 33. On Islamic Law and *as-siyar* notions of *jus ad bellum* and *jus in bello*, see Shaheen Sardar Ali & Javaid Rehman, *The Concept of Jihad in Islamic International Law*, 10 J. CONFLICT & SEC. L. 321 (2005); M. KHADDURI, WAR AND PEACE IN THE LAW OF ISLAM 102 (1955).

between the right to go to war and the rules of law that limit what is legal during war.[35] *Jus in bello* is important for our discussion of prosecution and punishment in relation to war, as it requires that soldiers and their governments respect the difference between combatants and non-combatants. It is difficult to understand *jus in bello* without an understanding of *jus ad bellum*.[36] *Jus ad bellum*, the right to go to war, obviously assumes that war is legal, at least if its cause is "just."[37] This relates to the legality of the purpose for the war.[38] Determining what a just cause or legal purpose might be may be problematic.[39] Problems arise when states or groups go to war believing that their "just cause" limits or obliterates their need for morality or law.[40] Unfortunately, both sides in most wars

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[35] These are the focus of this section. *See* GROTIUS, DE JURE BELLI AC PACIS *supra* note 26 (Grotius discussed *jus ad bellum* in Book I, chapter 2, and the major portions of *jus in bello* discussed in Book III). This is discussed in Klabbers, *supra* note 26, at 59, 61, and 65 nn.8 and 23, respectively. *See also* Christopher Greenwood, *Historical Development and Legal Basis, in* THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS 1, 32 (Dieter Fleck ed., 1995) (noting that *jus in bello* cannot be properly understood without understanding *jus ad bellum*), *referenced in* Klabbers, *supra* note 26, at n.50; Michael N. Schmitt, *The Confluence of Law and Morality: Thoughts on Just War*, 3 U.S. A.F. ACAD. J. LEGAL STUD. 91, 103 (1992) (quoting Archbishop J. Ryan, *Pastoral Letter in Time of War* (1991)); George Weigel, *Pope John XXIII Lecture: The Just War Tradition and the World After September 11*, 51 CATH. U. L. REV. 689, 700 (2002). *See also* Nussbaum, *supra* note 26.

[36] Christopher Greenwood, *Historical Development and Legal Basis, in* THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS 1, 32 (Dieter Fleck ed., 1995) (notes that *jus in bello* cannot be properly understood without understanding *jus ad bellum*), *referenced in* Klabbers, *supra* note 26, at n.50. The nexus between *jus ad bellum* and *jus in bello* in Islamic law and *as-siyar* is also very close. *See* Sardar Ali & Rehman, *supra* note 34, at 321, 338 (noting that *jus ad bellum* and *jus in bello* are heavily intertwined).

[37] *See* CICERO, THE OFFICES bk. I, xi, 36, 38–39 (W. Miller trans., 1951) (indicating that a just war must be preceded by a declaration of war, in addition to a warning or a demand for satisfaction), *noted in* YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE 61 (2d ed. 1994), and in Klabbers, *supra* note 26, at 72, n.52.

[38] Dan Belz, *The Excessive Use of Force Is International Humanitarian Law Lapsing Into Irrelevance In the War on International Terror?*, 7 THEORETICAL INQUIRIES L. 97, 100 (2006).

[39] CICERO, *supra* note 37, at bk. I, xi, 36, 38–39 (indicating that a just war must be preceded by a declaration of war, in addition to a warning or a demand for satisfaction), *noted in* DINSTEIN, *supra* note 37, at 61, and Klabbers, *supra* note 26, at 72 n.52.

[40] Klabbers, *supra* note 26, at 72, noting that: "this distinction masks the possibility that the perceived justness of the cause may influence the sort of behavior that takes place on the battlefield." Judith Gail Gardam makes the same point, in Judith Gail Gardam, *Proportionality and Force in International Law*, 87 AM. J. INT'L L. 391 (1993). Klabbers, *supra* note 26, at 72 and nn.49–51 continues: "Indeed, the distinction often collapses, either when authors acknowledge that the distinction has its limits or when

often obliterate *jus in bello* because of the belief that the "cause is just" or "holy."[41]

Thomas Aquinas considered punishment a just cause for going to war. He argued that it is a just war that, "avenges wrongs, when a nation or state has to be punished, for refusing to make amends for the wrongs inflicted by its subjects, or to restore what it has seized unjustly."[42]

Aquinas added that just causes include self-defense, punishment for wrongdoing, and saving others.[43] He also included "just intentions" such as protecting the common good against evil and attaining peace.[44]

Later scholars, including Francisco Suarez and Francisco de Vitoria, built upon Aquinas's and Augustine's work. Indicating his view that war was to punish wrongdoers, Suarez wrote:

> [J]ust as within a state some lawful power to punish crimes is necessary to the preservation of domestic peace; so in the world as a whole, there must exist, in order that the various states may dwell in concord, some power for the punishment of injuries inflicted by one state upon another, and this power is not to be found in any superior, for we assume that these states have no commonly acknowledged superior; therefore, the power in question must reside in the sovereign prince of the injured state . . . ;

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they claim that international law's capacity to regulate the jus ad bellum proves that it can also regulate the jus in bello." (footnotes omitted) and referencing the following: THOMAS NAGEL, WAR AND MASSACRE, IN MORTAL QUESTIONS 53, 65 (1979) (rejecting the validity of the distinction altogether, in relation to the Vietnam War, at least); WALZER, *supra* note 33, at 192 (indicating that the distinction collapses in circumstances of guerilla or nuclear war); and DINSTEIN, *supra* note 37, at 13, 155. *See also* Wills, *supra* note 33. *See also* Nussbaum, *supra* note 26.

41 Klabbers, *supra* note 26, at 72.

42 THOMAS AQUINAS, SUMMA THEOLOGICA, pt. II, question 40, art. 1 (The Fathers of the English Dominican Province trans., Benziger Brothers 1947) (1273), *discussed in* Benjamin V. Madison, III, *Trial by Jury or by Military Tribunal for Accused Terrorist Detainees Facing the Death Penalty? An Examination of Principles that Transcend the U.S. Constitution*, 17 U. FLA. J.L. & PUB. POL'Y 347, 402 (2006).

43 ACQUINAS, *supra* note 42, at question 40, art 1; Madison, *supra* note 42, at 402.

44 ACQUINAS, *supra* note 42, at pt. II, question 40, art. 1, at 502; *discussed in* Madison, *supra* note 42, at 402.

> and consequently, war . . . has been instituted in place of a tribunal administering punishment.[45]

Suarez and Vitoria added that wars, other than purely for self-defense, must be the last possible resort and must be proportionate.[46] Their proportionality argument developed into the *jus in bello*.[47]

The rules of *jus in bello* include principles of proportionality and discrimination.[48] Proportionality requires balancing the total evil against the total good.[49] It prohibits use of excessive force and that any harm done must be proportionate to the "just" goal of the war.[50] Discrimination requires that non-combatants, including civilians, POWs, etc., be spared as much as possible.[51] Vitoria wrote: "If the storming of a fortress or town garrisoned by the enemy but full of innocent inhabitants is not of great importance for eventual victory in the war, it does not seem to me permissible to kill a large number of innocent people by indiscriminate bombardment in order to defeat a small number of enemy combatants."[52]

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[45] FRANCISCO SUAREZ, A WORK ON THE THREE THEOLOGICAL VIRTUES: FAITH, HOPE AND CHARITY (Gwladys L. Williams trans., Oxford, Clarindon Press 1944) (1st ed. 1612); *quoted in* STEPHEN C. NEFF, WAR AND THE LAW OF NATIONS: A GENERAL HISTORY, at 7 (2005).

[46] R.A. McCormick, *Morality of War, in* 14 NEW CATHOLIC ENCYCLOPEDIA 802, 803 (1967); *discussed in* Madison, *supra* note 42, at 402–03.

[47] McCormick, *supra* note 46, at 803; Madison, *supra* note 42, at 403.

[48] Madison, *supra* note 42, at 403.

[49] Madison, *supra* note 42, at 403, referencing JAMES TURNER JOHNSON, JUST WAR TRADITION AND THE RESTRAINT OF WAR 203 (1981) (reiterating Vitoria's analysis that proportionality to subdue the enemy is weighed under the *jus ad bellum* notion instead of the *jus in bello*).

[50] More relevant, yet more dated is Walzer's book, *supra* note 33, which is said to be the most widely read and quoted modern work on the moral theory of just war. *See* Brown, *supra* note 33, at 73 n.81. *See also* Nussbaum, *supra* note 35.

[51] *See* WALZER, *supra* note 33, on the moral theory of just war. *See also* Brown, *supra* note 33, at 73 n.81; Nussbaum, *supra* note 26; JOHNSON, *supra* note 49, at 299–303; ADAM ROBERTS & RICHARD GUELFF, DOCUMENTS ON THE LAWS OF WAR 1, 14 (2000); the latter two referenced in Madison, *supra* note 42, at 403.

[52] Francisco de Vitoria, *On the Law of War, in* POLITICAL WRITINGS, 293, 315–16 (Anthony Pagden & Jeremy Lawrence eds. 1991) (1st ed. 1557); *quoted in* NEFF, *supra* note 45, at 64–65.

The same obligations should obligate and protect non-governmental fighters and their leadership. Similarly, the same protections should obtain for such fighters. The history of this rule and its promulgations is interesting.[53] Promulgation is the means by which law becomes binding, whether formally, as in legislation or treaties, or informally, as in customary international law,[54] or as general principles of international law,

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[53] I do believe that there has been promulgation of this rule for terrorism, based on what Anthony D'Amato calls "promulgative articulation." I will have more to say about this later. *See* ANTHONY D'AMATO, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW 74–76, 160–66 (1971), where D'Amato emphasizes the oral and other verbal (but non-legislative) creation of legal rules that function as law in international law. This notion of promulgative articulation has long been part of the so-called "civilian" tradition, where, like in the international system, it creates or promulgates law equivalent to legislation or treaties. Lon Fuller understood this and stated it well, in LON FULLER, THE MORALITY OF LAW (49–51 (1964), as did Myres McDougal, Harold Lasswell & Michael Reisman, in *The World Constitutive Process of Authoritative Decision*, 19 J. LEGAL EDUC. 403, 424 (1967). All of these are referenced by D'Amato and by Daniel G. Partan, *in "The Duty to Inform" in International Environmental Law*, 6 B.U. INT'L L.J. 43, 88 n.121 (1988). Scholars and judges who do not understand the nature of customary law in "civilian jurisdictions" also fail to understand it in international law. They seem to conceptualize it as lesser law or simply as a practice or usage. Indeed, they seem to impose their defective and shallow view of what they think the common law deems to be law. At bottom, it is a failure to understand the varied nature of legal authority.

[54] The second source of authority for international law reflected in ICJ Statute Article 38(1) is customary international law. Custom is binding authority, although treaties may be higher in the hierarchy. Customary international law also impacts the meaning of treaty terms. Certainly, subsequent practice of states parties to treaties, even relating to non-states parties may create customary rules that impact interpretation of treaty terms. On the other hand, negative conduct may prove their validity and continued legality, through negative implication. Customary international law is viewed as law that is promulgated (and there is a process of promulgation) on the basis of general or consistent state practice (or the material element) and *opinio juris* (the subjective or psychological element). *Opinio juris* is established when it is proved that a state acts or fails to act in a certain way, because it considers itself legally bound so to act or not to act. Even negative conduct (or violations of customary international law) may actually promote the rule or create new customary international law, especially when the violator tries to hide the violation or makes excuses for it. On the other hand, widespread negative conduct may erode custom, general principles, or the intended meaning of a provision of a treaty.

Some national constitutions provide a basis for courts to apply rules of customary international law by declaring specifically that international law is part of the law of the land, including the following examples. The Austrian Constitution of 1928 states in Article 9(1): "[t]he generally recognized principles of International Law are integral parts of the Federal Law." Article 2(2) of the 1987 Philippine Constitution states: "The Philippines . . . adopts the generally accepted principles of international law as part of the law of the land." Article 15 of the Russian Constitution of 1993 states that:

especially those of *jus cogens*.[55] After Suarez and Vitoria, Hugo Grotius,[56] Emerich de Vattel, and Jean Bodin reiterated these rules and values,

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"the commonly recognized principles and norms of international law and the international treaties of the Russian Federation shall be a component part of its legal system." Article 25 of the 1949 German Constitution, as amended, provides: "The general rules of public international law constitute an integral part of federal law. They take precedence over statutes and directly create rights and duties for the inhabitants of the federal territory." Article 10 of the Italian Constitution states: "Italy's legal system conforms with the generally recognized principles of international law." *See Re* Martinez, Italy, Court of Cassation, 1959, 28 I.L.R. 170 (1963) (Conformity between the two means that rules of municipal law which are contrary to customary international law "*must be eliminated*."). Article 28(1) of the Greek Constitution of 1975 declares that "the generally recognized rules of international law . . . shall be an integral part of domestic Greek law and shall prevail over any contrary provision of law." The Constitution of Slovenia in 1997 provided in Article 8, that "Statutes and other legislative measures shall comply with generally accepted principles of international law." One question that arises is whether any of these provisions mean that custom is automatically integrated or whether something further must be done to integrate it.

Stronger terms of acceptance of international law are found in other national constitutions, including Article 29(3) of the Constitution of Ireland (text of 1990), which provides that: "Ireland accepts the generally recognized principles of international law as its rule of conduct in its relations with other States." Article 98(2) of the Japanese Constitution of 1946 provides that "the . . . established laws of nations shall be faithfully observed." The Hungarian Constitution of 1949, as amended in 1997, is exceptional in providing, in Chapter 1, Section 7, that: "[t]he legal system of the Republic of Hungary accepts the generally recognized principles of international law, and shall harmonize the country's domestic law with the obligations assumed under international law." For more on this, see LINDA E. CARTER, CHRISTOPHER L. BLAKESLEY & PETER J. HENNING, GLOBAL ISSUES IN CRIMINAL LAW, at 17–21 (2007).

[55] "General principles of law recognized by civilized nations"are recognized in Article 38(1)(c) as the third authoritative or binding source of international law. General principles arise from the domestic law of nation-states. For example, "Thou Shalt Not Steal," is found in the domestic law of virtually all nations, so it is binding authority. In addition, some general principles have the aura of a universal, moral or natural law principle. These general principles are rules of the highest order in international law, sometimes called *jus cogens* principles. These seem to be a mixture of super-custom and super-general principle. The core crimes in international humanitarian law have this character. These are non-derogable by legislation, judicial decision, or treaty. There is little dispute over the extent of the authoritative character of general principles. Core international crimes, such as genocide, slavery, apartheid, crimes against humanity, war crimes, and torture, are considered *jus cogens* crimes.

[56] *See* Charles J. Reid, Jr., *HUGO GROTIUS: A Case of Dubious Paternity*, 10 GREEN BAG 2d 109 (2006), citing John Witte, Jr., *Law and Religion: The Challenges of Christian Jurisprudence*, 2 U. ST. THOMAS L.J. 439, 451 (2005); M.B. Crowe, *The "Impious Hypothesis:" A Paradox in Hugo Grotius?, in* GROTIUS, PUFENDORF, AND MODERN NATURAL LAW 3 (Knud Haakonssen ed., 1999) (reading Grotius's impious hypothesis, as consistent with the Christian tradition).

while considering them to be secular natural law. Grotius, for example, argued that war is legal only if fought in self-defense, to punish the wrongdoer, to enforce rights, and to seek reparations for injuries.[57] Moreover, he argued that punishment was necessary for those who commit serious offenses. He insisted that there be no sanctuary for criminals, including war criminals. Each state has an obligation to "prosecute or extradite."[58] "Positivism," ascendant in the 19th century, however, created the perception that international law was binding only on states and could not impose obligations or impose punishment directly on individuals Only states could do that.[59]

Telford Taylor in his classic, *Nuremberg and Vietnam*, discussed the ancient origin of the "laws of war," following two main developmental streams. "The first flowed from medieval notions of knightly chivalry. Over the course of the centuries the stream has thinned to a trickle; it had a brief spurt during the days of single-handed aerial combat, and survives today in rules (often violated) prohibiting various deceptions such as the use of the enemy's uniforms or battle insignia, or the launching of a war without fair warning by formal declaration."[60]

Theodor Meron added:

> For centuries military commanders—from Henry V of England, under his famous ordinances of war in 1419, to the American

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[57] *See* 1 HUGO GROTIUS, DE IURE PRAEDAE COMMENTARIUS [COMMENTARY ON THE LAW OF PRIZE AND BOOTY], at 64 (Gwladys L. Williams & Walter H. Zeydel trans., Clarendon Press 1950) (1604), *in* THE CLASSICS OF INTERNATIONAL LAW (James Brown Scott ed., 1950), *referenced and discussed in* Ileana M. Porras, Symposium: War and Trade, *Constructing International Law in the East Indian Seas: Property, Sovereignty, Commerce and War in Hugo Grotius' de Iure Praedae—the Law of Prize and Booty, or "On How to Distinguish Merchants from Pirates,"* 31 BROOK. J. INT'L L. 741, (2006).

[58] *See generally* HUGO GROTIUS, DE IURE BELLI AC PACIS, bk. II, cg, XXI, paras. III and IV; translated into English by F.W. KELSEY, THE LAW OF WAR AND PEACE: CLASSICS OF INTERNATIONAL LAW, AT 526–29 (Clarendon Press, 1925). *See also* 2 HUGO GROTIUS, THE RIGHTS OF WAR AND PEACE 1062 (Richard Tuck trans., Liberty Fund 2005) (1625). For an overview, M. CHERIF BASSIOUNI & EDWARD M. WISE, AUT DEDERE AUT JUDICARE: THE DUTY TO EXTRADITE OR PROSECUTE IN INTERNATIONAL LAW (1995).

[59] *See* Jack Landman Goldsmith III, Rapporteur, *Challenges to International Governance Theme IV—The Internationalization of Domestic Law: The Shrinking Domaine Reserve, The Year of International Law in Review*, 87 ASIL PROC. 575 (1993).

[60] TELFORD TAYLOR, NUREMBERG AND VIETNAM 20 (1970); *see* BLAKESLEY ET AL., *supra* note 32.

military prosecutions of soldiers involved in the My Lai massacre under the U.S. Code of Military Justice—have enforced such laws against violators. In other cases, states have brought to trial captured prisoners of war for offenses committed against the customary laws of war. Thus, both the accused's own state and the captor state have standing to prosecute. Neither system, however, has functioned with any degree of efficiency.[61]

Telford Taylor emphasized that:

The second and far more important concept is that the ravages of war should be mitigated as far as possible by prohibiting needless cruelties, and other acts that spread death and destruction and are not reasonably related to the conduct of hostilities. The seeds of such a principle must be nearly as old as human society, and ancient literature abounds with condemnation of pillage and massacre. In more recent times, both religious humanitarianism and the opposition of merchants to unnecessary disruptions of commerce have furnished the motivation for restricting customs and understandings. In the 17th century these ideas began to find expression in learned writings, especially those of the Dutch jurist-philosopher Hugo Grotius.[62]

Professor Taylor continued the history:

The formalization of military organization in the 18th century brought the establishment of military courts, empowered to try violations of the laws of war as well as other offenses by soldiers. During the American Revolution, both Captain Nathan Hale and the British Major John André were convicted as spies and ordered to be hanged, the former by a British military court and the latter by a "Board of General Officers" appointed by George Washington. During the Mexican War, General Winfield Scott created "military commissions," with jurisdiction over violations of the laws of war committed either by American troops against Mexican civilians, or vice versa.

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[61] Theodor Meron, *The Case for War Crimes Trials in Yugoslavia*, 72 FOR. AFF. 122, 123 (1993).

[62] TAYLOR, *supra* note 60, at 20.

> Up to that time the laws of war had remained largely a matter of unwritten tradition, and it was the United States, during the Civil War, that took the lead in reducing them to systematic, written form. In 1863 President Lincoln approved the promulgation by the War Department of "Instructions for the Government of Armies of the United States in the Field," prepared by Francis Lieber, a German veteran of the Napoleonic wars, who emigrated to the United States and became professor of law and political science at Columbia University. These comprised 159 articles, covering such subjects as "military necessity," "punishment of crimes against the inhabitants of hostile countries," "prisoners of war," and "spies." It was by a military commission appointed in accordance with these instructions that Mary Surratt and the others accused of conspiring to assassinate Lincoln were tried.[63]

Professor Taylor explains how the idea of war crimes and their punishments evolved after the Civil War, noting that the horrific violence of the Crimean War, the Civil War, and the Franco-Prussian War of 1870 prompted an increasing belief, in Europe and America, in the need for codification of the laws of war and their embodiment in international agreements. That movement precipitated the series of treaties, the modern foundation of the laws of war, known as the Hague and Geneva Conventions. These include the extremely important Fourth Hague Convention of 1907 and the Geneva Prisoner of War, Red Cross, and Protection of Civilians Conventions of 1929 and 1949. Taylor summarized some of the major points of these conventions, quoting Article 22 of the Fourth Hague Convention: "[T]he right of belligerents to adopt means of injuring the enemy is not unlimited."[64] He noted that the ensuing arti-

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[63] *Id., quoted with permission; see* BLAKESLEY ET AL., *supra* note 32, at 1254–59. *See also* TELFORD TAYLOR, THE ANATOMY OF THE NUREMBERG TRIALS: A PERSONAL MEMOIR (1992). *See also* Meron, *supra* note 61; Blakesley, *Autumn of the Patriarch, supra* note 18; Blakesley, *The Modern Blood Feud, supra* note 6; Blakesley, *Obstacles, supra* note 6. *See also* Georg Schwarzenberger, *The Problem of an International Criminal Law, in* INTERNATIONAL CRIMINAL LAW 3, 10, 16 (Gerhardt O.W. Mueller & Edward M. Wise eds., 1965); Hans Kelsen, *Collective and Individual Responsibility in International Law with Particular Regard to the Punishment of War Criminals*, 31 CAL. L. REV. 530, 553–56 (1943) (noting that international law provides for some offenses as criminal, though enforcement is to be undertaken by domestic courts); Diane Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537 (1991); M. Cherif Bassiouni, *International Criminal Law and Human Rights*, 9 YALE J. WORLD PUB. ORDER 193 (1982); Quincy Wright, *The Outlawry of War and the Law of War*, 47 AM. J. INT'L L. 365 (1953).

[64] TAYLOR, *supra* note 60, at 20.

cles specify a number of limitations to what is allowed in warfare and how the Geneva Conventions expand these principles.

Taylor made the important point that these conventions articulate laws of war as general principles of conduct; the conventions specify neither the means of enforcement nor the penalties for violations. Nevertheless, he explains, the rules and principles have become domestic law in most nations, as their essence has been adopted by the military law of many countries. One can find these in the general orders, manuals of instruction, or other official documents. For example, in the United States, "the Lieber rules of 1863 were replaced in 1914 by an army field manual which, up-dated, is still in force under the title 'The Law of Land Warfare.' It is set forth therein that the laws of war are part of the law of the United States, and that they may be enforced against both soldiers and civilians, including enemy personnel, by general courts-martial, military commissions, or other military or international tribunals."[65] These have become *jus cogens* principles and rules of customary international law.

III. EXPIATORY VIOLENCE

War crimes, crimes against humanity, and the conduct we call terrorism have occurred since antiquity.[66] Societies since antiquity have exhibited, for good or for ill, a deep need for expiation and redemption through punishment, when crime has been committed in their midst or against them. When the crime was committed by an external source, war as the means to punish usually was the expiatory means of choice.[67] A form of prosecution and punishment, of course, were the means, when

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[65] *Id. See also* authority cited *supra* notes 63, 64, and *infra* note 170 and accompanying text. *See* UN commission urges immediate release of all women, children detained in war," UN News Center Report, Mar. 13, 2006:

> Condemning all violence committed against civilians during war, a U.N. commission has called for the immediate release of women and children taken hostage during armed conflict. The call, http://www.un.org/News/Press/docs/2006/wom1551.doc.htm, came as the Commission on the Status of Women wrapped up its annual session with the adoption of a resolution that also condemned the consequences of hostage-taking, particularly torture and other cruel, inhuman or degrading treatment or punishment, murder, rape, slavery, and trafficking in women and children.

[66] Exodus 21:24; Yoram Dinstein, *International Law as a Primitive Legal System*, 19 N.Y.U. J. INT'L L. & POL. 1, 11 (1986). *See* the Code of Hammurabi (1728–1686 BC), the Laws of Eshnunna (2000 BC), and even in the earlier Code of Ur-Nammu (circa 2100 BC).

[67] *See, e.g.*, Joshua 6:21; 1 Kings 2: 28–34.

the crime was committed internally. Redemption is good, but actions taken for expiation often seem to be antagonistic to the actual well-being or healing of the group.

The current and following few sections will study examples of attempts to expiate through punishment, considering the relationship between the authority or power to punish and the people's need for expiation. This relationship has been well understood and exploited by leaders who used the idea that the good of the group and the individual were dependant on punishment of enemies and wrongdoers. The people needed the wrongdoer to be punished, and the wrongdoer needed punishment.[68] If the wrongdoer was a foreigner and had taken refuge abroad, it was necessary to capture him or a proxy to accomplish this expiation, often requiring war.[69]

A mystical relationship between punishment or war and cleansing atonement seems to have applied in the domestic systems of punishment and in warfare to obtain retribution for wrongs. This idea has proved useful to leaders who wanted either to establish or maintain their own sovereign power from trouble within or outside the group.[70] War, terrorism, and punishment often seem to have been cut of the same cloth. Although redemption and cleansing the soul are good things, the tendency of group leaders to exploit this need or instinct is troublesome.

Anciently, the social cell or group would require vengeance against those who were found to have committed a crime against it or its leader.

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[68] *See discussion in* BLAKESLEY ET AL., *supra* note 32, at chs. 3, 16; LISA SILVERMAN, TORTURED SUBJECTS: PAIN, TRUTH, AND THE BODY IN EARLY MODERN FRANCE (2001).

[69] *See, e.g.*, I Kings 2:28–34.

[70] MICHEL FOUCAULT, DISCIPLINE & PUNISH: THE BIRTH OF THE PRISON, at chs. 1–2, at 1–69 (1979), MICHEL FOUCAULT, SURVEILLER ET PUNIR: NAISSANCE DE LA PRISON (1975); SILVERMAN, *supra* note 68. John W. Ragsdale, Jr., *Some Philosophical, Political and Legal Implications of American Archeological and Anthropological Theory*, 70 UKMC L. REV. 1, 35–36 (2001) discusses the recent work of the iconoclastic physical anthropologist Christy Turner, noting that she dealt a shuddering broadside to the paradigm of an integrated, egalitarian harmony among the pre-historic and contemporary Pueblo, when she proposed, in part, that the external facade of Pueblo pacifism and equanimity hides internal episodes of raw and loathsome terrorism—including violence, mutilation, and cannibalism practiced within the group. Beyond this, his work suggests that the apparent cooperation and common vision of the pre-historic Chacoan nirvana was produced by force and fear rather than the internalized precepts of balance and harmony.

Id., referencing CHRISTY G. TURNER II & JACQUELINE A. TURNER, MAN CORN: CANNIBALISM AND VIOLENCE IN THE PREHISTORIC AMERICAN SOUTHWEST 459–84 (1999).

Society was required to purge itself of the taint or crime, to avoid the wrath of the God or gods. Punishment of the wrongdoer, combined with religious ceremony, was the cleansing or expiating mechanism. The *Code of Manu* provided that rest and happiness for the wrongdoer and society is obtained only by soul-purging punishment of the perpetrator.[71] *Blood atonement* was required by the Israelites for some offenses.[72] Metaphysical harm could only be avoided through spilling the blood of the perpetrator or his proxy. If the perpetrator who put the group at this sort of metaphysical risk escaped, the group had to seek his return to expiate itself. If the perpetrator became a fugitive, it was necessary to obtain his person or a proxy to purge the taint.[73] When Jericho fell to Israel, "they utterly destroyed all that was in the city, both man and woman, young and old, and ox, and sheep, and ass, with the edge of the sword."[74] In virtually all ancient cultures, metaphysics and law were merged.[75] Another interesting example of this is found in Judges, Chapters 19 and 20. A concubine of the "Levite sojourning on Mount Ephraim," had been raped and murdered. The Levite believed that certain citizens of Gibeah, the Benjamites, had committed the crime. He had the responsibility and the right to take vengeance for the crime, so he sent a "diplomatic note" along with a portion of the concubine's cadaver to each of the other Tribes of Israel to symbolize the seriousness of the need for unity and solidarity in the need to obtain vengeance for the crime. The Benjamites failed to deliver the alleged perpetrators, so the Tribe of Benjamin was virtually annihilated by war. Virtually every man, woman, child, animal, and plant were extirpated from Gibeah, and only 600 or so men were left in the tribe of Benjamin.[76]

We will consider a few examples of societies applying punishment or war as a means to propitiate the gods after having been "attacked" by an enemy or by crime. Punishment and war also served to bolster or to symbolize the power of the "sovereign." For example, the punishment for Parricide in Ancient Rome (specifically including killing your mother or

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[71] Code of Manu, bk. VII, 18, 23–24; bk. VIII, 17.

[72] *See* I Kings 2:28–34.

[73] *See, e.g.*, Judges chs. 15; 19 and 20. When the perpetrator was not obtainable, sometimes the village, believed to be where the perpetrator was hiding or at least hailed from or in which he was believed to live, had to be utterly destroyed. *See id.* This caused many blood feuds.

[74] Joshua 6:21.

[75] *See discussion in* BLAKESLEY, TERRORISM, DRUGS, *supra* note 6, at chs. 1 and 4.

[76] *See* Judges, chs. 19 and 20.

father, but also symbolizing regicide) was to be beaten by rods stained with your blood, put into a bag with a viper, a dog, a cock, and an ape, and thrown into the sea. If the sea was not nearby, one was thrown to the wild beasts.[77]

Punishment has been the mechanism to rid the society of crime's perceived destructive plague.[78] Consider the *lex talionis*, or law of exact retaliation, found in the Jewish Torah or Biblical Pentateuch.[79] *Lex Talionis* "requires" an eye for an eye[80] to benefit the punished individual as much as to protect the punishers. When murder, theft, or assault were committed, it was necessary that both society and the perpetrator purge

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[77] 11 S.P. SCOTT, A.M., THE CIVIL LAW, INCLUDING THE TWELVE TABLES, THE INSTITUTES OF GAIUS, THE RULES OF ULPIAN, THE OPINIONS OF PAULUS, THE ENACTMENTS OF JUSTINIAN, AND THE CONSTITUTION OF LEO, at 64–66 (translated from the original Latin, edited and compared with all accessible systems of jurisprudence ancient and modern) (2001).

[78] *See* FREDRIK STROM, ON THE SACRAL ORIGIN OF THE GERMANIC DEATH PENALTIES 14, 208 (1942); *see also* HANS VON HENTIG, PUNISHMENT, ITS ORIGIN, PURPOSES & PSYCHOLOGY 83, 84 (1973).

[79] *See* Deuteronomy 19:21. "Do not look on such a man with pity. Life for life, eye for eye, tooth for tooth, hand for hand, and foot for foot!" Leviticus, 24:17–20: "When a man causes a disfigurement in his neighbor, as he has done it shall be done to him, fracture for fracture, eye for eye, tooth for tooth; as he has disfigured a man, he shall be disfigured." *See also* Exodus, 22:32; 22:1, 22:6; J. SMITH, ORIGIN AND HISTORY OF HEBREW LAW (1960). In addition, see *The Ancient Code of Hammurabi, in* G. DRIVER & J. MILES, THE BABYLONIAN LAWS (1952), which applied some 4,000 or so years ago, that applies both the *lex talionis* and compensation. Rule 196, for example, decrees that "If one destroys the eye of a free-born man, his eye shall one destroy," but Rule 198 requires, "If the eye of a nobleman he has destroyed or the limb of a nobleman he has broken, one mine of silver he shall pay." *Cf.* WILLIAM SHAKESPEARE, THE MERCHANT OF VENICE act 1, sc. 3, ll. 157–67. Nor that the exacting of a mutilating fine is contrary to Jewish law. Compare Rabbi Hertz's comment on the *lex talionis* ("eye for eye etc."): "In the Torah, . . . this law of 'measure for measure' is carried out literally only in the case of murder. . . . (O)ther physical injuries which are not fatal are a matter of monetary compensation for the injured party. Such monetary compensation, however, had to be equitable, and as far as possible equivalent." This is the significance of the legal technical terms, "life for life, eye for eye, and tooth for tooth." J.H. HERTZ, THE PENTATEUCH AND HAFTORAHS 309 (2d ed. 1981). *See also* Jules Gleicher, *Three Biblical Studies on Politics and Law*, 23 OKLA. CITY U. L. REV. 869, 890–99 (1998). Did Shylock's troubles begin with his deviation from Jewish law? *Compare* SHAKESPEARE, *supra*, at act 1, sc. 3, ll. 31–35, *with id.* at act 2, sc. 5, ll. 11–16; Dan Markel, *Are Shaming Punishments Beautifully Retributive? Retributivism and the Implications for the Alternative Sanctions Debate*, 54 VAND. L. REV. 2157 (2001).

[80] Exodus 21:24; Dinstein, *supra* note 66, at 68.

the "taint."[81] The Cheyenne banished the one who tainted the food or water supply. The Cheyenne required purging and group cleansing through punishment and the "breaking of the *arrows*" ceremony for the crime of tainting the food or water supply.[82] Intra-tribal murder "required the keeper of the arrows to cleanse the tribe of the specter of death" through punishment.[83] Many societies favored the cleansing qualities of fire for their method of capital punishment. Nero burned people at the stake to propitiate Vulcan, the god of fire.[84] Although these forms of ancient punishment are repugnant to us today, the mystical need to seek retribution, to "cleanse," "heal," and make society whole again after it has been tainted continues. Recall Dostoyefsky's *Crime and Punishment*.[85]

This apparent need leads to the blood feud. Still today, ancient or more recent memories of crimes committed prompts a desire for retaliation. Oppression or perceived oppression is impetus for retaliation and punishment when the chance arises. Counter-retaliation by the original oppressors follows. Any member of the opposing group (call it the family, clan, tribe, people, religion, class, nation-state) becomes fair subject of retaliation. The retaliator is not viewed by his or her own group as a criminal or a terrorist, because he or she is an instrument of the group's need to avenge and expiate itself. Once this occurs, the other group feels that a crime has been committed against it, thus justified in a counter-reprisal. The blood feud—the *vendetta*—rages. No doubt, violence is justified under certain circumstances but not when intentionally or recklessly applied to non-combatants or innocent civilians.[86] Rape and murder of innocent civilians is criminal in wartime, just as it is in peacetime.[87]

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[81] *See, e.g.*, I Kings 2: 28–34 (blood atonement).

[82] Robert A. Fairbanks, *A Discussion of the Nation State Status of American Indian Tribes: A Case Study of the Cheyenne Nation* 31 (1976) (unpublished LL.M. thesis in the Columbia University Law Library); K. Llewellyn & E. Hoebel, The Cheyenne Way: Conflict and Case Law in Primitive Jurisprudence (1941).

[83] M. Foustel de Coulanges, La Cite Antique, bk. III, ch. XIII (1864); Llewellyn & Hoebel, *supra* note 82.

[84] Graeme Newman, The Punishment Response 43 (1985), citing 15 Tacitus 44.

[85] Fyodor Dostoyefsky, Crime and Punishment (Sidney Monas trans., Penguin Classics, 1968).

[86] Hugo Grotius, for example, argues in Book III, *supra* note 58, the whole of which is devoted to what is permissible and impermissible in war, that "the death of innocent persons must be prevented 'so far as is possible.'" Rape and murder of civilians is equally wrong in wartime as in peacetime. Larry May, Crimes Against Humanity: A Normative Account 99 (2005), referencing Grotius, *supra* note 58, at bk. III, 723, 733 (1625).

[87] May, *supra* note 86.

IV. MEDIEVAL ABUSE: TERROR IN THE FRENCH MIDDLE AGES THROUGH THE 17TH CENTURY AND THE FRENCH REVOLUTION: THE RULE OF LAW AS POWER

The theoreticians and technicians of punishment in the French Middle Ages used the symbol of the *bourreau* (the executioner) to represent the king's power.[88] Contemplate the playing-card king. A person condemned to be "expiated" for attempted regicide (which included patricide or attempted patricide) was the bottom half: the inverted figure of the king. The alleged perpetrator was the perfect reflection, the exact opposite of the king. This perfect opposite of the king simultaneously represented the powerlessness of the condemned individual and the people. So the king was omnipotent; the people had no power. Naturally, the omnipotent king had control of life and death over his subjects. Indeed, he had power over their very souls. Terror and power interrelated in a very significant and horrifically symbolic way. One who would challenge that power, the traitor who had attempted regicide or even parricide, the analogue to regicide, must be shown to be absolutely without power or hope. He must be symbolized to the people, in the most striking way. The sovereign must be seen as omnipotent; the *regicidaire* utterly powerless. Indeed, he must be shown not even to have the power to die. The king had power over that person's very soul—over the very soul of the people. In fact, the people's soul had to be seen as being born of the punishment available to them.[89]

Thus, it followed that the traitor must die a thousand deaths.[90] It would not do simply to execute him. The executioner, therefore, was to take that person up to the very edge of death by torture but bring her or

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[88] MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON (A. Sheridan trans., 1979); MICHEL FOUCAULT, SURVEILLER ET PUNIR: NAISSANCE DE LA PRISON 11–13, 28–30 (1975), analyzing ERNEST H. KANTOROWITZ, THE KING'S TWO BODIES (1959); SILVERMAN, *supra* note 68. Of course, before punishment could be inflicted, it was necessary to "establish guilt." This was done by formulary torture, which was intended to find what was called "the objective truth." The only way truth could be obtained ultimately was out of the accused's mouth, so the inquisitor applied torture to obtain this "truth." *See* BERNARD GUI, MANUEL DE L'INQUISITEUR (2 vols.) (G. MOLLAT ED. & TRANS., CLASSIQUES DE L'HISTOIRE DE FRANCE AU MOYEN AGE (Nov. 8, 1926); BERNARDUS GUIDONIS (1261 or 1262–1331) (Bishop of Lodeve) MANUEL DE L'INQUISITEUR (2 vols., *reprinted by* Les Belles Lettres, Paris, 1964); BLAKESLEY, TERRORISM, DRUGS, *supra* note 6, at ch. 1.

[89] FOUCAULT, *supra* note 88, at 12. *See also id.* at 3–6.

[90] *See id.* at 26–31.

him back again. Then up to death and back again—up and back, up and back, a thousand times. The *bourreau* was "the man of a thousand deaths." Finally, the individual was "allowed" to die when it suited the king.[91] This ritual was the very essence of a policy of terror to strike the minds of the people with the power of the king.[92]

Consider the execution of the regicide, Robert-François Damiens.[93] Foucault reports, citing *les Pirces originales et procrdure du procrs fait a Robert-François Damiens:*

> On 1 March 1757 Damiens the regicide was condemned "to make the amende honorable before the main door of the Church of Paris," where he was to be "taken and conveyed in a cart, wearing nothing but a shirt, holding a torch of burning was weighing two pounds"; then, "in the said cart, to the Place de Grève, where, on a scaffold that will be erected there, the flesh will be torn from his breasts, arms, thighs and calves with red-hot pincers, his right hand, holding the knife with which he committed the said parricide, burnt with sulphur, and, on those places where the flesh will be torn away, melted together and then his body drawn and quartered by four horses and his limbs and body consumed by fire, reduced to ashes and his ashes thrown to the winds."[94]

Foucault continues:

> "Finally, he was quartered," recounts the *Gazette d'Amsterdam* of 1 April 1757. "This last operation was very long, because the horses used were not accustomed to drawing; consequently, instead of four, six were needed; and when that did not suffice, they were forced, in order to cut of the wretch's thighs, to sever the sinews and hack at the joints . . .

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[91] *See id.* at 3–6, 12, 26–31.

[92] *See id.* at 48–50; Michael Guest, *Beckett and Foucault: Some Affinities*, at 1–2, *available at* guest@ia.inf.shizuoka.ac.jp, originally published in 15 Central Japan English Studies, English Literary Society of Japan, Chubu 55–68 (1996).

[93] *See* A.L. ZEVAES, DAMIENS LE REGICIDE at 201–14 (1937).

[94] FOUCAULT, *supra* note 88, at 26–31; *Les Pieces Originales et Procedure du Proces fait a Robert-François Damiens*, III, at 322–74 (1757). Foucault references A.L. ZEVAES, DAMIENS LE REGICIDE 201–14 (1937) as his source for the account.

> "When the four limbs had been pulled away, the confessors came to speak to him; but his executioner told them that he was dead, though the truth was that I saw the man move, his lower jaw moving from side to side as if he were talking. One of the executioners even said shortly afterwards that they had lifted the trunk to throw it on the stake, he was still alive. The four limbs were untied from the ropes and thrown on the stake set up in the enclosure in line with the scaffold, then the trunk and the rest were covered with logs and faggots, and fire was put to the straw mixed with this wood. . . .
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> "In accordance with the decree, the whole was reduced to ashes. . . . The officers of whom I was one, as also was my son, and a detachment of archers remained in the square until nearly eleven o'clock."[95]

It seems natural and right that people should revolt against such power, even if that power is in the guise of or represented as "law." Revolution ensued, as we know. The French *Revolutionaires* applied tactics of terror learned from their former masters in the *Ancien Regime*. The people turned on their former masters with a vengeance, so to speak, and the Reign of Terror followed.

Violence is certainly justified in some circumstances—in rebellion and revolution to escape oppression. In his work, *On Liberty* 2 (1847), John Stuart Mill wrote: "Political liberties or rights which it was to be regarded as a breach of duty in the ruler to infringe, specified resistance, or general rebellion, was held to be justifiable."[96] "Modern" revolution and related violence may be seen as culminations of the Enlightenment philosophy and have been considered justified, even noble. Violence and terror against innocents, however, are neither noble nor justified. When revolution takes that turn, it descends to a self-destructive reign of terror.

Murder has always been murder and terror, terror. And so it was, under the *Ancien Regime* and under the following *Reign of Terror*, no matter how it was rhetorically "glorified" or "justified" at the time or afterward. In Charles Dickins's *Tale of Two Cities*, Madame DeFarge is an interesting literary symbol of this truth. She certainly had good reason to

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[95] FOUCAULT, *supra* note 88, at 3–5, quoting ZEVAES, *supra* note 94, at 201 et seq.

[96] JOHN STUART MILL, ON LIBERTY 2 (1859) (4th ed., Longman, Roberts & Green, 1869).

wish to avenge herself and the French people. The Revolution was justified. Mme. DeFarge knit and registered all who would be executed to avenge and "free" her people. Once the wave of violence and concomitant power took hold, they consumed her as she embodied them. Similarly, Evariste Gamelin (in Anatole France's *Les Dieux Ont Soif*),[97] a sensitive artist interested in rectifying injustice, became a paranoid monster as he is consumed with the need and desire to *guillotine* all who might have been connected in the slightest way with the *Ancien Regime* and, finally, no real nexus was needed at all.

When violence explodes with its ferocious and relentless intensity against those who "represent" or "symbolize" the enemy, it consumes those who wield it as well. Righting wrongs, in Mme. DeFarge's and Gamelin's cases, ultimately destroyed not only the original oppressors (who had wielded violence first, to oppress and to maintain power), but also those who used it second, to avenge the former evil. Violence and rage, thus, consume the good that prompts them. They consume even their own. Gamelin, who was finally decapitated by his beloved *guillotine*, makes the point:

> Until recently it was necessary to seek out the guilty to try to uncover them in their retreats and to wrench confessions from them. Today it is no longer a hunt with packs of hounds, no longer the pursuit of a timid prey. From all sides the victims surrender themselves. Nobles, virgins, soldiers, prostitutes flock to the Tribunal to extract their delayed condemnations from the judges, claiming death as a right, which they are eager to savor.[98]

Can we really say that we are much different today? True, we try to keep much of our indulgence of torture and slaughter secret, but, I suppose that has always occurred. The executive-sovereign, today, tries to keep it secret that he disappears people and tortures them.[99] When found out, the sovereign pretends that he only commits those horrors "against terrorists" or "evil-doers." In reality, it is applicable "by law" to anyone whom our executive-sovereign signals as "terrorists." Other

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[97] FRANCE, *supra* note 20.

[98] *Id.* at 198.

[99] *See, e.g.*, Larisa Alexandrovna & David Dastych, *Soviet Era Compound in Northern Poland was Site of Secret CIA Interrogation, Detentions*, In Raw Story, *available at* larisa@rawstory.com, Mar. 7, 2007.

nations do similarly, and everyone is attacked by groups who torture their enemies and murder innocent people for the "greater good." Violence against innocents for whatever end, however glorified, is immoral and criminal. In war or revolution, whenever violence moves from being applied to combatants or their leaders to strike down innocents, it becomes murder, a war crime or crime against humanity, even if rhetorically glorified. We saw the oppression and terror of the *Ancien Regime* be overcome by revolution. The revolution degenerated into slaughter of innocents, ultimately giving rise to the *directorat*, a regime that was at least as bad as the one it replaced. A balance and relative end to the violence eventually developed as a result of the rule of law. Today, the rules of life are no different. Violence against innocents is immoral and criminal. Any excuse is meaningless—a modern blood feud—and so it goes.

V. THE VERY EARLY "MODERN ERA"

Suarez, Vittoria, Jean Bodin, Hugo Grotius, and Emerich de Vattel all called for the rule that each nation has an obligation to "prosecute or extradite."[100] They argued that punishment was necessary for those who commit serious offenses, requiring that there be no sanctuary for the criminal.[101]

Later, ascendant "positivism" in the 18th, 19th, and the first half of the 20th centuries, posited the rule that international law was binding only on states and could not impose obligations or punishment directly on individuals.[102] Even within the statist context, the desire to eliminate impunity was evident. For example, in 1768, the great criminalist Cesare Beccaria, like natural law jurists Grotius, Jean Bodin, and Vattel before him, argued that: "the conviction of finding nowhere a span of earth where real crimes were pardoned might be the most efficacious way of preventing their occurrence."[103]

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[100] *See, e.g.*, GROTIUS, *supra* note 58, bk II, at 526–29 (1646); JEAN BODIN, LES SIX LIVRES DE LA RÉPUBLIQUE (1576), THE SIX BOOKS OF A COMMONWEALTH 100–11 (K.D. McRae ed., 1962); EMERICH DE VATTEL, LE DROIT DES GENS 311–13 (bk. 2, ch. 6, §§ 76–77 (1758) (Carnegie Inst. 1916).

[101] See, for example, authority cited *supra* note 100.

[102] CHRISTOPHER L. BLAKESLEY, ALBIN ESER & OTTO LAGODNEY, THE INDIVIDUAL IN THE FACE OF INTERNATIONAL COOPERATION IN CRIMINAL MATTERS (2002). LINDA E. CARTER, CHRISTOPHER L. BLAKESLEY & PETER J. HENNING, GLOBAL ISSUES IN CRIMINAL LAW 7–17 (2007); CHRISTOPHER L. BLAKESLEY ET AL., *supra* note 32, at ch. 9 (5th ed. 2001). *See also* Guido Acquaviva, *Subjects of International Law: A Power-Based Analysis*, 38 VAND. J. TRANSNAT'L L. 345 (2005).

[103] CESARE BECCARIA, DEI DELITTI E DELLE PENE (1764), *translated in* J. FARRAR,

Beccaria had clearly defined views on extradition consistent with his general philosophy of criminal justice. Beccaria believed that extradition could play a significant role in diminishing crime. Beccaria, in a manner reminiscent of current antiterrorism rhetoric, stated that "the conviction of finding nowhere a span of earth where real crimes were pardoned might be the most efficacious way of preventing their occurrence."[104] Beccaria's *chef d'oeuvre, Dei Delitti e Delle Pene*, has been one of the most influential works in the field of criminal justice in modern Western history. His theory is based on philosophical utilitarianism and the idea of "just deserts" retributivism. He believed that the punishment for crime should follow directly and surely upon its commission and that the punishment must fit the offense. His goals were to reduce crime, to induce the moderation of criminal law, and to make the punishment following the commission of a crime by anyone be swift and sure. Beccaria was a bit ambivalent on parts of this (as one should be): he wanted no sanctuaries, but he considered it crucial that extradition to be fair and based on law—no "extraordinary renditions" for Beccaria.

Beccaria, however, was careful to use the concept of extradition to help promote his notions of reform for more humanitarian criminal justice. Thus, he qualified his pro-extradition stand by stating that he would not decide an extradition's ultimate usefulness "until laws more in conformity with the needs of humanity, until milder penalties, and until the emancipation of law from the caprice of mere opinion, shall have given security to oppressed innocence and hated virtue."[105] These ideas found

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CRIMES AND PUNISHMENTS 193–94 (1880). *See also* GROTIUS, II DE JURE BELLI AC PACIS *supra* note 58, at 526–29; BODIN, THE SIX BOOKS, *supra* note 100, at 100–11.

[104] BECCARIA, *supra* note 103, at 193–94). *See generally* M. MAESTRO, CESARE BECCARIA AND THE ORIGINS OF PENAL REFORM (1973). Ancient religious society developed a different rationale for the swift and sure punishment sought by classical Beccarian penology. Anciently, breach of the law constituted an offense against God. Thus, there was no authority to condone or to provide refuge. *See* S. SINHA, ASYLUM AND INTERNATIONAL LAW 6 (1971). The Code of Manu required punishment for all crime. As the soul never died, it was a religious necessity and a pre-requisite for happiness in the next life to expiate by punishment for the sins of this life. *Lois de Manous*, annotated in French by L. Deslongschamps, vol. I, bk. VII, 18, 23–24, bk. VIII, 17 (1830), *cited in* Sinha, *supra* at 38 n.13.

[105] BECCARIA, *supra* note 103, at 193–94.

their way into extradition and influenced, among other ideas, the rule of speciality[106] and that of dual criminality.[107]

Voltaire, probably the greatest and most influential devotee of Beccaria's criminal justice philosophy,[108] found himself an example of the reason for Beccaria's ambivalence. Frederick the Great had sought Voltaire's extradition from the Free City of Frankfurt, because, after a dispute with the Great Frederick, Voltaire had quit Potsdam carrying a book of verse in which he portrayed Frederick deriding Louis XV, Madame de Pompadour, and the Empress Marie Thérèse, among others. Pursuant to the Prussian's request, Voltaire was arrested in Frankfurt for extradition. Although Voltaire ultimately was not extradited, he remained in a Frankfurt prison for several weeks awaiting a decision.[109]

Beccaria's vision and great work did not bear much fruit. The blood feud, the seemingly eternal *mal du siecle*, continues to accelerate in the new millennium. War crimes, crimes against humanity, and other atrocities form part of a nauseating modern equivalent of the ancient blood feud. There are so many examples that it is nearly impossible to keep track. Groups and states use war, even war crimes, crimes against human-

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106 The rule of speciality is a corollary to that of dual criminality. The speciality principle requires that the requesting state not prosecute the returned fugitive for any crime other than that for which he was extradited. *See, e.g.*, United States v. Herbage, 850, F.2d 1463, 1465 (11th Cir. 1988). *See generally* Christopher L. Blakesley, *Extradition Between France and the U.S.*, 13 VAND. J. TRANSNAT'L LAW 653, 706–09 (1980); Christopher L. Blakesley, *A Conceptual Framework for Extradition and Jurisdiction over Extradition and Jurisdiction over Extraterritorial Crimes*, 1984 UTAH L. REV. 685, 731–60; M. CHERIF BASSIOUNI, INTERNATIONAL EXTRADITION IN U.S. LAW AND PRACTICE 359–60 (2d rev. ed. 1987); ROGER MERLE & ANDRE VITU, TRAITE DE DROIT CRIMINEL: PROBLEMS GENERAUX DE LA SCIENCE CRIMINELLE, § 438, 436–37 *(Le principe de specialite)* (2d ed. 1973).

107 Dual criminality requires that extradition not take place, unless the alleged criminal conduct is a criminal in both the requesting and the requested states. *See, e.g.*, United States v. Herbage, *supra* note 108, at 1465. BASSIOUNI, *supra* note 106, at 324–25; MERLE & VITU, *supra* note 106, at 415–16 (*la double incrimination or récipocité d'incrimination*).

108 *See generally* MARCELLO T. MAESTRO, VOLTAIRE AND BECCARIA AS REFORMERS OF CRIMINAL LAW (Columbia Univ. Press, 1942).

109 *See* M. Aupècle, *L'Extradition et la loi du 10 mars 1927*, (Paris 1927), unpublished thesis available in Columbia University School of Law Library; *Voltaire et les fiches de police*. 199 Mércure 536–56, Nov. 1, 1927; Deidre Dawson, Book Review, RENE POMEAU AND CHRISTIANE MERVAUD (with Jacqueline Hellegouarc'h, Claud Lauriol, Jean Mondot, Ute van Runset, and Jacques Spica) *DE LA COUR AU JARDIN*, 1750–1759, 26 (No. 1) Eighteenth Century Studies 159–60 (Autumn 1992).

ity, torture and terrorism, to punish those whom they see as "others," because they feel a moral, religious right to do so. These crimes have become virtual institutions of punishment. Reaction to one side committing them against another breeds equivalent counter-action. Innocent people are the fodder for vengeance, a sense of self-righteousness expiation, or simple hatred. It may begin as an effort to throw off oppression, or as they see it, to make the world safe for their God, their way of life, their ideology, or their riches. Other times, the wronged group or state looks to right wrongs or to obtain retribution. Sometimes, it is the nihilist looking to destroy the status quo with terror. Even the nihilist seems to have an almost metaphysical vision of the need to destroy, using violence, war, terrorism, crimes against humanity, torture, and other crimes to reap vengeance, gaining power, or hypocritically to become a statist functionary. Then the cycle continues, with those people, groups using terror to maintain power. Victims attempt to fight back to punish those who wrought the wrongs or those who symbolize them. In addition, prosecution and punishment in the traditional sense follows on occasion and more frequently, today.

VI. TERRORISM, WAR CRIMES, CRIMES AGAINST HUMANITY, AND TOTAL WAR

Terrorism, crimes against humanity, torture, and "total war" are parallel offenses in the sense of having parallel purposes and parallel results. In total war, where innocent civilians are used as targets for military victory, war becomes quintessentially criminal. Blanket or saturation bombing and use of weapons designed to cause massive death or unnecessary suffering are war crimes, crimes against humanity, or terrorism, depending on the circumstances.[110] Their purpose is not only to kill and maim many people; it is to panic the population and to coerce the enemy leadership to succumb. Thus, a nuclear bomb was dropped on Hiroshima and Nagasaki, slaughtering so many in such a horrible way.[111] Innocents, in undefended Nagasaki, not part of the war effort, were chosen for incineration so that the shock would have sufficient impact, as discussed above. The mentality of the bombing nation is not really different from placing a bomb on a civilian flight or at a shopping mall.

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[110] On the other hand, historically, protecting innocents does not appear to have been the policy in philosophy and practice. For St. Augustine's views about this, see authority in note 21, *supra*.

[111] Richard Falk, *The Shimoda Case: A Legal Appraisal of the Atomic Attacks Upon Hiroshima and Nagasaki*, 59 AM. J. INT'L L. 759, 761 (1965).

Sadly, today and perhaps for many more years in the past than we think, belief in the inevitability of total war has pervaded all political and military theory and practice. Total war became acceptable and ingrained in the consciousness of all powers. Today, it pervades all of our relational thought processes, whether we are for societal status quo or for changing it. This may not be so different from how humans have acted since antiquity.

Consider this fearsome view of the world. Each side believes that absolute or total war is appropriate and necessary for it to survive. The people on each side of virtually every world conflict are manipulated into believing that they have absolute right on their side. Absolutist terminology and action take over. Each side is caused to believe that its very existence is threatened by its enemies—that it may be annihilated, unless it annihilates the opposition first or more atrociously. This is the same in both the domestic and international context. Governments convince their supporters to believe that minorities or oppressed groups are dangerous, and those who might rebel are absolute evil. Oppressed peoples see the state as absolute evil to which absolute destructive power may be applied. Nation-states who go to war each convince their own people similarly. So, each justifies the use of absolute power. Is it any wonder that terrorism and crimes against humanity are the mode of warfare and politics? It is tragic that such a terroristic mindset seems to have permeated orthodox military strategy—or perhaps it has grown naturally out of that strategy. Nearly every nation's basic political and military strategic planning is based on this dangerously flawed vision. With current availability of absolute power to destroy, we would be wise figure a better way to see the world and each other.

Fear, Rage, and Becoming what One Hates

Governments and leaders of smaller groups often react to harm or threats of harm to the group in self-destructive ways. They abuse their peoples' fears to accomplish selfish ends. Early in the era of the Cold War, a special Report of Covert Operations commissioned by President Eisenhower was adopted as hallowed American policy: "Another important requirement is an aggressive covert psychological, political and paramilitary organization more effective . . . and, if necessary, more ruthless than that employed by the enemy. . . There are no rules in such a game. Hitherto acceptable norms of human conduct do not apply."[112] This atti-

[112] *Report of the Special Study Group on the Covert Activities of the Central Intelligence Agency* (the "Doolittle Report") (Sept. 30, 1954) (declassified Apr. 1, 1976).

tude suggests what we have become: we are paying a serious price domestically and abroad for a false sense of security. The attitude will ultimately not only make us less secure, it eviscerates the values that we have always claimed.

In the face of terrorism or crimes against humanity, fear may become rage, and people turn to vengeance. Fear is easily manipulated into rage. This causes what Albert Camus called an "ugly, infernal dialectic—a self-destructive death dance."[113] Leaders with a melodramatic bent of mind blind their adherents to any humanity on the other side. The people are made to believe that they are fighting the devil himself, and that all truth is being destroyed. The people usually swallow it. Law and morality are perverted when people's normal reaction to violence is manipulated by leadership that uses deceit and obfuscation to gin up hatred and fear. Unrestrained reactionary violence ensues. This is not to say that truly horrible conduct is not a cause or trigger, but only to suggest that often times a horrific cause implicates a manipulated reaction that may be equally or more dangerous and destructive than the original horrific acts. When this occurs, counter-reaction ensues. Violence escalates and the rule of law is replaced by brute power. To accomplish this, the person against whom the force is applied must be associated with evil and demonized.[114] Media and many commentators fall into the trap laid by lead-

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[113] *See* Albert Camus, *Appeal for a Civilian Truce in Algeria* (lecture given in Algiers, Feb. 1956), *reprinted in* ALBERT CAMUS, RESISTANCE, REBELLION, AND DEATH 131 (J. O'Brien trans., 1960; Albert Camus, *Reflections on the Guillotine*, essay, *in id.*, at 174, 198; ALBERT CAMUS, NEITHER VICTIMS NOR EXECUTIONERS (D. MacDonald trans., 1972).

[114] Christopher L. Blakesley, *Book Reviews and Notes, in* DEMOCRATIC RESPONSES TO INTERNATIONAL TERRORISM (David A. Charters ed., 1991), and 89 AM. J. INT'L L. 858 (1995). *See also* Jeremy Waldron, *Torture and Positive Law: Jurisprudence For the White House*, 105 COLUM. L. REV. 1681, 1740–41, and nn.253–54 (2005) ("The warning has been sounded often enough: Do not imagine that you can maintain a firewall between what is done by your soldiers and spies abroad to those they demonize as terrorists or insurgents, and what will be done at home to those who can be designated as enemies of society. . . . Bear in mind also that some of the reservists involved in the abuse at Abu Ghraib were prison guards in civilian life." *See* Douglas Jehl & Eric Schmitt, *In Abuse, a Portrayal of Ill-Prepared, Overwhelmed G.I.'s*, N.Y. TIMES, May 9, 2004, sec. 1, at 1. Of course, it is "disturbing to think that that explains their abusive behavior in Iraq; it is also disturbing to think about causation back in the opposite direction"), also referencing HANNAH ARENDT, THE ORIGINS OF TOTALITARIANISM 185–86, 215–16, 221, and 441 (1973). Reynolds, *supra* note 21. *See also* Thomas E. Ricks, *In Haditha Killings, Details Came Slowly*, WASH. POST, June 3, 2006, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2006/06/03/ AR2006060300710.html; Julian Borger, *Marine's Wife Ppaints Portrait of US Troops Out of Control in Haditha*, GUARDIAN (U.K.), June 5, 2006, *available at* http://www.guardian.co.uk/usa/story/0,,1790500,00.

ers, using the label "*genocidaires*," "terrorists," "evil-doers," or other villainous epithets to justify criminal acts. This was not lost on Adolf Hitler, who, in his *Mein Kampf*, referred to Germany's failure in World War I as being in part due to not having sufficiently utilized this propaganda tactic of "making monsters of their enemies" in the eyes of the German *Volk*.[115]

Mutual Punishment as Part of a Symbiotic Relationship Between Enemies: An Infernal Dialectic

A paradoxical symbiotic relationship may develop between leaders of enemy groups. Leadership of each side needs the other side as a foil. The enemy is used to cover or take the heat off the leadership for incompetence, corruption, or other internal problems to maintain power. Leaders try to switch the discussion to an "enemy." They appropriate and pervert law and morality, as they demonize the "enemy" to cover up their own incompetence or ambition. This conduct coincides with making their people fearful and insecure. When one enemy disappears, another is found or invented. Wrongs that have been committed or are purported to have been committed are used to rationalize the "necessity" for the people to go to war, to punish, and to commit crimes or acquiesce to crimes in reaction. Claims of legal right, morality, and security are used as exhortation to summon public support for nefarious use of force.

An extremely strange phenomenon, consistent with the bait-and-switch tactic described immediately above, seems to be taking place at this writing. As the United States' war in and occupation of Iraq has fallen apart, the Bush administration seems to be ginning up for war against Iran over the possibility of Iran developing nuclear weapons and the alleged Iranian interference in Iraq. This seems strange, as the U.S. military and economy have been stretched very thin by the occupation of Iraq and the war in Afghanistan.[116] The *Business Times of Singapore* reports:

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html; Michael Duffy, *The Shame of KILO Company*, TIME MAGAZINE, May 28, 2006, *available at* http:// www.time.com/time/archive/preview/0,10987,1198892,00.html; Dan Whitcomb, *Marines to Cite War Chaos in Haditha Defense*, REUTERS, June 7, 2006, *available at* http://today. reuters.com/news/newsArticle.aspx?type=newsOne&storyID=2006-06-07T153858Z_01_N07171643_RTRUKOC_0_US-IRAQ-HADITHA-DEFENSE.xml.

115 ADOLF HITLER, MEIN KAMPF (Ralph Manheim, trans., 2001) (1925).

116 *See, e.g., Australia's Continuing Presence in Iraq Remains Unclear*, CANBERRA TIMES,

> The Bush administration's decision to dispatch a second carrier task force to the Persian Gulf—the USS John C Stennis—to back up the USS Dwight D Eisenhower, which was the first time since the invasion of Iraq in 2003 that the US has two carrier battle groups in the Gulf region, raised more red flags in Washington —as did President Bush's authorisation of American forces in Iraq to pursue Iranian operatives involved in aiding Iraqi insurgents.
>
> Those like Mr Rockefeller who suspect that the Bush administration is gearing for war against Iran through a campaign of misinformation, or disinformation, could point to the most recent media reports, that the US was investigating possible Iran involvement in a recent attack that killed five American soldiers in the Iraqi city of Karbala, as well as to the continued barrage of statements by top administration officials accusing Iran of meddling in Iraq.[117]

Malcom Rifkind of the *International Herald Tribune* writes: "There is an eerie similarity between the recent escalation of tension between the United States and Iran and that which preceded the invasion of Iraq. Not surprisingly, many are predicting that it will end in the same way, with an American attack."[118] Max Boot, in an opinion piece for the *Los Angeles Times*, writes that, "There is, in fact, little reason to think that we're about to go bombs away. With the U.S. already mired in two major conflicts, the last thing the administration needs is another one. President Bush is trying to ratchet up the pressure on Iran precisely in order to reach a diplomatic settlement and avoid a military confrontation."[119]

Mar. 8, 2007, CANBERRATM (No Page), 2007 WLNR 4328939 ("There are suspicions that the US might also be encouraging the terrorist group Mujahedin-e Khalq to attack;731;731 Iranian targets, both in Iraq and Iran.").

[117] *Hi-ho, Hi-ho It's Off to War We Go Critics Say the White House Is Manipulating Evidence to Create Conditions for a US Military Confrontation with Iran*, BUSINESS TIMES (Singapore), Mar. 7, 2007, BUSTMS (No Page), 2007 WLNR 4267642.

[118] Malcolm Rifkind, *Try Talk. You Can Use the Stick Later Dealing with Iran*, INT'L HERALD TRIB.; Mar. 7, 2007, INTLHT 6 2007 WLNR 4323126.

[119] Max Boot, *Keeping Iran in Line*, L.A. TIMES, Mar. 7, 2007, LATIMES 21 2007 WLNR 4293123.

Both sides of most conflicts rationalize even their own worst conduct as "legal" even though it is criminal when committed against them. Albert Camus describes this as falling into a miasma of evil, an "infernal dialectic that whatever kills one side kills the other too, each blaming the other and justifying his violence by the opponent's violence. The eternal question as to who was first responsible loses all meaning then . . . [Can't we] at least . . . refrain from what makes it unforgivable . . . . the murder of the innocent."[120] Albert Camus was right when he wrote in *Neither Victims Nor Executioners*,[121] that humanity generally does not want to be either victim or executioner, but leaders often manipulate their people to become both. When we participate in this conduct or accept the role, however, no matter how lofty the claimed end, we simply become oppressors or slaughterers of innocents. As Camus said in *Reflections on the Guillotine*, "[even] [i]f murder is in the nature of man, the law is not intended to reproduce that nature."[122] But, in this, we must still try to overcome, by rectifying wrongs done in the past or currently being perpetrated, the tendency to allow inertia or momentum to make executioners or victims of us all.[123]

Unfortunately, today, as before, we are caught-up in this "*infernal dialectic*," this horrible "death-dance," this "Plague," which is a propensity to pestilence and destruction that we try to hide. Thomas Merton, analyzing Camus' *The Plague*, states the tendency beautifully: "It is the willful negation of life that is built into life itself: the human instinct to dominate and to destroy . . . to seek one's own happiness by destroying the happiness of others, to build one's security on power and, by extension, to justify evil use of that power in terms of 'history,' or 'the common good,' or of 'the revolution,' or even of 'the justice of God.'"[124] Merton continues, noting that our drive to destroy, to kill, or simply to dominate and to oppress derives, perhaps, from our alienation or the "metaphysical void [one] experiences

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[120] Camus, *Appeal for a Civilian Truce in Algeria, supra* note 113, at 131, 135, 137.

[121] CAMUS, NEITHER VICTIMS NOR EXECUTIONERS, *supra* note 113, at 27.

[122] Camus, *Reflections on the Guillotine, supra* note 113, at 174, 198; ALBERT CAMUS, NEITHER VICTIMS NOR EXECUTIONERS, *supra* note 113. *See also* Camus, *Appeal for a Civilian Truce in Algeria, supra* note 113, at 131, 135, 137.

[123] Camus, *Reflections on the Guillotine, supra* note 113.

[124] Thomas Merton, *The Plague of Albert Camus: A Commentary and Introduction* (originally in a pamphlet, Seabury Press 1968), *reprinted in* THOMAS MERTON, THE LITERARY ESSAYS OF THOMAS MERTON, at 181–82 (Brother Patrick Hart ed., 1981).

when [one finds ones-self] a stranger in [one's] own universe."[125] We seek to make that universe familiar by using it for selfish ends, but these ends are often capricious and ambivalent.[126] "When a group is alienated and manipulated, these ends usually become life-denying, armored in legalism and false theology, or perhaps even the naked language of brute power."[127] Thus, those who are oppressed, or are manipulated into believing that they are, or those who oppress, because they believe insanely that they have a divine right to destroy, act out with brute violence. Those who are attacked will inevitably react with similar or worse violence. We have a death-dance, an infernal dialectic, a miasma of evil, a blood feud.

All attempts (from either or any side) to make it appear acceptable through obfuscation, secrecy, and rhetoric in the end will be for naught. We must stop participating in this "miasma of evil [being deluded by t]he self-assurance of those who know all the answers in advance and who are convinced of their own absolute and infallible correctness . . . [which] sets the stage for war, pestilence, famine, and other personages we prefer to leave unnoticed in the pages of an apocalypse."[128] This ignorance that Camus and Merton reject, "prefers its own rightness to the values that are worth defending. Indeed it sacrifices those values by its willingness to kill men in honor of its dogmatic self-idolatry."[129] "As long as one is content to justify one's existence by reference to these automatically accepted norms, one is in complicity with the absurd, with a murderous society, with death, with '*the Plague*.'"[130] It is worth considering whether prosecution of perpetrators, especially the leaders, is beneficial to escaping the cycle. Does international law, prosecution, and punishment exacerbate or thwart these negative characteristics of humankind? Jean-Paul Sartre believed that law made things worse, as he said in his Preface to Frantz Fanon's, *The Wretched of the Earth*:[131]

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[125] *Id.*

[126] *Id.*

[127] *Id.*

[128] *Id.* at 181, 191.

[129] *Id.* at 195.

[130] *Id.* at 198 (emphasis mine).

[131] JEAN-PAUL SARTRE, *Preface* FRANTZ FANON, THE WRETCHED OF THE EARTH, at 21 (C. Farrington ed., 1963).

A fine sight they are too, the believers in non-violence, saying that they are neither executioners nor victims. Very well then; if you're not a victim when the government which you've voted for, when the army in which your younger brothers are serving without hesitation or remorse have undertaken race murder, you are, without a shadow of doubt, executioners . . . Try to understand this at any rate: if violence began this very evening and if exploitation and oppression had never existed on the earth, perhaps the slogans of non-violence might end the quarrel. But if the whole regime, even your non-violent ideas, are conditioned by a thousand year-old oppression, your passivity serves only to place you in the ranks of the oppressors.[132]

Does international law foster or promote oppression and violence? Recall, that this was Voltaire's point, as well.[133] Indeed, when the law is appropriated and abused, it often does just that. Moreover, it is true that oppressing nations justify their conduct by claiming that it is "legal." Others simply suggest by their actions and their cynical excuses that there is no international law. The reality, however, is that oppression violates international law, no matter what the excuse given and no matter if some nations "get away with it" for a time. Rebellion to escape oppression, therefore, is legal. The rub, however, is the difficulty determining what conduct is legal and moral, even when it is to break the yoke of oppression.

Victims or their leadership may legally opt for violence, even terror tactics, as a means of challenging and escaping oppression. Intentional or criminally reckless violent action against other innocents is *not* self-defense or a legal means to escape oppression. In addition, when violence is applied to innocent civilians, it is often self-defeating and only strengthens the hand of the oppressors. When the oppressed rise up using innocents as their targets, it causes them to be hated and to become what they have hated. This conduct gives ammunition to the oppressors to rally support against what otherwise is a legitimate movement akin to self-defense. *Lex talionis*, "an eye for an eye," (as in Exodus 21:24) calls victims or the victims' proxies to carry out the sanction against victimizers or their proxies.[134] Abuse of this concept, more nuanced than popularly viewed, helps to illustrate my point. The history

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[132] *Id.*

[133] VOLTAIRE, CANDIDE, *supra* note 4, at 10.

[134] *See* discussion, *supra* at notes 78–85, and accompanying text. *See also* notes

and true nature of *lex talionis* and related notions are interesting and provide insight into the sensed "need" to retaliate.[135]

Self-Centered, Self-Justified, and Self-Serving "Self-Defense"

It has been argued by U.S. administrations that it is "justifiable self-defense" to apply military force to preempt anticipated terroristic activity or to retaliate against terrorists or against states that harbor, finance, or train terrorists.[136] In addition, abduction of "terrorists" or even common criminals from abroad is argued also to be "justifiable self-defense."[137] Thus, the bombing of Tripoli, including the targeting of Qaddafi's family, was argued to be in "self-defense," and, although Qaddafi was missed, his adopted baby girl and at least 100 civilian casualties were not.[138] It was argued that the only judge of self-defense is the claimant. A decision to take such measures of "self-justified self-defense," thus becomes per se legal. No other branch of government and certainly no other nation or institution may question it. We find ourselves making the same tired argument once again.[139]

85–131; Judges, chs. 19 and 20: *See also, e.g.*, I Kings 2: 28–34; Joshua 6:21 (when Jericho fell to Israel, "they utterly destroyed all that was in the city, both man and woman, young and old, and ox, and sheep, and ass, with the edge of the sword).

135 *See* authority cited *supra* note 134, and discussion in the text accompanying the referenced notes. *See also infra* notes 136–181, and accompanying text relating to attacks on innocents.

136 *See* Semour Hersh, *Qaddafi Targeted*, N.Y. TIMES MAGAZINE, Feb. 22, 1987; RICHARD FALK, REVOLUTIONARIES & FUNCTIONARIES: THE DUAL FACE OF TERRORISM 73, 78, 123, 198 n.1 (1988) (over 100 civilian casualties in attack on Qadaffi's compound).

137 *See* Oscar Schachter, *Self-Judging Self-Defense*, 19 CASE W. RES. J. INT'L L. 121, 122–23 (1987); Abraham Soafer, N.Y. TIMES, Jan. 19, 1986, at A4 and Jan. 28, 1986, at A24, col. 4; John Walcott, Andy Pazstor, & David Rogers, *Reagan Ruling to Let C.I.A. Kidnap Terrorists Overseas Is Disclosed*, WALL ST. J., Feb. 20, 1987, at 1, col. 6; O.C. Findlay, *Abducting Terrorists Overseas for Trial in the United States: Issues of International and Domestic Law*, 23 TEX. INT'L L.J. 1 (1988); United States v. Alvarez-Machain, 504 U.S. 655 (1992).

138 *See* Hersh, *supra* note 136; FALK, *supra* note 136, at 198 n.1.

139 *See* John Yoo, *Using Force*, 71 U. CHI. L. REV. 729, 730–31, 775 (2004) (characterizing those who do not subscribe to anticipatory or preemptive, self-justifying self-defense, as taking a restrictivist,"doctrinal" position); John Yoo, *International Law and the War in Iraq*, 97 AM. J. INT'L L. 563, 572–74 (2003) (arguing that test for self-defense, today, is significantly more nuanced than Webster's test in The Caroline); Ryan Schildkraut, *Note Where There are Good Arms, There Must be Good Laws: An Empirical*

One obvious practical danger of this attitude of self-justification is that other nations or groups may utilize it as well. President George W. Bush in his State of the Union Message in January 2002,[140] "warned" us all about the "axis of evil"—North Korea, Iran, and Iraq—suggesting that a preemptive strike may not be out of order.[141] Does this rhetoric and conduct help or hurt? Subsequent history bears out the horrid application of the rhetoric. Could it prompt China, Iran, North Korea, Russia, or some other nation, or group to "justify" a preemptive strike against the United States? Has this action and rhetoric eroded the law of self-defense so that groups or states that consider themselves at risk by the United States "justify" similar conduct, through nuclear, chemical, biological, or other weaponry of mass destruction? If self-justification replaces a neutral rule of law for self-defense, and the former is elevated to the level of legality, there is no rule of law in any crucial context.[142]

A significant danger of this concept of self-justifying self-defense is that, if it eviscerates the rule of law relating to self-defense, replacing it with power and self-justification, all states, nations, or groups may claim legality to any act that they wish to commit in the name of "self-defense."

Assessment of Customary International Law Regarding Preemptive Force, 16 MINN. J. INT'L L. 193, 206–07 (2007). *See also generally* Allen S. Weiner, *The Use of Force and Contemporary Security Threats: Old Medicine for New Ills?*, 59 STAN. L. REV. 415 (2006); Mark L. Rockefeller, *The "Imminent Threat" Requirement for the Use of Preemptive Military Force: Is It Time For a Non-Temporal Standard?*, 33 DENV. J. INT'L L. & POL'Y 131 (2004); Jordan Paust, *Use of Armed Force against Terrorists in Afghanistan, Iraq and Beyond*, 35 CORNELL INT'L L.J. 533 (2002); Michael J. Glennon, *The Fog of Law: Self-Defense, Inherence, and Incoherence in Article 51 of the United Nations Charter*, 25 HARV. J.L. & PUB. POL'Y 539, 546–49 (2002); Christopher Greenwood, *International Law and the Pre-emptive Use of Force: Afghanistan, Al-Qaida, and Iraq*, 4 SAN DIEGO INT'L L.J. 7, 11–18 (2003); Christopher Clarke Posteraro, *Intervention in Iraq: Towards a Doctrine of Anticipatory Counter-Terrorism, Counter-Proliferation Intervention*, 15 FLA. J. INT'L L. 151, 179–85 (2002); Miriam Sapiro, *Iraq: The Shifting Sands of Preemptive Self-Defense*, 97 AM. J. INT'L L. 599 (2003); Michael N. Schmitt, *Preemptive Strategies in International Law*, 24 MICH. J. INT'L L. 513, 528–45 (2003); William H. Taft IV & Todd F. Buchwald, *Preemption, Iraq, and International Law*, 97 AM. J. INT'L L. 557 (2003).

[140] President's Address Before a Joint Session of the Congress on the State of the Union, Jan. 20, 2004, 39 Weekly Comp. Pres. Doc. 109, 115 (Jan. 28, 2003), *available at* http://www.gpoaccess.gov/wcomp/2002.html, and http://www.whitehouse.gov/news/releases/2004/01/20040120-7.html; *see also The National Security Strategy of the United States of America* (Sept. 17, 2002), *reprinted in* 41 I.L.M. 1478 (2002).

[141] *See* Sean D. Murphy, *Brave New World: The Doctrine of Preemptive Self-Defense*, 50 VILL. L. REV. 699, 701 (2005); *referenced in* Schildkraut, *supra* note 139, at 201–02.

[142] Schachter, *supra* note 137, at 121, 122–23.

If one has the power to succeed, one is "justified." It is fearsome that this is the current view of international law and self-defense held by many leaders in the world. Another danger is what such a self-defining vision of self-defense might do to democratic constitutional order. It is a denunciation of the rule of law over the rule of power. It assumes a dangerous perception of the separation of powers tending toward accepting executive branch absolutism. We see this eroding the idea of the checks and balances and separation of powers in the U.S. Constitution.[143] Acceptance in the United States of so-called "extraordinary renditions" abduction of individuals to be sent out for torture as "legal mechanism" provides a good example.[144] It is worth noting that much of the abuse of the criminal justice system in the United States and elsewhere today is based on a "war against terrorism," a "war against drugs" or a "war against crime."

A Comparative Excursus

Self-justified self-defense is strikingly similar to the ancient Russian, than the former Soviet, the current Russian, and ancient Germanic notions of "necessary defense." The ancient German concept of *das Recht* combined with that of "necessary defense" (*Notwehr*)[145] and the former

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[143] *See generally The Constitution Project, Deciding to Use Force Abroad: War Powers in a System of Checks and Balances* (2005), *available at* http://www.constitutionproject.org/pdf/War_Powers_Deciding_To_Use_Force_ Abroad1.pdf; cf. Mark A. Drumbl, *Victimhood in Our Neighborhood: Terrorist Crime, Taliban Guilt, and the Asymmetries of the International Legal Order*, 81 N.C. L. Rev. 1, 27–48 (2002) (addressing self-defense in international law).

[144] *See generally* The Torture Papers: The Road to Abu Ghraib (Karen Greenberg et al. eds., 2005). *See, e.g.*, Complaint at 20–25, El-Masri v. Tenet, 437 F. Supp. 2d 530 (E.D. Va. 2006) (No. 1:05-cv-01417); Petition for Writ of Habeas Corpus at 2, 16, Omar v. Harvey, 416 F. Supp. 2d 19 (D.D.C. 2006) (No. 1:05-cv-02374). *Cf.*, Craig Whitlock, *U.S. Won't Extradite CIA Agents for Kidnap Charges in Italy*, Wash. Post, Feb. 28, 2007, (Bus. Sec.) (Pg. Unavail. Online), 2007 WLNR 3873235. *But see* Curtis A. Bradley, Jack L. Goldsmith & David H. Moore, *Sosa, Customary International Law, and the Continuing Relevance of Erie*, 120 Harv. L. Rev. 869 (2007) (providing a functional apologia for the "constitutionality" of the practice).

[145] *See* former StGB, § 53 (1986). *See also* Mordechai Kremnitzer, *The Landau Commission Report—Was the Security Service Subordinated to the Law, or the Law to the "Needs" of the Security Service?*, 23 Isr. L. Rev. 216, 247 (1989); Mordechai Kremnitzer & Khalid Ghanayim, in *Symposium: Twenty-Five Years of George P. Fletcher's Rethinking Criminal Law Proportionality and the Aggressor's Culpability In Self-Defense*, 39 Tulsa L. Rev. 875, 888–89 n.56 (2004) (noting that Kant's position is to require culpability in the assailant or aggressor), referencing Immanuel Kant, Part IV. Kant on the Meta-

Soviet Union's idea of the same principles (*neobxodimaja oborona*),[146] also resting on the notion of "social dangerousness" provide that any right or defendable interest, from life to personal honor, receive the same degree of protection and privilege. The only question is whether a right or interest is threatened. If one is threatened, good social order is equally threatened. "Necessary defense," therefore, is triggered. Any force necessary to prevent the invasion of the right or interest, and the concomitant destruction of "good order," is justified.[147]

In both the German and Russian conceptualization of "necessary defense," the ideas of "Legal Order" (*die Rechtordnung*) and social dangerousness (and *protivopravnost*) identify "necessary defense" and "social

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PHYSICS OF MORALS: VIGILANTIUS'S LECTURE NOTES, *in* LECTURES ON ETHICS 279–80 (Peter Heath & J.B. Schneewind eds., Peter Heath trans., 1997); also referencing CLAUS ROXIN, STRAFRECHT ALLGEMEINER TEIL [CRIMINAL LAW: THE GENERAL PART], 2 Auflage 535–39, 558 (Muenchen 1994) ("Culpability has but one function in regard to an offense, and that is the justification of punishment. According to this argument, the aggressor's culpability is not a necessary precondition to self-defense. In self-defense, the right is manifested against the wrong") (*In Notwehr wird das Recht gegenüber dem Unrecht behauptet*)), Kremnitzer & Ghanayim, *supra* at 878 n.15; and Boaz Sangero, *A New Defense for Self-Defense*, 9 BUFF. CRIM. L. REV. 475, 516 n.112 (2006).

146 *See* former Ugolovnyj Kodeks, R.S.F.S.R. Part 25, § 13 (anticipating "socially dangerous action or inaction); Jeffrey Kahn, *The Search for the Rule of Law in Russia*, 37 GEO. J. INT'L L. 353, 383 (2006).

147 *See* George Fletcher, *Proportionality and the Psychotic Aggressor: A Vignette in Comparative Criminal Theory* ch. 9, *in* STUDIES IN COMPARATIVE CRIMINAL LAW, at 123, 123–27 (E. Wise &G. Mueller eds., 1975). Critics of George Fletcher's arguments on necessary defense in relation to the insane aggressor include: Mordechai Kremnitzer & Khalid Ghanayim, in *Symposium: Twenty-Five Years, supra* note145, at 888–89 n.56 (2004) (noting that Kant's position is to require culpability in the assailant or aggressor), referencing KANT, *supra* note 145, at 279–80; also referencing ROXIN, *supra* note 145, at 535–39, 558 ("Culpability has but one function in regard to an offense, and that is the justification of punishment. According to this argument, the aggressor's culpability is not a necessary precondition to self-defense. In self-defense, the right is manifested against the wrong") (*In Notwehr wird das Recht gegenüber dem Unrecht behauptet*)), Kremnitzer & Ghanayim, *supra* at 878, n.15; and Sangero, *supra* note 145, at 516 n.112. My sense is that these critics would agree with the view that a full-blown acceptance of "necessary defense" in the context of l'ordre public, is dangerous. *See* authority in this note and Kremnitzer, *supra* note 145, at 216, 247. In relation to international law, see Judith Gardam, *Necessity and Proportionality in Jus ad Bellum and Jus in Bello, in* INTERNATIONAL LAW, THE INTERNATIONAL COURT OF JUSTICE, AND NUCLEAR WEAPONS 275 (Laurence Boisson de Chazournes & Philippe Sands eds., 1999) (detailed analysis of necessity and proportionality in relation to *jus ad bellum* and *jus in bello*).

defense" with protection of the legal order itself in its entirety.[148] Thus, justification for attacks on the Sudetenland, Poland, etc., at the beginning of World War II, as well as the attempted "*elimination*" of many perceived "threats" to the legal order, such as the Jewish population, the Roma, "deviates," the insane or otherwise "mentally deficient," or similar enemies of the Third Reich, were justified in the name of self-justified "necessary defense."[149] Justice Black, joined by Justice Douglas, dissenting in *Shaughnessy v. United States ex rel. Mezei*, wrote:

> No society is free where government makes one person's liberty depend upon the arbitrary will of another. Dictatorships have done this since time immemorial. They do now. Russian laws of 1934 authorized the People's Commissariat to imprison, banish and exile Russian citizens as well as "foreign subjects who are socially dangerous." Hitler's secret police were given like powers. German courts were forbidden to make any inquiry whatever as to the information on which the police acted. Our Bill of Rights was written to prevent such oppressive practices.[150]

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[148] Fletcher, *supra* note 147, at 140. France was much the same. *See* Olivier Cachard, *Translating the French Civil Code: Politics, Linguistics and Legislation*, 21 CONN. J. INT'L L. 41 (2005) ("During the nineteenth century, some authors gave a very vague definition of the expression 'lois de police et de surete,' which seemed to include different types of legislation, including criminal law and public order."). *See* Charles Demolombe, Cours de Code Napoleon ¶ 83 (Paris, Imprimerie generale 1871):

> Sous ce mot lois, il faut comprendre non-seulement les lois proprement dites, mais les ordonnances, r glements ou arr tes, rendus par les autorites competentes comme les prefets, les maires dans les limites de leurs attributions. Le caract re de ces lois, ou plutot, en general de ces regles obligatoires, est d'ordinaire facile a reconna tre; elles ont pour but la surete des personnes et des proprietes, le bon ordre, la salubrite publique; elles repriment les crimes, les delits et les contraventions. Mais je crois qu'il faut aller plus loin, et que cet article doit s'entendre, dans un sens plus vaste, de tout ce qui concerne l'ordre public, l'interet public.

[149] Dostoyefsky presents this with his usual genius through Raskolnikov's attempts to justify his slaughter of the old malevolent pawnbroker, Aliona Ivanova, as a revolutionary blow against capitalism and a call to destroy the Czarist rule in Russia. FYODOR DOSTOYEFSKY, CRIME AND PUNISHMENT (Penguin Classics 1968). *See* Thomas Franck & Scott Senecal, *Porfiry's Proposition: Legitimacy and Terrorism*, 20 VAND. J. TRANSNAT'L L. 195, 197 (1987). *See also* Fletcher, *supra* note 147.

[150] Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 217–18 (1953) (Black, J., dissenting), *quoted in* Elliot Walker, Note, *Safe Harbor: Is Clark v. Martinez the End of the Voyage of the Mariel?*, 39 CORNELL INT'L L.J. 121, 129 n.64 (2006).

The same thing has occurred in Stalinist USSR, Bosnia, Rwanda, Kosovo, Tibet, East Timor, Sierra Leone, the Democratic Republic of the Congo, and so it goes.

The danger of the statist version of *l'ordre public* in comparison to "*l'ordre public internationale*" is noted by Professor Leila Sadat:

> State sovereignty is the principle organizing premise of the world's legal order. However, to the extent that national and international legal orders, each autonomous in their own right, exist in a mutually reinforcing, even symbiotic relationship, it would seem deeply problematic to argue that states alone are the ultimate repositories of the international community's prescriptive and adjudicative jurisdictional capacities. Rather, as European scholars suggested during the post-war period, the international community may assert jurisdiction over a problem if it affects a fundamental interest of the international community or *l'ordre public international*.[151]

The policy of self-justified self defense and the *cliche*, "one person's terrorist is another's freedom fighter," are really a propagandistic appropriation[152] of the law that actually should be allowed to condemn terrorism by all who commit it. Counter-terrorism today seems to have deteriorated to violent vigilante justice against anyone or group even loosely connected to the claimed enemy. Innocents suffer, are maimed, and killed. Nationalistic rhetoric is that terrorism and such crimes are committed only by "the enemy." The enemy, including anyone remotely associated with them, is demonized as evil and to be eliminated. Obviously, when the leaders of all sides use this propaganda to convince their people, brute power and violence are accepted as the only efficient international relations. The rule of law and constitutional or human rights protections are eviscerated.

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[151] Leila Nadya Sadat, *Exile, Amnesty and International Law*, 81 NOTRE DAME L. REV. 955, 977 (2006), referencing Georges Levasseur, *Les Crimes Contre l'Humanité et le Probleme de leur Prescription*, 93 J. DROIT INT'L 259, 267 (1966) (Fr.).

[152] *See generally* RICHARD FALK, REVOLUTIONARIES AND FUNCTIONARIES: THE DUAL FACE OF TERRORISM 140 (1988).

VII. TERRORISM, TORTURE, AND THE UNITED STATES—WHAT DANGERS FACE OUR CONSTITUTIONAL REPUBLIC?

Propagandistic Appropriation[153] of the Term Terrorism and of the Law on Terrorism

W.H. Auden, *In Time of War, Commentary, from Journey to War* (1939)[154]

> Leave truth to the police and us; we know the good;
> We build the Perfect City time shall never alter;
> Our Law shall guard you always like a cirque of mountains
> Your ignorance keep off evil like a dangerous sea; . . .

We delude ourselves if we think that we do not commit terrorism or if we believe that we may use terrorism or terrorist tactics, because we have justice, goodness, or God on our side. "Enemies" are usually equally deluded. If we are truly interested in limiting terrorism, we must define terrorism in a manner that does not excuse or exclude our own conduct.[155] To define or characterize terrorism on the basis of the ends sought is misguided and self-defeating. Finally, the claim that because others commit terrorism, we may do the same is self-destructive.

Mario Vargas Llosa uses his novel, *The Feast of the Goat*, to illustrate the dangers of what Professors Dershowitz and others suggest ought to become official practice and John Yoo helped make official U.S. policy.[156] Generalissimo Trujillo's Minister of the Armed Forces, General Jose Rene (Pupo) Roman Fernandez, reflects on torture in *La Cuarenta*, where he thought he was being taken:

> He had even been present, . . . when one of those being interrogated, Dr. Tejeda Florentino, sitting on the grotesque

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153 Richard Falk used this term throughout his book, REVOLUTIONARIES, *supra* note 152.

154 From Auden, *In Time of War, Commentary, from Journey to War, supra* note 2.

155 *See* CHRISTOPHER L. BLAKESLEY, TERROR AND ANTI-TERRORISM: A NORMATIVE AND PRACTICAL ASSESSMENT 19–38, 213–24 (2006).

156 *See* Luban, *Liberalism, Torture, and the Ticking Time Bomb, supra* note 15; BLAKESLEY, TERROR AND ANTI-TERRORISM, *supra* note 155, at 279–94; David Luban, *The Defense of Torture, supra* note 15. *See also* Bassiouni, *supra* note 15; Monbiot, *supra* note 15; Goodman, *supra* note 15.

> Throne—a seat from a jeep, pipes, electric prods, bullwhips, a garrote with wooden ends for strangling the prisoner as he received electric shocks—was mistakenly electrocuted by a SIM technician, who released the maximum voltage.[157]

General Pupo Roman was tortured in a house also equipped with a throne. They had kept Roman "mounted" (a moribund term formerly used in Voodoo ceremonies in which they were drained of themselves and occupied by spirits):

> [T]hey stripped him and sat him on the black seat in a . . . windowless, dimly lit room. The strong smell of excrement and urine nauseated him. The seat, misshapen and absurd with all its appendages, was bolted to the floor and had straps and rings for the ankles, wrists, chest, and head. Its arms were faced with copper sheets to facilitate the passage of the current. A bundle of wires came out of the Throne and led to a desk or counter, where the voltage was controlled. In the sickly light, as he was strapped into the chair, he recognized the bloodless face of Ramfis [Rafael Trujillo's son]. . . . Ramfis moved his head and Pupo felt himself thrown forward with the force of a cyclone. The jolt seemed to pound all his nerves, from his head to his feet. Straps and rings cut into his muscles, he saw balls of fire, sharp needles jabbed into his pores. He endured it without screaming, he only bellowed. . . . Between sessions they dragged him, naked, to a damp cell, where buckets of pestilential water made him respond. To keep him from sleeping they taped his lids to his eyebrows with adhesive tape. . . . At . . . times they stuffed inedible substances into his mouth; at times he detected excrement, and vomited. In a rapid descent into sub-humanity, he could keep down what they gave him. . . . [Later] they removed the tape, ripping off his eyebrows. . . . and a drunken, joyful voice announced: "Now you'll have some dark, so you'll sleep real good." He felt the needle piercing his eyelids. He did not move while they sewed them shut. . . . When they castrated him, the end was near. They did cut off his testicles with a knife but used a scissors, while he was on the Throne. . . . They stuffed the testicles into his mouth, and he swallowed them, hoping with all his might that this would hasten his death.[158] . . .

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[157] LLOSA, *supra* note 17, at 328.

[158] *Id.* at 329–31.

> Another former Trujillista stalwart who had joined the conspiracy to assassinate the Goat was Miguel Angel Baez Díaz, after being tortured like Pupo Roman and then received the following treatment. "[When they were near starvation], a pot with pieces of meat was brought to them . . . Bàez . . . gulped it down, choking, eating with both hands until they were full . . . [The jailer came in and] . . . confronted Baez Diaz: 'General Ramfis Trujillo wanted to know if eating [your] own son didn't make [you] sick?'"[159]

Dashiell Hammett also provides a warning: "Play with murder [we can insert torture or terrorism] enough and it gets you one of two ways. It makes you sick, or you get to like it."[160] Camus does the same and provides a remedy: "[E]ven if murder is in the nature of man, the law is not intended to reproduce that nature."[161] A survivor of an Argentine torture camp during the "Dirty War," Lisandro Raul Cubas, has written poignantly about the impact of torture on its victim. *"La tortura psicológica . . . es tanto o más terrible que la fisica, aunke sean dos cosas que no se pueden comparar ya que una procura llegar a los umbrales del dolor. La capucha procura la desesperación."*[162] Members of radical movements have taken to slitting the throats or beheading captured civilians, journalists, or soldiers, as sick "advertisements" for their pretended "cause." This conduct is criminal. So is torture. So is indiscriminate bombing of civilians. The danger is equally as grave to the soul of the torturer, war criminal, or terrorist, and the soul of the nation that accommodates it.

The United States and Torture[163]

Vigilance is required, but has been missing, against governmental overreaction to and abuse of the people's fears of "terrorism." Whether governmental overreaction and abuse takes place at home or abroad, it

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[159] *Id.* at 339.

[160] DASHIELL HAMMETT, RED HARVEST 102 (1929).

[161] Albert Camus, *Reflections on the Guillotine, supra* note 113; from the essay, *Reflexions sur la Peine Capitale* (1957).

[162] "Psychological torture is much worse than physical torture, although they are two things that cannot be compared because one strives to reach the limits of pain and the other produces desperation, anguish, and madness." *Quoted and translated in* The Human Rights Brief, Center for Human Rights and Humanitarian Law, Washington College of Law, American University, Mar., 2006, http://www.wcl.american.edu/humanright/center.cfm, at 30.

[163] *See* authority cited *supra* notes 155 and 156.

erodes our constitutional liberty in the name of fighting terrorism, providing security, or protecting "the homeland." If we use terrorism to "fight" terrorism, we are terrorists. Hence, the "homeland," our constitutional republic, and our Constitution become victims to our own and other's terrorism. When we descend to the level of simple vengeance, or to become so fearful and overwrought, we lose our moorings. We have allowed our leaders to manipulate our fear of terrorism to the point that we have acquiesced in the erosion of our morals, our constitutional legal system, and our very sense of right and wrong. Michael Ignatieff writes: "we need to widen out our reflections, think about the moral nihilism of torture and why—this is the most painful question—torture remains a temptation, even a supposed necessity, in a war on terror."[164] Michael Ignatieff also makes this point about torture: "For torture, when committed by a state, expresses the state's ultimate view that human beings are expendable. This view is antithetical to the spirit of any constitutional society whose *raison d'etre* is the control of violence and coercion in the name of human dignity and freedom."[165] Ignatieff's statement about the moral nihilism of torture[166] is important, especially as some call for its legalization and regulation, and Congress legalizes it.[167] The law cannot

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[164] Ignatieff, *supra* note 11. *Cf.* Michael Ignatieff, *Essay: If Torture Works . . .* , 121 PROSPECT MAGAZINE, Apr. 1, 2006, *available at* http://www.prospectmagazine.co.uk/article_details.php?id=7374, extracted from MICHAEL IGNATIEFF, TORTURE: DOES IT MAKE US SAFER? IS IT EVER OK?, (Kenneth Roth & Minky Worden eds., 2006). *See also* Jonathan H. Marks, *9/11 + 3/11 + 7/7 = ? What Counts in Counterterrorism*, 37 COLUM. HUM. RTS. L. REV. 559, 560 (2006) (noting that "[d]espite the smaller scale of these attacks, they have the potential to generate widespread fear and anger. This article builds on new work in behavioral law and economics to show how these emotional responses can generate systematic biases that motivate and direct counter-terrorism policy. These biases should be cause for concern, not least when they lead us to adopt policies that are more burdensome on others instead of those that are most effective at preventing further attacks. Not surprisingly, policies which impose burdens on others—and therefore appear less costly—tend to interfere with civil liberties.").

[165] Ignatieff, *supra* note 11.

[166] *Id.*

[167] *See, e.g.*, DERSHOWITZ, *supra* note 13, at 477. A segment of CBS News's "60 Minutes" program broadcast Sunday, January 20, 2002, featured law professor Alan Dershowitz, who argued the position that he has earlier promoted strenuously since September 11, 2001, that the use of torture by law enforcement officials should be sanctioned in certain cases, such as acts of terrorism. He argues that torture is "inevitable" in such cases and that it would be better to have procedures in place to regulate it. Kenneth Roth, executive director of Human Rights Watch, was also interviewed for the program and disagreed just as vigorously with Professor Dershowitz. *See*

accommodate moral nihilism, which renders the rule of law a tool of nihilism. Those who take the decision to violate our values in the name of "security" or "anti-terrorism," or "democracy" must not be allowed to devalue our law and morals by being given impunity. If the law condones such actions, the law itself is corrupted.

Professor Alan Dershowitz may be correct that torture will always occur in stressful times. He is wrong, however, that the proper adaptation to this "reality" is to "regulate" torture, which is to say, to legitimize it. If we allow Congress or our judiciary to be complicit in torture or terrorism, we enshrine that conduct as legal, as moral, as representing what we are. Justice Jackson's dissent in the *Koramatzu* case is apt for this point, especially his quotation of Cardozo's aphorism: "[a]n enshrined rule 'will expand to the limits of its logic'."[168] Thus, the issue of "allowing" torture is a matter of principle, of moral standards, and the value of the rule of law.[169]

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also Wallace & Kutrip, *supra* note 13. *But see* Luban, *Liberalism, Torture, and the Ticking Time Bomb, supra* note 15; BLAKESLEY, TERROR AND ANTI-TERRORISM, *supra* note 155, at Ch. 11, at 279–294; Luban, *The Defense of Torture, supra* note 15. *See also* Monbiot, *supra* note 15; Goodman, *supra* note 15.

168 Korematsu v. United States, 323 U.S. 214, 65 S. Ct. 193, 89 L. Ed. 194 (1944), Justice Jackson's dissenting opinion, at 323 U.S. 242, 246, quoting Cardozo's aphorism, BENJAMIN CARDOZO, THE NATURE OF THE JUDICIAL PROCESS, at 51 (William S. Hein, & Co., 1921).

169 *See* THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB 172, 172 (Karen J. Greenberg & Joshua L. Dratel eds., 2005) [hereinafter THE TORTURE PAPERS], *referenced and discussed in* W. Bradley Wendel, *Legal Ethics and the Separation of Law and Morals*, 91 CORNELL L. REV. 67, 68, n.1, 114–15 n.173 (2005), also noting the following: Powell's objections are succinctly presented in a memo to Alberto Gonzales. *See* Memorandum from Colin L. Powell, Sec'y of State, to Alberto R. Gonzales, Counsel to the President (Jan. 26, 2002), in THE TORTURE PAPERS, *supra*, at 123, 122–25. According to sources at the State Department, Powell "hit the roof" when he read the analysis prepared by Justice Department lawyers. *See* John Barry et al., *The Roots of Torture*, NEWSWEEK, May 24, 2004, at 26, 31. The State Department's Legal Advisor also objected to the decision not to apply the Geneva Conventions to the conflict in Afghanistan. *See* Memorandum from William H. Taft, IV, Legal Advisor to the State Dep't, to Alberto R. Gonzales, Counsel to the President (Feb. 2, 2002) [hereinafter Feb. 2, 2002, Taft Memorandum], *in* THE TORTURE PAPERS, *supra* at 130. *See also* TORTURE: A COLLECTION (Sanford Levinson ed., 2004); THE CONSTITUTION IN WARTIME: BEYOND ALARMISM AND COMPLACENCY (Mark Tushnet ed., 2004); JEAN STEFANCIC & RICHARD DELGADO, HOW LAWYERS LOSE THEIR WAY (2005); Bassiouni, *supra* note 15. *See* some of the interesting comments have been entered on http://prawfsblawg.blogs.com/prawfsblawg/2006/06/ kahan_on_goldsm.html.

Torture and terroristic conduct must be recognized and treated as criminal. The law must not condone the conduct, even if an executive or Congress ultimately pardons, or if any of the three branches of government mitigates the punishment of a perpetrator. The pardoner must also be accountable for pardoning someone who has tortured or committed an act of terrorism. Failure to hold those who commit such acts degrades us, makes us complicit, and eviscerates all that we and our constitutional republic should stand for. When a perpetrator is acting in our name, the principles of our democratic society and the rule of law require condemnation and clarity.

The similarities are striking between anti-terrorism measures, including torture, and terrorism itself—or between the legal and moral justifications for anti-terrorism measures and the manifestos or self-righteous calls for vengeance, which claim to justify terrorism—to fight a just cause. Frighteningly, some legislators, judges, scholars, and common people on all sides are willing to justify, or at least excuse or ignore, conduct that is morally repugnant, illegal, and dangerous to their own interests. Terrorism and reaction (or over-reaction) to it strains the very core of a constitutional republic and, it seems, cause many who have professed to

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[I]n the Torture Memo, everything was shaky, from top to bottom, and the resulting conclusions, when implemented by the recipient, had very clear, direct and tragic consequences. . . . NEWSWEEK, http://www.msnbc.msn.com/id/11079547/site/newsweek/, establishes the time-line.

Posted by "transatlanticlawyer," June 6, 2006. Brad Wendel writes:

As suggested in the post by transatlanticlawyer, there is a difference between arguing for reasonable interpretations of legal norms to permit your client to do what it wants, and the style of interpretation engaged in by Yoo and Bybee. The Yoo/Bybee style is unconcerned with what a reasonable lawyer or judge would believe the law to mean; their only concern is to find some barely non-frivolous basis for unlimited latitude in the treatment of detainees. Here's where many lawyers respond, what's wrong with that? The answer is that it may be permissible (if not a very good idea, tactically speaking) to urge barely non-frivolous arguments in litigation, where there is an adversary and an impartial referee, but transactional and counseling practice is very different. Without adversarial checking, a lawyer in a counseling setting is in effect a private law-giver with respect to the client. Thus, it is completely disingenuous to claim to be justified with respect to litigation standards when one is acting in a counseling role. The role of any lawyer in a counseling role—not just a government lawyer in a policymaking office like OLC—is to tell the client what the law is, not what it might be in cloud-cuckoo-land if a judge accepted a whole string of highly implausible textual arguments, completely ignoring the substantive meaning of those texts.

See analysis of this case and the question of moral and legal responsibility *in* W. Bradey Wendel, *Legal Ethics and the Separation of Law and Morals*, 91 CORNELL L. REV. 67 (2005).

be libertarians to decide that abuse, even torture, is appropriate or acceptable under extreme circumstances, such as that caused by the September 11 attack. Some, claiming to represent a "liberal" perspective and others claiming a "conservative" point of view (if those terms have any meaning today), have argued that the institution of military commissions for Guantanamo is constitutional and wise.[170] The U.S. Supreme

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[170] Congress enacted the Military Commissions Act of 2006, Pub. L. No. 109–366, 120 Stat. 2600 (2006) (authorizing prosecution of "alien unlawful enemy combatants engaged in hostilities against the United States" by military commissions and precludes habeas corpus review by the civilian courts); 10 U.S.C.A. § 821; 5 U.S.C.A. § 551 (West 1998 & Supp. 2006); Ronald D. Rotunda, *The Detainee Cases of 2004 and 2006 and Their Aftermath*, 57 SYRACUSE L. REV. 1 (2006). *See* Bradley, Goldsmith & Moore, *supra* note 144 (providing a functional apologia for the "constitutionality" of the practice). Ruth Wedgwood argued for military commissions for Walker-Lindh: "As a 'battlefield detainee,' Walker "has no more right to a lawyer than any other al-Qaida member, said Ruth Wedgwood, [a]ny information he revealed could be used in military commissions that might try other terrorism suspects, Wedgwood added." SEATTLE TIMES, Dec. 20, 2001, at A3 News, Close-Up; Jim Puzzanghera, *The Case of 'Taliban John: Treason Among Options for Charging American* 2001 WL 3530877; Charles Lane, *Walker's Case Poses Novel Legal Issues; Taliban Suspect's Detainment Overlaps Geneva Convention, Fifth Amendment*, WASH. POST, Dec. 20, 2001, at A25, *available at* WL 31544095; Ruth Wedgwood., *Commentary: The Case for Military Tribunals*, WALL ST. J., Dec. 3, 2001. *See also* Akhil Reed Amar, *War Powers: Is Bush Making History?*, TIME MAGAZINE, Nation, Dec. 3, 2001. *Cf.* Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259 (2002) (arguing that without a declaration of war, the executive order establishing military commissions is invalid). The arguments for use of military commissions are challenged by George P. Fletcher, in *War and the Constitution*, AM. PROSPECT, Jan. 1, 2002, at 26, referring to *Ex parte Milligan*, as being the proper precedent, not the aberrational and embarrassing decisions of (generally cited as authority); *Ex parte* Quirin, 317 U.S. 1 (1942); and Yamashita v. Styer, 327 U.S. 1 (1946) (almost never cited, as it is far too embarrassing); and by Harold Hungju Koh, Editorial, TIME MAGAZINE, *available at* http://www.time.com/time/nation/article/0,8599,186581,00.html. *See also* James W. Smith III, *A Few Good Scapegoats: the Abu Ghraib Courts-Martial and the Failure of the Military Justice System*, 27 WHITTIER L. REV. 671 (2006); Carlton F.W. Larson, *The Forgotten Constitutional Law of Treason and the Enemy Combatant Problem*, 154 U. PA. L. REV. 863, 864–65 nn.1 and 2 (2006), citing and quoting the following, while disagreeing with both the "liberal" and the"conservative" positions: "Liberal:" Wayne McCormack, *Military Detention and the Judiciary: Al Qaeda, the KKK and Supra-State Law*, 5 SAN DIEGO INT'L L.J. 7, 71 (2004) ("Until the international community defines terrorist crimes as being violations of the 'law of war,' the U.S. system should commit that these persons be tried in civilian courts rather than by military commissions . . . because there is no coherent distinction between the alleged terrorist and the ordinary street criminal."); Jordan J. Paust, *Post-9/11 Overreaction and Fallacies Regarding War and Defense, Guantanamo, the Status of Persons, Treatment, Judicial Review of Detention, and Due Process in Military Commissions*, 79 NOTRE DAME L. REV. 1335, 1342 (2004) ("[A]ny conflict between the United States and al Qaeda as such cannot amount to war or trigger application of the laws of war."); Kenneth Roth, *The Law of*

Court raised questions about military commissions in relation to Guantanamo.[171]

Some Courageous Attorneys Challenged Administration Practices

Attorneys in the Judge Advocate General (JAG)[172] Corps, many at the top of this juridical corps, and some attorneys in the Department of

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War in the War on Terror, FOREIGN AFF., Jan.–Feb. 2004, at 2, 7 ("War rules should be used in [cases away from the traditional battlefield] only when no law-enforcement system exists, . . . not when the rule of law happens to produce inconvenient results."). "Conservative:" Thomas L. Hemingway, *In Defense of Military Commissions*, 35 U. MEM. L. REV. 1, 2 (2004) ("In short, [the conflict with Al Qaeda] is a real, not a metaphorical, war. The criminal paradigm . . . is thus inapplicable."); Derek Jinks, *September 11 and the Laws of War*, 28 YALE J. INT'L L. 1, 38 (2003) ("[T]he September 11 attacks constituted the initiation of an 'armed conflict' within the meaning of . . . the Geneva Conventions."); John C. Yoo & James C. Ho, *The Status of Terrorists*, 44 VA. J. INT'L L. 207, 211 (2003) ("As a matter of domestic law, the President's finding [that the September 11 attacks placed the United States in a state of armed conflict] settles the question whether the United States is at war."); John C. Yoo, *War and the Constitutional Text*, 69 U. CHI. L. REV. 1639, 1683–84 (2002) (rejecting the contention that the use of military force requires congressional approval on the grounds that such an approach is too inflexible and unwieldy to effectively counter threats to national security). Also citing LOUIS FISHER, MILITARY TRIBUNALS AND PRESIDENTIAL POWER 9 (2005) Rosa Ehrenreich Brooks, *War Everywhere: Rights, National Security Law, and the Law of Armed Conflict in the Age of Terror*, 153 U. PA. L. REV. 675, 725–29 (2004) (arguing that "binary distinctions between war and peace are no longer tenable"). *See also* Mark Tushnet, *Emergencies and the Idea of Constitutionalism, in* THE CONSTITUTION IN WARTIME: BEYOND ALARMISM AND COMPLACENCY 39 (Mark Tushnet ed., 2004).

171 Hamdan v. Rumsfeld, 126 S. Ct. 2749 (2006) (*Hamdan II*). *See also* Zagaris, *Counter-Terrorism, supra* note 7, discussing *Ali Saleh Kahlah Al-Marri v. Commander S.L. Wright*, No. 06-7427 (4 Cir. Nov. 20, 2006); United States v. Al-Marri, No. 03-cr-94–VM-1, Criminal Complaint (S.D.N.Y. Jan. 22, 2003). Also note that the Canadian Supreme Court unanimously overturned terrorist detention procedures. *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9; Zagaris, *Canadian Supreme Court, supra* note 7.

172 Osiel, *The Banality of Good, supra* note 18, at 1751, 1852–53, and nn.470–474, writes about the JAG Corps:

> As licensed lawyers, they have had considerably more formal education than most officers, with their compensation in part determined accordingly. Their years of higher civilian education generally exceed even higher-ranking officers who seek their counsel on humanitarian law.
>
> As lawyers, JAG officers are also members of a learned profession whose civilian ranks they may soon expect to join and whose nonmilitary norms have considerable purchase upon them. Their relative independence from even civilian superiors at high levels in the U.S. Defense Department was recently made apparent, for instance, in the public disclosure by active duty JAGs of their pro-

Justice and other agencies courageously challenged the Bush administration's wanton misreading of both international and U.S. domestic law. The military attorneys argued, in sharp contrast to previous reports of military investigations, that the "aggressive interrogation techniques" used at Guantanamo and elsewhere were in violation of the *Army Field Manual* on interrogation.[173] The recent law makes the field manual the legal standard for all U.S. military interrogation practices, which must not include cruel, inhuman, or degrading treatment, however that is defined.[174] President Bush, himself, however, has suggested that he may ignore that legislation, like any other, when it comes to his view and decision that "national security" or maybe even just foreign affairs necessitate it.[175] This position is still consistent with the noted position in the infa-

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fessional disagreement with civilian White House and Defense Department lawyers about interpretation of the Anti-Torture Convention in its application to Al Qaeda detainees.

Citing for this latter point, Barry et al., *supra* note 169, at 28, 32.

[173] *See* Josh White, *Military Lawyers Say Tactics Broke Rules*, WASH. POST, Mar. 16, 2006, at A13, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2006/03/15/AR2006031502299.html. Wendel, *supra* note 169, at 68, n.1, 114–15, n.173, notes that in July 2005, "a series of memos from high-ranking military lawyers in the services' Judge Advocate Generals (JAG) Corps were declassified." *See* http://balkin.blogspot.com/ jag.memos.pdf [hereinafter JAG Memos]. These memos raised a number of objections to the legal analysis put forward by the Justice Department, Office of Legal Counsel (OLC) lawyers, referenced in notes 144 and 169 *supra* and accompanying text. One recurring theme is that removing the protection of the Geneva Conventions from any category of detainees will jeopardize American service personnel in future conflicts. *See id.* The JAG Memos emphasize that the U.S. military has historically taken the moral high ground in its operational conduct, regardless of whether this conduct is reciprocated by the enemy. *See id.*

[174] *See* White, *supra* note 173.

[175] For example, "after the President signed into law Senator John McCain's legislation to prohibit the cruel, inhuman, and degrading treatment of detainees, a bill the President claimed to support in its final form, he asserted his right to interpret the bill consistent with his authority as Commander-in-Chief—in effect, to ignore the law if he deems necessary." *Harman And Conyers Demand Administration Rescind Patriot Act "Signing Statement,"* Government Press Releases via FDCH, GOVPR (No Page), Mar. 28, 2006, available at 2006 WLNR 5140508. Not only that, the Pentagon is attempting, in June, 2006, to exclude from the Army Field Manual, any requirement prohibiting prisoner humiliation as an interrogation technique. *See* Julian E. Barnes, *Army Manual to Skip Geneva Detainee Rule: The Pentagon's move to omit a ban on prisoner humiliation from the basic guide to soldier conduct faces strong State Dept. opposition.*, L.A. TIMES, June 5, 2006, *available at* http://www.latimes.com/news/printedition/la-na-torture5jun05,0,5568593.story?coll=la-news-science.

mous Yoo and Gonzales torture memoranda, which argues in a nearly frivolous manner, that the president may authorize torture, or, at least, conduct that had always been considered torture or cruel and inhumane. To advise the president, in the manner of a counselor who ultimately makes policy (as did the lawyers in the Office of Legal Counsel), it is disingenuous to claim that one is only acting like any lawyer in litigation. The president's lawyers were making "barely-non-frivolous" arguments in an adversarial mode, as is sometimes done in litigation (although this seems like a generally bad tactic). The infamous "torture memoranda" resulted in not only bad results, but results that were tragic and disastrous for U.S. policy, morale, morality, and standing in the world community.[176] The sickening reality that we are willing to keep so many human beings lost in black holes, without hope, and without any attempt to present evidence against them is also indicative of some depravity.

Congressional Authority and Military—"Security" Conduct

Even President Bush seems to have conceded that Congress had authority to prevent the U.S. military from torturing, through their powers to regulate the armed forces. Prohibitions of torture and inhumane treatment already exist under Rules for the Government and Regulation of the Land and Naval Forces,[177] although in June 2006, the Pentagon, with strong State Department opposition, attempted to remove the prohibition on prisoner humiliation from the new *Army Field Manual on Interrogation:*

> The Pentagon has decided to omit from new detainee policies a key tenet of the Geneva Convention that explicitly bans "humiliating and degrading treatment," according to knowledgeable military officials, a step that would mark a further, potentially permanent, shift away from strict adherence to international human rights standards.

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[176] See authority and discussion *supra* notes 144, 169, 173, and *infra* note 177 and accompanying text.

[177] *See, e.g.*, Army Reg. 190–8 (governing treatment of persons detained by the military, which essentially reproduces the Geneva Convention Relative to the Treatment of Prisoners of War, and other relevant treaties). The following few paragraphs were greatly benefitted by my research assistant, Peter Nuttal. *But see* Julian E. Barnes, *Army Manual to Skip Geneva Detainee Rule: The Pentagon's move to omit a ban on prisoner humiliation from the basic guide to soldier conduct faces strong State Dept. opposition*, L.A. TIMES, June 5, 2006, *available at* http://www.latimes.com/news/printedition/la-na-torture5jun05,0,5568593.story?coll=la-news-science.

> The decision could culminate a lengthy debate within the Defense Department but will not become final until the Pentagon makes new guidelines public, a step that has been delayed. However, the State Department fiercely opposes the military's decision to exclude Geneva Convention protections and has been pushing for the Pentagon and White House to reconsider, the Defense Department officials acknowledged.[178]

Subjects like offenses against the law of nations and regulating the CIA or any other service falls under Congress's power to define and punish offenses against the law of nations.[179] Some of the framers seem to have found the language, in Article 1, Section 8, Clause 10, that Congress could *define* the offenses against the law of nations to be controversial, since most of them saw the law of nations as a body of international law. It seems strange that this might have been controversial, unless perhaps it occurred to some of the framers that they should be leading, not just following, in the arena of international law. It also may have been that the language was so broad, perhaps vague and empowering to Congress.[180]

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[178] Barnes, *supra* note 177. *See* the strong opposition to this stressed vigorously by Major General Daniel V. Wright, *Know What Is Right*, June 2006 ARMY 24 (2006) (referencing and quoting speech emphasizing the need to be human, even in war, by former Justice Sandra Day O'Conner, given at the occasion of her acceptance of the Thayer Award, at West Point, Sept. 2005). See also Ted Sorensen stated the following in *America's Role in the World: Presidential Trashing of American Law and Diplomacy, Remarks from and Interview with Theodore C. Sorensen*, 30-SUM FLETCHER F. WORLD AFF. 11, 15 (2006) and at 16, quoting THOMAS PAINE, COMMON SENSE (Philadelphia: W. & T. Bradford, 1776), *available at* www.bartleby.com/133/ (accessed June 6, 2006).

[179] U.S. CONST., art. 1, § 8, cl. 10.

[180] Also, Attorney General Alberto Gonzales recognized this, at least when the Constitution directly refers to the term. *See* Alberto Gonzales, U.S. Att'y General, Foreign Law and Constitutional Interpretation, Address at the University of Chicago Law School (Nov. 9, 2005) (excerpts available at WASH. POST: *Campaign for the Supreme Court*, http://blogs.washingtonpost.com/campaignforthecourt/ (Nov. 9, 2005)) (where Gonzales asserted that the framers "imported into the Constitution certain terms and concepts from international law—such as 'Offenses Against the Law of Nations,' 'Letters of Marque and Reprisal,' 'Consuls,' and 'Treaties'," although Gonzales argued that the use or application of international law in constitutional analysis should be limited to these concepts"). *Cited, quoted and discussed in* Sarah H. Cleveland, *Our International Constitution*, 31 YALE J. INT'L L. 1, 4 and 6, nn.19, 33 (2006). Similarly controversial for some, but pertinent to congressional authority to define and punish this conduct, is Article 1, Section 8, Clause 18, as noted by Michael Paulsen: "[T]he Framers gave Congress the wonderfully indefinite and enduringly controversial Sweeping Clause power to 'make all Laws which shall be necessary and proper for carrying into execution the foregoing Powers, and all other Powers vested

Proscription of torture and inhumane treatment of captives in U.S. custody can probably find justification in Congress's power to define and punish offenses against the law of nations, since torture and inhumane treatment are offenses against the standards of international law.[181]

In the light of Senator John McCain's motivation to sponsor H.R. 2985, based on feedback from the international community and from attorneys from the Judge Advocate's General Corps., among others, over Abu Ghraib, Guantanamo, and other places, the amendment can be characterized as "due diligence" to prevent torture and inhumane treatment, in accord with our international obligations.[182] Mistreatment of persons in U.S. custody would fit the over-arching definition of offenses against the law of nations, since each incident is likely to involve international concerns with the U.S. government interacting with a foreign citizen and involves congressional concerns about America's image in the international community.[183]

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by this Constitution in the Government of the United States, or in any Department or Officer thereof.'" Michael Stokes Paulsen, *Youngstown at Fifty: A Symposium Youngstown Goes to War*, 19 CONST. COMMENT. 215, 239, nn.69–71 (2002). On the other hand, "[i]n the controversial Henfield's Case, leading jurists among the framers stressed the U.S. obligation to impose sanctions for offenses against the law of nations, emphasizing both the duty to so act and the range of responses open to the government." Henfield's Case, 11 F. Cas. 1099 (C.C.D. Pa. 1793) (No. 6360), *cited and discussed in* Beth Stephens, *Federalism and Foreign Affairs: Congress's Power To "Define and Punish . . . Offenses Against The Law of Nations,"* 42 WM. & MARY L. REV. 447, 494, and n.185 (2000). *See also* Sorensen *supra* note 178, at 15 and at 16, quoting THOMAS PAINE, COMMON SENSE (Philadelphia: W. & T. Bradford, 1776), available at www.bartleby.com/133/ (accessed June 6, 2006):

> But where, say some, is the King of America? I'll tell you Friend, . . . let a crown be placed thereon, by which the world may know, that so far as we approve of monarchy, that in America THE LAW IS KING. For as in absolute governments the King is law, so in free countries the law ought to be King; and there ought to be no other. But lest any ill use should afterwards arise, let the crown at the conclusion of the ceremony be demolished, and scattered among the people whose right it is.

181 *See United States v. Arjona*, 120 U.S. 479 (1887) (finding that the offenses power legitimized the federal crime of counterfeiting notes issued by foreign government-owned banks, since "the law of nations extended to the protection of this more recent custom among bankers of dealing in foreign securities").

182 *Id.* at 488 ("[I]f the thing made punishable is one which the United States are required by their international obligations to use due diligence to prevent, it is an offense against the law of nations.").

183 *See, e.g.*, National Public Radio (NPR), Morning Edition 10:00 AM EST, Oct. 6, 2005, Senate backs strict rules for detainee treatment (traveling around the world, Senator McCain found the photos of Abu Ghraib and perceived prisoner mistreat-

VII. CONCLUSION

W.H. Auden, *Gare du Midi* (1940)

Behind you swiftly the figure comes softly,
The spot on your skin is a shocking disease.
Clutching a little case,
He walks briskly to infect a city
Whose terrible future may have just arrived.[184]

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ment treatment issue, harming the U.S. world image); *see also* Sanchez-Espinoza v. Reagan 770 F.2d 202 (D.C Cir. 1985) (offenses against the law of nations violate standards, rules or customs (1) affecting relationships between states or between an individual and a foreign state, and (2) used by or between states for their common good). *But see* IIT v. Vencap, Ltd., 519 F.2d 1001, 1015 (2d Cir. 1975) ("Thou Shalt Not Steal," is not part of the law of nations). I would respectfully disagree with this point made by the Second Circuit in *IIT v. Vencap, Ltd.*, inasmuch as "Thou Shalt Not Steal" is a general principle of law to be found in the domestic law of all nations; hence, it is binding authority according to the Statute of the International Court of Justice, article 38. Statute of the International Court of Justice, art. 38, *available at* http://www.icj-cij.org/icjwww/ibasicdocuments/ibasictext/ibasicstatute.htm (last visited May. 19, 2006) [hereinafter ICJ Statute]. *Also quoted and discussed in* BLAKELSEY, ET AL., *supra* note 32, at 3–26. Article 38(1) was directly incorporated from the Statute of the Permanent Court of International Justice. Article 38(1) reads:

> 1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
>
> a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
>
> b. international custom, as evidence of a general practice accepted as law;
>
> c. the general principles of law recognized by civilized nations;
>
> d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

This authority and its hierarchy are seen as representing the basic legal sources of international law. It is derived from the "civil law tradition," so to understand international law properly, to be able to negotiate, litigate, or even to communicate effectively in the arena of international law, it is necessary to understand that its origin and discipline, its philosophical context, and the mind set of many of its practitioners is "civilian" or a variation on that theme, rather than common law in inspiration. To practice international law well, one should also be a comparativist.

[184] W.H. Auden, *Gare du Midi* (1938), *reprinted in* W.H. AUDEN, COLLECTED POEMS 180 (Edward Mendelson ed., 1991).

True, those who allow, affirm, or acquiesce to oppressing others and, of course, slaughter the innocents are truly on the side of the executioners. Similarly, as Thomas Merton warns in his essay, *The Plague of Albert Camus*[185] and as Camus himself suggests in his novel, *The Plague* and in his essay, *L'Homme Revolte* (1954),[186] revolution and "freedom fighting" are often used as "facile justification of mass murder."[187] Sartre was wrong to suggest that violence against non-combatants is justified. He believed that all those not engaged in fighting oppression were enemies, hence, the equivalent of combatants or oppressors.[188] Camus was correct, however, to reject this Sartrean ethic to the extent that it finds virtue in slaughtering innocents even for a supposed just cause.[189] One can defend and protect the innocents of the world, without destroying other innocents.

No doubt, Camus is correct that the established *cliches* or the "ethic" of established order, or at least of those with power, is based upon "values" that lead ultimately to a moral (and I would add, legal) abyss. Those with power are trying to maintain or expand it, or those seeking power apply ideology based on demonization and death. Thus, oppression and exploitation of human beings to accommodate one's material interests, even if disguised in some high-sounding abstraction, are terroristic. Similarly, destruction of innocent humanity to accomplish escape from oppression is terrorism.[190] In the end, this self-justification and self-delusion works only to allow so-called enemies to feel justified in their counter-vengeance. Oppression, crimes against humanity, and in-kind counter-violence are of a kind; they only continue the frightening cycle. We participate in this tyranny of evil and death,[191] when we passively allow our government or the leaders of our group to commit it or to bol-

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185 Thomas Merton, *The Plague of Albert Camus: A Commentary and Introduction, in* MERTON, *supra* note 124, at 181.

186 Albert Camus, *l'Homme Révolté* (The Rebel) (Gallimard, 1951), *discussed in* Merton, *supra* note 185.

187 Albert Camus asks, "[c]an there be any historic action that does not eventually end in mass murder?"), in *L'Homme Révolté* (The Rebel) (1951); *discussed in* Merton, *supra* note 185, at 181, 199.

188 Ironically, this famous atheist harkens back to St. Augustine on this point. *See* authority and discussion of this in notes 21, 110, *supra* and accompanying text.

189 *See* Merton, *supra* note 185, at 181, 185, 194.

190 *See* Merton, *supra* note 185, at 181.

191 *Id.* at 182.

ster regimes or groups that commit it. Our obligation as human beings is to fight passionately to save the lives of all other human beings.[192]

Sartre was correct, but incomplete, in aphorizing that "once begun, it [a war of national liberation] is a war that gives no quarter."[193] Today, no quarter is given. Mass killing of innocents in war, sadly, is done by states and sometimes deemed to be justifiable or acceptable for a "just cause." This perception is especially troublesome, when groups consider themselves being faced with an unending war. Thus, the seemingly eternal war of the oppressed to escape oppression (or so it is called by its proponents) calls for the destruction of the enemy, so that one's own will not be destroyed or oppressed. We recall the "Crusade" against Islam during the Middle Ages. Today, we see the idea of a "clash of civilizations" marketed. It is not far-fetched for some to see this as a "Crusade" against Islam. This view is raised by some as a "battle-flag" call for vengeance for a counter-"Holy War." President Bush called for his "War against Terrorism," which he warns will be long-lasting and continual, requiring all our devotion.[194] Thus, if we have an ongoing, continual war on evil doers (from both side's points of view), what does that cause to happen to our values, our human rights, and civil liberties? If we remain in an emergency setting, what are we willing to accommodate? What are we willing to become?

Happily, some conduct still, even within war, and, thus, *a fortiori* during times of relative peace, is not justifiable, legal, or acceptable. A fight for survival or even one for gaining or retaining power may cause people to do unspeakable things, but we must not justify or even accommodate this. Thus, even if killing innocents is deemed effective to promote an end considered by the actors to be good—even if it actually is an efficient means to intimidate a government or dissident group, or to render a population insecure—it is not morally justified or legal. Unfortunately,

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[192] *Id.* at 186.

[193] JEAN-PAUL SARTRE, PREFACE TO FRANTZ FANON, THE WRETCHED OF THE EARTH, at 21 (C. Farrington ed., 1963).

[194] David E. Sanger, *Domestic Security Spending to Double Under Bush Plan*, Jan. 25, 2002 N.Y. TIMES NEWS SERV. 2002 WL-NYT 0202500118 (page numbers not available on line) ("President Bush said . . . that he would propose doubling the amount the government spends on domestic security next year to nearly $38 billion, saying the United States was "still under attack" and would remain on a war footing for a long time to come.").

many international law jurists and commentators have not learned or have forgotten essential and basic criminal law.[195]

Perhaps we have developed enough to transcend the extremes of this need to propitiate the gods, but justice is *required* for real peace. At least some culprits may now be preparing to meet a proper legal fate. For example, Generalissimo Augusto Pinochet, although not extradited to Spain by the United Kingdom, was held in the United Kingdom and extradited to Chile, with holdings that he is not to be immune from prosecution.[196] Pinochet is currently under house arrest and, given his age, it is questionable that he will ever face earthly justice. Spain and Italy prosecuted some Argentine and Chilean military officials for their conduct in their Dirty Wars in those two countries.[197]

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[195] *See, e.g.*, WAYNE R. LAFAVE, CRIMINAL LAW ch. 7 (3d ed. 2000); ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW 46–119 (3d ed. 1982); GEORGE FLETCHER, RETHINKING CRIMINAL LAW 235–391 (1978). *Cf.* JOSEPH CONRAD, THE HEART OF DARKNESS (Signet Classic, 1950); JOSEPH CONRAD, LORD JIM (Penguin, 1968); WILLIAM FAULKNER, THE SOUND AND THE FURY (Norton Critical Ed., 2d ed., 1994); WILLIAM FAULKNER, LIGHT IN AUGUST (Random House, 1930); WILLIAM FAULKNER, SANCTUARY (Random House, 1931), especially *see* André Malraux's classic preface in the French version. All of this is discussed brilliantly in Thomas Merton, *Faulkner and His Critics, in* MERTON *supra* note 124, at 117–23. *See also* R. v. Dudley and Stephens [1884] 14 Q.B.D. 273, 285–86 (U.K.); R. v. Howe [1987] 1 A.C. 417 (H.L.) (U.K.); United States v. Holmes, 26 F. Cas. 360 (C.C.E.D. Pa. 1842); GLANVILLE WILLIAMS, TEXTBOOK OF THE CRIMINAL LAW 604 (2d ed. 1983); John Smith, *Justification and Excuse on the Criminal Law*, and *Necessity and Duress*, the Hamlyn Lectures (1989). On the moral problem of choosing one's victim, *see* Andrew Ashworth, *Justifications, Necessity, and the Choice of Evils, in* PRINCIPLES OF CRIMINAL LAW 153–54 (3d ed. 1999).

[196] *See* Blakesley, *Autumn of the Patriarch, supra* note 18.

[197] *See, e.g.*, OSIEL, *supra* note 18; Oisel, *The Banality of Good, supra* note 18, at 1751, 1797, nn.4 and 216 (2005); Schwartz, *supra* note 18, at 364 n.295 (noting that "Adolfo Scilingo, who voluntarily came to Spain, was convicted for crimes against humanity in April 2005"). *See also* the case of Ricardo Miguel Cavallo, extradited by Mexico to Spain in June 2003; *see* Human Rights Watch, *available at* http://www.hrw.org/reports/2001 and 2004. On January 11, 2006, Spanish prosecutor Dolores Delgado formally charged Ricardo Miguel Cavallo of genocide, organized terrorism, crimes against humanity and murder. From Trialwatch, http://www.trial-ch.org/trialwatch/profiles/en/legal-procedures/p48.html, case of Ricardo Miguel Cavallo. Trial Watch notes that it is "*un projet de l'association* TRIAL (Track Impunity Always—Association Suisse Contre l'Impunite)." *See also generally* Giulia Pinzauti, *Symposium An Instance of Reasonable Universality: The Scilingo Case*, 3 J. INT'L CRIM. JUST. 1092, 1095–97 (Nov. 2005); Alicia Gil Gil, *Symposium: The Flaws of The Scilingo Judgment*, 3 J. INT'L CRIM. JUST. 1082 (Nov. 2005); Christine A.E. Bakker, *Note and Comment A Full Stop to Amnesty in Argintina: The Simón Case*, 3 J. INT'L CRIM. JUST. 1106 (Nov. 2005). *See also* Jonathan Miller, *Judicial*

Also, more recent "hybrid" international criminal courts, like those for the conflicts in Sierra Leone, East Timor, and Cambodia, combine international and local judges. Sometimes the tribunal is a part of the national judiciary. Iraq and Indonesia have their own courts for this, although the court in Iraq, of course, is backed by the United States. The "mixed tribunal" for Sierra Leone is under-funded.[198] The jury is still out, so to speak, on the Cambodia Tribunal to prosecute some of the Khmer Rouge *genocidaires*.[199]

Review and Constitutional Stability: A Sociology of the U.S. Model and its Collapse in Argentina, 21 HASTINGS INT'L & COMP. L. REV. 151–52, 176 (1997) (explaining collapse of judicial independence in Argentina, resulting in a highly politicized judicial review which de facto always supported the actions of the executive branch.

[198] *See* Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, art. 2 (Jan. 16, 2002), *available at* http:///www.specialcourt.org/documents/Agreement.htm [hereinafter Court Agreement 2002]; University of California at Berkeley, War Crimes Studies Center, Interim Report on the Special Court for Sierra Leone 3 (2005), *available at* http://www.hrcberkeley.org/download/BWCSC_Interim_ Report.pdf; Statute of the Special Court for Sierra Leone, Aug. 14, 2000, *available at* http://www.sierra-leone.org/specialcourtstatute.html. *See generally* Vincent O. Nmehielle & Charles Chernor Jalloh, *International Criminal Justice: the Legacy of the Special Court for Sierra Leone*, 30 FLETCHER F. WORLD AFF. 107 (2006); Truth and Reconciliation Commission of Sierra Leone, Witness to Truth: Report of the Sierra Leone Truth and Reconciliation Commission (Accra: GPL Press, 2004), *available at* http://www.trcsierraleone.org/pdf/FINAL%20VOLUME%20ONE/VOLUME% 20ONE.pdf. On the ten year war in Sierra Leone, see generally DAVID KEEN, CONFLICT AND COLLUSION IN SIERRA LEONE (2005), *reviewed in* Christof P. Kurz, *Sifting Through the Fog of an African Conflict: Explaining the Paradoxes of Sierra Leone's 10-Year War*, 30 FLETCHER F. WORLD AFF. 235 (2006). On the lead-up to the creation of the Special Court, see Michael Dynes, *War Crimes Court Waits for Sierra Leone Poll*, TIMES OF LONDON, May 14, 2002, 2002 WL 4207936; Anthony Goodman, *Mixed Court Proposed to Try S. Leone War Criminals*, http://www.my.aol.com/news/story/html#CYCLE (July 27, 2000); Tom Masland, *"We Beat and Killed People . . ."; Leaders Gather at the U.N. this Week to Discuss the World's Kids, Including Child Soldiers. NEWSWEEK Went to Sierra Leone to Talk in Depth with Four Real Experts*, NEWSWEEK, INT'L, May 13, 2002, 2002 WL 7294190.

[199] *See generally* Katheryn M. Klein, *Bringing the Khmer Rouge to Justice: The Challenges and Risks Facing the Joint Tribunal in Cambodia*, 4 NW. U. J. INT'L HUM. RTS. 549 (2006). On the Khmer Rouge auto-genocide generally, see CRAIG ETCHESON, AFTER THE KILLING FIELDS: LESSONS FROM THE CAMBODIAN GENOCIDE (2005); DAVID P. CHANDLER, VOICES FROM S-21: TERROR AND HISTORY IN POL POT'S SECRET PRISON. (2000); *The Cambodian Genocide Program*, http://www.yale.edu/cgp/; Peace Pledge Union Information, *Talking about Genocide—Genocides Cambodia 1975, available at* http://www.ppu.org.uk/genocide/g_cambodia1.html.

This is why the U.S. claim that to allow trials of its own for the violation of international humanitarian law endangers peace is ultimately spurious. Those who have suffered the pain of terror, torture, rape, and slaughter of loved ones will hold that pain within themselves. They and humanity need catharsis, which prosecution may help provide. Whether a "peace" is "imposed" or not (if peace may ever really, or ultimately, be *imposed*), it seems likely that someday, unless justice of some sort is felt by the people, rage will fester, and violence, or the blood feud, will arise again. Mercy is also necessary in certain cases, such as when those who committed the atrocities were kidnapped children, manipulated by threats, coercion, drugs, "brain-washing," such as those implicated in depredations committed in the horrific conflicts in Sierra Leone, Liberia, the Ivory Coast, Uganda, Congo, and Colombia. These children do not fit well into the status of willing atrocity mongers or executioners.[200] On the other hand, apart from the children, perhaps, as Hanna Arendt noted, mercy is not possible if there is no possibility of punishment.[201] It is not true and it is dangerous to suggest that somehow *not* punishing those who commit atrocities lends itself to peace. By the same token, prosecuting or punishing without being scrupulous in ensuring fairness and justice is as dangerous.

Are terrorism and the usual response to it of one cloth? They are indeed, in at least one way. Simone Weill and Thomas Merton were not far off in expressing this, as they described a great beast, which is the urge to collective power, "the grimmest of all the social realities."[202] They

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[200] *See* David Gray, *An Excuse-Centered Approach to Transitional Justice*, 74 FORDHAM L. REV. 2621, 2630, and nn.87–92 (2006), referencing RACHEL BRETT & MARGARET MCCALLIN, CHILDREN: THE INVISIBLE SOLDIERS (2d ed. 1998); Norimitsu Onishi, *Children of War in Sierra Leone Try to Start Over*, N.Y. TIMES, May 9, 2002, at A14; Human Rights Watch, *How to Fight, How to Kill: Child Soldiers in Liberia* (2004), *available at* http://www.hrw.org/reports/2004/liberia0204; Human Rights Watch, *Stolen Children: Abduction and Recruitment in Northern Uganda* (2003), *available at* http://www.hrw.org/reports/2003/uganda0303; Human Rights Watch, *"You'll Learn Not to Cry": Child Combatants in Colombia* (2003), *available at* http://www.hrw.org/reports/2003/colombia0903.

[201] Hanna Arendt, *paraphrased by* Aryeh Neier, in his presentation at the Meeting of Experts, Association Int'l de Droit Penal, December 4–8, 1994, Siracusa, Italy. *See also generally* ARYEH NEIER, WAR CRIMES: BRUTALITY, GENOCIDE, TERROR, AND THE STRUGGLE FOR JUSTICE (1998).

[202] *See* Thomas Merton, *The Answer of Minerva: Pacifism and Resistance in Simone Weil, in* MERTON, *supra* note 124, at 134, 138, analyzing Simone Weil, *The Power of Words, in* SIMONE WEIL, SELECTED ESSAYS 1934–1943 (1962). *See also* SIMONE WEIL, A FELLOWSHIP OF LOVE, 155–60 (1964).

said aptly that this lust for power is masked by the symbols of "nationalism, fundamentalism, capitalism, fascism, [and] racism."[203] I would add to that list perversion of religion, morality, and values, such as sovereignty, self-determination, liberation, freedom, and even democracy, which cause similar problems.[204] By abusing people's sense of community, ethnicity, and heritage, by prompting fear that it is being destroyed, and by fostering insecurity and xenophobia, leaders can cause their followers to do unspeakable acts. And, of course, one must add to the list the perversion of national security, which often is "a chimerical state of things in which one would keep for oneself alone the power to make war while all other countries would be unable to do so."[205] We must, individually and in our nations or groups, explode the myths created and used to prompt us to violence. Otherwise, terrorism and crimes against humanity will be the "norm."

The conduct at the focus of this chapter poses a vicious threat to peace and human dignity. I believe, however, that the common person may be capable of avoiding or overcoming the manipulation that prompts participation. I believe that we have common core values that allow us to recognize these crimes and to condemn them.[206] We condemn them easily when these crimes are committed against us. We need to instill the vision and fortitude to recognize and resist when "our" leaders, or our compatriots, want to pursue that sort of conduct against "others."

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[203] Merton, *The Answer of Minerva, supra* note 202, at 138.

[204] *See* Ecclesiastes 1:2 ([it seems that] everything is [or may be turned into] vanity).

[205] Merton, *The Answer of Minerva, supra* note 202, at 139 (quoting Simone Weil).

[206] *Cf.* Nora V. Demleitner, *Combating Legal Ethnocentrism: Comparative Law Sets Boundaries* 31 Az. St. L.J. 737 (1999).

> The absence of a [complete] "common core" of values and legal norms, however, should not be interpreted as lack of a common humanity but rather as recognition of different normative values and possibly institutional processes. Moreover, a group's identification of difference may serve to "create[ ]" "the community and "'create[ ]'" the difference with the outside world." Such a process may be psychologically necessary to counteract the perceived pressure to achieve cultural and legal uniformity, as expressed through universal human rights standards.

Referencing Mark Van Hoecke & Mark Warrington, *Legal Cultures, Legal Paradigms and Legal Doctrine: Towards a New Model for Comparative Law*, 47 Int'l & Comp. L.Q. 495, 498, 536 (1998). *See also* Laura Nader, Introduction, in Law in Culture and Society 1, 7–8 (Laura Nader ed., 1997); *Cf.* Conrad, *supra* note 195, and accompanying citations.

Terrorism is condemned—it is criminal—whether committed by states against their own inhabitants or extraterritorially. It is criminal whether it is perpetrated by insurgents, even those struggling for independence or freedom from oppression. I am not arguing herein for punishment of "states" or "nations" or "groups" for the commission of these offenses, although this may sometimes be reasonable. My attention has been aimed at the fact that individuals commit these offenses and cause their people to commit them. Thus, individuals, even (or certainly) when functioning in their official governmental capacity, are subject to law and may be punished for committing or aiding and abetting the criminal conduct analyzed herein. Impunity must be eliminated. If prosecution is to occur, the elements of the offenses must be clearly established. Thus, this criminal conduct we call terrorism would include: (1) violence committed by any means; (2) causing death, great bodily harm, or serious property damage; (3) to innocent individuals; (4) with the intent to cause those consequences or with wanton disregard for those consequences (and for the purpose of coercing or intimidating some specific group, or government, or otherwise to gain some perceived political, military, or other philosophical benefit); (5) without justification or excuse.

Procedural and other human rights protections for victims and the accused must be clarified and vigorously maintained. To date, none of this has been done well in treaties. Perhaps customary and *jus cogens* principles, as manifest in the domestic laws of virtually all nations, provide the needed clarity and specificity. The penal codes of all nations and the customary rules of groups everywhere, condemn intentional killing or maiming without justification or excuse. Even those nations or groups that claim some privilege, justification, or excuse to commit such conduct do not accept its being committed by others against them. An example from the human rights arena may illustrate. Groups that commit female genital mutilation justify it on cultural or even religious grounds. Suppose, however, that a group of women from another culture (or even from their own) captured men from the group that commits genital mutilation. Now suppose that the captured group of women apply genital mutilation on the captured men claiming some justification or excuse. Does anyone have any doubt that the captured men and the official hierarchy of their group or nation would claim that the mutilation was criminal? This is true, at least, when the mutilation causes malfunction, dysfunction, or incapacity. So it is with a common core of crimes, which can be established by looking to the basic principles of nations, that conduct, which is deemed criminal when committed against that nation, may well be universally criminal. This is true, whether or not nations commit

this conduct against others. Thus, the evidence of the universal condemnation of these offenses is found in the complex of international treaties and domestic substantive criminal law.

The pretentious justifications, excuses, and rationalizations given by apologists for those who commit atrocity ring hollow and are frighteningly familiar.[207] Care must be taken to ensure that international and domestic and international action to obtain justice and to prosecute perpetrators does not fall into the same trap that ensnared those who committed the crimes. If we allow ourselves to descend to simple vengeance, terrorism, torture and similar atrocity, because of our fear or insecurity, or in the name of "fighting terrorism" or fighting for "freedom," we are lost. We must remind ourselves of John Milton's poignant warning:

> "So spake the Fiend, *and with necessity.*
> The tyrant's plea, excus'd his devilish deeds' and it is still the
> shibboleth of the descendants of the Prince of Darkness."[208]

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[207] JOHN MILTON, PARADISE LOST, bk. 4, lines 393–94 (Merrut Y. Hughes ed., Odyssey Press 1962) (1674). *See also* JOSEPH CONRAD, LORD JIM 86, 95, 357, 367 (1924); JOSEPH CONRAD, HEART OF DARKNESS, *in* COMPLETE WORKS (1926).

[208] MILTON, *supra* note 207, at lines 393–94; *see also* CONRAD, LORD JIM, *supra* note 207, at 86, 95, 357, 367; CONRAD, HEART OF DARKNESS, *supra* note 207.

CHAPTER 6

TERRORIZING THE TERRORISTS: AN ESSAY ON THE PERMISSIBILITY OF TORTURE

*Christopher C. Joyner**

Cherif Bassiouni was one of the drafters of the Torture Convention, and in the aftermath of the attacks on 9/11, his was one of the strongest voices urging that the so-called "global war on terror" be waged without violating international human rights law, including in particular the prohibition against torture. This chapter addresses the tension between human rights and combating terrorism.

The attacks on the World Trade Center and the Pentagon by nineteen al-Qaeda extremists on September 11, 2001, jolted Americans with a stark reality: There are people in the world who hate Americans for who they are, for what they do, and for what they represent.[1] These same persons really want to kill people in the United States. And they will kill them. No event in modern history makes this fact more starkly evident than the nearly 3,000 dead victims from 9/11, from the ashes of the Twin Towers, from the gaping hole and burning walls of the Pentagon, to a plane crash site in Shanksville, Pennsylvania.[2] The subsequent video and audio tapes

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[1] *See* Maj. Jaime Gomez, Jr., USAF, *Terrorist Motivations for the Use of Extreme Violence*, 4 STRATEGIC INSIGHTS (May 2005), *available at* http://www.ccc.nps.navy.mil/si/2005/May/gomezMay05.asp.

[2] On September 11, 2001, hijacked aircraft were flown by 19 al-Qaeda members into the two World Trade Center Towers in New York City and into the Pentagon Building in Virginia. Approximately 3,000 people were killed. A fourth hijacked aircraft crashed in the Pennsylvania countryside, near Shanksville. *See US Attacked: Hijacked Jets Destroy Twin Towers and Hit Pentagon in Day of Terror*, N.Y. TIMES, Sept. 12, 2001, at 1; *Terrorists Hijack 4 Airliners, Destroy World Trade Center, Hit Pentagon; Hundreds Dead*, WASH. POST, Sept. 12, 2001, at 1. For an authoritative analysis of these events, see THOMAS H. KEAN & LEE HAMILTON, THE 9/11 REPORT: THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES (2004).

from Osama Bin Laden and his henchmen reaffirm the reality of that danger, as they adamantly assert more attacks are coming—sometime, somewhere, by some means—against Americans in the United States.[3]

I. THE RATIONALE FOR TORTURE

This threat from al-Qaeda terrorists is real. What should the U.S. government do about it? Such a threat poses an enormous danger from people who are convinced they are acting against American infidels, in the name of their god, driven by the conviction of their extremist religious ideology, and who will be rewarded for sacrificing their lives in the name of this jihad, this holy mission to kill Americans.[4] What can Americans do to thwart this real-world danger to their society that cannot be deterred by conventional military or strategic means? What strategies should U.S. policymakers adopt? What plan should the U.S. government follow? What policies best serve the U.S. national interest and the need to be protected after the events of 9/11?

These questions were answered in no uncertain terms by the Bush administration before the end of 2001.[5] The Bush White House decided that the United States must openly declare and militarily prosecute a global war against terrorism.[6] The United States must use every conven-

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[3] *See* WALTER LAQUEUR, VOICES OF TERROR 410–19 (2004).

[4] *See generally* MOHAMMED HAFEZ, WHY DO MUSLIMS REBEL? (2003); JESSICA STERN, TERROR IN THE NAME OF GOD; and Martha Crenshaw, *Theories of Terrorism: Instrumental & Organizational Approaches, in* INSIDE TERRORIST ORGANIZATIONS 14–25 (David Rapoport ed., 1988).

[5] President George W. Bush, *The Global War on Terrorism: The First 100 Days*, Dec. 11, 2001, White House Statement, *available at* http://www.whitehouse.gov/news/releases/2001/12/100dayreport.html#1. As detailed in this statement, since September 11, the United States:

> Began to destroy al-Qaeda's grip on Afghanistan by driving the Taliban from power; disrupted al-Qaeda's global operations and terrorist financing networks.; destroyed al-Qaeda terrorist training camps; helped the innocent people of Afghanistan recover from the Taliban's reign of terror; and helped Afghans put aside long-standing differences to form a new interim government that represents all Afghans—including women. *Id.* These efforts were achieved by building a worldwide coalition against terrorism, seizing terrorist finances, launching a military campaign against the Taliban, arresting terrorists, sending humanitarian aid to Afghanistan, strengthening homeland security and protecting Muslim-Americans from hate crimes.

Id.

[6] *Id.*

tional weapon and tactic at its disposal to protect Western civilization, American society, and its values of democracy and economic liberalism from the death and destruction promised by these Islamic terrorists. After all, the American cause is just: they are protecting themselves—the best, most successful, most envied democratic and Western civilization in history—from religious fanatics who want to kill them merely because of who they are and what they represent. These Islamic terrorists killed nearly 3,000 people, mostly Americans, on U.S. soil six years ago. Surely they will do so again in the future, if they are not stopped, if U.S. law enforcement officials relax their vigilance, if the government lets down its guard.[7]

This war against global terrorism was launched against the Islamic extremists by American military forces in October 2001 in Afghanistan.[8] But the bulk of this bloody armed conflict has been fought throughout Iraq since the United States invaded that country in March 2003. The war against terrorism is being waged on the battlefield, in the towns and cities, on the roads and in the deserts of Iraq. But the conflict is also being fought in the minds of most Americans. Many question whether the United States is doing the right thing, in the right way, to the right people. Do the Iraqis and Afghanis who are taken into custody by local or U.S. military forces really threaten America? Are insurgents and "enemy combatants," who are often branded as "suspected terrorists," actually terrorists?[9] The answer is all too clear: of course they must be—otherwise they would not have been taken into custody by U.S. forces.

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[7] As President Bush asserted, "We face a united, determined enemy. America is going to be prepared." Remarks by The President and Governor Tom Ridge at Swearing-In Ceremony of Governor Ridge as Director of the Office of Homeland Security October 8, 2001, *available at* http://www.bard.edu/hrp/resource_pdfs/bushandridge.security.pdf.

[8] *Afghanistan Awakes After Night of Intense Bombings*, CNN.com/US, Oct/ 7, 2001, *available at* http://archives.cnn.com/2001/US/10/07/gen.america.under.attack/.

[9] Enemy combatants are individuals who oppose the United States and are affiliated with non-state, terrorist organizations. *See* Memorandum from William J. Haynes II, Gen. Counsel, U.S. Dep't of Def., to Members of the ASIL-CFR Roundtable (Dec. 12, 2002), *available at* http://www.cfr.org/publication.php?id=5312. *See also* Anita Ramasastry, *Indefinite Detention Based upon Suspicion, How the Patriot Act Will Disrupt Many Lawful Immigrants' Lives*, FindLaw Writ, Oct. 5, 2001, *available at* http://writ.news.findlaw.com/scripts/printer_friendly.pl?page=/commentary/20011005_ramasastry.html. For an insightful treatment of the evolution of this thinking into practice, see the collection of documents in THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB (Karen J. Greenberg & Joshua L. Dratel eds., 2005).

Given that obvious conclusion, what information do these suspects know about al-Qaeda's plans for future attacks in the United States, against Americans, against the cities of Washington DC, New York, Chicago, Los Angeles, Cleveland, or St. Louis? Where will the attacks come? Against what targets will they be directed? Using what kind of weapons? Are weapons of mass destruction in their arsenal?[10] If Americans are to be protected from the brutal, violent, real threat of Islamic terrorism, the U.S. government must find the answers to these questions. To this end, government officials have made it clear that the answers must be learned, through any means possible to achieve national security objectives. After all, this strategy is being done to protect the American people, their society, and their way of life. But are there limits to the means used to secure intelligence information? Is physical torture of these suspected terrorists permitted? If it is not, should it be? No, asserts President Bush. The United States does not condone the use of torture.[11] But how else can the U.S government learn the plans of these killers? Torture would seem to be an easy way to secure reliable intelligence containing accurate information about what they intend to do, where it will occur, and how attacks will be carried out. If torture of captured suspected terrorists can protect American society from mass murder, surely it must be used.[12]

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[10] The belief is that al-Qaeda is seeking to obtain nuclear weapons. *See* Rediff.com, "Al Qaeda bought nuclear weapons," Mar. 22, 2004, *available at* http://www.rediff.com/news/2004/mar/22mir.htm; *Warning Over al Qaeda Nuclear Weapons Fear*, DAILY MAIL, May 24, 2005, *available at* http://www.dailymail.co.uk/pages/live/articles/news/news.html?in_article_id=349848&in_page_id=1770. For an inventory of al-Qaeda's efforts to secure nuclear weapons, see Center for Nonproliferation Studies, "Al-Qaeda's Nuclear Ambitions," June 2005, *available at* http://www.epsusa.org/publications/newsletter/june2005/alqaeda.htm.

[11] As President Bush declared in June 2005, "Freedom from torture is an inalienable human right, and we are committed to building a world where human rights are respected and protected by the rule of law." Press Release, *The White House, President's Statement on the U.N. International Day in Support of Victims of Torture* (June 26, 2005), *available at* http://www.whitehouse.gov/news/releases/2005/06/20050626.html.

[12] For criticisms of this view and the Bush administration's parochial interpretation of torture to accomplish this end, see generally M. Cherif Bassiouni, *"Torture and the War on Terror": The Institutionalization of Torture under the Bush Administration*, 37 CASE W. RES. J. INT'L L. 389 (2006); Jordan J. Paust, *Executive Plans and Authorizations to Violate International Law Concerning Treatment & Interrogation of Detainees*, 43 COLUM. J. TRANSNAT'L L. 811, 843 (2005); Diane M. Amann, *Abu Ghraib*, 153 U. PA. L. REV. 2085 (2005); Asli U. Bali, *Justice Under Occupation: Rule of Law and the Ethics of Nation Building in Iraq*, 30 YALE J. INT'L L. 431, 467–68 (2005); and Jennifer Moore, *Practicing What We Preach: Humane Treatment for Detainees in the War on Terror*, 34 DENV. J. INT'L L. & POL'Y 33 (2006). For insights into the political costs and damage to reputation of such think-

The main point in such logic is this: the United States is fighting a global war against terrorism. Terrorists are not fictional characters; they are real killers and an ominous threat to Americans and their society. Should not all be fair in the war against terrorists? These fanatics do not play by the rules of war. Should not the U.S. government fight fire with fire? Should not U.S. strategy uphold the cardinal objective of protecting American society, with the greatest good going to the great number? Should not Americans use every means available to obtain information from captured persons who are thought to participate in terrorist groups? Can we afford not to?

The pragmatic answer to these questions for many Americans might seem obvious: the United States should and must employ any, every, and all means to protect its society from radical extremists who want to kill U.S. citizens. Leave fuzzy notions of morality, ethics, and the law to philosophers, theologians, and legal pundits. The most important thing is to protect the American people and ensure their nation's survival. The United States must achieve these ends at any cost. This is a war against an enemy that does not fight by the rules of armed conflict. U.S. national policies must reflect those ultimate goals of protection and survival, regardless of moral, ethical, or international legal considerations. But for those who wish to live in a civil society, these attitudes beg profound questions: Is this what the American people really want? Are these the views for which the United States actually stands? Should perceived national security concerns overshadow fundamental legal rights and principles? Should torture be included in the U.S. arsenal to be used against terrorists? If so, what kind of conduct amounts to acts of torture?

II. DEFINING TORTURE

To appreciate the permissibility of terrorizing the terrorists, one must understand what acts constitute torture. The key international legal instrument concerning torture is the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and it defines torture as:

> Any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes

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ing, see Int'l Comm. of the Red Cross, *Report of the International Committee of the Red Cross (ICRC) on the Treatment by the Coalition Forces of Prisoners of War and Other Protected Persons by the Geneva Conventions in Iraq during Arrest, Internment and Interrogation* (2004).

> as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.[13]

Many acts are commonly thought to be means of torture, among them beating the soles of the feet, applying electric shocks to the genitals and nipples, rape, near drowning through submersion in water, near suffocation by tying plastic bags around the head, burning, whipping, inserting needles under fingernails, mutilation, and hanging a person by his feet or hands for prolonged periods.[14]

International norms also point to abuses that might not strictly conform with the definition of torture, either because less severe physical or mental pain is inflicted, or because the necessary purpose of the mistreatment is not apparent. In this regard, every person is presumed to enjoy the right not to be subjected to cruel, inhuman, or degrading treatment. Examples of such mistreatments include being forced to stand spread eagled against the wall, subjection to bright lights or blindfolding, exposure to continuous loud noise, violent shaking, and deprivation of sleep, food, or drink. In essence, any form of physical treatment used to intimidate, coerce, or "break" a person during an interrogation constitutes abuse or ill-treatment. If these practices are sufficiently intense, prolonged in duration, or combined with other measures that result in severe pain or suffering, they can qualify as torture.[15]

Appreciating the definition of torture and its broad scope, a number of news reports since 2002 have suggested that U.S. military personnel in

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[13] Convention the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 46, at 197, art. 1, U.N. GAOR, 39th Sess., Supp. No. 51, U.N. Doc. A/39/51, (Dec. 10, 1984) [hereinafter Convention Against Torture].

[14] Human Rights Watch, *The Legal Prohibition Against Torture* (June 1, 2004), *available at* http://www.hrw.org/press/2001/11/TortureQandA.htm#What.

[15] Nigel S. Rodney, The Treatment of Prisoners Under International Law 85 (1999).

Afghanistan, Iraq, and at the Guantanamo Naval Base in Cuba have engaged in the systematic torture of large numbers of Muslim detainees. It eventually was discovered that "enhanced interrogation techniques"[16] are being used as regular means of obtaining information from "suspected terrorists,"[17] "unlawful enemy combatants,"[18] and other prisoners who threaten U.S. national interest, although it was left unsaid as to what those techniques were.[19]

III. The Impermissibility of Torture

Notwithstanding the perceived pragmatic utility of torture, certain fundamental moral, ethical, and legal principles render such conduct under any circumstance as evil and unacceptable. For torture proponents, however, there then comes a list of buts, and as regards U.S. gov-

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[16] Brian Ross & Richard Esposito, *CIA's Harsh Interrogation Techniques Described*, ABC News Investigation, Nov. 18, 2005, *available at* http://abcnews.go.com/WNT/Investigation/story?id=1322866; Dana Priest, *CIA Puts Harsh Tactics On Hold*, WASH. POST, June 27, 2004, at A01; Amnesty Int'l, *United States of America, Guantanamo and Beyond: The Continuing Pursuit of Unchecked Executive Power*, AMR 51/063/2005, May 13, 2005, *available at* http://web.amnesty.org/library/Index/ENGAMR510632005; and Human Rights Watch, Jennifer Daskal, *Detainee Legislation Clearly Outlaws "Alternative" Interrogation Techniques*, Nov. 8, 2006, *available at* http://hrw.org/english/docs/2006/11/08/usdom14702.htm.

[17] Anthony Gregory, *Suspected Terrorists Deserve Due Process*, INDEP. INST., Sept. 15, 2005, *available at* http://www.independent.org/newsroom/article.asp?id=1570.

[18] The Bush administration initially classified all al-Qaeda and Taliban prisoners as "unlawful combatants" who fell outside the Convention's protection. On February 7, 2002, President Bush redefined the administration's view, providing in part that

> [the] United States is treating and will continue to treat all of the individuals detained at Guantanamo humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of the Third Geneva Convention of 1949. The President has determined that the Geneva Convention applies to the Taliban detainees, but not to the al-Qaida detainees. Al-Qaida is not a state party to the Geneva Convention; it is a foreign terrorist group. As such, its members are not entitled to POW status.

Omar Akbar, *Losing Geneva in Guantanamo Bay*, 89 IOWA L. REV. 195, 202–03 (2003).

[19] It should be noted that certain euphemisms commonly used by administration officials for such techniques include "physical pressure," "harsh interrogation techniques," "softening up," applying "rough treatment," "taking off the gloves," and "using alternative means of interrogation." Michael Davis, *The Moral Justifiability of Torture and Other Cruel, Inhuman or Degrading Treatment*, 19 INT'L J. APPLIED PHIL. 161, at 174 n.3 (2005).

ernment policies in the war against terrorism, the list becomes all too familiar. But, with regard to the act, how should torture be defined? But, with regard to propriety, what acts can the president lawfully authorize? But, with regard to jurisdiction, who can do what, where, and to whom?

Answers to these queries must be considered in light of the prevailing international legal considerations that the United States took the lead in shaping over the last half century. Torture is regarded by civil libertarians as an abomination that every civilized nation should outlaw. Modern international humanitarian law categorically prohibits its use.[20] As a concept of early humanitarian law, the customary norms regarding torture evolved through both accepted state practice and *opinio juris* and were codified in the four Geneva Conventions of 1949[21] and in the two 1977 additional protocols to these Geneva Conventions.[22] At the heart of this corpus of humanitarian law is common Article 3 to the four Geneva Conventions of 1949, which contains the core of rights applicable to both inter-state armed conflict and to non-international wars. The most relevant part of this provision contains the essence of the prohibition against torture and declares that among the acts that "are and shall remain prohibited at any time and in any place whatsoever" are "violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and

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[20] As the International Committee of the Red Cross (ICRC) observed, "Certain human rights are never derogable. Among them are the right to life, prohibition of torture or cruel, inhuman or degrading treatment or punishment, prohibition of slavery or servitude and the prohibition of retroactive criminal laws." ICRC, *International Humanitarian Law and International Human Rights Law: Similarities and Differences* (Jan. 2003) *available at* http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/57JR8L/$FILE/IHL_and_IHRL.pdf?OpenElement.

[21] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Convention for the Wounded in the Field]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Convention for the Wounded at Sea]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Convention for Prisoners of War]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Convention for Protection of Civilian Persons].

[22] *See* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977, 1125 U.N.T.S. 609.

torture."[23] It is important to realize that these prohibitions in common Article 3 apply irrespective of the status of the person involved, that is, whether they are combatants or non-combatants, including unlawful combatants such as spies and saboteurs.[24]

Several international legal instruments specifically prohibit and criminalize the use of torture as a means of interrogation. Most recently, the 1998 Rome Statute of the International Criminal Court classifies torture

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[23] In full, common Article 3 asserts the following:

> In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions: 1. Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons: (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; (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

Convention for the Wounded in the Field, *supra* note 21, 6 U.S.T. at 3116, 3118, 75 U.N.T.S. at 32, 34; Convention for the Wounded at Sea, *supra* note 21, 6 U.S.T. at 3220, 3222, 75 U.N.T.S. at 86, 88; Convention for the Protection of Prisoners of War, *supra* note 21, 6 U.S.T. at 3318, 3320, 75 U.N.T.S. at 136, 138; Convention for the Protection of Civilians, *supra* note 21, 6 U.S.T. at 3518, 3520, 75 U.N.T.S. at 288, 290.

[24] With specific regard to "spies and saboteurs," the Convention for the Protection of Civilians avers that:

> Where in occupied territory an individual protected person is detained as a spy or saboteur, or as a person under definite suspicion of activity hostile to the security of the Occupying Power, such person shall, in those cases where absolute military security so requires, be regarded as having forfeited rights of communication under the present Convention. In each case, such persons shall nevertheless be treated with humanity, and in case of trial, shall not be deprived of the rights of fair and regular trial prescribed by the present Convention. They shall also be granted the full rights and privileges of a protected person under the present Convention at the earliest date consistent with the security of the State or Occupying Power, as the case may be.

Convention for the Protection of Civilians, *supra* note 21, art. 5, 6 U.S.T. at 3522, 75 U.N.T.S. at 292.

as a crime against humanity,[25] as well as a war crime[26] and a violation of the laws and customs of armed conflict.[27] Moreover, among the rights guaranteed in the Statute to individuals under investigation is that those persons "shall not be subjected to any form of coercion, duress or threat, to torture or to any other form of cruel, inhuman or degrading treatment or punishment."[28] The Third Geneva Convention of 1949 prohibits the use of torture against prisoners of war[29] and the Fourth Geneva Convention of 1949 prohibits torture against civilians in situations of armed conflict and military occupation.[30] The 1948 U.N. Universal Declaration of Human Rights unequivocally affirms in its Article 5 the proscription against torture, "no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."[31] Although the Universal Declaration is a General Assembly resolution and does not carry the full weight of binding international law, its status as customary law is generally recognized. Moreover, its provision against torture is imposed as a binding obligation in the 1966 International Covenant on Civil and Political Rights,[32] as well as Article 2 in the Convention Against Torture, both of which the United States is a party.[33] Indeed, if agents of the U.S. government use torture against other Americans or foreign nationals, those acts perforce violate U.S. law. In 1994, Congress passed the Torture Convention Implementation Act, which implements the Convention Against Torture and specifically provides for penalties includ-

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[25] Rome Statute of the International Criminal Court, art. 7, July 17, 1998, 2187 U.N.T.S. 90. Torture is defined in the Statute as a "means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions." *Id.* art. 7(2)(e)

[26] *Id.* art. 8(2)(a)(ii).

[27] *Id.* art. 8(2)(c)(i).

[28] *Id.* art. 55(1)(b).

[29] Geneva Convention for Prisoners of War, *supra* note 21, arts. 3, 17, 87, and 130.

[30] Geneva Convention for Protection of Civilians, *supra* note 21, arts. 3, 32, and 147.

[31] Universal Declaration of Human Rights, G.A. Res. 217A, at 71, art. 5, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 12, 1948).

[32] International Covenant on Civil and Political Rights, G.A. Res. 2200, art. 7, U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966).

[33] In full, Article 2 provides that:

> 1. Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.
>
> 2. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political in stability or any other public emergency, may be invoked as a justification of torture.

ing fines and up to 20 years' imprisonment for acts of torture committed by American or other officials on any persons outside the United States.[34] In cases where torture results in the death of the victim, the sentence is life imprisonment or execution.[35] Moreover, the War Crimes Act of 1996 makes it a criminal offense for U.S. military personnel and U.S. nationals to commit war crimes as specified in the 1949 Geneva Conventions.[36] War crimes under the act include grave breaches of the Geneva Conventions and violations of common Article 3 to the Geneva Conventions, which prohibits "violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; . . . outrages upon personal dignity, in particular humiliating and degrading treatment."[37] The prohibition against torture is also codified in the European Convention for the Protection of Human Rights and Fundamental Freedoms,[38] the

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> 3. An order from a superior officer or a public authority may not be invoked as a justification of torture

Convention Against Torture, *supra* note 13, art. 2.

[34] Foreign Relations Authorization Act for Fiscal Years 1994 and 1995, Pub. L. No. 103–236, § 506, 108 Stat. 382 (codified at 18 U.S.C. §§ 2340–2340B (2000)).

[35] 18 U.S.C. § 2340A, *available at* http://caselaw.lp.findlaw.com/casecode/uscodes/18/parts/ i/chapters/113c/sections/section_2340a.html]. 18 U.S.C. § 2340, *available at* http://caselaw.lp.findlaw.com/scripts/ts_search.pl?title=18&sec=2340, provides the following definitions:

> (1) "torture" means an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control;
>
> (2) "severe mental pain or suffering" means the prolonged mental harm caused by or resulting from—
>
> > (A) the intentional infliction or threatened infliction of severe physical pain or suffering;
> >
> > (B) the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality;
> >
> > (C) the threat of imminent death; or
> >
> > (D) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality;

[36] War Crimes Act of 1996, 18 U.S.C. § 2441 (2000).

[37] Geneva Convention for Prisoners of War, *supra* 21, art. 3. *See supra* note 23.

[38] Convention for the Protection of Human Rights and Fundamental Freedoms art. 3, Nov. 4, 1950, E.T.S. No. 5 ("No one shall be subjected to torture or to inhuman or degrading treatment or punishment."); *see also* Charter of Fundamental Rights of

African Charter on Human and Peoples' Rights,[39] and the Inter-American Convention on Human Rights.[40]

In the aftermath of the U.S. Supreme Court case *Hamden v. Rumsfeld*,[41] Congress, in September 2006, adopted the Military Commissions Act,[42] which criminalizes treatment of prisoners that causes serious physical or mental pain or suffering. This legislation aims to redefine U.S. obligations under common Article 3 of the 1949 Geneva Conventions, which places an absolute prohibition on inhumane treatment of detainees during armed conflict. Moreover, the legislation explicitly states that such suffering need not be "prolonged" for the treatment to constitute a war crime, a rebuke to past Bush administration legal opinions that reportedly permitted the practice of water-boarding on the questionable grounds that the terror it induces does not have a prolonged impact on its victims. Two of the chief sponsors of the legislation, Senators John McCain and John Warner, have said that the law criminalizes water-boarding.[43]

Yet, the U.S. government still seeks to justify ways and means of torture and abuse in the "global war on terrorism" by narrowly defining the

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the European Union, art. 4, 2000 O.J. (C 364) 1; Draft Charter of Fundamental Rights of the European Union, art. 4, July 28, 2000, Charter 4422/00, Covenant 45.

[39] African Charter on Human and Peoples' Rights, art. 5, adopted June 27, 1981, O.A.U. Doc. CAB/LEG/67/3 rev. 5, *reprinted in* 21 I.L.M. 58 (1982) ("All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.").

[40] American Convention on Human Rights, Nov. 22, 1969, art. 5, 1144 U.N.T.S. 144. *See also* American Declaration of the Rights and Duties of Man, O.A.S. Official Rec., OEA/Ser. L./V./II.23, doc. 21, rev. 6 (1948), *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82, doc. 6, rev.1, at 18, art. 1 (1992) ("Every human being has the right to life, liberty and the security of his person") and the Inter-American Convention to Prevent and Punish Torture, Dec. 9, 1985, 67 O.A.S.T.S. 13.

[41] Hamdan v. Rumsfeld, 126 S. Ct. 2749 (2006).

[42] The Military Commissions Act of 2006 (Pub. L. No. 109-366, 120 Stat. 2600 (Oct. 17, 2006)).

[43] Jonathan S. Landay, *Cheney Confirms that Detainees Were Subjected to Water-Boarding*, McClatchy Newspapers, Oct. 26, 2006, *available at* http://www.realcities.com/mld/krwashington/15847918.htm. On September 6, 2006, the Pentagon issued a new Field Manual on Intelligence Interrogation that explicitly forbids the use of water-boarding in any interrogation. The U.S. Army's new counter-insurgency manual states that "torture and cruel, inhumane and degrading treatment is never a morally permissible option, even in situations where lives depend on gaining information." It concludes that those who "lose moral legitimacy" by employing such methods will "lose the war."

term and arguing that the prohibition against cruel, inhuman, or degrading treatment does not apply to Americans conducting interrogations outside the United States.[44] This selective interpretation of the Convention Against Torture grew from efforts to rationalize the permissibility of using interrogation techniques that are known to violate that instrument. As a consequence, during 2003–2005, a climate of confusion was created among U.S. soldiers that led to widespread torture and abuse of hundreds of detainees in held captive in Guantanamo Bay, Iraq, and Afghanistan.

This confusion first stemmed from the so-called "torture memo," written in August 2002 by Judge Jay Bybee, the Justice Department's Office of Legal Counsel, at the request of the CIA and the White House.[45] This memo argues that it "may be justified" to torture al-Qaeda suspects and speculates that international law, which categorically prohibits torture, "may be unconstitutional."[46] Following, there was a series of the so-called "Rumsfeld memos."[47] These documents were written in late 2002 and early 2003 by a Pentagon working group that integrated

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[44] *See* Memorandum from William J. Haynes II, General Counsel to Secretary of Defense Donald Rumsfeld, Subject: Counter-Resistance Techniques (Nov. 27, 2002), *available at* http://www.washingtonpost.com/wp-srv/nation/docurnents/dodmemos.pdf, which recommended approval of the proposed techniques. Secretary Rumsfeld approved the General Counsel's recommendation by endorsing the memorandum. Commenting on the proposed limitation on the use of "stress positions" to four hours, the Secretary observed: "However, I stand for 8–10 hours a day. Why is standing limited to 4 hours?" Dana Priest, *Spirited Debate Preceded Policies*, WASH. POST, June 23, 2004, at A14.

[45] *See* Memorandum from U.S. Department of Justice, Office of Legal Counsel, Office of the Assistant Attorney General, to Alberto R. Gonzales, Counsel to the President, Re: Standards of Conduct for Interrogation Under 18 U.S.C. 2340–2340A, at 1 (Aug. 1, 2002), *available at* http://www.washingtonpost.com/wp-srv/nation/documents/dojinterrogationmemo20020801.pdf. This memorandum concluded that, in conducting interrogation outside the United States, acts that inflict or intend to inflict severe mental or physical pain or suffering must be "of an extreme nature" to rise to the level of torture within the meaning of the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment. The notion of "extreme nature" was left undefined. *See generally* Louis-Philippe F. Rouillard, *Misinterpreting the Prohibition of Torture Under International Law: The Office of Legal Counsel Memorandum*, 21 AM. U. INT'L L. REV. 9 (2005).

[46] *Id.* at 46.

[47] Memorandum from Donald Rumsfeld, Secretary of Defense, to Commander, U.S. Southern Command, Subject: Counter-Resistance Techniques (Jan. 15, 2003), *available at* http://www.dod.mil/news/Jun2004/d20040622doc8.pdf; Memorandum from Donald Rumsfeld, Secretary of Defense, to General Counsel of the Department of Defense, Subject: Detainee Interrogations (Jan. 15, 2003), *available at* http://www.dod.mil/news/Jun2004/d20040622doc8.pdf.

the Bybee memo's findings and declared that not only the American president has the power to evade international law and torture foreign prisoners, but that interrogators who follow the president's commands can, in addition, be immune from prosecution under U.S. law.[48] Interestingly enough, much of the strongest opposition to these views came from within military itself, as army, marine, navy and air force officers saw these interpretations as being detrimental to the mission, morale, and combatant status of soldiers in the field.[49]

Evidence from a range of sources, including over 100,000 government documents produced during 2003–2005 to the American Civil Liberties Union through Freedom of Information Act (FOIA) litigation, reveal a systemic pattern of torture and abuse of detainees in U.S. custody.[50] This abuse was the direct result of policies promulgated from high-level civilian and military leaders and the failure of these leaders to prevent torture and other cruel, inhuman, or degrading treatment by subordinates. It is known that detainees have suffered various unlawful

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[48] Working Group on Detainee Interrogations in the Global War on Terrorism, *Assessment of Legal, Historical, Policy, and Operational Considerations*, at 70, 64 (Apr. 4, 2003), *available at* http://www.dod.mil/news/Jun2004/d20040622doc8.pdf. Recommended techniques included face or stomach slaps, forced standing, sleep adjustment, removal of clothing, and isolation. *Id.* at 64–65. For a compilation of these memoranda, see THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB (Karen J. Greenberg & Joshua L. Dratel eds., 2005).

[49] *See* Jordan J. Paust, *Executive Plans and Authorizations to Violate International Law Concerning Treatment & Interrogation of Detainees*, 43 COLUM. J. TRANSNAT'L L. 811, 843 (2005); Josh White, *Military Lawyers Fought Policy on Interrogations*, WASH. POST, July 15, 2005, at Al. The U.S. military is a professional institution based on values, ethics, and moral principles, with clearly defined norms of right and wrong. Precepts such as "duty," "honor," and "country," and values such as "courage," "selfless service," and "integrity" are intended to constitute a way of life and personal conduct. The underpinnings of international humanitarian law strongly support those values, ethics, and moral principles. *See generally* ANTHONY E. HARTLE, MORAL ISSUES IN MILITARY DECISION MAKING (2004); JAMES H. TONER, MORALS UNDER THE GUN: THE CARDINAL VIRTUES, MILITARY ETHICS, AND AMERICAN SOCIETY 22 (2000); Lewis S. Sorley III, *Duty, Honor, Country: Practice and Precept, in* WAR, MORALITY, AND THE MILITARY PROFESSION 144 (Malham M. Wakin ed., 1986); James Turner Johnson, *Does Defense of Values by Force Remain a Moral Possibility?, in* THE PARAMETERS OF MILITARY ETHICS 3 (Lloyd J. Mathews & Dale E. Brown eds., 1989); and Richard D Rosen, *America's Professional Military Ethic and the Treatment of Captured Enemy Combatants in the Global War on Terror*, 5 GEO. J.L. PUB. POL'Y 113 (2007).

[50] American Civil Liberties Union, *Enduring Abuse: Torture and Cruel Treatment by the United States at Home and Abroad* (Apr. 27, 2006), *available at* http://www.aclu.org/safefree/torture/25354pub20060427.html.

abuses, among them being beaten, forced into painful stress positions, threatened with death, sexually humiliated, subjected to racial and religious insults, stripped naked, hooded and blindfolded, exposed to extreme heat and cold, denied food and water, deprived of sleep, isolated for prolonged periods, subjected to mock drowning, and intimidated by dogs.[51] One simply has to recall the Abu Ghraib prison photographs and what they showed. Iraqi prisoners were being tortured, abused, and humiliated, but perhaps even more alarming was that the American military police guards appear absolutely certain of their legal and moral right to torture and several unidentified personnel CIA intelligence personnel were standing around, watching as the abuses were perpetrated.[52]

Beyond the conviction in late 2005 of at least nine accused Army Reserve military policemen involved committing the abuses at Abu Ghraib and the demotion of the commanding officer at the prison, Brig. General Janis Karpinski, the U.S. government still has not authorized any independent investigation into decisionmaking for the systematic pattern of torture and abuse elsewhere in Iraq, Afghanistan, and Guantanamo Bay. In fact, the Bush administration has sought to insulate from criminal prosecution any CIA personnel who committed the abuses.[53] Moreover, no high-level civilian official involved in developing or implementing policies that led to torture and abuse has been charged with any crime related to these acts. The government continues to assert that abuses at Abu Ghraib were simply the actions of a few rogue soldiers.[54]

Serious limitations remain concerning the rights of redress and remedy for victims of torture and abuse committed by government officials

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[51] American Civil Liberties Union, *Enduring Abuse: Torture and Cruel Treatment by the United States at Home and Abroad: Shadow Report by the American Civil Liberties Union Prepared for the United Nations Committee Against Torture on the Occasion of Its Review of the United States of America's Second Periodic Report to the Committee Against Torture* (Apr. 2006) at 4, *available at* http://www.aclu.org/safefree/torture/torture_report.pdf .

[52] The official investigation report of Abu Ghraib is that by Major General Antonio M. Taguba, "Article 15-6 Investigation of the 800th Military Police Brigade," March 2004, Part One, para 6, *available at* http://www.npr.org/iraq/2004/pnson_abuse_report.pdf. *See also* Seymour M. Hersh, *Torture at Abu Ghraib*, NEW YORKER, May 10, 2004, *available at* http://www.newyorker.com/archive/2004/05/10/040510fa_fact.

[53] Dan Eggen, *CIA Acknowledges 2 Interrogation Memos*, WASH. POST, Nov. 14, 2006, at A29; Rupert Cornwell, *Bush Defends Demands for CIA 'Torture' Power*, INDEPENDENT, Sept. 16, 2006, *available at* http://news.independent.co.uk/world/americas/article1603860.ece.

[54] *See* Marcy Strauss, *The Lessons of Abu Ghraib*, 66 OHIO ST. L.J. 1269 (2005).

both inside and outside of the United States. The rights of prisoners inside the United States to obtain redress are severely limited by the Prison Litigation Reform Act.[55] Further, the U.S. government continues to argue that victims of abuse outside the United States have virtually no remedy for torture and abuse in U.S. courts under domestic or international law. In fact, the Bush administration in October 2006 advocated that persons who were rendered to prisons abroad should be prohibited from speaking to anyone, including their attorneys, about what interrogation techniques had been used against them.[56] The logic here is that such information, if made public, could alert terrorists elsewhere what techniques were being used to interrogate prisoners and thereby assist them in preparing counter-measures. In this regard, it should be noted that the Detainee Treatment Act, enacted in December 2005, attempts to close ambiguities in the extraterritorial application of the Convention Against Torture by declaring that all individuals acting on behalf of the U.S. government are categorically prohibited from engaging in or authorizing torture or cruel, inhuman, or degrading treatment of detainees in U.S. custody regardless of the location of their detention, that is, regardless of whether or not they are held on U.S. territory.[57] Yet, it remains unclear whether or when the U.S. government will implement this legislation in a way that brings it into compliance with the Convention Against Torture.

The Bush administration asserts that detainees captured in the "global war on terrorism" are "enemy combatants" and can be held pursuant to the president's powers as commander-in-chief until the end of hostilities.[58] This position places all detainees in legal limbo so that they

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[55] Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321 (1996) (codified as amended in scattered titles and sections of the U.S.C.). *See* the critique by John Boston, *The Prison Litigation Reform Act* (Sept. 14, 2004), *available at* http://www.wnylc.net/pb/docs/plra2cir04.pdf.

[56] Michael A. Fletcher, *Bush Signs Terrorism Measures; New Law Governs Interrogation, Prosecution of Detainees*, WASH. POST, Oct. 18, 2006, at A4.

[57] Detainee Treatment Act, Department of Defense Appropriations Act, 2006, Pub. L. No. 109-148, Div. A, Title X, § 1003, 119 Stat. 2739 (2005). *See generally* Arsalan M. Suleman, *Detainee Treatment Act of 2005*, 19 HARV. HUM. RTS. J. 257, 259–60 (2006).

[58] There is no authoritative definition for the term "enemy combatant" because the Bush administration has provided only specific examples of persons who might be designated enemy combatants, without providing any examples of persons who could not be designated enemy combatants. *See In re* Guantanamo Detainee Cases, 355 F. Supp. 2d 443, 475 (D.D.C. 2005). In *Hamdi v. Rumsfeld*, the Supreme Court established that "enemy combatant" includes any person, whether a U.S. citizen or a foreign

can be indefinitely detained without charge, denied access to counsel and family members, and provided with no meaningful access to judicial proceedings. The United States continues to deny the status of prisoners of war (POW) under the Third Geneva Convention to persons detained during hostilities in Afghanistan and Iraq. The Combat Status Review Tribunals created in 2004 by the Department of Defense for Guantanamo do allow detainees to contest their detention and status as "enemy combatants,"[59] but they do not constitute tribunals in the strict sense of the Geneva Conventions, nor do they guarantee fundamental due process protections.[60] The upshot of these policies is to put the detainees at higher risk of torture and abuse.

Over the past four years, several methods of torture and abuse reportedly were used against detainees in Guantanamo Bay, among them prolonged incommunicado detention, disappearances, beatings, death threats, painful stress positions, sexual humiliation, forced nudity, exposure to extreme heat and cold, denial of food and water, sensory deprivation such as hooding and blindfolding, sleep deprivation, water-boarding, use of dogs to inspire fear, and racial and religious insults.[61] In addition, an official report confirmed that from 2002 through February 2006, at least 98 detainees in U.S. custody in Afghanistan and Iraq died.[62] The government

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national, who engages in foreign armed conflict against the United States or directly assists enemy forces engaging in such hostilities. *See* 542 U.S. at 516–17. *See In re* Guantanamo Detainee Cases, 355 F. Supp. 2d at 475. In addition, the government asserts that the location of capture is not relevant; a person may be designated an enemy combatant regardless of whether that person is seized on U.S. soil or abroad. *See* Padilla v. Hanft (*Padilla II*), 423 F.3d 386, 392 (4th Cir. 2005), *cert. denied*, No. 05-533, 2006 WL 845383 (U.S. Apr. 3, 2006).

[59] Memorandum from Deputy Secretary of Defense, to the Secretary of the Navy, Subject: Order Establishing Combatant Status Review Tribunals (July 7, 2004), *available at* http://www.defenselink mil/news/Jul2004/d20040707review.pdf. *See generally* Robert A. Peal, *Combatant Status Tribunals and the Unique Nature of the War on Terror*, 58 VAND. L. REV. 1629, 1650–54. (2005).

[60] Alan Tauber, *Ninety-Miles from Freedom? The Constitutional Rights of Guantanamo Bay Detainees*, 18 ST. THOMAS L. REV. 77 (2005).

[61] American Civil Liberties Union, *Enduring Abuse: Torture and Cruel Treatment by the United States at Home and Abroad—Executive Summary* (Apr. 27, 2006), *available at* http://www.aclu.org/safefree/torture/25351pub20060427.html.

[62] Hina Shamsi, *Command's Responsibility: Detainee Deaths in U.S. Custody in Iraq and Afghanistan* (Feb. 2006), *available at* http://www.humanrightsfirst.info/pdf/06221-etn-hrf-dic-rep-web.pdf. Cherif Bassiouni asserts that by 2006, "the estimated deaths of over 200 detainees in U.S. custody" had occurred, "presumably as a result of torture." Bassiouni, *supra* note 12, at 390.

has acknowledged that 27 deaths in U.S. custody were homicide, some caused due to "strangulation," "hypothermia," "asphyxiation," and "blunt force injuries." These techniques constitute cruel, inhuman, or degrading treatment and, when used in combination or for prolonged periods of time, may amount to torture.[63]

Disallowing torture does not obviate performing effective interrogations of terrorist suspects. If interrogators are patient, adept, and well trained, they can obtain crucial information without resorting to cruel, inhuman, or degrading treatment. Indeed, most expert interrogators realize that use of torture is not only immoral and illegal, but sometimes less effective. The likelihood is great that people being tortured will confess to anything to stop the pain. Accordingly, information gained from torture is often untrue, of suspect accuracy, and dubious value.[64]

IV. PROHIBITION AGAINST TORTURE

The prohibition against torture is deep-rooted in customary international law, international agreements ratified by the United States, and in U.S. domestic legislation. The U.S. Department of State put it well in 1999 when it asserted that the "United States has long been a vigorous supporter of the international fight against torture . . . Every unit of government at every level within the United States is committed, by law as well as by policy, to the protection of the individual's life, liberty and physical integrity."[65] That commitment must not be forsaken or cast aside. It must be reinvigorated and fixed more firmly as the international community views the ways in which the United States responds to its foreign policy challenges. In its war against global terrorism, if the United States were to excuse or advocate torture by its government officials or foreign governments, it would abrogate its own principles, laws, and international treaty obligations. It would profoundly undercut its moral compass to decry and condemn torture in other states. It would also impart to other governments a convenient rationale to apply torture to further their own national security ambitions.[66]

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[63] ACLU, *Enduring Abuse, supra* note 61.

[64] Oliver Ravel, former deputy director of the FBI, has stated that force is not effective: "People will even admit they killed their grandmother, just to stop the beatings." *Quoted in* Human Rights Watch, The Legal Prohibition Against Torture, *available at* http://www.hrw.org/press/2001/11/TortureQandA.htm.

[65] U.S. Department of State, *Initial Report of the United States of America to the UN Committee Against Torture, Oct 15, 1999* (Nov. 15, 2001).

[66] *See generally* Jeffrey K. Cassin, *United States' Moral Authority Undermined: The Foreign Affairs Cost of Abusive Detentions*, 4 CARDOZO PUB. L. POL'Y & ETHICS J. 421 (2006); Omar

The prohibition against torture is also fundamental to humanitarian law—that is, the laws of war—that governs the conduct of parties during armed conflict. An important element of international humanitarian law is the duty to protect the life, health, and safety of civilians and other non-combatants, including soldiers who are captured or who have laid down their arms. Torture of such protected persons is absolutely forbidden. Common Article 3 to the Geneva Conventions, for instance, bans "violence of life and person, in particular murder of all kinds, mutilation, cruel treatment and torture" as well as "outrages upon personal dignity, in particular humiliating and degrading treatment." The use of force to obtain information is specifically prohibited in Article 31 of the Fourth Geneva Convention, "no physical or moral coercion shall be exercised against protected persons, in particular to obtain information from them or from third parties."[67] The United States was the preeminent contributor to elaboration of this legal instrument in 1949. Article 4 of the Convention Against Torture obligates states parties to ensure that all acts of torture are criminal offenses under domestic legislation.[68]

It is important to realize that aliens (i.e., non-citizens) in the United States enjoy the same right not to be tortured as American citizens. Neither international nor domestic law conditions that right on citizenship or nationality. No detainee held by U.S. authorities—regardless of nationality, whether held in the U.S. or in another country, or deemed a combatant or civilian—may be tortured. All applicable international law applies to U.S. officials operating abroad, including the Convention Against Torture and the Geneva Conventions. The prohibition against torture is universal and it covers all countries and all U.S. citizens and persons of other nationalities.

Under international law and U.S. legislation, coercion can never be used to pressure a detainee to speak, even if it seems only slight or mod-

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Akbar, *Losing Geneva in Guantanamo Bay*, 89 IOWA L. REV. 195 (2003); and Elizabeth K. Dahlstrom, *The Executive Policy Toward Detention and Trial of Foreign Citizens at Guantanamo Bay*, 21 BERKELEY J. INT'L L. 661 (2003).

[67] Convention for the Protection of Civilian Persons, *supra* note 21, art. 31

[68] In full, Article 4 provides that:

> 1. Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture.
>
> 2. Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature.

Convention Against Torture, *supra* note 13, art. 4.

erate. The absolute injunction against force has practical as well as moral underpinnings. Historical practice indicates that the use of only a "little bit" of physical pressure to compel someone to speak during an interrogation is more fiction than fact. Once some degree of force is allowed, interrogators confront an irresistible lure to apply as much force as necessary to acquire the information they are seeking. A "little" torture may give rise to much torture.

The prohibition against the ill-treatment of persons under interrogation is rooted in respect for human dignity and the inviolability of the human body and mind. Interestingly enough, to force a person to confess through the application of drugs such as truth serum is as much a denial of human dignity as to coerce talk through the use of physical force.[69] Moreover, use of truth serum transgresses the Constitution's Fifth Amendment right against self-incrimination. Put bluntly, there are no situations in which torture is permitted. Under customary international law as well as under international human rights treaties, torture or other cruel, inhuman, or degrading treatment is prohibited at all times and in all circumstances. The right not to be tortured enjoys of the status of *jus cogens*, a preemptory norm.[70] It is a non-derogable right, one of those core rights that may never be suspended, even during times of war, when national security is threatened, or during other public emergencies.

V. THE TICKING BOMB SCENARIO

Some commentators argue that the goal of saving innocent lives should override a person's right not to be tortured. This argument is presented in its starkest form as the "ticking bomb" scenario: a bomb has been set to explode that will kill thousands of people and a detained person is known to have information on where the bomb is and how to

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[69] *See generally* Linda M. Keller, *Is Truth Serum Torture?* 20 AM. U. INT'L L. REV. 521 (2005).

[70] *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 702 cmt. n (1987) (asserting torture and other cruel, inhuman, or degrading treatment, and prolonged arbitrary detention are examples of *jus cogens*); Jose E. Alvarez, *Torturing the Law*, 37 CASE W. RES. J. INT'L L. 175, 187–189 (2006); Jordan J. Paust, *Post-9/11 Overreaction and Fallacies Regarding War and Defense, Guantanamo, the Status of Persons, Treatment, Judicial Review of Detention, and Due Process in Military Commissions*, 79 NOTRE DAME L. REV. 1335, 1357–58 (2004). In discussing the principle of *jus cogens*, the *Restatement (Third)* observes that, "Some rules of international law are recognized by the international community of states as peremptory, permitting no derogation. These rules prevail over and invalidate international agreements and other rules of international law in conflict with them." RESTATEMENT (THIRD), *id.*, at § 102 cmt.

defuse it. Is torture justified in such a case to force the detainee to talk? Those who say that it is contend that governments should be permitted to choose torture as the lesser of two evils in such a situation. The salvation of thousands of innocent people at the expense of inflicting pain on a would-be terrorist is viewed as pragmatic, fair, and moral.[71]

The international legal community, however, rejects the use of torture even in the "ticking bomb" case. International human rights law—as well as U.S. domestic law—does not provide for any exceptions to the prohibition against torture.[72] There are practical as well as moral reasons for not permitting a "ticking bomb" exception to the ban on torture.[73] Although such an exception might appear to be highly limited, experience reveals that the exception can readily become the standard practice. Moreover, critical considerations remain unanswered. For instance, how imminent must the attack be to trigger an exception to justify torture—an hour, a week, a year? How much certainty must the government have that the detainee actually has the necessary information? Under the utilitarian logic that the end justifies the means, torture should be permitted even if the disaster might not occur until some point in the future, and it should be permitted against as many people as is necessary to secure the information that could be used to avert the disaster. It bears remembering that this logic is unacceptable under international law, as well as U.S. law.

The underlying premise of the ticking bomb scenario prompts concern over whether the United States will lose valuable information if torture is prohibited. The answer is likely no. As noted earlier, torture is likely to yield false information. When a person is being tortured the "impression of pain . . . may increase to such a degree, that, occupying the mind entirely, it will compel the sufferer to use the shortest method of freeing himself from torment . . . [H]e will accuse himself of crimes of

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[71] *See* Fritz AllHoff, *A Defense of Torture: Separation of Cases, Ticking Time-bombs and Moral Justification*, 19 INT'L J. APPLIED PHIL. 245 (Fall 2005); .Alan Dershowitz, *Warming Up to Torture*, L.A. TIMES, Oct. 17, 2006, *available at* http://www.law.harvard.edu/news/2006/10/17_dershowitz.php; Alan Dershowitz, *Torture Could Be Justified*, CNN.com, Mar. 4, 2003, *available at* http://edition.cnn.com/2003/LAW/03/03/ cnna.Dershowitz/.

[72] Vicki Haddock, The *Unspeakable: To get at the truth, is torture or coercion ever justified?*, S.F. CHRON., Nov. 18, 2001, at D-1.

[73] For a discussion of the moral considerations in the "ticking bomb" scenario, see David Luban, *Liberalism, Torture, and the Ticking Bomb*, 91 VA. L. REV. 1425 (2005).

which he is innocent."[74] Indeed, the unreliability of forced confessions was a principal reason why U.S. courts originally prohibited their use.

VI. "OUTSOURCING" TORTURE

Since 2002, the United States has repeatedly engaged in the practice of rendition, or flying detainees to other countries where they are then interrogated by foreign and, perhaps, U.S. officials.[75] Are these actions lawful? The answer is a definitive no. The United States may not send detainees to another country to be questioned by police or security forces, especially if the latter are likely to use torture or cruel, inhuman, or degrading treatment during their interrogation.[76] Article 3 of the Convention Against Torture expressly prohibits sending a person to another state "where there are substantial grounds for believing that he would be in danger of being subjected to torture."[77] Even so, it is well known that the United States has engaged in such unlawful renditions in which the CIA kidnapped individuals and transferred them to countries known for their routine use of torture, such as Egypt, Jordan, Saudi Arabia, Poland, Romania, Syria, Turkey, Morocco, Uzbekistan, Algeria, and Pakistan.[78] While the U.S. government euphemistically refers to this

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[74] Cesare Becca, "Of Torture," *in An Essay on Crimes and Punishments* (1764), *available at* http://www.constitution.org/cb/crim_pun16.htm. *See also supra* note 64.

[75] *Europe "Aided US in CIA flights,"* BBC.news. Rendition involves the extra-legal transfer of an individual from one state to another (June 7, 2006), *available at* http://news.bbc.co.uk/1/hi/world/europe/5054426.stm. *See* Margaret Satterthwaite & Angelina Fisher, *Tortured Logic: Renditions to Justice, Extraordinary Rendition, and Human Rights Law*, 6 LONG TERM VIEW 4, 52–71 (2006). For a discussion of the norms governing "extraordinary rendition," see Association of the Bar of the City of New York & NYU Center for Human Rights and Global Justice, Torture by Proxy: International and Domestic Law Applicable to "Extraordinary Rendition," (2004), *available at* http://www.nyuhr.org/docs/TortureByProxy.pdf. *See also* Janet Meyer, *Outsourcing Torture: The Secret History of America's "Extraordinary Rendition" Program*, NEW YORKER, Feb. 14, 2005, *available at* http://www.newyorker.com/archive/2005/02/14/050214fa_fact6.

[76] The U.S. government made this clear in legislation adopted in 1998, as it asserted that it was the policy of the United States not to: "expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, *regardless of whether the person is physically present in the United States*." Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, § 2242, 112 Stat. 2681 (Oct. 21, 1998), *reprinted in* 8 U.S.C. § 1231, Historical and Statutory Notes (1999) (emphasis added).

[77] Convention Against Torture, *supra* note 13, art. 3.

[78] An authoritative report by Committee on Legal Affairs in the Council of Europe

practice as "extraordinary rendition," human rights groups commonly call it "outsourcing torture." Perhaps the best known rendition incident is that of Maher Arar, a Syrian-born Canadian. In September 2002, Arar was changing planes at New York's JFK Airport while returning home to Canada from a trip to Tunisia. He was arrested by U.S. officials, accused of being affiliated with al-Qaeda, and deported to Syria, even though he was carrying a Canadian passport. He was kept in Syria for more than a year, where he said he was interrogated and tortured. Following his return in October 2003, and a judicial inquiry in Ottawa that concluded in 2006, the Canadian government awarded $12 million to Arar as compensation for his suffering and legal fees.[79] Other detainees have been "disappeared" to secret detention facilities overseas. U.S. violations of the Convention Against Torture are not limited to actions by military personnel overseas in the "war on terror." On September 7, 2006, President Bush boldly affirmed that 14 "suspected terrorists" had been transferred to Guantanamo from foreign states where they had been held the past three years.[80] From his statement and subsequent news reports, it was revealed that these individuals had been subjected to "irregular interrogation techniques" and, according to White House officials, valuable information was obtained from these interrogations, most notably from Khalid Sheik Mohammed, the self-proclaimed mastermind of the 9/11 attacks.[81] While the public was not informed what the information was or what means were used to obtain it, one technique that likely was used is water-boarding.[82] Vice President Cheney recently issued the Bush admin-

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described the worldwide U.S. process of extraordinary rendition as a "global spider's web." *See* Parliamentary Assembly, Council of Europe, Alleged secret detentions and unlawful inter-state transfers involving could of Europe member states, AS/Jur (7 June 2006) 16 Part II, *available at* http://news.bbc.co.uk/1/shared/bsp/hi/pdfs/07_06_06_renditions_draft.pdf.

[79] Meyer, *supra* note 75; *Mather Arar Timeline*, CBC News, Jan. 26, 2007, *available at* http://www.cbc.ca/news/background/arar/; and David Ignatius, *'Rendition' Realities*, WASH. POST, Mar. 9, 2005, at A21.

[80] *Bush Says High-Level Detainees Will Face Fair Military Trial*, USINFO, CURRENT ISSUES, Sept. 6, 2006, *available at* http://usinfo.state.gov/xarchives/display.html?p=washfile-english&y=2006&m=September&x=20060906171819eaifas7.320583e-03.

[81] Phil Hirshkorn, *9/11 Mastermind Admits to Multiple Plots*, CBS News, Mar. 15, 2007, *available at* http://www.cbsnews.com/stories/2007/03/15/terror/main2571875.shtml.

[82] Brian Ross, *History of an Interrogation Technique: Water-boarding*, ABC News, Nov. 29, 2005, *available at* http://abcnews.go.com/WNT/Investigation/story?id=1356870; Brian Ross & Richard Esposito, *CIA's Harsh Interrogation Techniques Described*, ABC News Investigations, Nov. 18, 2005, *available at* http://abcnews.go.com/WNT/Investigation/story?id=1322866&page=1.

istration's first clear endorsement of water-boarding, or mock drowning, as a form of interrogation. In a radio interview on October 25, 2006, Cheney agreed that subjecting prisoners to "a dunk in water" is a "no-brainer" if it could save lives. After being asked about this technique, he said that such interrogations have been a "very important tool" used against high-level al-Qaeda detainees such as Khalid Sheikh Mohammed, and that they do not, in his view, constitute torture.[83] Cheney's comments on the perceived lawfulness of water-boarding contradict the views of the U.S. Congress and the U.S. Defense Department, as well as fundamental principles of international law, and could come back to haunt the United States if not corrected by the Bush administration.

There are legal remedies for victims of detention and torture suffered at the hands of U.S. agents. Under U.S. law, such victims can seek redress in state or federal court for damages. There is the Federal Torts Claims Act, which permits suits against U.S. federal employees who engage in negligent or wrongful conduct.[84] There is the Alien Tort Statute, which provides that U.S. "district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[85] In addition, there is the Torture Victims Protection Act, which imposes civil liability against persons who commit acts of torture under the authority of a foreign government.[86] Even so, this latter legislation, which was passed in the aftermath of the *Filartiga v. Pena-Irala* case,[87] is aimed at individuals acting at the behest of "any foreign nation," not the United States. Consequently, it exempts action perpetrated by agents acting at the direction of the U.S. government.[88]

These pieces of legislation aside, numerous practical obstacles still encumber the prospects for lawsuits against U.S. officials accused of tor-

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[83] Human Rights Watch, U.S.: *Vice President Endorses Torture; Cheney Expresses Approval of CIA's Use of Water-boarding*, Oct. 26, 2006, *available at* http://hrw.org/english/docs/2006/10/26/usdom14465.htm .

[84] 28 U.S.C. § 1346(b)(1) (2000).

[85] Alien Tort Claims Act, 28 U.S.C. § 1350 (2000).

[86] Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (codified as amended at 28 U.S.C. § 1350 (2000).

[87] Filartiga v. Pena-Irala, 630 F.2d 876, 878 (2d Cir. 1980).

[88] Pub. L. No. 102-256, 106 Atat. 73 (1992). For an assessment, see Rachael E. Schwartz, *Note, And Tomorrow? The Torture Victim Protection Act*, 11 ARIZ. J. INT'L & COMP. L. 271 (1994).

ture. Among these are the difficulties of securing evidence that "torture" actually occurred, proving that such acts were actually perpetrated by the accused, the high costs of litigation, as well as legal and procedural impediments to reaching a satisfactory conclusion.[89] The best "remedy" for torture is to prevent it from occurring. In short, given the unequivocal proscription of torture under U.S. domestic law, as buttressed by uncompromising principles of international law, it seems manifest that U.S. officials should resolutely resist any temptation or encouragement to use torture or cruel, inhuman, or degrading treatment against detainees being held and questioned in connection with the U.S. campaign against global terrorism.

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Several conclusions can be drawn about the contention that terrorizing the terrorists by U.S. agents may be permissible in the contemporary war against global terrorism. First, torture and abusive treatment contravene the most fundamental principles of humanity and respect for human life and dignity—principles that must be preserved for all people, at all times. Second, torture and abusive treatment by anyone, anywhere, at all times are flatly prohibited. Third, a government that employs torture will have its international image severely tarnished and its political credibility and moral authority grossly undercut in its foreign relations. Fourth, any approved governmental use of torture and other abusive treatments contributes to the erosion of their prohibition—an erosion that could encourage the more widespread use of these malevolent acts. Fifth, while experts might differ on the efficacy of torture and other forms of abusive treatment in securing confessions, resorting to such repugnant tactics prompts serious doubts about the accuracy of the information obtained.

Since 2002, the capture of high-ranking al-Qaeda and other "terrorist" suspects rekindled a debate in the United States about whether torture may be used during interrogations. It appears that many Americans, including a number of high ranking U.S. government officials, are unaware of the absolute, unequivocal legal, moral, and ethical prohibitions against torture or other cruel, inhuman, or degrading treatment of any person. These persons include "enemy combatants," as well as "suspected terrorists." If these officials were aware, they endeavored through

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[89] *See* Laura N. Pennelle, *The Guantanamo Gap: Can Foreign Nationals Obtain Redress for Prolonged Arbitrary Detention and Torture Suffered Outside the United States?*, 36 CAL. W. INT'L L.J. 303 (2006).

premeditated arguments to circumvent both international and domestic law prohibitions by perverting the legal interpretation of "torture" so that clearly proscribed acts would be transformed into possibly permissible means of interrogation. Acceptance of such a policy to interrogate persons utilizing torture comes at the expense of abrogating basic moral, ethical, and legal principles. The right to be free from such mistreatment is one of the most fundamental and indisputable of all human rights. As the United States carries out its global war against terrorism, the nexus of perceived national security needs, public anxiety, and the desire for retribution might generate temptations to sacrifice certain fundamental rights and freedoms. But, if respect for international norms and the rule of law are to be preserved, that temptation, especially as regards the prohibition against torture, must be vigorously resisted.

The right to be free from torture or abuse is not an extravagance that can be expropriated by government officials during difficult times. Rather, that right reflects the very essence of a society's values that are worth defending. In short, President Bush has said that the war on terrorism is about values, and he has pledged that, in its foreign policy, the United States will always stand for "the non-negotiable demands of human dignity." As Cherif Bassiouni has often reminded us, standing for human dignity entails the wholesale rejection of torture and other forms of ill treatment. The time has long passed for all Americans to live up to our fundamental moral, ethical, and legal obligations.

CHAPTER 7

SECRET DETENTIONS, SECRET RENDITIONS, AND FORCED DISAPPEARANCES DURING THE BUSH ADMINISTRATION'S "WAR" ON TERROR

*Jordan J. Paust**

It is an honor to participate in this publication dedicated to Professor Cherif Bassiouni, a longtime friend[1] and an internationally renowned scholar, who has tirelessly opposed international crime in any form and who has successfully engaged in significant, perhaps crucial, efforts on behalf of humankind to create a permanent international criminal court. As he noted recently, he was led to this role partly because of his suffering as a young victim of psychological torture during his "house arrest in . . . Cairo [with] the shutters . . . nailed, telephone and radio cut off, and food delivered once a day" and "no contact with the outside world" for seven months.[2] Although not "disappeared" entirely, Cherif Bassiouni suffered some of the effects that one can experience when held in a secret detention center with no contact with the outside world for several months. This crime against humanity is known as "forced disappearance"—an admitted "program" of President Bush and the primary focus of this chapter.

After September 11, the Bush administration authorized roundups of hundreds of foreign persons within the United States. They were dis-

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[1] I first met Cherif at a conference in the early 1970s, and we began to know each other better during a 1973 law of war–anti-terrorism symposium (with Richard Baxter) at Akron that had been arranged by the former Academic Director of the U.S. Army JAG School and Professor at Akron, Al Rakas. *See Symposium: Terrorism in the Middle East*, 7 AKRON L. REV. 373–421 (1974).

[2] *See* M. Cherif Bassiouni, *The Institutionalization of Torture under the Bush Administration*, 37 CASE W. RES. J. INT'L L. 389, 420 (2006).

appeared for weeks or months in a gulag operated in the name of anti-terror that has apparently done little to provide real security but much to enrage a people who feel that they were really singled out because of their religious preferences and national origin in violation of basic human rights.[3] This "program" was much like the shameful incarceration of loyal Americans of Japanese ancestry in concentration camps on the West Coast during World War II.[4] Meanwhile real German prisoners of war were released on parole in Texas, and real German saboteurs had landed in Florida and New York,[5] but no German or Italian Americans were detained without trial because of their racial heritage or alleged collective disloyalty.

After September 11, the executive branch refused to release the names and whereabouts of thousands of persons detained as so-called "special interest" INS detainees,[6] as material witnesses,[7] and as persons detained without trial as alleged security threats in the United States, Guantanamo Bay, Cuba, and elsewhere.[8] In an essay concerning immi-

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[3] *See, e.g.*, Human Rights Watch, *Presumption of Guilt: Human Rights Abuses of Post-September 11 Detainees*, vol. 14, no. 4 (G), at 22–24 (Aug. 2002) [hereinafter *Presumption of Guilt*]; Steven W. Becker, *"Mirror, Mirror on the Wall . . .": Assessing the Aftermath of September 11th*, 37 VALPARAISO U.L. REV. 563, 610 (2003); Michael J. Kelly, *Executive Excess v. Judicial Process: American Judicial Responses to the Government's War on Terror*, 13 IND. INT'L & COMP. L. REV. 787, 788, 799, 803 (2003); Lawyers Committee for Human Rights, *Assessing the New Normal: Liberty and Security for the Post-September-11 United States* 31, 34, 39 (2003) [hereinafter Lawyers Comm.], *available at* http://www.humanrightsfirst.org.http://www.humanrightsfirst.org.

[4] *See, e.g.*, Korematsu v. United States, 323 U.S. 214 (1944); Korematsu v. United States, 584 F. Supp. 1406 (N.D. Cal. 1984).

[5] *See, e.g., Ex parte* Quirin, 317 U.S. 1 (1942).

[6] *See, e.g., Presumption of Guilt, supra* note 3, at 7, 17; Lawyers Committee for Human Rights, *A Year of Loss: Reexamining Civil Liberties since September 11*, at 19–21 (2002), *available at* http://www.lchr.org/US_law/loss/loss_report.pdf; Human Rights Watch, *U.S. Supreme Court Should Review and Reject Secret Detentions, available at* http://www.hrw.org/press/2003/09/us093003.htm.

[7] *See, e.g., Presumption of Guilt, supra* note 3, at 17; Kelly, *supra* note 3, at 808–11; Edward Walsh, *Court Upholds a Post-9/11 Detention Tactic*, WASH. POST, Nov. 8, 2003, at A11.

[8] *See, e.g.*, Amnesty International, Memorandum to the US Government on the Rights of People in US Custody in Afghanistan and Guantanamo Bay 23–27 (Apr. 15, 2002), *available at* http://web.amnesty.org/ai.nsf/Index/AMR510532002?OpenDocument&of=COUNTRIES\US; Dan Chapman, *Al-Qaida Cases Blur Rules on Interrogations*, ATLANTA JOURNAL-CONST., Mar. 4, 2003, at 1A ("U.S. officials say more than 3,000 al-Qaida members and supporters have been detained worldwide since

gration detainees, Professor Joan Fitzpatrick in 2002 identified the problem posed by "unprecedented policies of detention and secrecy"[9] and the fact that the Department of Justice had "refused to reveal the identities of the detainees, and ordered state and local jails to keep their identities a secret from the press and public."[10] She also noted, with respect to refusals to disclose names and secret hearings, that in 2001 "[t]he Chief Immigration Judge issued an order directing his colleagues to close removal hearings and conceal docket entries in 'special procedures' cases designated by the INS, even where terrorism grounds were not in issue and all evidence was unclassified."[11]

President Bush admitted in 2006 that there has also been a program of secret detention and secret rendition of persons outside the United States and that this program will continue.[12] The program has involved

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Sept. 11," some in Afghanistan, some on Diego Garcia in the Indian Ocean, some 650 at Guantanamo Bay, some "in Jordan, Egypt and Saudi Arabia, whose governments are known to allow torture," and others in places unknown.); Daphne Eviatar, *Foreigners' Rights In the Post-9/11 Era: A Matter of Justice*, N.Y. TIMES, Oct. 4, 2003, at B7 ("More than 5,000 citizens of foreign countries have been detained."); Lawyers Comm., *supra* note 3, at 52–53; Katharine Q. Seelye, *Moscow, Seeking Extradition, Says 3 Detainees Are Russian*, N.Y. TIMES, Apr. 3, 2002, at A11. In addition to requirements under human rights law and the laws of war to not engage in torture, cruel, or inhuman treatment of persons being interrogated, the United States has related obligations under international law to not become a complicitor in foreign violations. On the prohibition of complicitous behavior, see, e.g., JORDAN J. PAUST, M. CHERIF BASSIOUNI ET AL., INTERNATIONAL CRIMINAL LAW 44–49 (3d ed. 2007); JORDAN J. PAUST, INTERNATIONAL LAW AS LAW OF THE UNITED STATES 210, 286–87, 291 (2d ed. 2003). Further, the United States must not send persons to a foreign country, for example, for interrogation if one can foresee that there will be a "real risk" of violations of human rights or rights or duties under the laws of war. *See, e.g.*, PAUST, BASSIOUNI ET AL., *supra* at 344–45, 348 (addressing the Soering Case, 161 Eur. Ct. H.R. (ser. A), paras. 88, 91–92, 111 (1989)), 349, 352–53, 396 (Jefferson quoted in *Ex parte* Kaine, 14 F. Cas. 78, 81 (C.C.S.D.N.Y. 1853) (No. 7,597), 401; RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 475, cmt. g, 476, cmt. h, 711, RN 7 (1987).

[9] Joan Fitzpatrick, *Terrorism and Migration* at 9 (Oct. 2002), *available at* http://www.asil.org/taskforce.

[10] *Id.* at 10.

[11] *Id.*, citing Memorandum from Michael Creppy, Sept. 21, 2001, *reprinted in* 78 INTERPRETER RELS. 1836 (Dec. 3, 2001); *see also Presumption of Guilt, supra* note 3, at 24–27; Becker, *supra* note 3, at 610; Kelly, *supra* note 3, at 803–08.

[12] *See, e.g.*, Julian E. Barnes, *CIA Can Still Get Tough on Detainees*, L.A. TIMES, Sept. 8, 2006, at A1; John Donnelly & Rick Klein, *Bush Admits to CIA Jails; Top Suspects Are Relocated*, BOSTON GLOBE, Sept. 7, 2006, at A1; Ken Herman, *Bush Confirms Secret Prisons, Denies Torture*, ATLANTA J.-CONST., Sept. 7, 2006, at 1A (adding that the CIA

the detention of thousands of individuals in Afghanistan, Iraq, Guantanamo Bay, Cuba, and in many other places. The whereabouts of all persons detained, their names, whether or not secret detention was under the control of CIA or (until September 7, 2006) U.S. military personnel was not disclosed. Such forms of secret detention are violations of the customary and *jus cogens* prohibition of forced disappearance that can lead to civil and criminal sanctions.[13]

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secret detention program "had held about 100 detainees"); Dana Priest, *CIA Holds Terror Suspects in Secret Prisons*, WASH. POST, Nov. 2, 2005, at A1; Mark Silva et al., *Bush Confirms Use of CIA Secret Prisons*, CHICAGO TRIB., Sept. 7, 2006, at 1. *See also* Dan Eggen, *CIA Acknowledges 2 Interrogation Memos*, WASH. POST, Nov. 14, 2006, at A29; David Johnston, *CIA Tells of Bush Directive on Handling of Detainees*, N.Y. TIMES, Nov. 15, 2006, at A14; Jordan J. Paust, *Executive Plans and Authorizations to Violate International Law Concerning Treatment and Interrogation of Detainees*, 43 COLUM. J. TRANSNAT'L L. 811, 836–37 & n.96 (2005).

[13] *See, e.g.*, Rome Statute of the International Criminal Court art. 7(2)(i) (forced disappearance is a crime against humanity); Inter-American Convention on the Forced Disappearance of Persons art. II, done in Belen, Brazil, June 9, 1994, *reprinted in* 33 I.L.M. 1529 (1994); Council of Europe, Parliamentary Assembly, Res. 1433, Lawfulness of Detentions by the United States in Guantanamo Bay, paras. 7(vi), 8(vii)–(viii), (vii) (Apr. 26, 2005), *available at* http://assembly.coe.int/Documents/AdoptedText/ta05/RES1433.htm; RESTATEMENT (THIRD), *supra* note 8, § 702(c) and cmt. n & RN 1; JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW: RULES 340–43, 421, 439 (ICRC 2005); Jose E. Alvarez, *Torturing the Law*, 37 CASE W. RES. J. INT'L L. 175, 199, 210–11, 213 (2006); M. Cherif Bassiouni, *The Institutionalization of Torture Under the Bush Administration*, 37 CASE W. RES. J. INT'L L. 389, 411–13 (2006); Maureen R. Berman & Roger C. Clark, *State Terrorism: Disappearances*, 13 RUTGERS L.J. 531 (1982); Jordan J. Paust, *Post 9/11 Overreaction and Fallacies Regarding War and Defense, Guantanamo, The Status of Persons, Treatment, Judicial Review of Detention, and Due Process in Military Commissions*, 79 NOTRE DAME L. REV. 1335, 1352–56 (2004); Leila Nadya Sadat, *Ghost Prisoners and Black Sites: Extraordinary Rendition Under International Law*, 57 CASE W. RES. J. INT'L L. 309, 322–23 (2006); The Prosecutor v. Kupreskic, Case No. IT-95-16-T (ICTY Trial Chamber, Judgment, Jan. 14, 2000); *In re* Marcos, Human Rights Litigation, 25 F.3d 1467, 1475 (9th Cir. 1994); Tachiona v. Mugabe, 234 F. Supp.2d 401, 416, 426 (S.D.N.Y. 2002); Xuncax v. Gramajo, 886 F. Supp. 162, 184–85 (D. Mass. 1995); Forti v. Suarez-Mason, 694 F. Supp. 707, 710–12 (N.D. Cal. 1988); *see also* U.N. Committee Against Torture (CAT), *Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: Conclusions and Recommendations of the Committee against Torture, United States of America*, 36th sess., U.N. Doc. CAT/C/USA/CO/2, paras. 17–18 (May 18, 2006) (17—"The State party should ensure that no one is detained in any secret detention facility under its *de facto* effective control. Detaining persons in such circumstances constitutes, *per se*, a violation of the Convention"; 18—"The State party should adopt all necessary measures to prohibit and prevent enforced disappearance in any territory under its jurisdiction, and prosecute and punish perpetrators, as this practice constitutes, *per se*, a violation of the Convention."), *available at* http://www.ohchr.org/english/bod-

In addition to other customary and treaty-based international law concerning illegal rendition and forced disappearance of persons, European countries have relevant regional obligations. Article 8(2) of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment[14] requires signatories to provide the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment full information on all places where persons deprived of their liberty are held. The European Court of Human Rights has held that a state violates Article 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms[15] if the authorities fail to take reasonable measures to prevent the disappearance of a person with respect to whom there is a particular risk of disappearance.[16] Further, Articles 2 and 13 are violated by the failure of authorities to carry out an investigation of disappearances.[17]

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ies/cat/docs/AdvanceVersions/CAT.C.USA.CO.2.pdf ; 22 U.S.C. § 2151n(a) (2000); 22 U.S.C. § 2304(d) ("causing the disappearance of persons" is among "flagrant" and "gross violations of internationally recognized human rights"); S. REP. NO. 102–249, at 9 (1991), *quoted in* Xuncax v. Gramajo,, 886 F. Supp. 162, 172 (D. Mass. 1995).

In the context of wars in Afghanistan and Iraq, the policy also creates violations of the Geneva Conventions and the violations can be prosecuted as war crimes. *See* Geneva Convention Relative to the Protection of Civilian Persons in Time of War arts. 5, 25, 71, 106–107, 143, 75 U.N.T.S. 287 (Aug. 12, 1949) [hereinafter GC]; IV COMMENTARY, GENEVA CONVENTION RELATIVE TO THE TREATMENT OF CIVILIAN PERSONS IN TIME OF WAR 56–58 (ICRC, J. Pictet ed. 1958) [hereinafter IV COMMENTARY]; Paust, *supra* note 12, at 836–37 n.96; Paust, *supra,* at 1355 n.84. CAT obligations apply in time of war or times of relative peace. *See, e.g.*, CAT, *supra,* art. 2 ("[n]o exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability, or any other public emergency, may be invoked as a justification"); U.N. Committee Against Torture, *Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: Conclusions and Recommendations of the Committee against Torture, United States of America*, 36th sess., U.N. Doc. CAT/C/USA/CO/2 (May 18, 2006), paras. 14 and 15 (14—the U.S. "should recognize and ensure that the Convention applies at all times, whether in peace, war or armed conflict, in any territory under its jurisdiction"; 15—"provisions of the Convention . . . apply to, and are fully enjoyed by, all persons under theeffective control of its authorities, of whichever type, wherever located in the world"), *available at* http://www.ohchr.org/english/bodies/cat/docs/AdvanceVersions/CAT.C.USA.CO.2.pdf . Human rights also apply during war. *See, e.g.*, Paust, *supra* note 12, at 820–23.

[14] E.T.S. No. 126 (1987).

[15] 213 U.N.T.S. 221, E.T.S. No. 5 (1950).

[16] *See* Mahmut Kaya v. Turkey, 28 Eur. Ct. H.R. 1 (Mar. 28 2000); Gongadze v. Ukraine, judgment of Nov. 8, 2005.

[17] *See Cyprus v. Turkey*, 35 Eur. Ct. H.R. 30 (May 10, 2001); *Kurt v. Turkey*, 27 Eur.

European officials cannot rightly be complicit in violations of such obligations and the rights of persons secretly detained and/or transferred through their territory.

I. DEFINITIONS OF FORCED DISAPPEARANCE IN VIOLATION OF INTERNATIONAL LAW

The secret detention and processing of various detainees engaged in by the executive branch after 9/11 and over the last five years fits within the definition of forced disappearance of persons, which is absolutely proscribed by international law in all circumstances. The Inter-American Convention on the Forced Disappearance of Persons defines forced disappearance as an

> act of depriving a person or persons of his or their freedom, in whatever way, perpetrated by agents of the state or by persons or groups acting with the authorization, support, or acquiescence of the state, followed by an absence of information or a refusal to acknowledge that deprivation of freedom or to give information on the whereabouts of that person, thereby impeding his or her recourse to the applicable legal remedies and procedural guarantees.[18]

Similarly, the U.N. General Assembly Declaration on the Protection of All Persons from Enforced Disappearance[19] addresses the nature of enforced disappearance as a circumstance involving persons who are "arrested, detained or abducted against their will or otherwise deprived of their liberty by [for example] officials . . . followed by a refusal to disclose the fate or whereabouts of the persons concerned or a refusal to acknowledge the deprivation of their liberty, which places such persons outside the protection of the law."[20] U.S. courts have recognized and applied similar definitions. For example, in *Forti v. Suarez-Mason*,[21] a federal district court

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Ct. H.R. 373 (May 25,1998), adding that Article 5 requires the authorities to take effective measures to safeguard against a risk of disappearance and to conduct prompt and effective investigations.

[18] *Supra* note 13, art. II. A similar definition of "enforced disappearance" as a customary crime against humanity appears in Article 7(2)(i) of the Rome Statute of the International Criminal Court. *Supra* note 13.

[19] G.A. Res. 47/133 (Dec. 18, 1992), U.N. Doc. A/RES/47/133, 92d plenary mtg., *reprinted in* 32 I.L.M. 903 (1993).

[20] *Id.* preamble.

[21] Forti v. Suarez-Mason. 694 F. Supp. 707 (N.D. Cal. 1988).

stated that causing a disappearance in violation of customary international law can be characterized by two elements: "(1) abduction by state officials or their agents; followed by (2) official refusals to acknowledge the abduction or to disclose the detainee's fate."[22]

II. IMPERMISSIBILITY OF SECRET DETENTIONS UNDER INTERNATIONAL LAW

As the *Restatement (Third) of the Foreign Relations Law of the United States* recognizes "causing the disappearance of individuals" is absolutely prohibited under international law;[23] constitutes a violation of the customary human rights of the persons who disappear;[24] and constitutes a violation of a peremptory prohibition *jus cogens*.[25] Thus, forced disappearance is a prohibition that preempts more ordinary international law and allows for no derogation under any circumstances.[26] Similarly, the Human Rights Committee under the International Covenant on Civil and Political Rights has declared that "unacknowledged detention" of persons is a violation of human rights law and is "not subject to derogation."[27] U.S. cases also recognize that forced disappearance violates customary and treaty-based international law and can lead to civil sanctions against those who authorize, tolerate, or engage in the practice.[28]

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[22] *Id.* at 710–12.

[23] RESTATEMENT (THIRD), *supra* note 8, § 702(c). *See also* THOMAS BUERGENTHAL, DINAH SHELTON & DAVID STEWART, INTERNATIONAL HUMAN RIGHTS 277–79 (3d ed. 2002) (addressing several cases before the Inter-American Court of Human Rights); Richard J. Wilson & Jan Perlin, *The Inter-American Human Rights System: Activities from Late 2000 Through October 2002*, 18 AM. U. INT'L L. REV. 651 (2003); Berman & Clark, *supra* note 13; Sadat, *supra* note 13.

[24] RESTATEMENT (THIRD), *supra* note 8, § 702, cmnts. a, c, n & RNs 1, 11.

[25] *Id.* cmt. n & RN 11.

[26] *Id.* RN 11; JORDAN J. PAUST, JON M. VAN DYKE & LINDA A. MALONE, INTERNATIONAL LAW AND LITIGATION IN THE U.S. 61–64 (2d ed. 2005).

[27] H.R. Comm., General Comment No. 29, States of Emergency (art. 4), para. 13 (b), U.N. Doc. CCPR/C21/Rev.1/Add.11 (2001).

[28] *See, e.g., In re* Estate of Ferdinand Marcos, Human Rights Litigation Hilao v. Estate of Ferdinand Marcos, 25 F.3d 1467, 1475 (9th Cir. 1994); Tachiona v. Mugabe, 234 F. Supp. 2d 401, 416, 426 (S.D.N.Y. 2002); Xuncax v. Gramajo, 886 F. Supp. 162, 184–85 (D. Mass. 1995); Forti v. Suarez-Mason, 694 F. Supp. 707, 710–12 (N.D. Cal. 1988); *see also* Abebe-Jira v. Negewo, 72 F.3d 844, 845–46 (11th Cir. 1996) (campaign of arbitrary imprisonments, etc.); Rodriguez-Fernandez v. Wilkinson, 505 F. Supp. 787 (D. Kan. 1980) (arbitrary detention violates customary international law), *aff'd on other grounds*, 654 F.2d 1382 (10th Cir. 1981) (arbitrary detention violates a federal statute, international law was used as an aid to interpret the statue); Alfonso Chardy, *Fernandez Larios Found Liable for Chilean Official's Death*, MIAMI HERALD, Oct. 16, 2003 (addressing $4 million jury verdict re: crimes against humanity and various human rights violations

Additionally, both Congress[29] and the executive branch[30] have made the same recognitions with respect to foreign violations.

Within the Americas, the preamble to the Inter-American Convention on the Forced Disappearance of Persons affirms "that the forced disappearance of persons violates numerous non-derogable and essential human rights enshrined in the American Convention on Human Rights, in the American Declaration of the Rights and Duties of Man, and in the Universal Declaration of Human Rights."[31] Additionally, the Convention on Forced Disappearance recognizes that forced disappearance is a crime that is "a grave and abominable offense against the inherent dignity of the human being, and one that contradicts the principles and purposes enshrined in the Charter of the Organization of American States,"[32] and affirms "that the systematic practice of the forced disappearance of persons constitutes a crime against humanity."[33] With respect

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as well as the disappearance of some 3,200 persons during the Pinochet regime in Chile).

[29] *See, e.g.*, Foreign Assistance Act, 22 U.S.C. § 2151n(a) (2000); 22 U.S.C. § 2304(d) (2000); S. REP. NO. 102-249, at 9 (1991), *quoted in* Xuncax v. Gramajo, 886 F. Supp. 162, 172 (D. Mass. 1995).

[30] *See, e.g.*, U.S. Dep't of State, Country Reports on Human Rights Practices for 1999, Argentina (Feb. 25, 2000), at 3–5; *id.* Burundi (Feb. 25, 2000), at 4; *id.* Columbia (Feb. 25, 2000), at 15–17; *id.* Guatemala (Feb. 25, 2000), at 15; *id.* Peru (Feb. 25, 2000), at 6; *id.* Sudan (Feb. 25, 2000), at 5. The 1999 Country Reports are available at http://www.state.gov/www/global/human_rights/1999_hrp_report/ [name of country] .html. Country Reports for 2002 are available at http://www.state.gov/g/drl/rls/hrrpt/2002/. For example, disappearances in Iraq during Saddam Hussein's regime are addressed in Country Reports on Human Rights Practices—2002, Iraq (Mar. 31, 2003), *available at* http://www.state.gov/g/drl/rls/hrrpt/2002/18277.htm. The U.S. Army also recognizes that "causing the disappearance of individuals" is a violation of customary international law. *See, e.g.*, U.S. DEP'T OF ARMY, OPERATIONAL LAW HANDBOOK 39–40 (2003).

[31] *Supra* note 13, preamble. Technically, the Convention does "not apply to the international armed conflicts governed by the 1949 Geneva Convention[s], *id.* art. XV; but this certainly does not eliminate applicability of relevant customary international and treaty-based human rights and other proscriptions, especially those identified in the Convention. Moreover, in case of an international armed conflict, the rights and duties under the Geneva Conventions apply.

[32] *Id.*

[33] *Id. See also* Forti v. Suarez-Mason, 694 F. Supp. 707, 711 (N.D. Cal. 1988), citing O.A.S. General Assembly Res. 666 (Nov. 18, 1983), which stated that disappearance is a crime against humanity. Concerning the nature of crimes against humanity more generally, *see, e.g.*, PAUST, BASSIOUNI ET AL., *supra* note 8, at 701–70. Such crimes also

to criminal sanctions, Article IX of the Convention mirrors customary international law concerning customary international crimes and non-immunity when it prohibits the use of domestic "[p]rivileges, immunities, or special dispensations" with respect to criminal prosecutions of perpetrators for the crime of forced disappearance.[34] Indeed, state involvement, support, or acquiescence can constitute elements of the offense and, as such, cannot logically provide any sort of immunity or excuse. Similarly, other articles prohibit any "defense of due obedience to superior orders or instructions that stipulate, authorize, or encourage forced disappearance"[35] and assure that "[t]he acts constituting forced disap-

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implicate universal jurisdiction for criminal or civil sanctions in any state that has an offender within its territory, occupied territory, or the equivalent of its territory under international law. On the nature, history, and reach of universal jurisdiction, see, e.g., *id.* at 157–76; PAUST, *supra* note 8, at 420–23, 432–41, and numerous references cited; *see also* M. CHERIF BASSIOUNI & EDWARD M. WISE, *AUT DEDERE AUT JUDICARE:* THE DUTY TO PROSECUTE OR EXTRADITE (1995) (concerning the responsibility to engaged in sanction efforts).

[34] *See also* Chumbipuma Aguirre et al. v. Peru (Barrios Altos Case), Inter-American Court of Human Rights, para. 41 (Mar. 14, 2001) (amnesty laws cannot eliminate responsibility "for serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance"); Catalan Lincoleo v. Chile Case 11.771, Inter-Am. Ch.H.R., Report No. 61/01, OEA/Ser.L/V/II.111 Doc. 20 rev. at 818 (2000), Inter-American Commission on Human Rights, April 16, 2001 (ruling that Chile's amnesty law preventing criminal investigation and prosecution of those involved in disappearance, torture, and extrajudicial killing impermissibly interfered with right of claimants to obtain reparations through civil courts); Rodriguez v. Uruguay, U.N. Doc. CCPR/C/51/D/322/1988 (1994); INTERNATIONAL CRIMINAL LAW 108 (diplomat can be prosecuted), 622 (public officials) (Gerhard O.W. Mueller & Ed Wise eds. 1965); PAUST, *supra* note 8, at 422 (no head of state, diplomatic, or public official immunity exists under customary international law or in any international criminal law treaty or instrument), 435–39, 443–45, 449–52; PAUST, BASSIOUNI ET AL., *supra* note 8, at 29, 33–43, 131–34, 138–40, 142, 168–70, 207, 355, 427, *passim*; PAUST, VAN DYKE & MALONE, *supra* note 26, at 452, 753–59, 763, 766, 773–75, 981–82, 986–88. Of particular interest with respect to violations of customary international law is the express recognition of non-immunity by the International Military Tribunal at Nuremberg: "The principle of international law, which under certain circumstances protects the representatives of a state, cannot be applied to acts which are condemned as criminal by international law. The authors of these acts cannot shelter themselves behind their official position . . . [and one] cannot claim immunity while acting in pursuance of the authority of the State if the State in authorizing action moves outside its competence under international law." Opinion and Judgment, I.M.T. at Nuremberg (1946).

[35] *Supra* note 13, art. VIII.

pearance shall not be deemed to have been committed in the course of military duties."[36]

More generally, Article X of the Inter-American Convention assures that "[i]n no case may exceptional circumstances such as a state of war, the threat of war, internal political instability, or any other public emergency be invoked to justify the forced disappearance of persons."[37] Article X adds: "[i]n such cases, the right to expeditious and effective judicial procedures and recourse shall be retained as a means of determining the whereabouts or state of health of a person who has been deprived of freedom, or of identifying the official who ordered or carried out such deprivation of freedom."[38] Article XI provides additional rights, duties, and safeguards:

> Every person deprived of liberty shall be held in an officially recognized place of detention and be brought before a competent judicial authority without delay, in accordance with applicable domestic law.
>
> The States Parties shall establish and maintain official up-to-date registries of their detainees and, in accordance with domestic law, shall make them available to relatives, judges, attorneys, any other person having a legitimate interest, and other authorities.[39]

The U.N. General Assembly Declaration on the Protection of All Persons from Enforced Disappearance generally mirrors several provisions contained in the Inter-American Convention. For example, the preamble to the U.N. Declaration states that "enforced disappearance undermines the deepest values of any society committed to respect for the rule of law, human rights and fundamental freedoms, and that the systematic practice of such acts is of the nature of a crime against humanity."[40]

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[36] *Id.*, art. IX.

[37] *Id.*, art. X.

[38] *Id.* Customary and treaty-based human rights law also requires access to a court of law to address the propriety of detention. *See, e.g.*, Jordan J. Paust, *Judicial Power To Determine the Status and Rights of Persons Detained Without Trial*, 44 HARV. INT'L L.J. 503, 505–10 (2003).

[39] *Supra* note 13, art. XI.

[40] U.N. Declaration, *supra* note 19, pmbl. *See also* G.A. Res. 60/148, para. 11 (Feb. 21, 2006) (noting "that prolonged incommunicado detention or detention in secret places may facilitate the perpetration of torture and other cruel, inhuman or degrading treatment . . . and can in itself constitute a form of such treatment").

Article 1 of the U.N. Declaration also affirms:

> 1. Any act of enforced disappearance is an offence to human dignity. It is condemned as a denial of the purposes of the Charter of the United Nations and as a grave and flagrant violation of the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights and reaffirmed in international instruments in this field.
>
> 2. Any act of enforced disappearance places the persons subjected thereto outside the protection of the law and inflicts severe suffering on them and their families. It constitutes a violation of the rules of international law guaranteeing, inter alia, the right to recognition as a person before the law, the right to liberty and security of the person and the right not to be subjected to torture and other cruel, inhuman or degrading treatment and punishment.[41]

Perhaps because of the need to alleviate the suffering experienced by family members of those who disappear, an earlier U.N. Standard Minimum Rules for the Treatment of Prisoners[42] states that "[a]n untried prisoner shall be allowed to inform immediately his family of his detention and shall be given all reasonable facilities for communicating with his family and friends."[43]

Similarly, the Geneva Convention Relative to the Protection of Civilian Persons in Time of War requires that all persons in the territory of a party to an international armed conflict or in occupied territory "shall be enabled to give news of a strictly personal nature to members of their families wherever they may be, and to receive news from them."[44] Yet, in occupied territory, only "where absolute military security so requires," a

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[41] *Id.*, art. 1. *See also* G.A. Res. 33/173 (Dec. 20, 1978), addressed in *Forti v. Suarez-Mason*, 694 F. Supp. 707, 710 (N.D. Cal. 1988).

[42] Adopted by the First U.N. Congress on the Prevention of Crime and Treatment of Offenders in 1955, approved by Res. 663 C (XXIV) C, 24 U.N. ESCOR, Supp. No. 1, at 11, U.N. Doc. E/3048 (July 31, 1957) and ECOSO Res. 2076(LXII) (May 13,1977).

[43] *Id.* para. 92.

[44] GC, *supra* note 13, art. 25; *see also id.* arts. 106–107. Prisoners of war have similar rights. *See, e.g.*, Geneva Convention Relative to the Treatment of Prisoners of War arts. 70–71, 75 U.N.T.S. 135 [hereinafter GPW]. Further, any person arrested or detained who is not a prisoner of war is protected under common Article 3 of the Geneva Conventions and under at least some other portions of the Geneva Civilian

non-prisoner of war rightly detained without trial under Geneva law standards can "be regarded as having forfeited rights of [private] communication."[45] However, even such persons who are detained in occupied territory cannot simply disappear or have their names kept secret. As the authoritative Commentary to the Geneva Civilian Convention prepared by the International Committee of the Red Cross (ICRC) explains, "[t]he Detaining Power is, however, in no way released from its obligation to notify the arrest to its official Information Bureau for transmission to the official Information Bureau of the country of which the person concerned is a national."[46] More generally,

> [a]s soon as he is interned, or at the latest not more than one week after his arrival in a place of internment . . . , every internee shall be enabled to send direct to his family, on the one hand, and to the Central Agency, provided for by Article 140, on the other, an internment card . . . informing his relatives of his detention, address and state of health. The said cards shall be forwarded as rapidly as possible and may not be delayed in any way.[47]

Further, "[i]nternees shall be allowed to send and receive letters and cards."[48] As the authoritative Commentary to the Geneva Convention states: "[t]he right of internees to carry on correspondence is absolute. Restrictions may be imposed on it in certain circumstances, but the right must never be completely suppressed. The Detaining Power, however, retains its right to censor internees' correspondence, as stated expressly in Article 112."[49]

Convention; and, thus, there are no complete gaps in the reach of Geneva law based on the status of a person. *See, e.g.*, Paust, *supra* note 12, at 816–20.

[45] GC, *supra* note 13, art. 5. Concerning the standard of necessity regarding detention or internment, see also *id.* arts. 42, 78.

[46] IV COMMENTARY, *supra* note 13, at 57–58; *see also id.* at 56 ("the Detaining Power . . . remains fully bound by the obligation, imposed on it by Article 136, to transmit to the official Information Bureau particulars of any protected person who is kept in custody for more than two weeks").

[47] GC, *supra* note 13, art. 106. Concerning use of similar cards on the West Bank and Gaza and efforts to ensure accurate identification of persons detained during the late 1980s, see, for example, Jordan J. Paust, Gerhard von Glahn & Gunter Woratsch, *Report of the ICJ Mission of Inquiry Into the Israeli Military Court System in the Occupied West Bank and Gaza*, 14 HAST. INT'L & COMP. L. REV. 1, 21–24, 26–27, 64 (1990). Similar rights exist for prisoners of war. *See* GPW, *supra* note 44, art. 70.

[48] GC, *supra* note 13, art. 107; *see also* GPW, *supra* note 44, art. 71.

[49] IV COMMENTARY, *supra* note 13, at 449.

Importantly, Article 143 of the Geneva Civilian Convention forbids the disappearance of detainees by requiring that the ICRC have access to all protected persons and the ability to freely interview detainees. Article 143 provides:

> Representatives or delegates . . . shall have permission to go to all places where protected persons are, particularly to places of internment, [or] detention. . . . They shall have access to all premises occupied by protected persons and shall be able to interview the latter without witnesses, personally or through an interpreter.
>
> Such visits may not be prohibited except for reasons of imperative military necessity, and then only as an exceptional and temporary measure. Their duration and frequency shall not be restricted." [50]

Prior to the creation of the 1949 Geneva Conventions, the forced disappearance of persons was recognized as a violation of the laws of war in *United States v. Altstoetter* (The Justice Case):[51]

> "Night and Fog" prisoners "were kept secretly and not permitted to communicate in any manner with their friends and relatives. This is inhumane treatment. . . . [T]he victim was held incommunicado and the rest of the population only knew that a relative or citizen had disappeared in the night and fog; hence, the name of the decree. If relatives or friends inquired, they were given no information. If diplomats or lawyers inquired concerning the fact of . . . [a victim], they were told that the state of the record did not admit of any further inquiry or information."[52]

Additional international laws require, without exception, that foreign persons who are "arrested . . . or detained in any . . . manner" shall be free to communicate with consular officers of their state and to have access to them. The consulate officers from their state shall have the

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[50] GC, *supra* note 13, art. 143.

[51] United States v. Altstoetter (The Justice Case), 3 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10 (1951).

[52] *Id.* at 1058. Our Supreme Court has also condemned the totalitarian practice of using "unrestrained power to seize persons . . . [and] hold them in secret custody, and wring from them confessions by physical and mental torture." Ashcraft v. Tennessee, 322 U.S. 143, 155 (1944).

same freedoms[53] as well as "the right to visit" their nationals who are "in prison, custody or detention, to converse and correspond with . . . [them] and to arrange for . . . [their] legal representation."[54] Non-derogable rights of communication and visitation have generally been of major import to the United States as the U.S. government seeks to protect U.S. nationals detained or arrested abroad.

Like the Inter-American Convention, the U.N. Declaration recognizes that "[n]o order or instruction of any public authority, civilian, military or other, may be invoked to justify an enforced disappearance,"[55] and "[n]o circumstances whatsoever, whether a threat of war, a state of war, internal political instability or any other public emergency, may be invoked to justify enforced disappearances."[56] Further, "[t]he right to a prompt and effective judicial remedy as a means of determining the whereabouts or state of health of persons deprived of their liberty and/or identifying the authority ordering or carrying out the deprivation of liberty is required,"[57] and "[a]ny person deprived of liberty shall be held in an officially recognized place of detention and, in conformity with national law, be brought before a judicial authority promptly after detention."[58] With respect to names and locations of detainees, the U.N. Declaration further requires:

> 2. Accurate information on the detention of such persons and their place or places of detention, including transfers, shall be made promptly available to their family members, their counsel or to any other persons having a legitimate interest in the information. . . .

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[53] *See, e.g.*, Vienna Convention on Consular Relations art. 36(1)(a), 596 U.N.T.S. 261 (1963). *See also* The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law, Advisory Opinion OC-16/99 (Oct. 1, 1999), Inter-Am. Ct. H.R. (ser. A), No. 16, paras. 77–84 (1999), *available at* http://www1.umn.edu/humanrts/iachr/A/OC-16ingles-sinfirmas.html.

[54] *Id.* art. 36(1)(c).

[55] *Supra* note 19, art. 6(1).

[56] *Id.* art. 7.

[57] *Id.* art. 9(1).

[58] *Id.* art. 10(1). The International Covenant on Civil and Political Rights also requires judicial review of the propriety of detention. See International Covenant on Civil and Political Rights, art. 9(4), 999 U.N.T.S. 171 (Dec. 9, 1966), a right that is now widely expected to be nonderogable and customary as well as treaty-based. *See also* Paust, *supra* note 38.

> 3. An official up-to-date register of all persons deprived of their liberty shall be maintained in every place of detention. Additionally, each State shall take steps to maintain similar centralized registers. The information contained in these registers shall be made available to the persons mentioned in the preceding paragraph, to any judicial or other competent and independent national authority and to any other competent authority entitled under the law of the State concerned or any international legal instrument to which a State concerned is a party, seeking to trace the whereabouts of a detained person.[59]

From this brief survey of relevant international legal norms, it is evident that the Bush administration's continued program of secret detentions and secret renditions is in serious violation of several treaties as well as customary international law concerning human rights, the prohibition of forced disappearance, Geneva law, the right of foreign persons to communicate with their consulate, and the concomitant rights of foreign consulates to communication, visitation, and representation of their nationals.

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[59] *Supra* note 19, art. 10(2)–(3).

CHAPTER 8

CHERIF BASSIOUNI AND THE 780 COMMISSION: THE GATEWAY TO THE ERA OF ACCOUNTABILITY

*Michael P. Scharf**

During the 20th century, four times as many people were killed by their own governments than in all the international wars combined.[1] After the Nazis exterminated 6 million Jews during the Holocaust, the world community said "never again." The victorious Allied powers set up an international tribunal at Nuremberg to prosecute the Nazi leaders for their monstrous deeds. There was hope that the legacy of Nuremberg would be the institutionalization of a judicial response to atrocities wherever and by whoever committed across the globe.

Yet, the hope of "never again" quickly became the reality of "again and again" as the world community failed to take action to bring those responsible to justice when 4 million people were murdered in Stalin's purges (1937–1953), 5 million were annihilated in China's Cultural Revolution (1966–1976), 2 million were butchered in Cambodia's killing fields (1975–1979), 30,000 disappeared in Argentina's Dirty War (1976–1983), 200,000 were massacred in East Timor (1975–1985), 750,000 were exterminated in Uganda (1971–1987), 100,000 Kurds were gassed in Iraq (1987–1988), and 75,000 peasants were slaughtered by death squads in El Salvador (1980–1992).[2] The U.N. High Commissioner for Human Rights summed up the state of affairs when he said, "a person stands a

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[1] Professor Rudi Rummel documents that as many as 170 million persons have been murdered by their own governments. R.J. RUMMEL, DEATH BY GOVERNMENT 9 (1994).

[2] Arle Levinson, *Genocide a Thriving Doctrine in 20th Century*, STAR, Sept. 18, 1995, at A1.

better chance of being tried and judged for killing one human being than for killing 100,000."[3]

I was first introduced to Professor M. Cherif Bassiouni in the summer of 1992. It was the summer that genocide had returned to Europe. At the time, I was serving as Attorney-Adviser for U.N. Affairs at the U.S. Department of State. In that capacity, I was the State Department official responsible for drafting Security Council resolutions related to the Yugoslavia crisis. Those resolutions eventually led to the creation of the "780 Commission," which Professor Bassiouni brilliantly and creatively chaired. The 780 Commission ultimately propelled the United Nations toward the creation of the Yugoslavia War Crimes Tribunal, the first international war crimes court since Nuremberg and Tokyo. This chapter tells the story behind the 780 Commission, and its role in establishing the modern era of accountability.

I. THE STORY OF THE 780 COMMISSION

The story begins on August 7, 1992. When I came to work that morning, the Department of State was in a frenzy over an ITN TV broadcast of conditions at the Serb-run Omarska concentration camp in Bosnia, which were reminiscent of photographs of the worst Nazi death camps. It was clear that some immediate action was required, if only to meet the growing sense of public discomfort as the Serbs cavalierly pressed on with their campaign of ethnic cleansing in the full glare of the international media. Others felt that wider principles were at stake and that Serbian impunity threatened to subvert emerging norms of international human rights.[4] Thus, I was not surprised to receive a message marked "urgent" from my colleagues in the Department's International Organizations Bureau, which handles policy concerning the United Nations. "We need a draft resolution to provide a means of documenting these atrocities—ASAP," the note read.

Rather than reinvent the wheel with every new resolution, it is the practice of the Security Council to recycle language found in earlier resolutions. That way, language that was once the product of drawn-out negotiations and careful compromises does not have to be debated anew.

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[3] *See* 8 BULL. INT'L TRIBUNAL FOR THE FORMER YUGOSLAVIA 1 (1996), quoting Jose Anala Lassa, May 14, 1996.

[4] IAIN GUEST, ON TRIAL: THE UNITED NATIONS, WAR CRIMES, AND THE FORMER YUGOSLAVIA 52 (1995).

In this spirit, I borrowed the language for the main operative clause of Resolution 771 from Resolution 674 concerning Iraq, which had invited member states to "collate substantiated information in their possession or submitted to them on the Grave Breaches by Iraq . . . and to make this information available to the [Security] Council." However, only two states—the United States and Kuwait—ever submitted information pursuant to the "invitation" contained in Resolution 674.[5] To avoid falling prey to a repeat of such international apathy, I used somewhat stronger wording for Resolution 771, "calling upon," rather than "requesting," states to submit information and assigning the Secretary-General the tasks of collating the information received from states, preparing a report summarizing the information, and recommending additional measures.

I began the draft resolution with a clause that was to become the earliest list of the acts deemed by the Security Council to constitute "violations of international humanitarian law" in the former Yugoslavia.[6] For maximum deterrent value in the former Yugoslavia, I drafted this list in the language of news reports rather than strictly following the legal terminology of the Geneva Conventions. In light of U.N. estimates that some 2.8 million Bosnians (more than half the country's entire population) would require food and medical aid to survive,[7] and the fact that U.N. attempts to provide such aid were persistently blocked by Serb paramilitary forces, I specifically included a reference in the list of violations to "impeding the delivery of food and medical supplies to the civilian population." This formulation, which is not contained in the Geneva Convention's list of grave breaches, later reappeared in Security Council Resolution 794 on Somalia and laid the foundation for a newly recognized category of war crime carrying individual criminal responsibility.

At the time I was drafting Resolution 771, I was aware of a proposal that had been recently circulated within the Office of the Legal Adviser

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[5] *Id.* at 38.

[6] The second preambular clause of Resolution 771 provides: "Expressing grave alarm at continuing reports of widespread violations of international humanitarian law occurring within the territory of the former Yugoslavia and especially in Bosnia and Herzegovina including reports of mass forcible expulsion and deportation of civilians, imprisonment and abuse of civilians in detention centres, deliberate attacks on non-combatants, hospitals and ambulances, impeding the delivery of food and medical supplies to the civilian population, and wanton devastation and destruction of property." S.C. Res. 771 (Aug. 13, 1992).

[7] *See* Paul Lewis, *White House Adamant on Balkan War Crimes*, N.Y. TIMES, Nov. 3, 1993, at A-16.

to establish an international commission to investigate Iraqi war crimes committed during the Persian Gulf War. Although that proposal was never pursued, I thought such language might be appropriate for Resolution 771. In light of the Bush administration's opposition to the creation of a permanent international criminal court, I recognized that the U.S. government was not ready to entrust the United Nations with the authority to conduct trials of Yugoslav war criminals. But I felt there might nevertheless be support for the creation of a neutral international investigative body that could document the facts in a responsible manner. Thus, my first draft of the resolution had included a clause establishing an international commission to lay the groundwork for future national or international trials, or at least to establish the historic record of atrocities as the recently established U.N. Truth Commission for El Salvador was designed to do. Following standard procedure, after completing the draft resolution, I circulated the document to all of the bureaus of the Department of State with a potential interest in the subject matter. In all, I received comments from over two dozen officials. While several of the bureaus responded favorably to my proposal to establish an investigative commission, the consensus was to defer the proposal for the time being in favor of the formulation calling on the Secretary-General to recommend additional measures.

Two weeks later, when Tadeusz Mazowiecki, the Human Rights Commission's Special Rapporteur on the former Yugoslavia, proposed the establishment of such a commission in his first (August 28) report, I was asked to dust off my proposal and draft a new Security Council resolution, which would eventually become Resolution 780. That resolution requested the Secretary-General to establish, as a matter of urgency, an impartial commission of experts to assess the information submitted pursuant to Rresolution 771, as well as information obtained as a result of its own investigations or efforts, and to provide the Secretary-General with its conclusions concerning the evidence of violations of international humanitarian law in the territory of the former Yugoslavia.

The negotiations between the members of the Security Council leading to the adoption of Resolution 780 were particularly acrimonious. My colleagues at the State Department and I had three goals for our draft resolution that we felt were non-negotiable. First, we insisted that the resolution expressly refer to the new body as a "Commission," rather than a "Committee" as the United Kingdom, France, and Russia desired. We argued that the title "Commission" was of historic importance since the investigative body that preceded the Nuremberg Tribunal was known as

the U.N. War Crimes Commission. Further, we felt the title would be of practical significance since it would suggest a greater degree of independence and authority for the new body. While we would have preferred the title "War Crimes Commission," the United States accepted as a compromise "impartial Commission of Experts," which later came to be referred to simply as the "780 Commission."

Our second goal was that the Commission be given authority to undertake its own investigations. The United Kingdom and France, believing that the pursuit of war criminals might damage prospects for a peace settlement, made no secret of their preference that the Commission be limited to a passive group that would analyze and collate information that was passed to them.[8] They reluctantly agreed to the Commission's investigative authority only after high level interventions by U.S. government officials. However, they managed to undermine this authority by insisting that the Commission be funded from existing U.N. resources rather than include in the resolution a specific budget for the Commission. The United States found it hard to object, having insisted for years on a "zero-growth" U.N. budget. As a result, it would take over a year for the Commission to obtain alternative funding to conduct investigations in the field.

Finally, we pressed for a clause in the resolution that would require states to submit substantiated information in their possession of humanitarian violations in the former Yugoslavia to the Commission of Experts within 30 days after the adoption of the resolution and to periodically update their submissions thereafter. This requirement was seen as important because, in the two months since the passage of Resolution 771, only a small handful of countries had submitted such information to the United Nations. The idea was to ensure some discipline in reporting and also get a snapshot of what governments had already collected. It was my personal hope that this information would provide a solid basis for a determination as to whether genocide was in fact being committed in Bosnia. While this time limit was included in the final text of the resolution, it was largely ignored. Indeed, with the exception of the United States, none of the 15 members of the Security Council complied with the 30-day deadline.

It is noteworthy that Resolution 780 contains no reference to the creation of an international tribunal. Instead, the resolution requests the

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[8] *Halfway Response to All-Out War*, N.Y. TIMES Editorial, Oct. 9, 1992.

Secretary-General to take account of the Commission's conclusions in "any recommendations for further appropriate steps." While most U.S. officials at the time favored domestic trials, it was my intention to employ language that would leave the door open for an international judicial response. Unfortunately, this creative ambiguity was later exploited by other governments and members of the U.N. Secretariat, who argued that the Commission was not meant to collect "evidence" of war crimes for use in prosecutions, but to produce a history of war crimes like a truth commission.[9]

Resolution 780 was adopted unanimously by the members of the Security Council on October 6, 1992. By the end of the month, the Secretary-General had appointed five persons in their individual capacity on the basis of their "expertise and integrity" to serve on the 780 Commission.[10] Professor Frits Kalshoven, a 70-year-old Emeritus Professor of International Humanitarian Law at the University of Leiden (the Netherlands) was appointed to chair the new Commission. The four other members of the Commission were Commander William Fenrick, Director of Law for Operations and Training in the Department of Defense (Canada); Justice Keba M'Baye, former President of the Supreme Court of Senegal and former President of the International Court of Justice (Senegal); Torkel Opsahl, a Professor of Human Rights Law at Oslo University and former member of the European Commission on Human Rights (Norway); and Egyptian born Cherif Bassiouni, a Professor of Law at DePaul University in Chicago who had worked tirelessly for two decades on proposals to establish a permanent international criminal court.

The composition of the Commission quickly brought it under fire. My colleagues at the State Department made no secret of our feeling that there was too much emphasis on academic qualifications and too little on investigative or managerial skills. This sentiment was soon publicly voiced by Roy Gutman who wrote that the chairman of the Commission, Frits Kalshoven "tells visitors he does not know why he got the job."[11] The answer to that question was that the commissioners were chosen from a short list of between ten and 15 names compiled by the U.N.'s Office of

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[9] GUEST, *supra* note 4, at 58.

[10] *Report of the Secretary-General on the Establishment of the Commission of Experts pursuant to Paragraph 2 of Security Council Resolution 780*, U.N. Doc. S/24657 (1992).

[11] *Going Nowhere: UN War Crimes Commission Bogged Down in Bosnia Death Camp Probe, reprinted in* ROY GUTMAN, A WITNESS TO GENOCIDE (1993).

Legal Affairs (OLA). OLA vigorously defended Kalshoven's appointment. "We felt we needed an anchor, someone calming," one OLA official is quoted as saying. He added that Kalshoven was chosen because he was known to the U.N. Legal Counsel, Carl-August Fleishchauer and because of his experience serving on the international committee that monitors implementation of the Geneva Conventions.[12]

The 780 Commission met for the first of 12 sessions in Geneva in December 1992. Ironically, the Commission met in the room next door to where the Conference on the former Yugoslavia was holding its peace talks and where U.S. Secretary of State Lawrence Eagleburger was dropping a bombshell by announcing that the United States had identified ten suspected war criminals who should be brought to trial. This has become known in government circles as the "naming names speech." The list of persons named by Eagleburger included Slobodan Milosevic, President of the Federal Republic of Yugoslavia (Serbia and Montenegro); Radovan Karadzic, leader of the self-proclaimed Serbian Republic of Bosnia and Herzegovina; and General Ratko Mladic, commander of the Bosnian Serbs military forces.[13] Eagleburger's speech evidently rattled Cyrus Vance and Lord David Owen, whose peace plan was dependent upon the cooperation of three of the ten people Eagleburger had just labeled as likely war criminals—Milosevic, Karadzic, and Mladic. One newspaper report put it as follows: "The reaction in the room was dead silence from American's closest allies and subsequent criticism from international negotiator Lord Owen, who, Eagleburger said, 'made it clear that he considered my remarks unhelpful.'"[14] This was to have an effect on the success of the 780 Commission. According to 780 Commission member Cherif Bassiouni, "The last thing [supporters of the Vance-Owen venture] wanted was to have an activist Commission of Experts that could likely prove the accusations made by Secretary Eagleburger. The priority at that time was to achieve a political settlement—and justice was not viewed as an inducement to that end. Indeed, there was then great apprehension that the Commission might be an impediment to a political settlement."[15]

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[12] GUEST, *supra* note 4, at 57.

[13] *Elaine Sciolino, U.S. Names Figures to be Prosecuted Over War Crimes,"* N.Y. TIMES (International), Dec. 17, 1992, at A-1.

[14] Carla Anne Robbins, *World Again Confronts Moral Issues Involved in War Crimes Trials*, WALL ST. J., July 13, 1993.

[15] M. Cherif Bassiouni, *The Commission of Experts Established Pursuant to Security*

In Professor Bassiouni's view, this sentiment was at the root of the funding difficulties that were to plague the Commission and cripple its early work. "I'm convinced that U.N. Legal Counsel Fleischauer and his deputy, Ralph Zacklin, believed, and still do, that the top priority of the Security Council is to achieve a political settlement, and that everything that impedes this goal should be really checked," Professor Bassiouni told one author.[16] "They were fearful of the Commission," he added.[17] As a consequence, the United Nations provided the Commission just enough funds to pay the salary of the chairman (the only full-time commissioner); a stipend for the other four commissioners, not to exceed ten days a month; expenses for their travel to meet periodically in Geneva; and the salary of two staff members on loan by the U.N.'s OLA. Moreover, the United Nations agreed to pay these funds only through August 1993, after which time no U.N. funds were provided whatsoever. Nor did the United Nations ever provide any funds for the investigation or the operating expenses of the Commission.[18]

In an effort to secure alternative funding, in January 1993, the commissioners asked the United Naitons to set up a trust fund for countries to make voluntary contributions to cover the Commission's additional needs. The OLA opposed this action on the ground that the Security Council had not provided for the creation of such a fund in Resolution 780, and voluntary contributions to the United Nations cannot otherwise be earmarked for a specific program.[19] But the United States weighed in, and in March 1993, a trust fund for the Commission was approved by the General Assembly. Soon thereafter, the United States made a $500,000 voluntary contribution to the Commission. Yet, due to a series of bureaucratic delays, trust funds were not released to the Commission until August 1993—ten months after the Commission had been established.[20]

During its first months of operation, the 780 Commission devoted its time to an analysis of the law applicable to the atrocities occurring in the

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Council Resolution 780: Investigating Violations of International Humanitarian Law in the Former Yugoslavia, Occasional Paper No. 2, International Human Rights Law Institute, DePaul University College of Law, at 8 (1996).

16 GUEST, *supra* note 4, at 94.

17 *Id.*

18 Bassiouni, *supra* note 15.

19 GUEST, *supra* note 4, at 63.

20 *Id.* at 9.

former Yugoslavia, which it presented in the form of an interim report to the Secretary-General in February 1993.[21] To many observers, this signaled that the 780 Commission was heading toward the same fate that befell the 1943 U.N. War Crimes Commission that, due to a lack of resources and cooperation from governments, produced nothing more than an academic study of the Nazis' responsibility for war crimes.

The 780 Commission's interim report, which was largely drafted by Commission member Cherif Bassiouni, defined the relatively new term of "ethnic cleansing," in the context of the Yugoslav conflict, as "rendering an area wholly homogeneous by using force or intimidation to remove persons of given groups from the area." Based on the submissions of governments and international organizations, the Commission determined that ethnic cleansing had been carried out in the former Yugoslavia "by means of murder, torture, arbitrary arrest and detention, extra-judicial executions, rape and sexual assault, confinement of civilian population in ghetto areas, forcible removal, displacement and deportation of civilian population, deliberate military attacks or threats of attacks on civilians and civilian areas, and wanton destruction of property." The Commission concluded that the policy and practices of ethnic cleansing described above constituted crimes against humanity, could qualify as grave breaches of the Geneva Conventions, and could constitute the crime of genocide as defined in the Genocide Convention. In its closing paragraphs, the Commission of Experts discussed the idea of establishing an *ad hoc* international criminal tribunal in relation to events in the territory of the former Yugoslavia. While expressing the opinion that "it would be for the Security Council or another competent organ of the United Nations to establish such a tribunal," the Commission "observe[d] that such a decision would be consistent with the direction of [the Commission's] work."

In September 1993, the Chairman of the 780 Commission, Fritz Kalshoven, resigned his post in protest. "The Commission did not have the full political support of major governments," said Kalshoven, charging that the United Kingdom and France in particular had refused to contribute to the trust fund or otherwise cooperate with the Commission,

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[21] This report was issued as a United Nations document dated February 10, 1993 (U.N. Doc. S/25274), *reprinted in* 2 VIRGINIA MORRIS & MICHAEL P. SCHARF, AN INSIDER'S GUIDE THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 311–26 (1995).

thus depriving it of the resources it needed to do its work.[22] "Other major countries haven't given us any support either, but I was very angry about these two because they are permanent members of the U.N. Security Council. If they didn't want us to participate actively, they shouldn't have voted for us," Kalshoven explained.[23] Kalshoven added that when he asked the United Kingdom to supply a combat engineering unit to help with exhumations at a mass grave believed to contain the bodies of 200 Croatian hospital patients murdered at Vukovar, "Britain simply didn't react to our request."[24]

Kalshoven's resignation was taken as confirmation that the Commission would amount to nothing more than a "toothless study," in the words of the *New York Times*.[25] Things became even more bleak when, two weeks later, Commissioner Opsahl died of a heart attack in his Geneva Office, prompting an international headline that read: "U.N. War Crimes Body in Disarray on Anniversary."[26] To the surprise of many, the resulting personnel changes transformed the Commission into a more vigorous entity, under the leadership of its new chairman, the energetic and resourceful Cherif Bassiouni.

Unlike his predecessor, Bassiouni was not to be deterred by the lack of U.N. support for the Commission's activities. With a voluntary staff of 50 attorneys and law students and $800,000 in grants that he obtained from the Soros Foundation, the Open Society Fund, and the John D. and Catherine T. MacArthur Foundation, Bassiouni set about creating the Commission's documentation center and database at DePaul University's International Human Rights Law Institute "with not a penny from the U.N."[27] Bassiouni's efforts were initially opposed by Ralph Zacklin, the British Deputy U.N. Legal Counsel, who drafted a legal opinion stating that an American university could not be entrusted with the sensitive task of collecting and analyzing information for the first-ever war crimes

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[22] Andrew Kelly, *Head of U.N. War Crimes Panel Resigns*, REUTERS, Oct. 1, 1993.

[23] Patrick Bishop, *Britain "Snubbed War Crimes Team,"* DAILY TELEGRAPH, Dec. 4, 1993.

[24] *Id.*

[25] *Halfway Response to All-Out War*, N.Y. TIMES Editorial, Oct. 9, 1992.

[26] Stephanie Nebehay, *U.N. War Crimes Body in Disarray on Anniversary*, REUTERS, Oct. 6, 1993.

[27] John Pomfret, *War Crimes' Punishment Seen Distant; Balkan Probe Lacks Funds and Backing*, WAS. POST, Nov. 12, 1993, at A39; Bassiouni, *supra* note 15, at 10–14.

inquiry mandated by the Security Council.[28] The persistent Bassiouni responded by putting in place a series of measures designed to overcome Zacklin's concerns, including locating the center in a guarded room equipped with a security system and alarm, having his personnel sign non-disclosure agreements, and obtaining the protection of the FBI and Chicago police.[29] "Zacklin was unable to come up with a suitable alternative, and he no longer had a legitimate complaint," Bassiouni told the author in an interview. "So the members of the Commission agreed that I could run the data base from Chicago," he said.[30] By April 1994, the documentation center had systematically catalogued and analyzed over 64,000 documents and had created a computerized archive of over 300 hours of videotapes containing testimonies of individuals as well as footage capturing the carnage of the Yugoslav conflict.[31]

Once the Commission's trust fund was finally established, it enabled the Commission to undertake 34 field investigations under the direction of Commissioner Fenrick, who had been given the title "Rapporteur for On-site Investigations."[32] Thirteen governments were to contribute a total of $1,320,631 to the Commission's trust fund. In addition, several governments provided assistance in kind. The United States, for example, provided over $150,000 in material, transportation of material to Vukovar, and the salary and expenses of Clyde Snow, a forensics expert, to undertake the exhumation of a mass grave. Canada provided three military lawyers and four military police officials to help Commissioner Fenrick with investigations. Holland made available 35 soldiers to help with the exhumation of grave sites.[33]

In addition to several mass grave exhumations, the Commission undertook two ambitious investigations based on interviewing refugees. In November 1993, two new members had been appointed to the 780 Commission to replace Kalshoven and Opsahl: Hanne Sophie Greve, a judge from Norway, who had worked in Cambodian refugee camps in Thailand, and Christine Cleiren, a Dutch law professor with expertise in

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[28] Telephone Interview with M. Cherif Bassiouni, Aug. 8, 1996.

[29] *Id.*

[30] *Id.*

[31] Bassiouni, *supra* note 15, at 13–14.

[32] *Id.* at 31.

[33] GUEST, *supra* note 4, at 63–64.

criminal procedure. Commissioner Cleiren took on the task of organizing an investigation into rape and sexual assault. Under her direction, a 40-member all-female team of attorneys, mental health specialists, and interpreters interviewed 223 women in seven cities in Bosnia and Croatia who had been victims of or witnesses to rape.[34] Meanwhile, Commissioner Greve was made "Rapporteur for the Prijedor Project," under which she conducted an in-depth investigation into the ethnic cleansing of the Prijedor region of Bosnia. From some 400 interviews of witnesses to the destruction there, Greve was able to document how the Serbs in Prijedor had carefully prepared their campaign before Bosnia declared independence on April 6, 1992.

Resolution 780 did not indicate a due date for the completion of the Commission's work. At that time, U.N. Deputy Legal Counsel Ralph Zacklin had told the Chairman of the Commission that he did not expect it to last more than six months.[35] As mentioned earlier, no U.N. funds were provided the Commission for salaries and travel after August 1993. On December 13, 1993, the Commission received a letter from the U.N. Legal Counsel, Carl-August Fleischauer, saying that the Commission would be terminated on April 30, 1994.[36]

This decision was to have serious consequences for the Commission's two major investigations. It was to force an early end to Commissioner Cleiren's rape investigation, with 200 victims from Croatia and Bosnia still scheduled to be interviewed.[37] It also prevented the Commission from finishing the exhumation of the Vukovar mass gravesite, which had been suspended during the cold Croatian winter.[38] According to Chairman Bassiouni, "the premature termination of the Commission cannot be explained. Could it have been a purposeful political action to prevent the further discovery of the truth, which at the time was not politically propitious? Or was it simply an unwise administrative decision. Or perhaps it is the nature of the UN beast—part political, part bureaucratic—that accounts for what I believe to be an unconscionable outcome, no matter what the reason."[39]

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[34] Bassiouni, *supra* note 15, at 35–37.

[35] GUEST, *supra* note 4, at 89.

[36] *Id.* at 90.

[37] Telephone Interview with M. Cherif Bassiouni, Aug. 8, 1996.

[38] *Id.*

[39] Bassiouni, *supra* note 15, at 67.

At the end of April, 1994, the Commission submitted its final report, totaling 84 pages, along with 22 annexes containing 3,300 pages of detailed information and analysis.[40] Upon receipt of the 780 Commission report, Secretary-General Boutros Boutros Ghali stated, "the material and information collected and recorded in the data-base, now transferred to the Tribunal, will not only assist in the prosecution of persons responsible for serious violations of international humanitarian law, but will constitute a permanent documentary record of the crimes committed in the former Yugoslavia, and thus remain the memorial for the hundreds of thousands of its innocent victims."[41] Despite the many hurdles it had to overcome and its premature termination, Bassiouni feels the 780 Commission was an unqualified success. "The fact that the Tribunal's Office of the Prosecutor was able to produce over two-dozen indictments within a few months of the submission of our report indicates how useful the material turned out to be," Bassiouni told the author. "More importantly," he added, "our report revealed the large picture—the connection between Belgrade and the policy and tactics of ethnic cleansing."[42]

II. THE 780 COMMISSION AND THE DEMISE OF IMPUNITY

There are several different theories in vogue to explain the behavior of governments and international organizations. For example, "political realism" posits that foreign policy decisions are determined by respective power relationships, while the "New Haven" approach focuses on the role of process, and "constructivism" focuses on the role of social norms.[43] None of the various approaches give much weight to the idiosyncrasies and unique strengths of particular individuals who, like Cherif Bassiouni, find themselves at the right place and at the right time to change the course of history.

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[40] The 780 Commission's final report is reproduced in U.N. Doc. S/1994/674 (May 27, 1994). A dozen years later, Bassiouni donated his personal copy of the documents and correspondence related to the 780 Commission, along with the photographs, maps, and diagrams that adorned the Commission's "War Room," to Case Western Reserve University School of Law. Unveiled at a special ceremony on October 6, 2006, the collection is located in a dedicated alcove on the third floor of the school's Judge Ben C. Green Law Library.

[41] *Reproduced in* Bassiouni, *supra* note 15, at 60–61.

[42] Telephone Interview with M. Cherif Bassiouni, Aug. 8, 1996.

[43] *See* Anne-Marie Burley, *Symposium on Method*, 93 AM. J. INT'L L. 394–409 (1993).

But, like a stone tossed into a pond, Professor Bassiouni's personal contributions had ripple effects far beyond what the creators of the 780 Commission had envisioned. Once the Commission had officially reported, at Bassiouni's insistence, that grave breaches of the Geneva Convention and Genocide had been committed in Bosnia and concluded that the establishment of an international tribunal would be the most appropriate response, the entire dynamic of the debate on how to respond to the crisis radically changed. Using the platform of the 780 Commission, through a series of high-level meetings (one of which I attended), Professor Bassiouni and others were able to convince the state- and international organization-actors that make up the international community that international accountability would achieve five key objectives: establishing individual responsibility, discrediting institutions and leaders responsible for the commission of atrocities, establishing an accurate historical record, providing victim catharsis, and promoting deterrence.

As envisioned by Professor Bassiouni, the first function of international accountability is to expose the individuals responsible for atrocities and to avoid assigning guilt to an entire people. Importantly, by assigning guilt to specific perpetrators on all sides, the creation of an International Criminal Tribunal for the former Yugoslavia would enable the international community to avoid the assignment of collective guilt, which had characterized the years following World War II and in part laid the foundation for the commission of atrocities during the 1990s Balkan conflict.

According to Professor Bassiouni, the second function of international accountability would be to provide a foundation for dismantling institutions and discrediting leaders and their ideology that have promoted war crimes. When a government pursues policies of ethnic cleansing or systematically denies human rights, it is often done through legal structures. Through an international tribunal, it is possible to promote the dismantling of the institutions and a discrediting of the leaders who encouraged, enabled, and carried out the commission of humanitarian crimes.

The third function served by international accountability is to establish an accurate accounting of the actions of all parties and to create an accurate historical record. If, to paraphrase George Santayana, a society is condemned to repeat its mistakes if it does learn the lessons of the past, then a reliable record of those mistakes must be established if we wish to prevent their recurrence. As Professor Bassiouni reminded us, the chief prosecutor at Nuremberg, Supreme Court Justice Robert Jackson,

underscored the logic of this proposition when he reported to President Truman that one of the most important legacies of the Nuremberg trials following World War II was that they documented the Nazi atrocities "with such authenticity and in such detail that there can be no responsible denial of these crimes in the future and no tradition of martyrdom of the Nazi leaders can arise among informed people." As envisioned by Professor Bassiouni, the Yugoslav Tribunal would generate a comprehensive record of the nature and extent of crimes against humanity and genocide in the Balkans, how they were planned and executed, the fate of individual victims, who gave the orders, and who carried them out. By carefully proving these facts one witness at a time in the face of vigilant cross-examination by distinguished defense counsel, the international trials would produce a definitive account that can pierce the distortions generated by official propaganda, endure the test of time, and resist the forces of revisionism.

The fourth function of international accountability is to acknowledge the victims of crimes—an often overlooked but equally important element to the success of any peace process as is punishing the offenders. Offering victims an opportunity to state their injuries publicly can provide victims with a sense of justice and catharsis—a sense that their grievances have been addressed and can more easily be put to rest rather than smoldering in anticipation of the next round of conflict. This can help break the cycle of violence and contribute to reconciliation.

Finally, in the case of criminal prosecutions, the execution of justice ideally acts as a deterrent against future humanitarian crimes, or at least sets a precedent for accountability. Moreover, the international prosecution of responsible individuals can become an instrument through which respect for the rule of law is instilled into the popular consciousness. The establishment of the rule of law is particularly important since a dominant characteristic of the post-Cold War era in international affairs is that conflicts occur among peoples of different ethnic and religious backgrounds *within* states, not between them. In war-torn societies, one of the most basic obstacles to reconciliation is a lack of trust on the part of citizens between each other and with their government. One of the most effective ways to institutionalize that trust is to establish a stable legal system and the rule of law.

Some U.S. officials expressed the view that a truth commission might be a more appropriate response to the Yugoslav atrocities. Versions of this approach had been successfully employed in South Africa, El

Salvador, Chile, and Argentina, where the calculation was made that the benefits of healing wounds through the establishment of the truth outweighed the benefits of retributive justice. Others favored domestic trials. But as documented by the 780 Commission, the particular circumstance of the crimes committed in the former Yugoslavia required the formation of an *ad hoc* criminal tribunal for moral, practical, and legal reasons. First, the genocide, rape, and torture that occurred were of a nature and scale so horrific that nothing short of full accountability for those responsible would provide justice. Second, the domestic legal systems in some of the republics of the former Yugoslavia had been so thoroughly corrupted that they were not competent to conduct a fair trial of the war's perpetrators, many of whom are still in power. Third, despite initial U.S. efforts to characterize the conflict in the former Yugoslavia as a civil war and to avoid the genocide label, the obligation to prosecute contained in the Geneva Conventions and Genocide Convention were triggered when the 780 Commission concluded that the atrocities constituted grave breaches of the Geneva Conventions and genocide.

Professor Bassiouni's efforts came to fruition on May 25, 2003, when the Security Council adopted Resolution 827, establishing the International Criminal Tribunal for the former Yugoslavia. The creation of the tribunal led inextricably to the issuance of indictments, which in turn contributed to the downfall of Slobodan Milosevic, ultimately resulting in his arrest and transfer to The Hague for trial. This precedent, in turn, led to the establishment of the Rwanda Tribunal, the East Timor Tribunal, the Special Court for Sierra Leone, and finally the permanent International Criminal Court—fulfilling, at last, Professor Bassiouni's life-long quest.

CHAPTER 9

SEXUAL VIOLENCE AS GENOCIDE: THE IMPORTANT ROLE PLAYED BY THE BASSIOUNI COMMISSION IN THE RECENT DEVELOPMENT OF INTERNATIONAL CRIMINAL LAW

Brigitte Stern and Isabelle Fouchard***

The Commission of Experts created by the Secretary-General of the United Nations, pursuant to Security Council Resolution 780 (hereinafter the "Commission" or "Bassiouni Commission"), is not unprecedented. Since the formal prohibition of violations of the laws and customs of war by The Hague Convention IV of 1907, it has become increasingly clear that punishing the authors of such violations, especially for the most serious crimes, is necessary in order to prevent warfare and deter the commission of such abominable acts in the future. Two international commissions of experts were set up to investigate war crimes and prepare potential criminal proceedings against their authors since the beginning of the 20th century: the 1919 Commission of Experts created at the end of the First World War, during the Preliminary Peace Conference; and the U.N. War Crimes Commission created during the Second World War by a diplomatic conference held in London in 1942.[1] These commissions shared at least two common features. Firstly, the commissions resulted from major wars, characterized by both their wide-ranging political and geographic repercussions and the gravity of the

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[1] For more details on these commissions, see Cherif Bassiouni, *The United Nations Commission of Experts Established Pursuant to Security Council Resolution 780*, 88 AM. J. INT'L L. 784–89 (1992).

large-scale violations of fundamental rights they generated. Secondly, the weakness of international cooperation and the instability of state political will at the time the commissions were created meant that neither of them was provided with the effective means to accomplish their task. Consequently, the contribution of these early precedents to the development of international law, especially international criminal law, cannot be compared with that of the 1992 Commission, both with regards to international recognition and concrete results.

From the outset, the 1992 Commission of Experts, which has come to be known as the "Bassiouni Commission,"[2] was supported by a unanimous Security Council[3] and broad, active international cooperation. Moreover, its results lived up to expectations. The Commission has made wide-ranging contributions to a number of major developments in international criminal law over the last decade, at both the institutional and substantive levels.

At the institutional level, the Commission's most obvious contribution was the part it played in the decision to establish an *ad hoc* international criminal tribunal, the International Criminal Tribunal for the former Yugoslavia (ICTY), discussed in detail below. The Bassiouni Commission also encouraged preliminary recourse to international commissions of experts as a complementary but essential tool in all peace processes. The best-known successor commission was created in July 1994, using the same procedure (establishment by the U.N. Secretary-General at the request of the Security Council), "with a view to providing (the Secretary-General) with its conclusions on the evidence of grave violations of international humanitarian law committed in the territory of Rwanda, including the evidence of possible acts of genocide."[4] Adopting the conclusions of the Commission of Experts for Rwanda,[5] the Security Council created the International Criminal Tribunal for Rwanda (ICTR), modeled on the ICTY. Several other commissions of experts have since

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[2] At the second session of the Commission, held in Geneva in December 1992, Cherif Bassiouni was elected "Rapporteur for the Gathering and Analysis of the Facts," before being appointed Chairman, on October 19, 1993.

[3] Security Council action relating to the situation in the former Yugoslavia was highly consensual. Many of the resolutions on this situation were adopted unanimously; *see* U.N. Doc. S/RES/780 (Oct. 6, 1992), U.N. Doc. S/RES/798 (Dec. 18, 1992) and U.N. Doc. S/RES/827 (May 25, 1993).

[4] U.N. Doc. S/RES/935, sec. 1 (July 1, 1994).

[5] U.N. Doc. S/1994/1125 (Oct 4, 1994).

been established[6] to investigate violations of international humanitarian law. The first part of this chapter will analyze the part taken by the Bassiouni Commission in the creation of the ICTY.

At the substantive level, although this was not its primary task, the Commission of Experts also made a meaningful contribution to the evolution of international law relating to, for example, the characterization of international/non-international conflicts,[7] as well as the definition of crimes against humanity[8] and command responsibility.[9] The Commission also made a possibly more decisive contribution regarding the definition of rape and sexual violence in international criminal law. The second part of this chapter will focus on the invaluable work of the Commission in this respect and its contribution to recent developments in international criminal law.

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[6] For example, the International Commission of Inquiry for Togo was established on June 7, 2000, under the auspices of the Secretary-General of the Organization of African Unity and the Secretary-General of the United Nations, at the request of the Government of Togo (see U.N. Doc. E/CN.4/Sub.2/2000/8 (July 28, 2000) and U.N. Doc. E/CN.4/Sub.2/2001/3 (Feb. 22, 2001); The International Commission of Inquiry for Ivory Coast was created on December 5, 2000, by the Secretary-General of the United Nations following consultations with the national government; the International Commission of Inquiry on East Timor was established by the Secretary-General in January 1999 (U.N. Doc. A/54/726, S/2000/59, at 35). The most recent example is the International Commission of Inquiry on Darfur, established by the Secretary-General in late September 2004 at the request of the Security Council.

[7] *Letter dated 24 May 1994 from the Secretary-General to the President of the Security Council*, U.N. Doc. S/1994/674, at 2, annexing the *Final Report of the Commission of Experts established pursuant to Security Council resolution 780* (1992), U.N. Doc. S/1994/674 (Feb. 10, 1993) [hereinafter *Final Report*], Part II, *Applicable Law, A. International/non-international character of the conflict.* Position later deepened in *Prosecutor v. Dusko Tadic*, Case No. IT-94-1-T, *Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction*, paras. 66–70 (Oct. 2, 1995).

[8] ICTY case law has referred to the Final Report, of the Commission of Experts to adopt a wide definition of the persons who may be considered "civilians" (Prosecutor v. Dusko Tadic, Case No. IT-94-1-T, Trial Chamber, Opinion and Judgment, para. 640 (May 7, 1997)), and to hold that "the notion of civilian population as used in Article 5 of the Statute includes, in addition to civilians in the strict sense, all persons placed *hors de combat* when the crime is perpetrated" (Prosecutor v. Jelisic, Case No. IT-95-10-T, Trial Chamber I, Judgment, para. 54 (Dec. 14, 1999)).

[9] *Final Report, supra* note 7, Part II, *Applicable Law, D. Command Responsibility. See also* Prosecutor v. Mucic et al. ("Celebici Camp"), Case No. IT-96-21-T, para. 398, especially n.428 (Nov. 16, 1998).

I. THE CONTRIBUTION OF THE FINAL REPORT OF THE BASSIOUNI COMMISSION TO THE CREATION OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA BY THE U.N. SECURITY COUNCIL

It is worth recalling, by way of introduction, the specific context surrounding the establishment of the 1992 Commission of Experts and the role it played in the overall peace process in the former Yugoslavia. Bosnia's declaration of independence, confirmed by the referendum of February 29–March 1, 1992, marked the outbreak, in April 1992, of the bloodiest war in Europe since World War II, lasting more than three years before the signature of the 1995 Dayton Peace Agreement. Thus, the priority before the creation of the Commission of Experts was the restoration of peace in the former Yugoslavia, a traditionally sensitive part of the Balkan region. Indeed, the U.N. Security Council took up the issue within a month of the outbreak of war in Bosnia. Since then, it has never ceased to restate that "all parties are bound to comply with the obligations under international humanitarian law and in particular the Geneva Conventions of August 12, 1949, and that persons who commit or order the commission of grave breaches of the Conventions are individually responsible in respect of such breaches."[10] In August 1992, the Security Council also expressed "grave alarm at continuing reports of widespread violations of international humanitarian law occurring within the territory of the former Yugoslavia" and strongly condemned all violations of international humanitarian law.[11] This resolution, based on Chapter VII of the U.N. Charter, also called upon all states, the U.N. Secretary-General and competent international organizations "to collate substantiated information in their possession or submitted to them relating to the violations of humanitarian law, including grave breaches of the Geneva Conventions, being committed in the territory of the former Yugoslavia."[12]

The Establishment of the Commission of Experts and the Definition of Its Mandate

The establishment of the Commission of Experts was decided by the Security Council as an added step in a series of resolutions, "as a matter of urgency,"[13] due to "continuing reports of widespread violations of

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[10] *See, e.g.*, U.N. Doc. S/RES/764, para. 10 (July 13, 1992), and U.N. Doc. S/RES/771, para. 1 (Aug. 13, 1992).

[11] U.N. Doc. S/RES/771, pmbl. and para. 2 (Aug. 13, 1992).

[12] *Id.* para. 5.

[13] U.N. Doc. S/RES/780 (Oct. 6, 1992).

international humanitarian law occurring within the territory of the former Yugoslavia." Pursuant to Paragraph 2 of Security Council Resolution 780 (1992), the Secretary-General created an impartial Commission of Experts:

> to examine and analyse the information submitted pursuant to resolution 771 (1992) and 780 (1992), together with such further information as the Commission of Experts may obtain through its own investigations or efforts, of other persons or bodies pursuant to resolution 771 (1992), with a view to providing the Secretary-General with its conclusions on the evidence of grave breaches of the Geneva Conventions and other violations of international humanitarian law committed in the territory of the former Yugoslavia.[14]

The Commission was thus mandated to collect information on the basis of the widest possible international cooperation, including all states, international bodies, and non-governmental organizations (NGOs), and especially in coordination with the Special Rapporteur for the Commission on Human Rights on the former Yugoslavia,[15] Tadeusz Mazowiecki.

As indicated in its first Interim Report,[16] the Commission approved a plan of work consisting of two main goals: gathering and analyzing information through the establishment of a global database and conducting selective in-depth field investigations. The Commission's information-gathering activities were dictated by the text of Security Council Resolutions 771 (1992) and 780 (1992). As a consequence, either spontaneously or at the request of the Commission, thousands of pages of documentary evidence and video recordings from numerous governments, U.N. bodies, international organizations, international NGOs, national organizations, and private sources were sent to the Commission.[17] In fact, "the Commission's findings relied on documents submit-

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[14] *Id.* Furthermore, in its Resolution S/RES/787 (Nov. 16, 1992), the Security Council requested the Commission to pursue actively its investigations on this matter, in particular the practice of "ethnic cleansing."

[15] As expressed by the Secretary-General in his *Report on the Establishment of the Commission of Experts Pursuant to Paragraph 2 of Security Council resolution 780 (1992)*, U.N. Doc. S/24657 (Oct. 14, 1992).

[16] *Letter dated 9 February 1993 from the Secretary-General to the President of the Security Council*, [hereinafter *First Interim Report*], U.N. Doc. S/25274, Annex (Feb. 10, 1993),.

[17] *Id.*, Annex, paras. 8–14; *see also* Vladimir Kotliar, *The Work of the Commission of*

ted by 38 governments and 151 NGOs and other organizations."[18] There is no doubt that this exceptional international mobilization conferred unprecedented authority on the Commission's work.

In order to process all the information, the Commission set up a database using new information technology allowing interactive cross-referencing of an impressive range of criteria and categories that enabled it to extract both reports by category (victims, crimes, authors, geographic data, etc.) and more global trends from the varied sources of information. The database rapidly compiled several thousand alleged violations of international humanitarian law, all of which constituted potential future "cases." The Commission declared that "this alone can provide the foundation for the formulation of conclusions on the evidence of grave breaches of the Geneva Conventions and other violations of international humanitarian law."[19]

Concerning the second aspect of the Commission's plan of work, selective in-depth field investigations were quickly set up in the following areas:

(a) mass killings and destruction of property
(b) treatment of prisoners and detainees
(c) systematic sexual assaults
(d) 'ethnic cleansing.'[20]

Analysis of the information gathered and facts reported by the field investigations fully confirmed the fears of the international community concerning allegations of serious violations of fundamental rights perpetrated in the former Yugoslavia, as well as the need to prosecute the authors of such violations. The Commission's initial mandate was not aimed at criminal prosecution, being limited to impartial fact-finding and analysis. In practice, however, its work was organized from the outset to

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Experts Established Pursuant to Security Council Resolution 780 (1992) to Investigate Violations of International Humanitarian Law in the Former Yugoslavia, in INTERNATIONAL LEGAL ISSUES ARISING UNDER THE UNITED NATIONS DECADE OF INTERNATIONAL LAW 800–02 (1995).

[18] Cherif Bassiouni, *Sexual Violence*, Occasional Paper No. 1, International Human Rights Law Institute (IHRLI), at 38, Annex 4 (De Paul University School of Law 1998) [hereinafter Bassiouni, *Sexual Violence*].

[19] *First Interim Report, supra* note 16, Annex, para. 65.

[20] *Id.* para. 66.

facilitate "its conclusions on the evidence of grave breaches of the Geneva Conventions and other violations of international humanitarian law" to future criminal prosecution. Thus, although there was initially no formal link between the Commission and the ICTY, it is not surprising that in practice a strong nexus became apparent between the Security Council's two creations.

The Commission undoubtedly paved the way for the establishment of an *ad hoc* international tribunal and made an effective contribution towards effective international prosecutions by the future ICTY prosecutor. In this respect, the concluding remarks of the Commission's first Interim Report are worth citing:

> The Commission was led to discuss the idea of the establishment of an ad hoc international tribunal. In its opinion, it would be for the Security Council or another competent organ of the United Nations to establish such a tribunal in relation to events in the territory of former Yugoslavia. The Commission observes that such a decision would be consistent with the direction of its work.[21]

The Commission of Experts as One of the Bases on Which the Decision to Create the ICTY Was Taken

From this perspective, the establishment of the Commission may be seen as a preliminary step in two respects: (1) towards the creation of the ICTY, and (2) towards the facilitation of its judicial work.

The Commission's first contribution to the establishment of the ICTY resulted from its impressive investigative work, facilitating worldwide dissemination of information concerning the war itself and the atrocities perpetrated during the war. In addition, for the first time in history, the atrocities suffered by entire human groups were reported by the world media in such a large-scale, well-documented way that it became impossible for the international community to ignore. The Commission itself strongly supported publication of all the annexes as an integral part of its Final Report to ensure the "widest possible dissemination in order to inform Member States and the interested public."[22] Therefore, the

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[21] *Id.* para. 74.

[22] *Final Report, supra* note 7, Part V, *General Recommendations and Conclusions.*

Commission's fact-finding function played an essential role in showing the need to establish an *ad hoc* international tribunal.

Security Council Resolution 808 (1993) clearly confirmed the importance of the Commission's work in its decision to create the ICTY:

> *Having considered* the interim report of the Commission of Experts established by resolution 780 (1992) (S/25274), in which the Commission observed that a decision to establish an ad hoc international tribunal in relation to events in the territory of the former Yugoslavia would be consistent with the direction of its work,
>
> *Expressing once again* its grave alarm at continuing reports of widespread violations of international humanitarian law occurring within the territory of the former Yugoslavia, including reports of mass killings and the continuance of the practice of 'ethnic cleansing',
>
> *Determining* that this situation constitutes a threat to international peace and security,
>
> *Determined* to put an end to such crimes and to take effective measures to bring to justice the persons who are responsible for them,
>
> *Convinced* that in the particular circumstances of the former Yugoslavia the establishment of an international tribunal would enable this aim to be achieved and would contribute to the restoration and maintenance of peace.[23]

In this resolution, the Security Council recognizes openly the link between maintaining international peace and effective accountability for the authors of serious violations of international humanitarian law. It also clearly underlines the nexus between the Commission's conclusions and recommendations and the creation of the *ad hoc* tribunal. The Secretary-General later confirmed that in preparing his draft of the *ad hoc* tribunal's Statute, which was adopted unanimously by the Security Council without amendment, he "has also sought the views of the Commission of Experts established pursuant to Security Council resolution 780 (1992)

[23] U.N. Doc. S/RES/808 (1992).

and has made use of the information gathered by that Commission."[24] The way the two bodies compliment each other in the broader context of peace restoration was also noted in the Commission's Final Report: "[i]t is particularly striking to note the victims' high expectations that this Commission will establish the truth and that the International Tribunal will provide justice. All sides expect this. Thus, the conclusion is inescapable that peace in the future requires justice, and that justice starts with establishing the truth."[25] However, the Commission of Experts went beyond emphasizing the need to establish an international criminal tribunal to restore and maintain peace in the specific context of the former Yugoslavia, when it called on the Security Council to provide the tribunal with the effective means to accomplish its task and an opportunity to create momentum for future evolution towards permanent, effective institutions of international justice.[26] This is only one example of the Commission's daring, *avant-garde* contribution in favor of the progressive development of international criminal law.

Moreover, it is clear that the Commission's work greatly facilitated prompt implementation of the ICTY Statute, not only by demonstrating the need to prosecute the authors of violations of international humanitarian law, but also by the transmission to the tribunal of the evidence of such violations. For this reason, the Secretary-General, "confident that the material collected and analysed by the Commission will greatly facilitate the task of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 in carrying out its mandate," requested the Commission to forward "the database and all of the information gathered by the Commission in the course of its work"[27] to the Office of the Prosecutor of the international tTribunal. Indeed, the Final Report indicates that:

> The Commission finds significant evidence of and information about the commission of grave breaches of the Geneva Conventions and other violations of international humanitarian law

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[24] *Report of the Secretary-General pursuant to paragraph 2 of Security Council resolution 808 (1993)*, U.N. Doc. S/25704, para. 13 (May 3, 1993).

[25] *Final Report, supra* note 7, Part V, *General Recommendations and Conclusions.*

[26] *Id.*

[27] *Letter dated 24 May 1994 from the Secretary-General to the President of the Security Council*, U.N. Doc. S/1994/674, at 2 (1994).

> which have been communicated to the Office of the Prosecutor of the International Tribunal.
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> Some of the conclusions relative to these violations are reflected in the present report, but for obvious reasons information and evidence of a prosecutorial nature are not described herein.[28]

The nexus between the Commission of Experts and the ICTY is also confirmed by the informal link established between the two bodies in Security Council Resolution 827 (1993):

> Considering that, pending the appointment of the Prosecutor of the International Tribunal, the Commission of Experts established pursuant to resolution 780 (1992) should continue on an urgent basis the collection of information relating to evidence of grave breaches of the Geneva Conventions and other violations of international humanitarian law as proposed in its interim report (S/25274).[29]

Thus, while the Commission played an effective role in the establishment of the ICTY, it is clear that its contribution lasted far beyond the end of its mandate in late April 1994. ICTY case law has since largely demonstrated the reliability of the Commission's work as grounds for prosecution in the context of the former Yugoslavia. Although this is true in a wide range of cases, this chapter will focus on rape and sexual violence, acts recognized as some of the worst in this conflict. As early as December 1992, the Security Council unanimously declared itself "[a]ppaled by reports of the massive, organized and systematic detention and rape of women, in particular Muslim women, in Bosnia and Herzegovina."[30]

ICTY case law (and later that of the ICTR) provides clear evidence of the evolution of the definition of rape and sexual assault under international criminal law, initiated by the Commission's work. Many decisions make explicit reference to both Bassiouni's personal writings and the Final Report of the Commission of Experts, which he chaired. Needless to say, since the establishment of the *ad hoc* international criminal tribunals, their case law has led to a general evolution in the definition of rape and sexual assault.

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[28] *Final Report, supra* note 7, Part V, *General Recommendations and Conclusions.*

[29] U.N. Doc. S/RES/827 (May 25, 1993).

[30] U.N. Doc. S/RES/798 (Dec. 18, 1992).

II. THE CONTRIBUTION OF THE FINAL REPORT OF THE BASSIOUNI COMMISSION TO THE EVOLUTION OF THE DEFINITION OF RAPE AND SEXUAL VIOLENCE IN INTERNATIONAL CRIMINAL LAW

Before focusing on the evolution in international criminal law initiated by Cherif Bassiouni's work, let it be mentioned that the work of the Commission was relevant in another forum. As a member of the legal team for Bosnia and Herzegovina in the *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Yugoslavia) before the International Court of Justice (ICJ),[31] one of the authors (Stern) made extensive use of the invaluable information collected by the Commission of Experts. The thorough, impartial investigation conducted by the Commission, as evidenced by the most useful, exhaustive "Final Report" (especially Annexes II, IX, IXA, and IXB), served as one of the bases for Bosnia and Herzegovina's claim against Yugoslavia before the ICJ. These annexes, "which as a whole constitute an integral part of the Report,"[32] deal specifically with sexual violence, as their respective titles indicate: Annex II, *Rape and Sexual Assault: A Legal Study*; Annex IX: *Rape and Sexual Assault*; Annex IX A: *Sexual Assault Investigation*; and Annex IX B: *Rape Pilot Study (Sarajevo)*.[33] Bassiouni's personal academic contribution to the issue, especially his articles entitled *Sexual Violence*[34] and *Investigating Violations of International Humanitarian Law in the Former Yugoslavia*,[35] are also invaluable references that deserve mention.

The Commission of Experts' Factual Conclusions on Rape and Sexual Violence

The work of the Commission of Experts, Annexes II, IX, IXA, and IXB, probably constitutes one of the most reliable sources on sexual vio-

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[31] *The Case Concerning Application of the Convention on the Prevention and the Punishment of the Crime of Genocide* was brought before the ICJ in 1993 by Bosnia and Herzegovina against the Federal Republic of Yugoslavia (Serbia and Montenegro) pursuant to Article IX of the Genocide Convention. In this case, the Court rendered nine orders and a decision on its jurisdiction (Decision dated July 11, 1996, Preliminary Objections, Reports 1996, at 595). Public hearings on the merits in this case are scheduled to open on Monday February 27, 2006.

[32] *Letter dated 24 May 1994 from the Secretary-General to the President of the Security Council*, U.N. Doc. S/1994/674, p. 2 (1994).

[33] *Available at* http://www.ess.uwe.ac.uk/comexpert/.

[34] Bassiouni, *Sexual Violence, supra* note 18.

[35] Cherif Bassiouni, Occasional Paper No. 2, International Human Rights Law Institute (IHRLI) (De Paul University School of Law 1996).

lence in the former Yugoslavia.[36] Indeed, the methods used by the Commission of Experts in order to examine sexual violence have been cumulative: "The Commission investigated rape and sexual assault in three ways. The first method was through a study of the documentary evidence . . . The second method was through a field investigation . . . The final method was through the analysis of investigations and interviews conducted by governments."[37] The Commission also conducted a series of 223 direct interviews of refugees or displaced persons in Croatia: 32 out of 79 women from Bosnia and Herzegovina claimed to have been raped. In addition, 21 persons testified to having been eyewitnesses to rape or sexual assault.[38]

The Final Report provides the following overall picture:

> The reports contained in the Commission's data base identify close to 800 victims by name or number. An additional 1,673 victims are referred to, but not named, in reports of victims who indicate that they have witnessed or known of other similar victims. Additionally, there are some 500 reported cases which refer to an unspecified number of victims. The victims' ages range from 5 to 81 years old, with the majority of victims being below 35 years old.[39]

According to Professor Bassiouni, "[e]xtrapolation from the reports suggests that there were well over 12[,]000 victims of rape and sexual assault."[40] The Commission of Experts adds that in its opinion, although all the data is not fully corroborated with exact names, the number of victims is likely to be underestimated, given the reluctance to report sexual violence, fear of reprisals, and the shame and embarrassment felt by victims of sexual violence. As far as sexual violence is concerned, it is well known that even in peacetime reported cases only represent a small pro-

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[36] The Commission of Human Rights, which has also dealt with violations of human rights in the former Yugoslavia, especially sexual violence, is another extremely reliable source. For that purpose, it named M. Mazowiecki Special Rapporteur to investigate the question of human rights abuses in the former Yugoslavia.

[37] *Final Report, supra* note 7, Annex IX, *Rape and Sexual Assault*, at 6, para. 1.

[38] *Id.* at. 59, para. 241; *see also id.*, Annex IX A, *Sexual Assault Investigation*, at 5, para. 5.

[39] *Id.* at para. 236; *see also id.* at Annex IX A: *Sexual Assault Investigation*, para. 4.

[40] Bassiouni, *Sexual Violence, supra* note 18, at 10, Annex 6.

portion of existing cases. As stated in the *American Journal of Preventive Medicine*, "historically, estimates of rape have been derived from law enforcement sources. These methods have greatly underestimated incidence and prevalence through severe underreporting."[41]

However, the horror of these crimes does not result solely from the number of innocent victims; it also results from the discriminatory choice of victims and the special intent underlying the criminal acts. On the basis of the collected information and field investigations, the Commission was able to discern five patterns in the rape cases:

> The first pattern involves individuals or small groups committing sexual assault in conjunction with looting and intimidation of the target group. . . .
>
> The second pattern of rape involves individuals or small groups committing sexual assault in conjunction with fighting in an area, often including the rape of women in public. . . .
>
> The third pattern of rape involves individuals or groups sexually assaulting people in detention because they have access to the people. . . . Reports frequently refer to gang rape, while beatings and torture accompany most of the reported rapes. . . .
>
> The fourth pattern of rape involves individuals or groups committing sexual assaults on women for the purpose of terrorising and humiliating them often as part of 'ethnic cleansing'. Survivors of some camps report that they believe they were detained for the purpose of rape. . . .
>
> The fifth pattern of rape involves detention of women in hotels and similar facilities for the sole purpose of sexually entertaining the soldiers. These women are reportedly more often killed than exchanged.[42]

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[41] Ivy L. Schwartz, *Sexual Violence against Women: Prevalence, Consequences, Societal Factors, and Prevention*, 7 AM. J. PREVENTIVE MED., at 364, Annex 7.

[42] *Final Report, supra* note 7, Annex II, *Rape and Sexual Assault: A Legal Study*, U.N. Doc. S/1994/674/Add.2 (Vol. I), at 58–59, paras. 245–249 (Dec. 28, 1994); *see also Final Report, supra* note 7, Annex IX, *Rape and Sexual Violence*, U.N. Doc. S/1994/674/Add.2 (Vol. V), at 9–10, paras. 11–16; *see also* Cherif Bassiouni, *Investigating Violations of International Humanitarian Law in the Former Yugoslavia*, at 37–38, Annex 34.

The Commission concluded that an analysis of all the available data "could lead to the conclusion that there was an overriding *policy advocating the use of rape as a method of 'ethnic cleansing'*, rather than a policy of omission, tolerating the widespread commission of rape."[43] Saying that rape and sexual assault have been committed in a systematic manner means that rape could be called sexual violence as policy. There is unfortunately no doubt that all the opposing groups include rapists. But an isolated rape—though most unfortunate—is not a policy of rape, and the two types of acts do not answer to the same rules. Even several isolated rapes do not necessarily make up a policy of rape. What has happened in Bosnia and Herzegovina is not a sum of isolated events, but rather the systematic use of rape and sexual violence following clear patterns of conduct, the most prevalent of those being the pattern of "ethnic cleansing."

The Definition of the Crimes of Rape and Sexual Assault in International Law

Rape falls within the broader category of "sexual violence," the elements of which Professor Cherif Bassiouni proposed to define as follows:

> *Rape*[44] denotes vaginal, oral or anal sexual intercourse without the consent of one of the people involved. *Sexual assault*[45] is a broader term, which includes rape and other forced or coerced sexual acts, as well as mutilation of the genitals. *Sexual violence*[46] is the most general term, used to describe any kind of violence carried out through sexual means or by targeting sexuality.[47]

In the Commission's view, it seems clear that rape "constitutes a crime under international humanitarian law as well as under the criminal laws of the various republics which constituted the former Yugoslavia."[48] As the Commission pointed out however, the problem with this offense is that, "[u]nlike most codified penal laws in the world, in international

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[43] *Final Report, supra* note 7, Annex II, *Rape and Sexual Assault: A Legal Study*, U.N. Doc. S/1994/674/Add.2 (Vol. I), at 56, para. 237, emphasis added.

[44] Emphasis in original.

[45] Emphasis added.

[46] *Id.*

[47] Bassiouni, *Sexual Violence, supra* note 18, at 18, Annex 2.

[48] *Final Report, supra* note 7, at Part II, J, *Legal Aspects of Rape and Other Sexual Assaults.*

humanitarian law rape is not precisely defined."[49] Unavoidably, given the incredible scale of sexual violence in both the former Yugoslavia and Rwanda, the definition of rape has widely evolved through the case-law of the two *ad hoc* international criminal tribunals.

In 1996, the ICTY prosecutor defined rape "as the forcible sexual penetration of another person or forcing one person to sexually penetrate another."[50] Further details are necessary concerning the terms, "sexual penetration" and "forcible," which constitute the two essential elements of rape.

As far as "sexual penetration" is concerned, a definition proposed in the prosecutor's pre-trial brief in the *Tadic* case[51] and reiterated in the *Gagovic and others ("Foca")* indictment, dealing specifically with sexual offenses, was confirmed by a judge in the review of the indictment, under Article 19 of the ICTY Statute. This definition of sexual penetration included "penetration however slight, of the vagina, anus or oral cavity, by the penis; sexual penetration of the vulva or anus is not limited to the penis."[52] This descriptive definition clearly extends the oral cavity to the body parts able to be penetrated and eliminates the traditional distinction between penetration by a penis and other objects. Such an extended conception of rape was needed in the Yugoslavian context in view of the fact that rape was often committed using a variety of objects, but the definition sought to be as descriptive as possible to comply with the general principle of legality in international criminal law.

The definition of rape and sexual violence was then dealt with in the *Prosecutor v. Jean-Paul Akayesu* case before the ICTR, when the tribunal had to determine the extent to which rape may constitute a crime against humanity. The Trial Chamber, departing from the descriptive *Tadic* definition, stated that "rape is a form of aggression and that the central elements of the crime of rape cannot be captured in a mechanical description of objects and body parts"[53] and accordingly defined rape "as

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[49] *Id.*

[50] Prosecutor v. Dusko Tadic, Case No. IT-94-I-T, Pre-trial brief, at 53 (Apr. 10, 1996).

[51] *Id.*

[52] Prosecutor v. Gagovic and others ("Foca"), Case No. IT-96-23-I, Review of the Indictment pursuant to Article 19(1) of the Statute, at 5, para. 4.8 (June 26, 1996).

[53] Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4-T, Trial Chamber I, Judgment, para. 597 (Sept. 2, 1998).

a physical invasion of a sexual nature, committed on a person under circumstances which are coercive."[54] The *Akayesu* general definition thus confirmed the move beyond the traditional conception of rape towards a broader and extensive definition in order to encompass the various means of the worst sexual violence. This "conceptual" definition of rape adopted in the *Akayesu* case was later upheld by the ICTY in the *Celebici* case[55] and by the ICTR in the *Musema* case.[56]

However, when the ICTY Trial Chamber sought to establish, a few months later, in the *Furundzija* case, that forced oral penetration constituted rape, it did not rely on the existing precedents, but rather used its own approach in order "to arrive at an accurate definition of rape."[57] The Chamber searched for the definition of rape in the specific source of international law quoted in Article 38 of the ICJ Statute as the "general principles of law recognized by civilized nations." Thus, based on a review of the "principles of criminal law common to the major legal systems of the world," the Trial Chamber noted that "a trend can be discerned in the national legislation of a number of States of broadening the definition of rape" and concluded that the objective elements of the crime of rape are:

> (i) the sexual penetration, however slight:
>
> > (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or
> >
> > (b) of the mouth of the victim by the penis of the perpetrator;
>
> (ii) by coercion or force or threat of force against the victim or a third person.[58]

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[54] Sexual violence, which includes rape, was defined as "any act of a sexual nature which is committed on a person under circumstances which are coercive," *id.* para. 598.

[55] Prosecutor v. Delalic et al., Case No. IT-96-21-T, Judgment, paras. 478–479 (Nov. 16, 1998).

[56] Prosecutor v. Alfred Musema, Case No. ICTR-96-13, Judgment and Sentence (Jan. 27, 2000).

[57] Prosecutor v. Anto Furundzija, Case No. IT-95-17/1, Judgment, para. 177 (Dec. 10, 1998).

[58] *Id.*, para. 185.

This definition of the *actus reus* of the crime of rape, also later applied in the *Kunarac* case,[59] goes back to the "descriptive" definition given in the *Tadic* and *Foca* cases. It enabled the Trial Chamber to conclude that "the stigma of rape now attaches to a growing category of sexual offences, provided of course they meet certain requirements, chiefly that of forced physical penetration."[60] This reasoning led the tribunal to justify that "forced oral penetration should be classified as rape."[61]

The second essential element, namely the coercion factor, has also evolved. According to the prosecutor in the *Tadic* case, "'[f]orcible' means that the act of sexual penetration was accomplished by *force or threat of force* against the victim or a third person. The threat of force can be either express or implied, and must place the victim in reasonable fear that he or she or a third person will be subjected to violence, detention, duress or psychological oppression."[62] As regards rape, this conception was necessary in order to encompass all situations in which a woman, or a man,[63] is not "free" to have sexual relations. "Forcible" thus means, "imposed" on a person, even where there is no physical violence. Accordingly, it is not necessary to physically restrain people in order to rape them. It would suffice, for example, to tell them that unless they submit to sexual relations, their children will be in danger. More often, even where no specific threat of this kind is articulated against the victim, he or she is placed in a general context of coercion. Needless to say, when a guard assaults a person held in a detention camp, or living in a town or village held by enemy forces, that person is unable to resist or escape the assailant.

This aspect has also been discussed in the *Kunarac* case, in which the ICTY Trial Chamber has held that the scope of the coercion element of the *Tadic* definition of rape was "more narrowly stated than is required

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[59] Prosecutor v. Dragoljub Kunarac et al. ("Foca"), Case No. IT-96-23&23/1, Judgment, para. 437 (Feb. 22, 2001).

[60] Prosecutor v. Anto Furundzija, Case No. IT-95-17/1, Judgment, para. 179 (Dec. 10, 1998).

[61] *Id.* para. 183.

[62] Prosecutor v. Dusko Tadic, Case No. IT-94-I-T, Pre-trial brief, at 54 (Apr. 10, 1996), emphasis added. *See also* Mrs Patricia Viseur-Sellers, the ICTY Legal Officer on gender issues of the ICTY, ICTY BULL., No. 7, Annex 3, at 5 (June 21, 1996).

[63] *See, e.g.*, The Prosecutor v. Dusko Tadic, Case No. IT-94-I-T, Pre-trial brief, at 54 (Apr. 10, 1996).

by international law."[64] According to the Trial Chamber, the requirement of "coercion or force or threat of force against the victim or a third person" indeed does not refer to "other factors which would render an act of sexual penetration *non-consensual or non-voluntary* on the part of the victim."[65] Thus, if attention had previously been focused on the use or threat of force as the defining characteristic of rape, the evolution in ICTY case law shows that other coercive factors may either nullify the possibility of resistance or render the context so coercive that consent is impossible. Based on this reasoning, the Trial Chamber concluded that the detention of women in *de facto* military headquarters or detention centres amounted to circumstances that are so coercive as to negate any possibility of consent.[66]

This evolution was adopted in the *Elements of Crimes*, which was designed to assist the International Criminal Court (ICC) in interpreting and applying its statute. Pursuant to the statute, the term forcibly "is not restricted to physical force, but may include threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment."[67] Rape may thus be described as non-consensual sexual relations with another person obtained through physical or psychological coercion, by force, threat, or intimidation.

However, even though rape and sexual violence are clearly crimes under international humanitarian law, they do not constitute international crimes as such. They are merely acts that, under specific conditions, may amount to grave breaches of Geneva Conventions, war crimes, crimes against humanity, or genocide.[68] The relevant provisions of the ICTY Statute, which the Commission found to "adequately and correctly

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[64] Prosecutor v. Kunarac, Case Nos. IT-96-23-T and IT-96-23/1-T, para. 438 (Feb. 22, 2001); confirmed by Article 7(3) of the ICC Statute: "For the purpose of this Statute, it is understood that the term "gender" refers to the two sexes, male and female, within the context of society. The term "gender" does not indicate any meaning different from the above."

[65] *Id.*

[66] *Id.* para. 132.

[67] *Elements of Crimes*, adopted by the Assembly of States Parties, 1st sess., New York, Official Records, ICC-ASP/1/3 (Sept. 10, 2002).

[68] *Final Report, supra* note 7, Annex II, *Rape and Sexual Assault: a Legal Study*, Parts II, III, IV, and V.

state the applicable law to this crime,"[69] only expressly mention rape and sexual violence in Article 5(g) (Crimes Against Humanity). However, through reference to relevant international treaties and international customary law, these offenses are also deemed to possibly constitute violations of the law and customs of war (Article 3)[70] grave breaches of the Geneva Conventions (Article 2),[71] and genocide (Article 4).[72]

The Case Law of the International Criminal Tribunals on Rape as an Act of Genocide

Article 4 of the ICTY Statute, as well as Article 2 of the ICTR Statute and Article 6 of the ICC Statute, repeats Article II of the Genocide Convention[73] verbatim:

> Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
>
> (a) Killing members of the group;
>
> (b) Causing serious bodily or mental harm to members of the group;
>
> (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
>
> (d) Imposing measures intended to prevent births within the group;
>
> (e) Forcibly transferring children of the group to another group.

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[69] *Id.*, Part II, J, *Legal Aspects of Rape and other Sexual Assaults.*

[70] The Hague Convention (IV) Respecting the Laws and Customs of War on Land deals with the question of sexual assaults in Article 46: "Family honour and rights, the lives of persons and private property, as well as religious convictions and practice, must be respected." The Fourth Geneva Convention explicitly prohibits rape in Article 27.

[71] They may, indeed, be characterized as forms of "torture or inhumane treatment" pursuant to Article 147 of the Fourth Geneva Convention.

[72] They may also be considered as a means of causing "serious bodily or mental harm" according the wording of Article II(b) of the Genocide Convention.

[73] Convention for the Prevention and Punishment of the Crime of Genocide ("Genocide Convention"), 78 U.N.T.S. 277, adopted Dec. 9, 1948, entered into force Jan. 12, 1951.

No express mention of rape or sexual violence as a means to commit genocide is made in this definition. However, genocide's link to rape and sexual violence was initially brought to light in the *Karadzic and Mladic* case. The fact that rape and sexual assault have been used as genocidal tools was emphasized in the Decision of the Trial Chamber in its *Review of the Indictments of Karadzic and Mladic pursuant to Rule 61:*

> certain methods used for implementing the project of 'ethnic cleansing' appear to reveal an *aggravated intent* as, for example, the massive scale of the effect of the destruction. The number of victims selected only because of their membership in a group would lead one to the conclusion that an intent to destroy the group, at least in part, was present. Furthermore, *the specific nature of some of the means used* to achieve the objective of 'ethnic cleansing' tends to underscore that the perpetration of the acts is designed to reach the very foundations of the group or what is considered as such. *The systematic rape of women*, to which material submitted to the Trial Chamber attests, is in some cases intended to transmit a new ethnic identity to the child. In other cases, humiliation and terror serve to dismember the group.[74]

This approach was upheld in the landmark *Akayesu* case, in which the ICTR Trial Chamber concluded that:

> Indeed, rape and sexual violence certainly constitute infliction of serious bodily and mental harm on the victims and are even, according to the Chamber, one of the worst ways of inflict [sic] harm on the victim as he or she suffers both bodily and mental harm. In light of all the evidence before it, the Chamber is satisfied that the acts of rape and sexual violence described above, were committed solely against Tutsi women, many of whom were subjected to the worst public humiliation, mutilated, and raped several times, often in public. . . . These rapes resulted in physical and psychological destruction of Tutsi women, their families and their communities. Sexual violence was an integral part of the process of destruction, specifically targeting Tutsi women and specifically contributing to their destruction and to the destruction of the Tutsi group as a whole.[75]

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[74] Prosecutor v. Karadzic and Mladic, Cases Nos. IT-95-5-R61 and IT-95-18-R61, Trial Chamber, Review of the Indictment pursuant to Rule 61 of the Rules of Procedure and Evidence, at 53, para. 94 (July 11, 1996), emphasis added.

[75] *Id.*

This position that rape constitutes serious bodily and mental harm, and can therefore be one of the constituent element of genocide, was later evidenced in the ICC *Elements of Crimes*, which asserts that "serious bodily or mental harm" may include but is not limited to "acts of torture, rape, sexual violence or inhumane treatment."[76]

Yet the major innovation prepared by the *Akayesu* decision lies in the following assertion:

> rape and sexual violence . . . constitute genocide in the same way as *any other act* as long as they were committed with the specific intent to destroy, in whole or in part, a particular group, targeted as such.[77]

This may suggest a progressive interpretation of the constituent acts of genocide. The *mens rea* of the crime of genocide is thus reaffirmed to be the *essential* element of genocide, whereas the *actus reus* is broadened to encompass *any act*, as long as it is committed with genocidal intent. It might no longer be limited to the list set out in Article II of the Genocide Convention, as reiterated in the statutes of the *ad hoc* international criminal tribunals and the ICC. Following this approach, the ICC Preparatory Commission "recognized that rape and sexual violence may constitute genocide in the same way *as any act*, provided that the criteria of the crime of genocide are met."[78] Interestingly, this approach had already been put forward by the Commission of Experts, which stated that: "[u]nder the Genocide Convention, sexual assault and rape are included within the meaning of article II of the Convention, provided that the prohibited conduct is committed as part of an 'intent to destroy, in whole or in part, a national, ethnical, racial or religious group.'"[79] This is but one example of the invaluable contribution by the Commission of Experts to the evolution of international law. Under the guidance of its Chairman, the Commission proposed a sufficiently broad concept of both the crime of rape and the crime of genocide to encompass the new, odious evolution in criminal acts witnessed in the Yugoslav conflict.

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[76] ICC-ASP/1/3, art. 6(b) n.3.

[77] Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4-T, Trial Chamber I, para. 597 (sept. 2, 1998), emphasis added.

[78] *Discussion paper proposed by the Co-ordinator, Suggested comments relating to the crime of genocide*, U.N. Doc. PCNICC/1999/WGEC/RT.3, emphasis added.

[79] *Final Report, supra* note 7, Part II, J, *Legal Aspects of Rape and Other Sexual Assaults*, at 28–29, para. 107 (May 27, 1994).

As a concluding remark, it should be mentioned that the ICC Statute[80] confirms the evolution towards a broader criminalization of acts of sexual violence that encompasses "(r)ape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity,"[81] all of which can constitute under the ICC Statute crimes against humanity[82] as well as war crimes.[83] It is worth recalling that the *Elements of Crimes*[84] definition of rape clearly takes into account the two-fold ICTY case law evolution, which has been described earlier in this chapter:

1. The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.
2. The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.

The contribution of the Bassiouni Commission at both institutional and substantive levels is also illustrated by the latest commission established by the Security Council—the International Commission of Inquiry on Darfur, whose report was submitted to the Secretary-General on January 5, 2005. It is particularly interesting to note that the mandate conferred on this commission has largely broadened in comparison with the tasks assigned to the Bassiouni Commission. Indeed, paragraph 12 of Security Council Resolution 1564 (2004) sets out the following tasks for the Commission: "to investigate reports of violations of international human-

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[80] Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9 (July 17, 1998) and corrected by *procès-verbaux* (Nov. 10, 1998, July 12, 1999, Nov. 30, 1999, May 8, 2000, Jan. 17, 2001, and Jan. 16, 2002). The Statute entered into force on July 1, 2002.

[81] ICC Statute arts. 7(1)(g) and 8(2)(b)(xxii).

[82] Pursuant to ICC Statute Articles 7(1)(g)-1 to 7(1)(g)-6.

[83] Pursuant to ICC Statute Articles 8(2)(b)–1 to 8(2)(b)–6.

[84] *Elements of Crimes*, adopted by the Assembly of States Parties, 1st sess., New York, ICC-ASP/1/3 (Sept. 3–10, 2002).

itarian law and human rights law in Darfur by all parties . . . to determine also whether or not acts of genocide have occurred . . . [and] to identify the perpetrators of such violations . . . with a view to ensuring that those responsible are held accountable." By strongly recommending "that the Security Council should refer the situation in Darfur to the International Criminal Court, pursuant to Article 13(b) of the Statute of the Court,"[85] this Commission paved the way for the first exercise of jurisdiction by the ICC on this basis,[86] and once again the International Commission of Inquiry showed the decisive role it plays in international criminal law developments.

This chapter has no pretension to provide an exhaustive picture of the contribution by the 1992 Commission of Experts to recent developments in international criminal law, and far less that of Professor Bassiouni himself. It simply underlines two examples where the Commission of Experts made a meaningfully contribution: the establishment of the ICTY and the evolving definition of rape and sexual violence.

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[85] *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, Pursuant to Security Council Resolution 1564 of September 18, 2004*, Geneva, at 162, para. 647 (Jan. 25, 2005).

[86] The United States has already made known their opposition to this idea, while at the same time proposing the creation of a Sudan Criminal Court (SCC).

CHAPTER 10

THE INTERNATIONAL CRIMINAL COURT AND THE TRANSFORMATION OF INTERNATIONAL LAW

*Leila Nadya Sadat**

Just as globalization was the buzzword of the 20th century, it remains the order of the day in the 21st. The positive aspects of this process are many—instantaneous e-mail contact with friends living abroad, an Internet linking potentially all human beings together in a vast new jurisdiction known as cyberspace, free trade, fabulous travel opportunities, and greater economic prosperity, at least for individuals in the developed world.[1] Yet costs accompany the benefits: extreme poverty for those left behind, terrorism and transnational crime, disease, global warming and other forms of international and local environmental degradation, and even war.[2] Moreover, it is unclear as yet what globalization portends for world order. Greater integration of goods, services, capital, and labor, with supranational, democratic governance structures to organize the chaos?[3] Or increased violence, disorder, and entropy?[4]

Mohammed Cherif Bassiouni, with his gift for languages, brilliant legal mind, and cosmopolitan background—born in Egypt, a U.S. national, educated in Cairo, Paris, and the United States—is the ultimate new "global citizen," and could have benefited enormously from the

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[1] JEFFREY D. SACHS, THE END OF POVERTY: ECONOMIC POSSIBILITIES FOR OUR TIME (2005).

[2] Leila Nadya Sadat, *An American Vision for Global Justice: Taking the Rule of (International) Law Seriously*, 4 WASH. U. GLOBAL STUD. L. REV. 329 (2005).

[3] For an articulation of this vision, particularly as regards the International Criminal Court and its relationship to global democratization, see Richard Falk & Andrew Strauss, *Next, a Global Parliament*, INT'L HER. TRIB., Apr. 19, 2002, at 4.

[4] *See, e.g.*, Michael J. Glennon, *Why the Security Council Failed*, 82 FOR. AFF. 16 (2003).

many advantages he had in the new global economy. Instead, he dedicated his life's work to the solution of global problems on an astonishing scale—the prevention and suppression of international crime, including the most serious crimes of concern to the international community as a whole—genocide, war crimes, crimes against humanity, and aggression. Perhaps his most enduring legacy has been his tireless advocacy for the establishment of an international criminal court that could try the perpetrators of such crimes, an effort that would certainly have been dubbed "quixotic" a decade ago.

Now that the International Criminal Court (ICC) exists, it is easy to minimize the extraordinary and improbable feat that its creation entailed. Nearly 75 years of discussions, wars, projects, negotiations, drafts, and failures preceded the climatic signing of the International Criminal Court Treaty in the Italian city of Rome on a hot day in July 1998. Four more years ensued before the 60 ratifications required for the treaty's entry into force were assembled, on April 11, 2002. Since that date, books, articles, newspaper stories—even a Hollywood movie (*The Interpreter*)—have brought to life this new institution in a way that its founders probably never thought possible. This chapter is a tribute to an individual who helped bring about this new reality, as well as a brief discussion of both his and the new Court's potential contribution to international law and world order. Given space limitations, the discussion here can only be limited. Nonetheless, it will highlight a few of Bassiouni's major contributions, and the "uneasy revolution" worked by the adoption of the Rome Statute itself.[5] Finally, it will offer a few thoughts about the Court's first cases and the direction of international criminal justice in the 21st century.

One could legitimately ask if there would even *be* an ICC had not Bassiouni made its establishment a goal of his life and work—his "Grotian quest," one might say.[6] That is not to say that many others were not instrumental as well. But not only are many of the intellectual foundations of the Court's jurisdiction and operation to be found in his early writings, but his practical contributions to the Court's establishment have

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[5] Leila Nadya Sadat, *The New International Criminal Court: An Uneasy Revolution*, 88 GEO. L.J. 381 (2000) (with S. Richard Carden).

[6] This is the title of a wonderful essay by Mendlovitz and Daran entitled *"Judge Weeramantry's Grotian Quest,"* describing Weeramantry's dissent in the *Nuclear Weapons Advisory Opinion* of the International Court of Justice. Saul Mendlovitz & Merav Datan, *Judge Weeramantry's Grotian Quest*, 7 TRANSNAT'L L. & CONTEMP. PROBS. 402 (1997).

been extraordinary. He chaired the U.N. Commission of Experts established to examine and analyze allegations of grave breaches of the Geneva Conventions and other violations of international humanitarian law committed in the territory of the former Yugoslavia in 1994,[7] which ultimately led to the establishment of the International Criminal Tribunal for the former Yugoslavia,[8] the first international war crimes tribunal established since the Nuremberg Tribunal in 1946. He then served as Vice-Chair of the U.N. *Ad Hoc* Committee on the Establishment of an International Criminal Court, the report of which was critical to the framing of key issues to be discussed and negotiated in the elaboration of a statute for the Court, as well the organizational plan to be adopted in continuing the negotiating process leading up to the holding of the Diplomatic Conference at Rome.[9] When the *Ad Hoc* Committee was succeeded by a Preparatory Committee (PrepCom) for the negotiation of the text,[10] Bassiouni was there, too. Moreover, even when not present in person, or chairing a particularly important committee, Bassiouni's articles and books, which were among the most important scholarly works available on international criminal law at the time, were vitally important to an understanding of the legal issues presented, as well as the political context of the ICC negotiations.[11]

During the Preparatory Committee meetings leading up to the Rome Conference, Bassiouni was an active participant. I can recall, in particular, one day in December of 1997, in which he took the floor to propose the addition of a provision to the war crimes article of the

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[7] U.N. Commission of Experts Established Pursuant to S.C. Res. 780 (1992), *Final Report*, U.N. Doc. S/1994/674 (May 27, 1994) (prepared by M. Cherif Bassiouni, Chairman and Rapporteur).

[8] Statute for the International Criminal Tribunal for the former Yugoslavia art. 5, S.C. Res. 827, U.N. SCOR, 48th Sess., U.N. Doc. S/RES/827 (May 25, 1993) [hereinafter ICTY Statute].

[9] *Report of the* Ad Hoc *Committee on the Establishment of an International Court*, G.A. Res. 50/22, U.N. Doc. A/RES/50/22 (Dec. 12, 1995).

[10] Open to all members of the United Nations as well as members of specialized agencies, the Preparatory Committee held six official meetings, each in approximately two-week long sessions, at the U.N. Headquarters in New York City during the period March 1996 until April 1998. *See* LEILA NADYA SADAT, THE INTERNATIONAL CRIMINAL COURT AND THE TRANSFORMATION OF INTERNATIONAL LAW: JUSTICE FOR THE NEW MILLENNIUM 2, n.4 (2002).

[11] *See, e.g.*, M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY IN INTERNATIONAL LAW (1992).

Statute, Article Y.[12] The purpose of Article Y was to prevent the more restrictive rules it was increasingly clear the Statute was likely to contain from constraining the progressive development of international humanitarian law. More generally, and as far as I know, the article has no equivalent in any other international treaty.[13] Even during the negotiations, Bassiouni recognized the potentially profound impact of the treaty with respect to the creation and enforcement of international human rights norms. Finally, the Institute founded and presided over by Professor Bassiouni in Siracusa, Italy, The International Institute of Higher Studies in Criminal Sciences, was often the host either for informal meetings of the PrepCom's many working groups, or, supplied funding and organized inter-sessional meetings, including an important meeting in Courmayeur, Italy, held one month prior to the Rome Diplomatic Conference, during which extensive planning for the Rome Diplomatic Conference took place.[14]

Bassiouni's leadership as chair of the drafting committee at Rome was also vitally important to the Statute's elaboration. The negotiation and drafting of the Statute has been described by many participants elsewhere, and I will not go into extensive detail here. Yet it bears mentioning that the text flowed to the Drafting Committee in isolated bits and pieces, making synthesis of the entire document extraordinarily difficult.

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[12] Bassiouni was also an extraordinarily influential member of the International Law Association (American Branch) Committee on an International Criminal Court that I had the honor to chair and in which capacity I attended the ICC negotiations. He was also the President of the Board of Directors (*Conseil de Direction*) of the International Association of Penal Law (AIDP), which had historically been in the forefront of working on the international criminal court project. He organized the publication of a series of influential volumes under the auspices of the AIDP that were distributed to delegates during the PrepCom meetings; THE INTERNATIONAL CRIMINAL COURT: OBSERVATIONS AND ISSUES BEFORE THE 1997–98 PREPARATORY COMMITTEE; AND ADMINISTRATIVE AND FINANCIAL IMPLICATIONS, 13 NOUVELLES ÉTUDES PÉNALES (M. Cherif Bassiouni ed., 1998); OBSERVATIONS ON THE CONSOLIDATED ICC TEXT BEFORE THE FINAL SESSION OF THE PREPARATORY COMMITTEE, 13 NOUVELLES ÉTUDES PÉNALES (M. Cherif Bassiouni & Leila Sadat Wexler eds., 1998) and again at the Diplomatic Conference. MODEL DRAFT STATUTE FOR THE INTERNATIONAL CRIMINAL COURT BASED ON THE PREPARATORY COMMITTEE'S TEXT TO THE DIPLOMATIC CONFERENCE, ROME, JUNE 15–JULY 17, 1998, 13 NOUVELLES ÉTUDES PÉNALES (M. Cherif Bassiouni & Leila Sadat Wexler eds., 1998).

[13] Article Y was ultimately included in the Rome Statute as Article 10. Leila Nadya Sadat, *Custom, Codification and Some Thoughts About the Relationship Between the Two: Article 10 of the ICC Statute*, 35 DEPAUL L. REV. 909, 916–17 (2000).

[14] M. CHERIF BASSIOUNI, THE STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A DOCUMENTARY HISTORY 27 (1998).

Moreover, because the U.N. translators were located in New York and Geneva, rather than Rome, the Drafting Committee was called upon to work in all six official U.N. languages simultaneously and do its own translations rather than rely upon others to do so. The result was that the members of the Committee worked (as did the other participants at Rome) absolutely grueling hours, under fairly difficult conditions, to accomplish what could only be described as a Herculean task.[15]

Yet were the Rome Statute and its many complexities simply the product of hard-working individuals, dedicated to perform their jobs to the highest degree of professionalism, it would be hard to associate with the Statute the label "transformative"—and yet transformative, or perhaps more accurately, *potentially* transformative, it is.[16] For embodied in the technical complexity of the Statute's 128 articles (completed with 230 Rules of Procedure of Evidence and more than 92 Elements of Crime) are the seeds of change. The ICC was the last great international institution of the 20th century. It is a bridge between the past and a yet uncertain future. With its focus on individual accountability for the commission of serious crimes under international law, it suggests that globalization is no longer just about trade and international commerce, but concerns human rights, as well. With its emphasis on the "common bonds" uniting all peoples, and their "shared heritage" that might be "shattered at any time,"[17] the institution responds legally to the visceral emotion felt seeing pictures of the Earth from space—of a small, blue

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[15] Much of this information is from my own recollections and notes taken during the Rome Diplomatic Conference. For a more detailed description of the drafting process, see M. Cherif Bassiouni, *Negotiating the Treaty of Rome on the Establishment of an International Criminal Court*, 32 CORNELL INT'L L.J. 443 (1999).

[16] Some of my U.S. colleagues would clearly disagree with my characterization of the Court and its potential importance, having written either that the ICC is a fundamentally bad idea, or alternatively, that it is a relatively insignificant institution. *See, e.g.*, Jack Goldsmith, *The Self-Defeating International Criminal Court*, 70 CHI. L. REV. 89 (2003); David Wippman, *Exaggerating the ICC, in* BRINGING POWER TO JUSTICE: THE PROSPECTS OF INTERNATIONAL CRIMINAL LAW (Joanna Harrington, Michael Milde & Richard Vernon eds., 2006). Whether or not they (or I) are (am) correct is an essay I leave for another day. For an argument *in favor* of the ICC, see Leila Nadya Sadat, *The Least Dangerous Branch: Six Letters from Publius to Cato in Support of the International Criminal Court*, 35 CASE W. RES. J. INT'L L. 339 (2003). *See also* Harold Hongju Koh, *On American Exceptionalism*, 55 STAN. L. REV. 1479, 1501–09 (2003).

[17] Rome Statute of the International Criminal Court, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, pmbl., U.N. Doc. A/CONF.183/9 (July 17, 1998) [hereinafter Rome Statute].

and green planet, fragilely and precariously floating in inhospitable space.[18] Yet the oneness of humanity, seen at a distance, has been an unrealized hope, for the 20th century ably demonstrated that when different peoples interact with each other on a daily basis, tribalism, ethnic prejudice, racism, and avarice often displace loftier sentiments.[19] The *mission civilatrice* of the Rome Statute—to bring order and justice to chaos and impunity—is a task that may ultimately prove too great for a small institution with very little real power. Yet the transformative potential of the institution lies not only in its own power but in its ability to act as a catalyst for change at the state and local level. Each state that ratifies the ICC Treaty obliges itself legally, and morally, to prevent and to punish the commission of the crimes embodied in the ICC Statute. Just as the enforcement of international human rights "begins at home," conflict that starts at the national level can best be stopped there.

Yet there are more banal aspects of the ICC Statute's negotiation and operation that challenge the current international legal order as well. As to the process by which the treaty was elaborated, unlike the Hague Peace Conferences held a century earlier, there was active input by elements of civil society, particularly the Coalition for the International Criminal Court (CICC) and the more than 800 non-governmental organizations (NGOs) it represented at the time, in direct contrast to the secret meetings that had characterized much international diplomacy in the past.[20] Through an alliance it was able to form with the so-called group of "like-minded" states, who were united in their view that the Court's ultimate establishment was a priority, combined with the support of many European countries and other traditional U.S. allies, it rallied Western democracies behind the Court despite the fervent objections of the United States, the world's only super-power at the time. Indeed, given the fierce opposition to the ICC by the United States, particularly under the current administration, it is astonishing that 105 countries have

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[18] *See Earth from Space, available at* http://etsimo.uniovi.es/solar/eng/earthsp.htm.

[19] In an important article published in 1998, Bassiouni estimated that more than 170 million individuals had died in 250 conflicts taking place since World War II. M. Cherif Bassiouni, *The Normative Framework of International Humanitarian Law: Overlaps, Gaps and Amibiguities*, 8 TRANSNAT'L L. & CONTEMP. PROBS. 237 (1998) (discussing need to reexamine international law to prevent such casualties).

[20] Sadat, *supra* note 5, at 386–87. This phenomenon has been apparent in the negotiation of other international treaties, as well, such as the Land Mines Convention.

already ratified or acceded to the treaty as of this writing.[21] One could speculate that underlying the U.S. opposition to the Court is perhaps a fear, or indeed, the recognition, that its establishment moves the world away from geopolitics to geogovernance—which in both process and substance, makes international law and politics less susceptible to U.S. hegemony. The U.S. government, particularly under the Bush administration, has gone to unprecedented lengths to oppose, even to destroy, some might say, the ICC, suggesting that it sees in this new institution a real threat to U.S. dominance of world affairs.[22]

Yet, perhaps ironically, the ICC Statute was voted upon by states once at the behest of the United States itself (which lost the vote).[23] This not only directly challenges current notions of "absolute" sovereignty often associated with the Westphalian model, but the U.S. capacity to dominate international law and politics. At the Diplomatic Conference, large and powerful states like the United States were juridically as important as the smallest states in attendance, although of course, they could apply all sorts of extra-legal pressure to small states to achieve their negotiating objectives. Indeed, the United States attempted to dominate the Conference by sending a large delegation that worked around the clock to try to influence the outcome. This strategy was partially successful—many aspects of the Statute reflect U.S. positions and proposals, particularly as regards the definitions of crimes, the state cooperation regime, and the process for bringing challenges to jurisdiction and admissibility. At the same time, on some of the thornier questions, such as the right of the prosecutor to initiate a complaint on his own initiative, the U.S. position did not prevail, and the United States was, ultimately, outvoted. To the extent that the Rome Conference was therefore "quasi-legislative" in nature, establishing not only a new institution but an international code of criminal norms and procedure, adopted not by consensus but by (overwhelming) majority vote, the political legitimacy of the norms rests not solely upon classic theories of treaty law but on other, less explicit, grounds.

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[21] Coalition for the International Criminal Court, *World Signatures and Ratifications*, http://www.iccnow.org/index.php?mod=romesignatures (click on "World Chart by Region").

[22] Leila Nadya Sadat, *Summer in Rome, Spring in the Hague, Winter in Washington? U.S. Policy Towards the International Criminal Court*, 21 WIS. INT'L L.J. 557, 590–94 (2003).

[23] *See generally* John L. Washburn, *The Negotiation of the Rome Statute for the International Criminal Court and International Lawmaking in the 21st Century*, 11 PACE INT'L L. REV. 361 (1999).

As regards the substantive norms in the Statute, some have asserted that they were already well-established norms of customary international law, which would make their inclusion in the Statute less controversial. This would be true of the Statute's provisions on the crime of genocide, which track Article II of the Genocide Convention, and most of the war crimes, as well, although the Statute includes in its ambit war crimes committed in non-international armed conflict, which is probably more akin to a progressive development rather than a codification of international law. Moreover, the crimes against humanity provisions of the Statute were negotiated from a confused tangle of conflicting customary international and domestic law norms, meaning that the negotiators made choices about the definitions of the crimes that went beyond a simple redaction of existing law.[24] Indeed, prior to the crime's codification in the Rome Statute, no two international instruments incorporated the same text, including variations that were more than simply questions of linguistics or form. The Rwanda Statute, for example, included the idea that the crimes must involve discriminatory intent;[25] the Yugoslav Statute excluded this provision, but included an armed conflict requirement that was absent from the Rwanda Statute.[26] (The Rome Statute eliminates both.[27])

Moreover, through the jurisdictional mechanisms of the Statute that permit not only the territorial state to refer cases to the ICC regarding the commission of crime by non-state party nationals, but also the Security Council to refer cases to the Court regarding the commission of crimes anywhere in the world, the law, while technically covering only crimes falling within the ICC's jurisdiction, has juridically acquired a universal reach not consistent with modest notions of multi-lateral treaty law otherwise extent. As I have written elsewhere, the power and legitimacy of these norms was premised, in Rome, on a theory of universal interstate jurisdiction deriving from the idea that when criminal activity rises to a certain level of harm (represented by the notion of "gravity" in the Statute),[28] or sufficiently important interests of international society are threatened, all states may apply their laws to the act. This notion of uni-

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[24] Sadat, *supra* note 5, at 426.

[25] Statute for the International Criminal Tribunal for Rwanda art. 3, S.C. Res. 955, U.N. SCOR, 49th Sess., U.N. Doc. S/RES/955 (Nov. 6, 1994) [hereinafter ICTR Statute].

[26] ICTY Statute, *supra* note 8, art. 5.

[27] Rome Statute, *supra* note 17, art. 7.

[28] Rome Statute, *supra* note 17, pmbl., arts. 1, 17(1)(d).

versal inter-state jurisdiction was transformed by the Rome Statute, following the Nuremberg precedent and the establishment of the *ad hoc* tribunals for Rwanda and Yugoslavia, to a theory of *universal international jurisdiction*, permitting the international community, in certain limited circumstances, to supplement or even displace ordinary national laws of territorial application with international laws that are universal in thrust and unbounded by space and time.[29] Layered upon this notion of universal jurisdiction, however, are several limiting notions—the principle of complementarity, that the Court's jurisdiction should not be exercised if national jurisdiction can do the job, and a state consent regime that requires either the territorial state or the state of the accused's nationality to be a party to the Statute (or consent to the Court's jurisdiction), in cases not involving the referral of a matter by the Security Council.[30] Moreover, the idea of seriousness or gravity—that the Court should exercise its functions only as regards the "most serious crimes of the concern to the international community as a whole"[31]—suggests an additional limit to the universality principle enshrined in the Statute.

The Court's Statute also innovates in its mix of the common law and civil law procedure, attempting to blend elements of both traditions into an autonomous amalgam suitable for the needs of a fledgling international criminal justice system, in the establishment of a Victims Trust Fund for the compensation of those injured by the accused before the Court, and in the decision to make the Court, not its member states, the ultimate arbiter of its own jurisdiction. These elements of autonomy and supra-nationalism are the institutional embodiments of the Nuremberg principles that permit international law to apply directly to individuals, including heads of state, as well as remove the defense of superior orders and reliance upon municipal law as a shield.

At the same time, it must be admitted that there are many elements of the Court's Statute that did not yield to the forces of innovation and change at the Diplomatic Conference. The most obvious point, of course, is that the Court has no police force and must rely entirely on the good offices of states for the apprehension of suspects, access to witnesses, and the conduct of investigations. Indeed, Part 9 of the Statute,

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[29] Sadat, *supra* note 5, at 407.

[30] Rome Statute, *supra* note 17, art. 12.

[31] *Id.*, art. 1.

entitled "International Cooperation and Judicial Assistance," amounts to what I have previously dubbed the "state (Un)cooperation Regime."[32] Under this part of the Statute, states may specify the form in which a request for cooperation, such as the arrest and surrender, of a suspect, is made, and may refuse to fulfill a request from the Court for a variety of reasons—national security concerns, a preexisting international agreement, or some other reason. Moreover, although states parties are under a general obligation of assistance to the Court,[33] neither the judges nor the prosecutor of the Court have any power to compel witnesses to appear. Although these concessions to state sovereignty were the *sine qua non* of obtaining treaty ratification, they may ultimately render the Court impotent except in cases referred to the Court by the Security Council under its Chapter VII authority that might include orders to states to cooperate with the Court's investigation and prosecution of a particular case. Moreover, the Court is not a U.N. organ but was negotiated as a free-standing institution brought into relationship with the United Nations through certain *passerelles* in its Statute, as well as a relationship agreement entered into between the Court and the United Nations. This represented a practical political solution to the impossibly difficult task of amending the U.N. Charter—but it highlights both the innovative nature and the vulnerability of this new institution.

Finally, if the adoption of the ICC Statute was in certain respects revolutionary, the revolution was in no sense an easy one. For one of the most significant challenges to the ICC's ultimate power and effectiveness lies in the U.S. decision to actively oppose the Court and its operation, discussed above. Clinton administration officials worked assiduously during the negotiating process to obtain a Court that would be friendly to U.S. interests, particularly as regards the Court's ability to accept jurisdiction over particular cases. Disappointment with the result (the Court was stronger and more independent than desired) led President Clinton to sign the Statute only reluctantly on the last day it was open for signature, December 31, 2000. As President Clinton was signing the Statute, however, a new U.S. president, whose administration would prove to be implacably opposed to the Court, was taking office, leading the U.S. government to adopt an increasingly bellicose tone towards the fledgling institution, which has not ameliorated particularly with the passage of time and election of a distinguished group of jurists to make up the first "bench."

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[32] Sadat, *supra* note 5, at 444.

[33] Rome Statute, *supra* note 17, arts. 86, 93(1).

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This all-too-brief survey of the Court's Statute, as well as the treaty's negotiating history suggests how the Court's establishment and operation may be considered potentially transformative. Now that the Statute has been in effect for nearly four years, however, the question is whether the Court is likely to achieve its potential. The answer now, as before, is maybe.

The Court has achieved a great deal in the past four years. With Japan depositing the 105th instrument of ratification on July 17, 2007,[34] it is undeniable that the Statute has achieved great acceptance among states, although the continued absence of several major powers continues to be worrying as regards the Court's goal of universal ratification and implementation. China and India, for example, with more than one-third of the world's population,[35] continue to remain outside the Statute's reach, other than through the unlikely event of a Security Council referral. Although China has adopted a "wait-and-see" policy as regards the Court, recently expressing the hope that the "Court will win the confidence of non-Contracting Parties and wide acceptance of the international community through its work,"[36] India has neither signed nor ratified the Statute, nor does it appear likely to do so anytime soon.[37] The U.S. abstention from the Security Council's referral of the Darfur situation to the Court buoyed hopes that the Bush administration was relenting in its fierce opposition to the Court. Recent statements, however, have tempered that optimistic assessment.

These political uncertainties notwithstanding, however, the Court now has on its docket four referrals, with more apparently in the pipeline. In its last newsletter, the Court reported that it had opened a new field office in the Central African Republic, giving it a presence in five countries outside The Netherlands. Although it had initially been

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[34] *See* Coalition for the International Criminal Court, *supra* note 21.

[35] Estimates of 1.3 billion for China and 1 billion for India, out of a total worldwide population estimated at 6.5 billion. U.S. Census Population Database, http://www.census.gov/ipc/www/world.html.

[36] Position Paper of the People's Republic of China on the United Nations Reforms, Pt. III(2) (June 7, 2005), *available at* http://www1.fmprc.gov.cn/eng/zxxx/+199318.htm.

[37] For an analysis of India's position as regards the ICC, see Coalition for the International Court, *supra* note 21.

hoped that trials would begin as soon as 2006, the first trial, of Mr. Thomas Lubanga Dyilo (Congo),[38] is now scheduled to begin on March 31, 2008. The existence of an "active docket" has allayed fears that the Court would have "no business" in its early years, leading enthusiasm and political support to abate. Moreover, the nature of the referrals—from states parties regarding crimes committed on their territories, and the Security Council—has (at least temporarily) laid to rest the idea that the prosecutor would function as a kind of "independent counsel for the universe" (as one former Clinton administration official put it colorfully some years ago), and has led to a certain degree of comfort with the Court and its activities. Indeed, the Court's first prosecutor, Luis Moreno-Ocampo, has gone out of his way to reassure states that he is not looking for business, nor itching for a political fight.[39] At the same time, the Court continues to face certain practical difficulties in the organization and implementation of its mandate. Many states parties have been slow or completely deficient in the payment of their assessed contributions, and the Court still lacks a permanent "home," although the Seventh Meeting of the Assembly of States Parties adopted a resolution to launch an international design competition to construct a new facility.[40] The premises will need to be secure and accessible, at the same time, and provide adequate space for trials, for the Court's personnel, for victims and witnesses, for defense counsel, and for observers, NGOs, states parties, and the media. What one could certainly see as a failure of the Statute to include a "defense organ" has led to concerns that the rights of the accused may suffer in cases before the Court, and issues have already arisen as regards the qualifications, appointment, and payment of defense counsel. These are elements that must be closely monitored by the Court as well as by the Court's principal oversight organ, the Assembly of States Parties. Finally, many NGOs, even those quite supportive of the Court, have expressed concern that insufficient attention has been given to public education by the Court about the Court, particularly with regard to local communities in countries that are now before the Court as referrals. It may even be that some of the resistance, for example, in the Ugandan referral, about which I will say more below, is due to a fail-

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[38] International Criminal Court Newsletter No. 17 (Sept./Oct. 2007), *available at* http://www.icc-cpi.int/library/about/newsletter/index_12.html.

[39] Sadat, *supra* note 22, at 583–84.

[40] Conclusions of the Meeting of the Seventh Assembly of States Parties, Dec. 14, 2007, *available at* http://www.icc-cpi.int/press/pressreleases/311. html &l=en.

ure of the Court to sufficiently publicize, explain, and listen to local communities in Uganda regarding the nature of the referral and what could be expected from it by those living in the region affected by the crimes.[41]

In 2004 and 2005, three African states parties referred cases involving crimes committed on their territories to the Court—Uganda,[42] the Central African Republic[43] and the Democratic Republic of the Congo (DRC).[44] Chief Prosecutor Luis Moreno-Ocampo opened investigations in the DRC and Uganda cases, a trial is pending in the DRC referral, and he has issued arrest warrants regarding the Ugandan conflict,[45] provoking a heated debate on the question whether international justice is appropriately applied to the conflict in that country at all.[46] A fourth referral has come from the Security Council with respect to the situation in Darfur, Sudan.[47] These referrals come as somewhat of a surprise given that most negotiators at Rome probably did not assume that states would be invoking situations occurring on their own territories as those most likely to come before the Court. Rather, it was generally assumed that the Security Council and the "independent Prosecutor" would set the agenda for the Court. Indeed, it was the specter of the latter that concerned many states, and in particular the United States, as many states thought that it would be impossible to effectively check the power of the inde-

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[41] Coalition for the International Criminal Court, Budget and Finance Team, *Submission to the International Criminal Court on the Preparation of Its Draft 2006 Budget*, June 8, 2005, at 3.

[42] The prosecutor received the referral on January 29, 2004. *See President Refers Situation Regarding the Lord's Resistance Army (LRA) to the ICC, available at* http://www.icc-cpi.int/pressrelease_details&id/16&l/en.html.

[43] The prosecutor received the referral on January 7, 2005. *See Prosecutor Receives Referral Regarding Central African Republic, available at* http://www.icc-cpi.int/pressrelease_details&id/87&l/en.html.

[44] *See generally* International Criminal Court, *Situations and Cases, available at* http://www.icc-cpi.int/cases.html. The prosecutor received the referral regarding the situation in the DRC on April 19, 2004. *See Prosecutor Receives Referral of the Situation in the Democratic Republic of the Congo, available at* http://www.icc-cpi.int/pressrelease_details&id/19&l/en.html.

[45] *Statement by the Chief Prosecutor on the Uganda Arrest Warrants, The Hague* (Oct. 14, 2005), *available at* http://www.icc-cpi.int/cases.html.

[46] *Compare* Richard Goldstone, *Justice Now, and for Posterity*, INT'L HER. TRIB., Oct. 15–16, 2005 *with* Katherine Southwick, *When Peace and Justice Clash*, INT'L HER. TRIB., Oct. 15–16, 2005.

[47] S.C. Res. 1593, U.N. SCOR, 60th Sess., U.N. Doc. S/RES/1593 (Mar. 31, 2005).

pendent prosecutor. Instead, all four situations now referred to the Court theoretically present both political legitimacy and practical success—political legitimacy, because the cases have either been referred by states regarding crimes committed on their own territories or by the Security Council. With respect to the former, these were crimes that the referring governments had the right to investigate themselves, but deemed themselves unable to do so effectively, requesting international assistance with that task instead. The Darfur referral came from the U.N. organ charged with the maintenance of international peace and security, a "measure" that most modern international lawyers would probably find consistent with the Council's role and powers.

The referrals also suggest a certain degree of practicality as regards the Court's early cases, because the very great obstacles to state cooperation that might be found in the case of referrals by third states or by the prosecutor acting *proprio motu* are presumably lesser in cases referred by the affected states themselves, or by the Council, which can issue binding orders to states directly regarding cooperation (as it has done in the case of Sudan).

Yet these referrals present challenges, as well. First, given that all four of the Court's first set of cases involve African countries, it is unsurprising that they have generated some unease about the possibility of the ICC being little more than a neo-colonial institution bent on oppressing, rather than helping, Africans. If this is so, it is unfortunate, for obviously one of the Statute's aims is not only the punishment of offenders, but the prevention (indirectly) of future atrocities, including atrocities in Africa. Although many scholars have raised this question quite sincerely, surely it is correct that this argument, when made on behalf of potential indictees, appears self-serving. Moreover, given the extraordinarily serious nature of the crimes in the Court's jurisdiction, and their universal prohibition in several international treaties as well as customary international law, it is hard (in the view of this writer) to make the case that the ICC represents the application of unfair or oppressive standards of law aimed at anyone, including those living in African nations. That is, the accusation that the *substance* of the treaty unfairly targets residents of Africa, or perhaps more generally those living in the third world, is, to this writer in any event, unpersuasive.[48]

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[48] I believe it would be unpersuasive to Bassiouni, as well, who has written on many occasions as regards the universality of the norms embodied in international criminal law, particularly as regards *jus cogens* crimes. M. CHERIF BASSIOUNI, INTRODUCTION TO INTERNATIONAL CRIMINAL LAW 174 (2004).

But a second critique regarding the Court's legitimacy has more potential force, and that is the accusation of "double standards." This is a different argument, pre-supposing not that the law of the Statute is unfair as a matter of substance but that it is being unequally applied to small, less powerful, and in the instant case, African nations. As I have written elsewhere, this is in fact a very serious charge, as the enforcement of international criminal law depends upon a combination of force and political power, and is often influenced by the policy agendas of rich and powerful states.[49] Not only does this mean that it may be difficult to bring some cases before the Court that clearly should be there, because the government in question may have a powerful patron ready to veto an attempt to bring the case to the Security Council, but it also means that crimes committed by rich and powerful states are much less likely to be tried before the ICC because of the strong political costs involved in doing so. Those costs may include the state's withdrawing financial support for the Court or other punitive measures. This risk is not just theoretical, in fact, for the United States, in particular, has attempted to use a variety of measures to circumvent the Court's jurisdiction and even to punish states ratifying the Rome Statute that do not grant immunity to U.S. persons for unspecified offenses that might occur in the future that could give rise to potential criminal liability under the Statute's terms.[50] It is undeniable that the presence of double standards decreases the legitimacy of the entire endeavor; but at the same time, the *tu quoque* defense is not a principle of justice. As Chief Prosecutor Robert Jackson argued to the Nuremberg Tribunal more than 60 years ago, those credibly accused of the commission of human rights atrocities may be "hard pressed" if called to account for their crimes in court, but they are certainly not "ill-used."[51] Nonetheless, if the prosecutions brought by the Court do not, over time, appear to reflect the impartial and independent application of the law, but become only a question of international politics, that will probably undermine political support for the Court.

In the final analysis, the ICC project, and indeed the project of international criminal justice more generally, is a great experiment. Can notions of accountability, justice, and universality, so important in domestic legal systems as guarantors of individual human rights, be successfully

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[49] Leila Nadya Sadat, *Exile, Amnesty and International Law*, 81 NOTRE DAME L. REV. 955 (2006).

[50] Sadat, *supra* note 22.

[51] ROBERT H. JACKSON, THE NÜRNBERG CASE 34 (1971).

transposed to the international arena?[52] Can the perpetrators of crimes that shock the conscience of humanity be called before the bar of international justice in a situation-sensitive manner, whereby both the specific interests of the particular communities involved and the more-abstract interests of the international community can be harmonized in a manner satisfying to both constituencies? Or are the problems of mass atrocities essentially unsolvable, stemming from some primordial part of the human character and limbic brain, not capable of being reasoned with or even contained through national or international institutions?

Throughout his life and in his work, Cherif Bassiouni has argued passionately that humanity's condition can be improved—that human beings can create institutions to maximize the chances of containing destructive impulses and that legal regimes can be established that are sophisticated enough and responsive enough to local, state and international interests to successfully balance the competing factors involved. The fact that 105 governments have now signed onto this vision of humanity's future is encouraging. And as for those countries skeptically watching from the sidelines for the moment, the extraordinary Cherif Bassiouni, so practical as well as so firm in his conviction that humanity can be better than it presently is, would probably say, only 87 more to go.

[52] For the argument that this is a problematic notion, see Mark A. Drumbl, *Collective Violence and Individual Punishment: The Criminality of Mass Atrocity*, 99 NW. U.L. REV. 539 (2005).

CHAPTER 11

THE INTERNATIONAL CRIMINAL COURT AND THE CONGO: FROM THEORY TO REALITY

Mahnoush H. Arsanjani and W. Michael Reisman***

The intellectual development and shaping of modern international criminal law owes an enormous debt to Cherif Bassiouni. For decades, Cherif, through his books and articles, the many conferences he convened in the United States and in Siracusa, and his active proselytization, compelled the scholarly community and the world of practical diplomacy to continue to focus upon this important but seemingly terminally neglected area of international law. His contribution to the Rome Conference, where he served as chairman of the Drafting Committee, was both confirmation of this standing in the field and one more opportunity to contribute to the creation of the International Criminal Court (ICC). In addition to friendship, which the authors of this piece have shared with Cherif over almost four decades, we owe Cherif a deep intellectual debt, for he has been, for us, as for so many others, our professor of international criminal law. In affection and gratitude, we are happy to join his many friends in contributing this chapter in his honor.

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Analytically, there are two types of international criminal tribunals. The first, exemplified by the tribunals at Nuremberg and Tokyo, may be called *ex post* tribunals, in that they are established *after* an acute and violent situation in which the alleged crimes occurred has been resolved by

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military victory or political settlement. As a result, the tribunals' operations do not impact international security concerns; even if such considerations are present, they are not likely to be of paramount importance. Hence, *ex post* tribunals should not have to concern themselves with the thorny questions of the legality of a criminal court taking such considerations into account or the ethics of deciding to be oblivious to them.

The second type of tribunal may be called an *ex ante* tribunal, in that it is established *before* an international security problem has been resolved or even manifested itself, or it is established *in the midst* of the conflict in which the alleged crimes occurred. In these circumstances, other authoritative political entities are still engaged in reestablishing order, and the *ex ante* tribunal's various options for decision may impact on these political and often military actions.[1] The ICC is the archetypical *ex ante* tribunal.

The responsibilities of *ex ante* tribunals may create conflicting pressures on both the tribunals and the agencies and actors responsible for resolving the security problem. A formidable challenge falls on the prosecutor and eventually on the judges who must determine how to relate or prioritize (if at all) their curial responsibilities and the inevitable political consequences of their actions. It may be particularly difficult for the prosecutors of these tribunals if they have to negotiate and reach accommodations or agreements with the agencies or actors responsible for resolving the security problem, including abandoning an otherwise admissible prosecution for which there were reasonable grounds to proceed.

These sorts of problems are inherent in *ex ante* tribunals. Without statutory guidelines, their resolution may draw the prosecutor and the Court, under the guise of the "interest of justice," into political decisions, which may prove problematic for the image of a criminal court. Article 53(1)(c)[2] of the Rome Statute indicates that the drafters were aware of

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[1] The Rwanda Tribunal is an *ex post* tribunal. The former Yugoslav Tribunal is also essentially *ex post*, in that by the time of its operation, there was already a general outline of a political settlement, supported by a U.N. political and a NATO military presence in the arena.

[2] Article 53(1)(c) provides that in deciding whether to initiate an investigation, the prosecutor shall consider whether: "Taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice." Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 3, *reprinted in* UNITED NATIONS DIPLOMATIC CONFERENCE OF PLENIPOTENTIARIES ON THE ESTABLISHMENT OF AN INTERNATIONAL CRIMINAL COURT, OFFICIAL RECORDS (1998) [hereinafter Rome Statute].

the magnitude of the challenge these problems could present and, it would appear, the potential implications for the very juridical character of the Court, for the provision requires the prosecutor, when making a decision solely on the basis of Article 53(1)(c), to inform the pre-trial chamber of his or her decision. "In such a case," Article 53(3)(b) provides, "the decision of the Prosecutor shall be effective only if confirmed by the Pre-Trial Chamber."

In the crucible of the investigation and prosecution of concrete cases, the ICC will surely prove quite different from that of its predecessors and may even prove quite different from that envisaged by its creators. Even at this early stage of the Court's life, it could be significantly shaped by recent developments and initiatives with respect to the Congo.

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The drafters of the Rome Statute assumed that governments would be reluctant, in concrete cases, to surrender their national criminal jurisdiction to the Court.[3] If any of the crimes listed in the Statute were committed in their respective territories or by any of their citizens, governments would, it was presumed, themselves want to prosecute the perpetrators and by effectively applying their police powers, demonstrate to their constituents (and their opponents) their ability to defend their citizens and thus gain credibility and political legitimacy. In democratic societies, governments that fail this demonstration are unlikely to remain in power long; in undemocratic societies, such failures are likely to embolden other aspirants to power.

Before and during the Rome negotiations, no one—neither states that were initially skeptical about the viability of an international criminal court nor states that supported it—assumed that governments would want to *invite* the future court to investigate and prosecute crimes that

[3] Trinidad and Tobago's initiative in reviving the idea of establishing an international criminal court in 1989 was based on the concern that fragile national courts would be unable to deal with the crime of drug trafficking. An international criminal court would insulate national courts from the power and terror that those involved in such activities could bring to bear. Trinidad and Tobago's idea was not acceptable to the great majority of states. Hence, the Rome Statute of the International Criminal Court moved in an entirely different direction. *See* Mahnoush H. Arsanjani, *Reflections on the Jurisdiction and Trigger-Mechanism of the International Criminal Court, in* REFLECTIONS ON THE INTERNATIONAL CRIMINAL COURT 57, 68 n.8 (Herman von Hebel, Johan Lammers & Jolien Schukking eds., 1999).

occurred in their territory. To the contrary, it was assumed that the Court would become involved only in those states that were *unwilling*, refused to prosecute, staged a sham prosecution of their government cronies, or were simply *unable* to prosecute.[4] There is no indication that the drafters ever contemplated including *voluntary* state referrals to the Court of difficult or thorny cases arising in their own territory.[5] By voluntary referral, we refer to situations in which the sole basis for satisfying the Court's admissibility test is the referral—whether effected formally or implicitly—by the state in which a crime has occurred or the situation subject to investigation has taken place.

It was, thus, the ICC, and not a particular state, which would decide to take up the cases, based upon its assessment of the *unwillingness* or *inability* of the state in which the crimes occurred to undertake to prosecute them. What does the Statute mean—or what is it to mean—when it says the *inability* of a state to prosecute? Will *voluntary* referral henceforth

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[4] *Report of the* Ad Hoc *Committee on the Establishment of an International Criminal Court*, U.N. GAOR, 50th Sess., Supp. No. 22, para. 47, U.N. Doc. A/50/22 (1995); *see also* Report of the Preparatory Committee on the Establishment of an International Criminal Court, U.N. GAOR, 51st Sess., Supp. No. 22, paras. 154–157, U.N. Doc. A/51/22 (1996).

[5] This is apparent from the negotiating history of Article 14. Two concerns with regard to state referral emerged in the negotiations before and during the Rome Conference. One, expressed by non-governmental organizations (NGOs), was that states would be reluctant to make referrals of situations to the Court and that the prosecutor should therefore be granted *proprio motu* powers to initiate investigations. The second was that states might abuse such an option by trying to send frivolous or politically motivated referrals with regard to situations in the territory of a political adversary. Suggestions were made throughout the preparatory negotiations to limit the potential for abuse.

> One suggestion was to restrict the referral power by allowing referrals not from single States Parties but rather from groups of a specified number of States Parties. This suggestion did not attract widespread support as negotiations progressed. However, other proposals to prevent abuse were incorporated. One was to create an internal screening process to allow the Prosecutor to reject claims that were frivolous or not warranting international adjudication. Another was to require that interested States be notified and given an opportunity to effectively investigate and prosecute the crimes in question. The latter two proposals attracted considerable support and were eventually incorporated into the Statute, thereby offering safeguards against abuse and ensuring deference to legitimate national proceedings.

Philippe Kirsch & Darryl Robinson, *Referral by State Parties, in* THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 619, 622–23 (Antonio Cassese, Paola Gaeta & John R.W.D. Jones eds., 2002) (footnote omitted).

trump what had heretofore been deemed to be inherent requirements for ICC admissibility?

Article 17 of the Statute, which deals with issues of admissibility, sets out, in paragraph 3, the elements to be considered for determining the "inability" of a state to prosecute:

> In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.

A finding of *inability* of a state to prosecute depends upon any of three disabling events: (1) a total collapse of the national judicial system, (2) a substantial collapse of the national judicial system, or (3) the unavailability of the national judicial system. Note that all the elements for a determination are linked to the "national judicial system." One or more of these itemized events must produce the following condition: the judicial system of the state in question is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.[6] Note also that the drafters directed that only *objective* con-

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[6] John Holmes, the coordinator of the working group on complementarity who negotiated Article 17, states:

> In the discussions, it was ultimately decided that further definition of total or partial collapse was not necessary, especially if an additional criterion existed. This additional factor was the State being unable to secure the accused or to obtain the necessary evidence and testimony. These two criteria were added to create the test for the Court in determining inability. Both criteria must be met for the Court to determine admissibility in this regard. The State must be unable to obtain an accused or key evidence and testimony, and *its inability to do so must relate to the partial or total collapse of its judicial system.* Some delegations were concerned that combining these two criteria could limit the Courts ability to act, for example, if the accused and some evidence were obtained but other aspects of the national proceedings were affected by the collapse. To meet these concerns, the following phrase was added to the test: "or otherwise unable to carry out its proceedings."

John T. Holmes, *The Principle of Complementarity, in* THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE 41, 49 (Roy S. Lee ed., 1999) (emphasis added). Holmes gives the following as examples for the third criterion (the state is unable otherwise to carry out its proceedings): "the absence of sufficient qualified personnel to effect a genuine prosecution could be a determining factor even if the State has the accused and the evidence." John T. Holmes, *Complementarity: National Courts Versus the ICC, in* THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, *supra* note 5, at 667, 678 [hereinafter Holmes, *National Courts*].

ditions are to be considered. The provision does not include possible defects in the *quality* of justice of national legal or, more specifically, judicial systems as a ground that might authorize the ICC to conclude that it could take jurisdiction. Such a formula would have required the ICC to make qualitative judgments about the judicial systems of states parties.

While there is a tendency in contemporary international investment law for tribunals, dealing with claims of denial of justice, to make assessments of the overall system of justice in a respondent state,[7] there is no indication in the language of the Statute, nor any extrinsic evidence from the process of its negotiation, that states parties were assigning a censorial role to the ICC, in which it would be competent to appraise the *quality* of criminal justice in a State and if it found that it did not meet an international standard, "yank" the case, as it were, to the international level. For different reasons, the drafters were not evidently prepared to allow for creation of ICC jurisdiction *pro hac vice* by voluntary relinquishment on the part of the state that had jurisdiction. In 1995, during the meetings of the *Ad Hoc* Committee on the Establishment of an International Criminal Court, a suggestion was made that the Statute should provide for the possibility of voluntary relinquishment of jurisdiction by the states in favor of the Court with respect to the crimes in the Statute. The reaction to this suggestion was not favorable:

> This suggestion gave rise to reservations on the ground that it was not consistent with some delegations' view of the principle of complementarity. In this respect, the remark was made that the international criminal court should in no way undermine the effectiveness of national justice systems and should only be resorted to in *exceptional* cases.[8]

Indeed, during the drafting process, both the threshold and magnitude of the contingency that would satisfy the Statute's admissibility requirement

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[7] *See* Mondev Int'l v. United States, NAFTA Arb. Trib., Case No. ARB(AF)/99/22 (Oct. 11, 2002), *reprinted in* 42 I.L.M. 85 (2003). In the context of diplomatic protection, the requirement of exhaustion of local remedies may be waived if the justice system is deemed defective. *See* Draft Articles on Diplomatic Protection Prepared by the International Law Commission on First Reading, art. 16(a), (b), and commentaries thereto, *in Report of the International Law Commission on the Work of its Fifty-Sixth Session*, U.N. GAOR, 59th Sess., Supp. No. 10, paras. 75–79, U.N. Doc. A/59/10 (2004).

[8] *Report on the Establishment of an International Criminal Court, supra* note 4, at para. 47 (emphasis added).

were increased. The Draft Statute prepared by the Preparatory Committee had used the word "partial" collapse of the national judicial system. At the Rome Conference, that word was replaced with "substantial" to reinforce further the primacy of the national court. Thus, the reason for the change was

> [T]o preclude the Court from assuming jurisdiction merely because an armed conflict exists in a State and the judicial system is partially affected. Even in such instances, the State may be able, through shifting resources or transferring the trial to other venues, to effect a genuine prosecution.[9]

The consequences had to be related to the three destabilizing events that could occur to the state's "national judicial system."

Should situations in which the national judicial systems of states become over-burdened by the volume of cases for investigation and prosecution after, let us say, an internal or international armed conflict satisfy the requirement of the *inability* of the national judicial system under Article 17 of the Statute? It is clear from the legislative history that this particular scenario was not considered. The criteria for determining inability were intended to be more objective[10] and were only to be met in situations of total or substantial collapse of a national judicial system or its unavailability. An over-burdened national judicial system, an all too frequent condition even without the unwelcome introduction of the variable of internal conflict, is not a system that has partially or totally collapsed or is unavailable.

To be sure, the Statute should be subject to interpretation in light of circumstances that did not exist at the time it was drafted or were not anticipated by its drafters. One should not, however, push this too far. It is not hard to devise arguments for an expansive interpretation. One may, for example, argue that over-burdening a national judicial system could lead to its collapse or could cause its inability to investigate or pros-

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[9] Holmes, *National Courts, supra* note 6, at 677.

[10] *See*, in this regard, International Criminal Court, Office of the Prosecutor, Informal Expert Paper, *The Principle of Complementarity in Practice* (2003) [hereinafter Informal Expert Paper], which provides in Part I, paragraph 5 that "[t]he principle of objectivity (Article 54(1)) should be extended to admissibility fact-finding and analysis, so that willingness and ability are assessed in an objective, uniform and principled manner." This paper and other ICC documents cited below are available at the Court's website, http://www.icc-cpi.int.

ecute all relevant cases and hence amount to the unavailability of the system to investigate or prosecute certain number of cases. But the policy implications of such innovative interpretations should be carefully considered, since they could significantly impact the future operation of the Statute and other international legal policies.

A threshold and general question is whether extensive interpretation is appropriate for this genre of international agreement. The Statute is a unique treaty, in that, in addition to constituting new international institutions, it is also a criminal code, embodying a highly articulated set of rules on criminal procedure. One may argue[11] that, notwithstanding the strictures of Article 31 of the Vienna Convention on the Law of Treaties,[12] it is appropriate, if not mandatory, to adopt a more contextual and policy-oriented hermeneutic for the interpretation of constitutive instruments. Recall Chief Justice Marshall's injunction in *McCulloch v. Maryland:* "[W]e must never forget, that it is a constitution we are expounding."[13] But Article 31 of the Vienna Convention instructs us in no uncertain terms that contemporary international treaty law has opted for textual interpretation for all other agreements. Article 31's codification aside, a strict interpretation would appear more appropriate for criminal statutes, since innovative interpretations are perforce retroactive and may violate the legality principle, which is enshrined in the Rome Statute's Article 22, captioned "Nullum crimen sine lege:"

> 1. A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court.
>
> 2. The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.
>
> 3. This article shall not affect the characterization of conduct as criminal under international law independently of the Statute.

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[11] W. Michael Reisman, Book Review, 81 AM. J. INT'L L. 263, 266, 267 (1987) (reviewing (7 ENC.) ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (1984)).

[12] Opened for signature May 23, 1969, 1155 U.N.T.S. 331.

[13] McCulloch v. Maryland, 17 U.S. 316, 408 (1819).

Certainly, the very length of the Statute and the detail of treatment of the subject matters it covers manifest an intention on the part of the drafters to leave as little opportunity as possible for later judicial interpretation.[14] The intended limitation on interpretation is also apparent in Article 10 of the Statute, the only article that, curiously, does not have a title.[15] This article, which is placed in Part Two of the Statute, provides:

> Nothing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law *for the purposes other than the Statute.*

While the article was originally intended to apply to the definitions of the crimes, it now applies to the whole of Part Two of the Statute on "Jurisdiction, Admissibility and Applicable Law," which includes not only the definition of the crimes but also admissibility issues, including Article 17. The original purport of the article was to avoid freezing the development of international law with respect to crimes that were also defined in the Statute.[16] But the last phrase "for the purposes other than the

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[14] *See* Arsanjani *supra* note 3, at 58. In this regard, the Rome Statute differs from the statutes of the ICTY and the ICTR in two significant ways. The latter two statutes are comparatively brief, leaving considerable latitude for judicial elaboration through interpretation of their substantive provisions. Both of these statutes also leave the judges in control of the prescription of the rules of procedure and evidence. The drafters of the Rome Statute quite intentionally moved in the other direction. Not wishing to repeat the experience of the statutes of the two *ad hoc* criminal tribunals, the negotiators inserted a substantial number of provisions on procedural issues, in addition to the detailed description of crimes and provisions on jurisdiction. Indeed, they went even further, negotiating a separate agreement on the Rules of Procedure and Evidence. The purpose of all of these exercises was to leave little need for interpretation by the Court. For the Rules of Procedure and Evidence, see Assembly of States Parties to the Rome Statute of the International Criminal Court, First Session, Official Records 10–107, U.N. Doc. ICC-ASP/1/3, U.N. Sales No. E.03.V.2 (2002).

[15] Article 10, which was numbered as Article Y in the negotiations before and during the Rome Conference, was originally intended to be included as a paragraph of the article that defines the crimes under the Statute. But at the Rome Conference, once there was an agreement on the definition of the crimes in separate articles and the jurisdiction of the Court, Article Y was retained as a separate provision, and since the negotiations on this part of the Statute (Part 2), led by the Bureau of the Committee of Whole, lasted until the end of the Conference and bogged down over controversial questions of jurisdiction and the crime of aggression, the fact that Article Y, as Article 10, had no title, was overlooked.

[16] *See also Article 10, in* COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 315–21 (Otto Triffterer ed., 1999); Mohamed Bennouna, *The Statute's Rules on Crimes and Existing or Developing International Law, in* THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, *supra* note 5, at 1101.

Statute," which was added at the Rome Conference, insulates at least Part Two of the Statute from any further development of international law; hence it substantially narrows the latitude for interpretation. While this may not exclude interpretations involving reasonable adaptation of a particular provision to specific circumstances, it would appear, in our view, to be a far cry from a general license to engage in extensive interpretation of the Statute.

As is customary in a criminal code, the drafters of the Statute attempted to use objective criteria as often as possible. Criteria for establishing the jurisdiction of the Court and the admissibility of a case were drafted with the intention of safeguarding the independence of the Court as well as the primary jurisdictional competence of the states concerned. In the light of this object and purpose, Article 17 on admissibility should, it would appear, be interpreted with the restraint and prudent construction accorded to a body of criminal law, not to speak of the respect for text enshrined in Article 31 of the Vienna Convention on the Law of Treaties. As mentioned earlier, the preference of the drafters for objective standards is itself an indicator of their intention.

A decision as to whether a particular national judicial system is overburdened is a matter of judgment. Hence, an assessment by the prosecutor that the judicial system of a particular state is over-burdened and hence cannot conduct the investigation or prosecution of a certain number of perpetrators of serious crimes arising under the Statute could be challenged by the state if it did not wish the matter to be referred to the Court. After all, the fact and consequences of being "over-burdened," as distinct from total or partial collapse, are matters over which a state has considerable control; it may, for example, reallocate resources or give priority to the consideration of cases on its dockets that are related to crimes under the jurisdiction of the Court.

Conversely, a voluntary referral by a state to the Court on the ground that its national judicial system is over-burdened leaves the judgment on the matter to the state. Thus, a system of voluntary referral could open the way for using the Court as a back-up to national judicial systems that are otherwise competent and a selective externalization of difficult cases, thereby relieving governments from the pressure to develop and expand their national judicial systems to process the crimes enumerated in the Statute. And precisely such national developments were a primary objective of the ICC enterprise.

A different analysis has been developed in an "informal expert paper" prepared for the Office of the Prosecutor in 2003 by a group of distinguished jurists.[17] Based on the *chapeau* of Article 17, "Issues of admissibility," the experts purport to find in the two specified contingencies in Article 17(1)(a)—unwillingess or inability—*three* contingencies:

> Although it is common to emphasize the "unwilling or unable" test in Article 17, the Article in fact deals with three logically distinct circumstances.
>
> First, the most straightforward scenario is where no State has initiated any investigation (the inaction scenario). In such a scenario, none of the alternatives of Arts. 17(1)(a)–(c) are satisfied and there is no impediment to admissibility. Thus, there is no need to examine the factors of unwillingess or inability; the case is simply admissible under the clear terms of Article 17.[18]

Earlier, we concluded that the Statute excluded voluntary referrals as a basis of admissibility of a case. But does not the experts' interpretation create a form of voluntary referral by allowing a state to do nothing about certain cases in the expectation that the prosecutor will take them? If glossators say that henceforth mere inaction will authorize the ICC to proceed, states are on notice that they can achieve the effect of voluntary referral simply by abstaining from action. As the experts put it, "the case is simply admissible under the clear terms of Article 17."

The glossators' notice to states is hardly subtle. In a section of their report entitled "Uncontested admissibility and consensual sharing of labour,"[19] the experts state:

> There may also be situations where the appropriate course of action is for a State concerned not to exercise jurisdiction in order to facilitate admissibility before the ICC.[20]

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[17] Informal Expert Paper, *supra* note 10. The terms of reference of the paper lists the participants but states that "the Group operated in a collegial manner to try to develop a collective report, and hence the views reflected in this document do not necessarily reflect the views of each individual member." *Id.* at 2.

[18] *Id.* paras. 17–18.

[19] *Id.* paras. 59–66.

[20] *Id.* para. 61.

Even the procedure is made explicit:

> *Acknowledgement of non-exercise of jurisdiction:* In these types of situations, it may be appropriate for the State concerned to simplify the admissibility proceedings by expressly acknowledging that it is not investigating or prosecuting particular cases in favour of ICC jurisdiction. This does not entail any re-writing or alteration of the jurisdictional and admissibility regime of the Statute.[21]

This last assurance is not entirely persuasive.

The ICC prosecutor seems to follow the approach of the expert group to Article 17 of the Statute. In a Policy Paper issued in September 2003, the prosecutor sets out guidelines for his office. After stating that the Court has limited resources, he describes a two-tiered approach that his office will employ:

> On the one hand [the Office of the Prosecutor] will initiate prosecutions of the leaders who bear most responsibility for the crimes. On the other hand it will encourage national prosecutions, where possible, for the lower-ranking perpetrators, or work with the international community to ensure that the offenders are brought to justice by some other means.[22]

Later in his Policy Paper, the prosecutor elaborates his vision of the two-tiered approach when he speaks of the division of labor between the Court and national judicial systems as the "most logical and effective approach:"

> There may be cases where inaction by States is the appropriate course of action. For example, the Court and a territorial State incapacitated by mass crimes may agree that a *consensual division of labour is the most logical and effective approach.* Groups bitterly divided by conflict may oppose prosecutions at each others' hands and yet agree to a prosecution by a Court perceived as neutral and impartial. There may also be cases where a third

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[21] *Id.* para. 62.

[22] ICC, Office of the Prosecutor, *Paper on Some Policy Issues Before the Office of the Prosecutor*, pt. I, at 3 (Sept. 2003).

> State has extra-territorial jurisdiction, but all interested parties agree that the Court has developed superior evidence and expertise relating to that situation, making the Court the more effective forum. *In such cases there will be no question of "unwillingness" or "inability" under Article 17.*[23]

As the ICC moves from theory to reality, Article 17 may evolve. One hopes the evolution will be consistent with the essential principles of the enterprise.

* * *

The Democratic Republic of the Congo (DRC) has been plagued by violent and widespread civil war since 1999. There have been depressingly credible reports of mass killings, rapes, cannibalism, and other gross violations of human rights. It is estimated that, overall, since 1999 more than 3.4 million people have become displaced in the DRC.[24] The situation in Ituri, on the DRC's northeastern border with Uganda, which has a population of 4.6 million, has been singled out as a humanitarian catastrophe.[25] The U.N. Office for the Coordination of Humanitarian Affairs estimates that there are between 500,000 and 600,000 internally displaced persons in this region alone, many of whom are in hiding.[26] The death toll has been estimated at more than 60,000, with additional countless victims who have been maimed or mutilated.[27] Reports indicate that atrocities have been committed by all sides in the various conflicts, including by those operating under the direct control of neighboring states.[28]

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[23] *Id.* pt. II(1.1), at 5 (emphasis added).

[24] United Nations Consolidated Appeals Process, *Democratic Republic of the Congo* 18 (2004) (copies can be obtained from the U.N. Office for the Coordination of Humanitarian Affairs, CAP@reliefweb.int).

[25] The Secretary-General, *Special Report of the Secretary-General on the United Nations Organization Mission in the Democratic Republic of the Congo*, para. 10, U.N. Doc. S/2003/566 (May 27, 2003) [hereinafter Second Special Report].

[26] *Id.*

[27] *Id.*

[28] ITURI: "COVERED IN BLOOD," 15 HUMAN RIGHTS WATCH, DEMOCRATIC REPUBLIC OF CONGO, NO. 11(A), chs. 3, 5 (July 2003); *see also* Second Special Report, *supra* note 25, paras. 11–12.

The seven-year civil war has led to the collapse of the internal structure of government. It is reported that the national judicial system is in such total disarray that it could take years to establish a functioning judiciary. It is probable that, even with massive outside help and even if it proves possible to settle the civil war, the national judicial system of the DRC will simply be unable to investigate and prosecute the gravest crimes that have occurred in the course of the last seven years.

Atrocities continued to be committed in Ituri after July 1, 2002, the moment when the Rome Statute entered into force. That date was also the commencement of the application of the Statute to the DRC, which had deposited its instrument of ratification on April 11, 2002, among the initial states parties. In 2003, the Office of the Prosecutor announced that it had selected the situation in Ituri as the most urgent situation for investigation.[29] Following the initiative of the prosecutor, the government of President Kabila, in April 2004, referred to the Court the whole of the DRC for events occurring after July 1, 2002. This voluntary referral, vastly expanding the geographical scope of jurisdiction of the ICC, was explained by the government of the DRC as an effort to facilitate the task of the prosecutor.[30] On June 21, 2004, the prosecutor announced that he had determined that there was a reasonable basis to commence an investigation into crimes allegedly committed in the DRC. On October 6, 2004, the ICC and the DRC signed an agreement regarding the protection of investigators and their access to the governmental archives.[31]

The international outcry over the grave crimes in Ituri and the general recognition of the absence of any national judicial system and the lack of any reasonable prospect for reviving or establishing such a system within a reasonable period of time plainly put pressure on the prosecutor to act. Moreover, the situation clearly met the requirements of Article 17, paragraph 3 of the Statute concerning the genuine inability of the state to carry out the investigation or prosecution. Hence the legal problems precipitated by Uganda's voluntary referral do not arise here.[32] But,

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[29] International Criminal Court, *Communications Received by the Office of the Prosecutor of the ICC*, Press Release No. pids.009.2003-EN (July 16, 2003).

[30] *Statement of the Delegate of the Democratic Republic of the Congo in the Sixth Committee*, para. 14, U.N. Doc. A/59/C.6/SR.6 (Oct. 14, 2004) [hereinafter Statement of DRC Delegate].

[31] *Id.*

[32] Mahnoush H. Arsanjani & W. Michael Reisman, *The Law-in-Action of the International Criminal Court*, 99 Am. J. Int'l L. 385 (2005).

the practical and political problems facing any investigation by the prosecutor in the DRC are daunting, to say the least. There is an ongoing multi-party conflict with a seven-year history; there are allegations of abuses by all sides; there are ongoing international efforts to secure national reconciliation that perforce involves all sides to the conflict; and the matter is also before the Security Council.

The Security Council has not exercised the option, granted to it in Statute Article 16,[33] of requesting a deferral of investigation or prosecution with respect to the situation in Ituri. As a practical matter, such a request may not be necessary at this stage; the state of chaos and insecurity and the prevalence of land mines in Ituri forces a *de facto* deferral. It is difficult, if not impossible, for the Office of the Prosecutor to conduct any meaningful investigation on the ground or to have access to any accused. The assistance of the government of the DRC may be promised, but its ineffectiveness is the very predicate of the referral. The prosecutor, in an agreement with the DRC government, has agreed to limit its investigation and prosecution to "the leaders who bear the greatest responsibility," leaving the responsibility for dealing with other individuals to the DRC or to other mechanisms.

> We [the Office of the Prosecutor] have proposed a consensual division of labour with the DRC. We would contribute by prosecuting the leaders who bear the greatest responsibility. National authorities, with the assistance of the international community, could implement appropriate mechanisms to address other responsible individuals. The DRC has responded with a letter affirming that such a division of labour would be welcomed.[34]

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[33] Article 16 of the Rome Statute, *supra* note 2, provides:

Deferral of investigation or prosecution

No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.

[34] Remarks by ICC Prosecutor Luis Moreno-Ocampo, 27th Meeting of the Committee of Legal Advisors on Public International Law, Strasbourg (Mar. 18, 2004) (quoting President Museveni of *Uganda (emphasis added) (ellipsis in original)*), *available at* http://www.iccnow.org/documents/statements/others/ICCProsecutorCADHI18Mar04.pdf.

Even though both the International Law Commission and the pre-Rome negotiations considered suggestions to limit the competence of the Court to *leaders* of those responsible for such crimes, the Rome Conference decided otherwise. The reasoning was that the crimes listed in the Statute are so grave that their prosecution cannot be limited to a handful at the top; no one who has committed such crimes should escape prosecution and, if appropriate, punishment. But the implication of the DRC-ICC agreement (in the context of the DRC) suggests an evolution in approach. Consider: the involvement of the ICC in the DRC is justified on the ground of the inability or, as some reports indicate, the total non-existence of the DRC's national judicial system. How can other individuals below the civilian or military leadership who are accused of such grave crimes be investigated or prosecuted within a reasonable period of time, if the ICC, having taken jurisdiction because of the collapse of the national judicial system, does not pursue the matter itself? The policy of the Statute notwithstanding, the imperatives of practicality and resource limitations confront the prosecutor and Court in this initiative. Under the guise of an ostensible allocation of competence or prioritizing of cases, has the focus of the ICC retracted to the leaders, extending henceforth, if at all, only episodically or opportunistically to the rank-and-file?[35]

* * *

The DRC case presents still another dilemma. In spite of the efforts made by the drafters of the Rome Statute to maintain a distance between the Court and the Security Council as a demonstration of the independence and impartiality of the Court, it is becoming increasingly apparent that, in practice, the consent and cooperation of the Security Council will be important, if not indispensable, when the Court, as any *ex ante* tribunal, undertakes to conduct investigations and apprehend suspects in

[35] Article 53, paragraph 1(c) of the Statute accords considerable latitude to the prosecutor in a decision as to whether to initiate an investigation. As noted above, it provides that in deciding whether to initiate an investigation, the prosecutor shall consider whether, "[t]aking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice." This provision, which was intended to cover situations of national amnesty and truth commissions, may not allow the prosecutor to select from the leaders and rank-and-file, which category of the accused of the crimes under the Statute should be prosecuted by the Court and which should be left to national judicial systems. Mahnoush H. Arsanjani, *The International Criminal Court and National Amnesty Laws*, 93 AM. SOC. INT'L L. PROC. 65 (1999).

an ongoing conflict. As a general matter, it is likely that any conflict in which atrocities reach a level that requires action by the Court will also involve the Security Council. Where access by humanitarian aid workers requires security forces, whether provided by the United Nations, multinational forces or some regional arrangements, investigators of the Office of the Prosecutor, in practice, will not have access to these areas in order to conduct investigations and collect evidence without the agreement and support of such security forces.

Because the Court does not have a police force, it must rely on the cooperation of states. Lawful assistance by states parties is limited to the area where they exercise jurisdiction or control. It does not extend, even if a state wished it, to the emplacement of its police or security force in the territory of another state without that state's consent—or without the authorization of the Security Council. Consider situations of tense ongoing internal conflict in which states whose central government is in disarray or is a party to the conflict or appears implicated in crimes sounding in the Statute. These are precisely the situations that are likely to draw in the Security Council and involve United Nations or U.N. authorized forces on the ground. And in these situations, the only impartial police or security force that can be provided to assist the prosecutor's investigators will be U.N. forces, a multi-national force, or forces provided by regional organizations. If U.N. missions are to extend such assistance to the Office of the Prosecutor, the mandates for those missions, which are drafted by the Security Council, will have to specify such tasks.

A Security Council resolution mandating U.N. forces may contain language that can be interpreted as allowing for exchange of information with the prosecutor in the area of U.N. operations, a modest form of cooperation covered by Articles 15 and 18 of the Relationship Agreement between the United Nations and the ICC.[36] But a full-fledged criminal investigation—gathering testimony, collecting and securing evidence, and finally apprehending alleged perpetrators of crimes—requires a much greater involvement, encompassing coordination between investigators, forensic experts, other specialists, and, of course, the local population. Most, if not all of these activities will require the support of police or security forces. For example, taking testimony in an ongoing conflict may require providing witness protection locally or elsewhere and giving assurances or creating an environment in which witnesses will

[36] Relationship Agreement Between the United Nations and the International Criminal Court, U.N. Doc. A/58/874 (Oct. 4, 2004).

not be subject to retaliation from the perpetrators of the crimes or their supporters. These activities require a greater time and resource commitment and, in many situations, will depend on the active cooperation and support of U.N. forces.

It would be difficult to argue that these types of cooperation are already covered by either the Relationship Agreement or by the general language found in most Security Council resolutions. Lawyers can always invent arguments, but it would go beyond the pale of plausibility to pretend that an interpretation *in extenso* of the Relationship Agreement or a Security Council resolution is a simple, permissible option. An extensive construction could radically change the nature of the mission and ignite a chain of easily imaginable consequences for the United Nations so serious that one cannot fairly assume that these obligations had been undertaken implicitly. One example: active support of ICC investigators by U.N. forces might create the impression in the eyes of the local population or the parties to the conflict that the investigation was a U.N. operation. But in many situations, U.N. forces strive to remain scrupulously neutral in order to retain the trust of all segments of the local population. That trust would be lost, and the U.N. forces might find themselves in a much more complicated and politically violent situation if they were perceived as part of the operation gathering evidence against one or another party to the conflict. A further practical problem could be possible confusion in the line of command: who do security forces take orders from once they are called upon to provide active assistance and protection to the investigators on the ground?

In short, U.N. cooperation with the ICC may import new challenges for U.N. missions, especially when the cooperation puts the U.N. forces in the field into opposition against one of the contending parties that the United Nations was trying to separate. Cooperation could also import unanticipated problems for the ICC. Dependence by the Court on U.N. forces authorized by the Security Council in a particular situation would require it to pay more attention to what the Security Council was doing or intending to do in a particular crisis. Indeed, the Council could be in charge and insist that the Court adjust its program so as not to "rock the boat."

The prosecutor seemed sensitive to his dependency on the Security Council in his initiative in Ituri. In a press release in July 2003 regarding the decision to investigate the situation there, the Office of the Prosecutor explained, in a rather detailed fashion, that his office was aware of the steps being taken by the Security Council, that it supported the

efforts being made by national and international actors to help the country achieve peace, and it "will bear these efforts in mind as it continues to follow the situation in the Democratic Republic of Congo closely."[37] This is a politically sensible and a contextually reasonable position for any political entity operating in areas where its own remit overlaps with that of other political entities. As for the ICC, it may prove to be a necessary evolution of role and mission. But it is a curious, if not anomalous position for a court and especially a criminal court, *a fortiori* one whose designers sought independence from the Security Council.

* * *

In any manifold of events, an innovation in one part inevitably precipitates changes and potential problems elsewhere. In the normative sphere, the result is an adjustment in the law-in-action. So it is with the expectations of compensation for victims of serious crimes in the DRC. Victims want the perpetrators who tormented them to be punished, but they also expect to receive assistance from the Court, through the award of compensation, in order to repair their injuries, compensate their losses, and start their lives anew. Thus, the DRC representative to the Sixth Committee, in a statement regarding the ICC, observed that "[t]here was keen interest among victims in the possibility that the Court could order reparations."[38]

The importance of reparation for victims in settling the whole range of problems associated with the reconciliation process in post-conflict situations was emphasized in the *Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*. The report recognized that while non-material forms of reparation are easier to provide, it is much more difficult to arrange material compensation:

> Material forms of reparation present perhaps the greatest challenges, especially when administered through mass government programmes. Difficult questions include who is included among the victims to be compensated, how much compensation is to be awarded, what kinds of harm are to be covered, how harm is to be quantified, how different kinds of harm are to be compared and compensated and how compensation is to be distributed. . . .

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[37] ICC Press Release, *supra* note 29.

[38] *Statement of the DCR Delegate, supra* note 30, para. 15.

> No single form of reparation is likely to be satisfactory to victims. Instead, appropriately conceived combinations of reparation measures will usually be required, as a complement to the proceedings of criminal tribunals and truth commissions. Whatever mode of transitional justice is adopted and however reparations programmes are conceived to accompany them, both the demands of justice and the dictates of peace require that something be done to compensate victims. Indeed, the judges of the tribunals for Yugoslavia and Rwanda have themselves recognized this and have suggested that the United Nations consider creating a special mechanism for reparations that would function alongside the tribunals.[39]

During the negotiation of the Rome Statute, victim advocates pressed for more recognition of victims' needs by providing for their support, including the awarding of compensation. The result of their efforts was Article 79, which provides for the establishment of a trust fund for the benefit of victims of crimes within the jurisdiction of the Court, as well as for the families of victims of such crimes.

Whence the money for the trust fund? Article 79(2) provides that "[t]he Court may order money and other property collected through fines or forfeiture to be transferred, by order of the Court, to the Trust fund." The novel idea of the Court imposing fines or securing and transferring forfeited property to the trust fund seems reasonable and fair, but it may often prove impracticable. It is not at all clear that perpetrators of serious crimes accumulate substantial property or that the violence and number of atrocities correlates with the accumulation of wealth by the perpetrators. And even if there is a great stash of booty somewhere, how can the Court secure it?

A more likely source of revenue for the trust fund is voluntary contributions by governments and private entities. Indeed the Board of Directors of the Trust Fund for Victims, whose members have the responsibility for encouraging generous contributions to the trust fund by governments and private entities, is heavily endowed with high-profile personalities,[40] suggesting that the states parties to the Rome Statute had

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[39] The Secretary-General, *Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, paras. 54–55 U.N. Doc. S/2004/616 (Aug. 3, 2004).

[40] The Board of Directors are Mme. Simone Veil, Chair, His Grace Archbishop

no illusions about practical fundraising. But in a world of increasing donor fatigue, can one realistically expect voluntary contributions sufficient to satisfy the tens of thousands, if not more, of victims of such crimes and their families? The court-in-action may scale back the scope and ambition of the trust fund, but Article 79 has already created expectations among the victims; a failure to fulfill them may affect the image of the Court.

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Cherif Bassiouni has played a major role in shaping modern international criminal law. After decades of publications and lecturing on international criminal law, he served as one of the midwives at the birth of the Court in Rome. We are pleased to contribute this chapter in his honor.

Emeritus Desmond Tutu, His Excellency Mr. Tadeusz Mazowiecki, Mr. Arthur Robinson, and His Excellency Mr. Bulgaa Altangerel. The members of the board are elected by the Assembly of States Parties to the Rome Statute for a term of three years and will serve in an individual capacity on a pro bono basis.

CHAPTER 12

CRIMES AGAINST HUMANITY: THE STATE PLAN OR POLICY ELEMENT

*William A. Schabas**

Article 7(2) of the Rome Statute of the International Criminal Court says that the "[a]ttack directed against any civilian population," which is one of the contextual elements of crimes against humanity, must be committed, "pursuant to or in furtherance of a State or organizational policy to commit such attack."[1] Most academic commentators as well as specialized non-governmental organizations view this as a broad concept that brings a range of "non-state actors" within the ambit of crimes against humanity. Moreover, the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) has taken the view that at customary law, there is no requirement whatsoever of a state or organizational policy with respect to crimes against humanity.[2]

Cherif Bassiouni disagrees. In his recent three-volume work, *The Legislative History of the International Criminal Court*, he argues:

> Contrary to what some advocates advance, Article 7 does not bring a new development to crimes against humanity, namely its applicability to non-State actors. If that were the case, the mafia, for example, could be charged with such crimes before the ICC, and that is clearly neither the letter nor the spirit of Article 7. The question arose after 9/11 as to whether a group such as al-Qaeda, which operates on a worldwide basis and is capable of inflicting significant harm in more than one State, falls within

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[1] Rome Statute of the International Criminal Court art. 7(2), U.N. Doc. A/CONF.183/9 (July 17, 1998).

[2] Prosecutor v. Kunarac et al., Case No. IT-96-23/1-A, Judgment, para. 98 (June 12, 2002). *See also* Prosecutor v. Blaskic, Case No. IT-95-14-A, Judgment, para. 120 (July 29, 2004); Prosecutor v. Kordic et al., Case No. IT-95-14/2-A, Judgment, para. 98 (Dec. 17, 2004).

> this category. In this author's opinion, such a group does not qualify for inclusion within the meaning of crimes against humanity as defined in Article 7, and for that mater, under any definition of that crime up to Article 6(c) of the IMT, notwithstanding the international dangers that it poses. . . . The text [of article 7(2)] clearly refers to State policy, and the words "organisational policy" do not refer to the policy of an organisation, but the policy of a State. It does not refer to non-State actors.[3]

Given that he is the author of the leading monograph on the subject of crimes against humanity, and chair of the drafting committee at the Rome Conference that finalized the text of Article 7(2), Professor Bassiouni's views on the state plan or policy element of crimes against humanity certainly deserve detailed consideration.

Although Professor Bassiouni was addressing the interpretation of Article 7 of the Rome Statute, the position under customary international law is the appropriate starting point. Professor Bassiouni, in arguing that "Article 7 does not bring a new development to crimes against humanity," is himself placing the debate within the context of customary international law. The most authoritative statement against Professor Bassiouni's position is that of the ICTY Appeals Chamber, buried in a footnote in its judgment in *Kunarac*. The Appeals Chamber was addressing the issue from the standpoint of customary international law, because of its well-known approach to interpreting the Rome Statute by which its provisions are deemed consistent with custom.[4] After noting that "[t]here has been some debate in the jurisprudence of this Tribunal as to whether a policy or plan constitutes an element of the definition of crimes against humanity," the Appeals Chamber said that practice "overwhelmingly supports the contention that no such requirement exists under customary international law."[5] The Appeals Chamber cited a number of authorities in support: Article 6(c) of the Nuremberg Charter, the Nuremberg Judgment, national cases from Australia, Israel, and Canada, the Secretary-General's report on the draft ICTY Statute, and various mate-

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[3] M. Cherif Bassiouni, The Legislative History of the International Criminal Court: Introduction, Analysis and Integrated Text 151–52 (2005). *See also* M. Cherif Bassiouni, Crimes Against Humanity 243–81 (2d rev. ed. 1999).

[4] Prosecutor v. Tadic, Case No. IT-94-1-A, Judgment, paras. 287, 296 (June 12, 1999).

[5] Prosecutor v. Kunarac et al., Case No. IT-96-23/1-A, Judgment, para. 98 n.114 (June 12, 2002).

rials of the International Law Commission (ILC). Unfortunately, there is no detailed explanation, and it is often not very clear how and why these references buttress its position.

The first codification of crimes against humanity, in Article 6(c) of the Charter of the International Military Tribunal, does not explicitly establish a state plan or policy as an element of crimes against humanity. Presumably for this reason, the ICTY Appeals Chamber cited Article 6(c) as its first authority for the proposition that there is no state plan or policy element in customary international law.[6] However, a state plan or policy is undoubtedly implicit in the entire concept of crimes against humanity, at least as it was developed first by the U.N. War Crimes Commission and subsequently at the London Conference. The *chapeau* of Article 6 of the Charter specifies that accused persons must have been "acting in the interests of the European Axis countries, whether as individuals or as members of organizations." Moreover, the so-called *nexus*, which requires that crimes against humanity be committed "in connection with any crime within the jurisdiction of the Tribunal," has the effect of linking them to crimes that are themselves associated with a state plan or policy, namely war crimes and crimes against peace. Probably the possibility that crimes against humanity might apply to what are today called "non-state actors" never even crossed the minds of those who drafted the Charter. Precisely because they understood the necessary link between crimes against humanity and a state plan or policy, the four powers that drafted the Charter were actually concerned that the new category of offense might eventually apply to themselves, and to the policies of their own governments directed towards national minorities, and that is why they insisted on the *nexus* with armed conflict.[7]

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[6] *Id.*

[7] *See, e.g.*, Justice Jackson, United States Delegate, London Conference, Minutes of Conference Session of July 23, 1945, *in* REPORT OF ROBERT H. JACKSON, UNITED STATES REPRESENTATIVE TO THE INTERNATIONAL CONFERENCE ON MILITARY TRIALS, WASHINGTON: U.S. GOVERNMENT PRINTING OFFICE 333 (1949):

> [O]rdinarily we do not consider that the acts of a government toward its own citizens warrant our interference. We have some regrettable circumstances at times in our own country in which minorities are unfairly treated. We think it is justifiable that we interfere or attempt to bring retribution to individuals or to States only because the concentration camps and the deportations were in pursuance of a common plan or enterprise of making an unjust or illegal war in which we became involved. We see no other basis on which we are justified in reaching the atrocities which were committed inside Germany, under German law, or even in violation of German law, by authorities of the German State.

It is of course true that Streicher was convicted of crimes against humanity by the International Military Tribunal despite the conclusion that "the evidence fails to establish his connection with the conspiracy or common plan to wage aggressive war as that conspiracy has been elsewhere defined in this Judgment."[8] But Streicher was a *Gauleiter*, a position of some importance in the Nazi regime. Moreover, his crimes consisted essentially of being a propagandist for Nazi policy. It seems to be reading a lot into the judgment to assert, as does the ICTY Appeals Chamber, that his conviction is authority for the view that there is no state plan or policy element with respect to crimes against humanity. The other example given by the Appeals Chamber is van Schirach. Since the 1920s, van Schirach had been leader of the Hitler Youth. During the war, he was *Gauleiter* of Vienna, and it was for atrocities committed during the Nazi occupation of Austria that he was convicted of crimes against humanity by the Nuremberg Tribunal.[9] This is hardly authority for the position of the Appeals Chamber.

The International Military Tribunal never addressed the issue of plan or policy directly, and the reason is obvious: the Nazi plan and policy to wage aggressive war and to exterminate the Jews of Europe underpinned the entire case. Why would the tribunal ever have even spoken to the issue, under the circumstances? For the same reasons, the *Eichmann* trial—another source upon which the ICTY Appeals Chamber relies—seems flimsy authority indeed for the suggestion that there is no plan or policy element to crimes against humanity. The entire judgment of the Jerusalem District Court is constructed around evidence of the Nazi plan or policy. The Israeli judges concluded that Eichmann had known of the "secret of the plan for extermination" since mid-1941; it acquitted him of genocide for acts committed prior to that date.[10] The Appeals Chamber's position would have been more convincing if it could point to a single example of a prosecution for crimes against humanity directed against a "non-state actor" lacking any association with a state plan or policy. But there are none.

The Appeals Chamber's methodology, by which it argues that plan or policy is not an element of crimes against humanity, because it does

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[8] France et al. v. Goring et al., *reprinted in* 22 I.M.T. 203, 13 I.L.R. 203, 41 Am. J. Int'l L. 172, 294 (1946).

[9] *Id.*, 41 Am. J. Int'l L. at 309–11.

[10] A.G. Israel v. Eichmann, para. 195 *reprinted in* 36 I.L.R. 5 (1961).

not find this stated explicitly in the early instruments or judgments, seems flawed. This is because the same can be said of the "widespread or systematic" language that the Appeals Chamber contends is the defining contextual element of crimes against humanity. The Nuremberg judgment used the words "widespread" and "systematic" on many occasions, but in a general sense, applicable to all of the Nazi atrocities, and not as in any way a definitional element of crimes against humanity. In *Eichmann*, the word "widespread" appears once ("The Accused also headed a widespread establishment of officials," at paragraph 231), but "systematic" is not used at all. In other words, if the failure of the Appeals Chamber to find the "plan or policy" element in Nuremberg and *Eichmann* is an argument for dismissing its relevance at customary international law, can't one say the exact same thing about "widespread or systematic"?

The summary and obscure comment of the ICTY Appeals Chamber in *Kunarac* on this most important issue is especially striking because it fails to even mention Article 7(2) of the Rome Statute. The Appeals Chamber has not hesitated to invoke the Rome Statute as authority for customary international law when it corresponds to its own views on a particular point. In *Tadic*, for example, when it was first enunciating the theory of "joint criminal enterprise," the ICTY Appeals Chamber pointed to Article 25(3)(d) of the Rome Statute as important evidence of the *opinio juris* of states and, therefore, of customary law.[11] Of course, Article 7(2) of the Rome Statute leaves room for interpretation, but there can be no doubt that it imposes some kind of contextual element involving a plan or policy. The failure of the Appeals Chamber to even mention the rather obvious difficulty that Article 7(2) poses for its theory about the customary law of crimes against humanity certainly does not enhance the strength and credibility of its position.

Another noteworthy oversight in the Appeals Chamber's discussion of the question is some of the significant national decisions dealing with crimes against humanity. It cites three Canadian cases from lower courts but does not mention the leading case on crimes against humanity of the Supreme Court of Canada. The *Finta* ruling of the Supreme Court of Canada has already been referred to by the Appeals Chamber in a case where its own views coincided with those expressed by the Supreme Court.[12] On the state policy issue, however, *Finta* is not helpful to the

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[11] Prosecutor v. Tadic, Case No. IT-94-1-A, Judgment, para. 223 (June 12, 1999).

[12] *Id.* paras. 266–267.

Appeals Chamber. In *Finta*, the majority of the Supreme Court of Canada said that "'State action or policy' was a pre-requisite legal element of crimes against humanity,"[13] a view that seemed to be common ground even for the dissenters.[14] In adopting this view, by the way, the Supreme Court of Canada relied on an expert opinion provided by none other than M. Cherif Bassiouni! Similarly, in applying the French *Code pénal*, which requires evidence that crimes against humanity were "organised in the execution of a prearranged plan against a group in the civilian population,"[15] French cases have taken this as requiring a state plan or policy.[16]

Among the authorities listed by the ICTY Appeals Chamber to support its position that there is no plan or policy element is the Report of the Secretary-General to the Security Council on the draft ICTY Statute. The famous footnote in *Kunarac* cites paragraphs 47 and 48 of that report as proof of the "overwhelming support" of the contention that there is no state plan or policy requirement under customary international law. Probably most students of the Appeals Chamber's rulings take it at its word, and do not bother to go back and read the authorities that it cites. So that readers of this chapter can make up their own minds, I reproduce paragraphs 47 and 48 of the report verbatim:

> 47. Crimes against humanity were first recognized in the Charter and Judgement of the Nürnberg Tribunal, as well as in Law No. 10 of the Control Council for Germany. Crimes against humanity are aimed at any civilian population and are prohibited regardless of whether they are committed in an armed conflict, international or internal in character.
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> 48. Crimes against humanity refer to inhumane acts of a very serious nature, such as wilful killing, torture or rape, committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds. In the conflict in the territory of the former Yugoslavia, such inhumane acts have taken the form of so-called "ethnic

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[13] R. v. Finta, [1994] 1 S.C.R. 701, 823.

[14] *Id.* at 773.

[15] C. PEN. art. 212–1.

[16] Chamber criminelle [Cass. crim.] Oct. 6, 1983, J.C.P. 1983 (The Barbie Case), 11; The Touvier Case *reprinted in* 100 I.L.R. 341, 350 (1992).

> cleansing" and widespread and systematic rape and other forms of sexual assault, including enforced prostitution.[17]

Do these paragraphs really reinforce the Appeals Chamber's position? Can the silence of the Secretary-General, in the context of the two laconic paragraphs explaining the inclusion of crimes against humanity within the subject matter jurisdiction of the tribunal, be taken as providing even a hint of support that would justify invoking them as part of the "overwhelming" evidence of customary international law?

Similarly, the footnote in *Kunarac* refers to the 1954 draft Code of Crimes of the ILC as another authority supporting its view that there is no state plan or policy element. But here is the text of the 1954 ILC draft definition of crimes against humanity: "[i]nhuman acts such as murder, extermination, enslavement, deportation or persecution, committed against any civilian population on social, political, racial, religious or cultural grounds *by the authorities of a State or by private individuals acting at the instigation or with the toleration of such authorities*."[18] In fact, the ILC positions on this subject have changed frequently, perhaps reflecting the evolving membership of the body rather than any genuine legal development in the outside world. But even the ILC's recent pronouncements hardly buttress the position of the Appeals Chamber. The ILC's commentary on the 1996 version of the Code of Crimes Against the Peace and Security of Mankind has often been cited for its observation that the purpose of the threshold in crimes against humanity is to exclude "a random act" or "an isolated inhumane act."[19] Although the commentary did not explicitly mention "non-state actors" or provide any examples to assist in understanding its views, it did say, in remarks that are not helpful to Professor Bassiouni, "[t]he instigation or direction of a Government or any organization or group, which may or may not be affiliated with a

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[17] The Secretary-General, *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808*, U.N. Doc. S/25704, paras. 47–48 (May 3, 1993). The footnotes, which merely provide the bibliographic references, have been omitted.

[18] Draft Code of Offences Against the Peace and Security of Mankind, U.N. Doc. A/2693 (1954).

[19] *See, e.g.*, Prosecutor v. Tadic, Case No. IT-94-1-A, Judgment, para. 648 (June 12, 1999). The "random act" language has also been used in several judgments without acknowledgment to the International Law Commission: Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, para. 579 (July 29, 2004); Prosecutor v. Blaskic, Case No. IT-95-14-A, para. 202 n.376; Prosecutor v. Erdemovic, Case No. IT-96-22-A, Joint Separate Opinion of Judges McDonald and Vohrah, para. 22 (Oct. 7, 1997).

Government, gives the act its great dimension and makes it a crime against humanity imputable to private persons or agents of a State."[20] The ILC supported this proposition by citing the Nuremberg judgment, specifically the convictions of Streicher and von Schirach. The rationale seems to be that they were acquitted of crimes against peace because they were not Nazi insiders. But even if Streicher and von Schirach were "non-state actors," in that they were not part of Hitler's inner circle, their acts were not random or isolated precisely because they were part of the Nazi plan or policy to persecute minorities, as has already been noted earlier in this chapter.

One of the arguments invoked by the Appeals Chamber for rejecting the state plan or policy element is that its case law had earlier done this with respect to the crime of genocide. Indeed, the same debate has taken place concerning genocide, given the silence of the internationally accepted definition of the crime on this particular point. The issue has only really arisen once in the case law, a matter involving a severely disturbed Serb racist who was the principal executioner in the Luka camp, in northwest Bosnia, over a two-week period. He was shown to have systematically killed Muslim inmates, as well as some Croats. The victims comprised essentially all of the Muslim community leaders. Jelisic was charged with genocide as both an accomplice and as a principal perpetrator. Examining the evidence, an ICTY Trial Chamber, presided by Judge Claude Jorda, concluded that the prosecutor had failed to prove the existence of any general or even regional plan to destroy in whole or in part the Bosnian Muslims. It said that Jelisic could in no way be an accomplice to genocide because genocide was never committed by others. It said there was insufficient evidence of the perpetration of genocide in Bosnia in the sense of some planned or organised attack on the Muslim population.[21]

After dismissing the charge of complicity, the Trial Chamber turned to whether or not Jelisic could have committed genocide acting alone, as the principal perpetrator rather than as an accomplice. This Trial Chamber said it was "theoretically possible" that an individual, acting alone, could commit the crime—a kind of Lee Harvey Oswald of genocide. In the end, Jelisic was also acquitted as a principal perpetrator. But

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[20] *Report of the International Law Commission on the Work of Its Forty-Eighth Session*, U.N. Doc. A/51/10, art. 18, para. 5 (Oct. 23, 1996) [hereinafter ILC Report].

[21] Prosecutor v. Jelisic, Case No. IT-95-10-T, Judgment, para. 98 (Dec. 14, 1999).

the Trial Chamber's approach, developed as *obiter dictum* in a case more appropriate for psychiatry than criminal law, now stands as authority for the entirely speculative and hypothetical proposition that genocide may be committed without any requirement of an organized plan or policy of a state or similar entity.[22] These views were confirmed on appeal:

> The Appeals Chamber is of the opinion that the existence of a plan or policy is not a legal ingredient of the crime. However, in the context of proving specific intent, the existence of a plan or policy may become an important factor *in most cases*. The evidence may be consistent with the existence of a plan or policy, or may even show such existence, and the existence of a plan or policy may facilitate proof of the crime.[23]

In *most* cases? Are there *any* examples that might correspond to genocide being committed in the absence of a state plan or policy?

In support of its conclusion that a state plan or policy was not an element of crimes against humanity, in *Kunarac*, the ICTY Appeals Chamber referred to its ruling on this point in *Jelisic*.[24] But the reasoning in *Jelisic* with respect to a plan or policy is just as feeble and unconvincing as that in *Kunarac*. It relies on a literal and mechanistic reading of the text and of early case law and other authorities that is devoid of context. The Genocide Convention was not adopted to deal with perverse serial killers any more than the concept of crimes against humanity, to borrow the words of Professor Bassiouni cited above, was devised to prosecute the mafia.

Certainly, nothing in the text of the definition of genocide explicitly identifies a plan or policy as an element of the crime of genocide. During drafting of the Genocide Convention in 1948, proposals to include an explicit requirement that genocide be planned by a government were rejected.[25] Nevertheless, while theoretical exceptions cannot be ruled

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[22] *Id.* para. 100.

[23] Prosecutor v. Jelisic, Case No. IT-95-10-T, Judgment, para. 48 (July 5, 2001) (emphasis added). The Appeals Chamber's *obiter dictum* was followed in Prosecutor v. Sikirica et al., Case No. IT 95-8-T, Judgment on Defense Motions to Acquit, para. 62 (Sept. 3, 2001).

[24] Prosecutor v. Kunarac et al., Case No. IT-96-23/1-A, Judgment, para. 98 n.114 (June 12, 2002).

[25] U.N. Doc. E/AC.25/SR.4, at 3–6 (1948). *See also* Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995), *cert. denied*, 518 U.S. 1005 (1996).

out, it is impossible to imagine genocide that is not planned and organized either by the state itself, a state-like entity, or some clique associated with it. Raphael Lemkin, the scholar who first proposed the concept of genocide in his book *Axis Rule in Occupied Europe*, spoke regularly of a plan as if this was a *sine qua non* for the crime of genocide.[26] In *Kayishema et al.*, a Trial Chamber of the International Criminal Tribunal for Rwanda wrote: "[A]lthough a specific plan to destroy does not constitute an element of genocide, it would appear that it is not easy to carry out a genocide without a plan or organisation."[27] Furthermore, it said that "the existence of such a plan would be strong evidence of the specific intent requirement for the crime of genocide."[28] The 1996 commentary of the ILC on its draft Code of Crimes Against the Peace and Security of Mankind seemed to understand that a state plan or policy was central to the crime of genocide:

> The extent of knowledge of the details of a plan or a policy to carry out the crime of genocide would vary depending on the position of the perpetrator in the governmental hierarchy or the military command structure. This does not mean that a subordinate who actually carries out the plan or policy cannot be held responsible for the crime of genocide simply because he did not possess the same degree of information concerning the overall plan or policy as his superiors. The definition of the crime of genocide requires a degree of knowledge of the ultimate objective of the criminal conduct rather than knowledge of every detail of a comprehensive plan or policy of genocide.[29]

The draft Elements of Crimes, adopted by the Assembly of States Parties of the International Criminal Court in September 2002, includes the following element of the crime of genocide: "The conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction."[30] The

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[26] Raphael Lemkin, Axis Rule in Occupied Europe, Analysis of Government, Proposals for Redress 79 (1944).

[27] Prosecutor v. Kayishema et al., Case No. ICTR-95-1-T, Judgment, para. 94 (May 21, 1999).

[28] *Id.* para. 276.

[29] ILC Report, *supra* note 20, at 90.

[30] *Report of the Preparatory Commission for the International Criminal Court*, Addendum, Finalized Draft Text of the Elements of Crimes, U.N. Doc. PCNICC/2000/INF/3/Add.2.

elements eschew the words "plan" or "policy" in favor of a "manifest pattern of similar conduct," but any difference between the two expressions would appear to be entirely semantic. Alternatively, the context may be "conduct that could itself effect such destruction." Again, the ICTY Appeals Chamber did not even consider, in either *Jelisic* or *Kunarac*, this rather compelling evidence of *opinio juris* for the presence of a state plan or policy component with respect to genocide (and, by analogy) crimes against humanity, rather than its absence.[31]

One of the best recent examples to explain why a state plan or policy is so important to any determination of the crime of genocide appears in the report of the Commission of Inquiry on Darfur, set up in late 2004 at the behest of the Security Council and chaired by the distinguished international legal scholar Antonio Cassese. Answering the Security Council's question "was there a genocidal intent?," the Commission said "that the Government of Sudan has not pursued a policy of genocide." Explaining its position, the Commission said:

> However, one crucial element appears to be missing, at least as far as the central Government authorities are concerned: genocidal intent. Generally speaking the policy of attacking, killing and forcibly displacing members of some tribes does not evince a specific intent to annihilate, in whole or in part, a group distinguished on racial, ethnic, national or religious grounds. Rather, it would seem that those who planned and organized attacks on villages pursued the intent to drive the victims from their homes, primarily for purposes of counter-insurgency warfare.[32]

The Commission did not challenge the ICTY case law, and did not exclude the possibility that an individual acting alone might have committed genocidal acts.[33] But in practice, it attempted to answer the question posed by the Security Council, that is, whether acts of genocide were committed in Darfur, by looking for evidence of a plan or policy devised by the Sudanese State.

Similarly, the February 26, 2007, ruling of the International Court of Justice is along similar lines. Although the Court acknowledged, as did

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[31] Prosecutor v. Krstic, Case No. IT-98-33-A, Judgment, para. 224 (Apr. 19, 2004).

[32] *Report of the International Commission of Inquiry on Violations of International Humanitarian Law and Human Rights Law in Darfur*, U.N. Doc. S/2005/60, para. 518 (Feb. 1, 2005).

[33] *Id.* para. 520.

the Darfur Commission, that individuals could commit genocide, in practice it did not pursue this line of inquiry very far. Theoretically, if it were really true that an individual or group could commit genocide in the absence of a state plan or policy, the Court ought to have considered whether *any* individual whose acts might be attributable to Serbia had in fact committed genocide. All that would have been required—again, theoretically—would be to find a single Serb *génocidaire* in order to build the case that Serbia was liable under the Convention. Years earlier, the ICTY had wasted considerable judicial energy inquiring as to whether Goran Jelisic, acting alone, had committed genocide, but the International Court of Justice, wisely, did not follow suit. Instead, like the Darfur Commission, in answering whether Serbia was liable for genocide, it looked for the existence of a state plan or policy.[34]

Assuming, *arguendo*, that Professor Bassiouni is wrong about the state of customary international law, his position still needs to be addressed in terms of interpreting the positive legal norms expressed in Article 7(2) of the Rome Statute. Implicitly, by its silence, the ICTY Appeals Chamber seems to have taken the view that Article 7(2) is inconsistent with custom (indeed, the Rome Statute acknowledges the possibility that it is not perfectly aligned with customary international law[35]). As Professor Bassiouni acknowledges, some authors take the reference to "State or organisational policy" in Article 7(2) as a broad expression covering a range of "non-state actors." He takes a much narrower view, and considers that the "organisation" must be part of the state rather than outside it.

On a purely literal ruling of the provision, Professor Bassiouni's approach is the more compelling one. Dictionary definitions consider an "organisation" to comprise any organized group of people, such as a club, society, union, or business. Surely the drafters of the Rome Statute did not intend for Article 7 to have such a broad scope, given that all previous case law concerning crimes against humanity, and all evidence of national prosecutions for crimes against humanity, had concerned state-supported atrocities? If they really meant to include any type of organization, such as a highly theoretical "organisation" of two people, why did they put these words in at all? The biggest problem for the proponents of the broad view is their inability to explain how the term "organisation"

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[34] Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), Judgment, paras. 277, 319 (Feb. 26, 2007).

[35] Rome Statute, *supra* note 1, art. 10.

is to be qualified. The merit of Professor Bassiouni's approach is that he gives a reasonable and plausible explanation for how to construe the term "organisation." He says that the word "state" governs the scope of the word "organisation."

An alternative interpretation, somewhat different than that expressed by Professor Bassiouni but certainly one that is consistent with the spirit of his approach, would be to view the reference to "organisation" as an attempt to include state-like bodies. This is certainly logical and in keeping with the philosophy of the Statute. It would extend the concept of crimes against humanity from acts committed pursuant to a state plan or policy—the historic concept—to organizations that, while not states within the meaning of international law, exercise a state-like or governmental authority over civilian populations. Examples of such bodies might be the entities in Bosnia and Herzegovina, Taiwan, the Palestinian authority, and the zone in Colombia that is effectively administered by the rebel Revolutionary Armred Forces of Colombia (FARC). Such an approach seems to correspond to the position taken by the ICTY prosecutor herself, at least in litigation prior to the Appeals Chamber ruling in *Kunarac*. Here is how the argument was explained in 1997, in *Tadic:*

> An additional issue concerns the nature of the entity behind the policy. The traditional conception was, in fact, not only that a policy must be present but that the policy must be that of a State, as was the case in Nazi Germany. The prevailing opinion was, as explained by one commentator, that crimes against humanity, as crimes of a collective nature, require a State policy "because their commission requires the use of the State's institutions, personnel and resources in order to commit, or refrain from preventing the commission of, the specified crimes described in Article 6(c) [of the Nürnberg Charter]."[163] While this may have been the case during the Second World War, and thus the jurisprudence followed by courts adjudicating charges of crimes against humanity based on events alleged to have occurred during this period, this is no longer the case. As the first international tribunal to consider charges of crimes against humanity alleged to have occurred after the Second World War, the International Tribunal is not bound by past doctrine but must apply customary international law as it stood at the time of the offences. In this regard the law in relation to crimes against humanity has developed to take into account forces which, although not those of the legitimate government, have de facto

> control over, or are able to move freely within, defined territory. The Prosecution in its pre-trial brief argues that under international law crimes against humanity can be committed on behalf of entities exercising de facto control over a particular territory but without international recognition or formal status of a "de jure" State, or by a terrorist group or organization. The Defence does not challenge this assertion, which conforms with recent statements regarding crimes against humanity.[36]

Not surprisingly, footnote 163 in the above quote is a reference to the first edition of Cherif Bassiouni's monograph on *Crimes Against Humanity*.[37] The expanded approach to non-state actors, so as to include state-like entities, is not fundamentally at odds with Professor Bassiouni's overall approach, although it seems light years away from the extreme statement in *Kunarac*.

Professor Bassiouni's interpretation closes the door on using crimes against humanity to deal with terrorist groups, rebels, mafias, motorcycle gangs, and serial killers. Is that wise? Some may resist the idea that international law be interpreted from the standpoint of policy. But the exercise is surely a useful one, to the extent that it assists in understanding what international lawmakers intended to accomplish in making crimes against humanity a punishable category, subject to prosecution by international criminal tribunals as well as by national courts under the concept of universal jurisdiction.

Returning to the origins of the concept, at Nuremberg, it seems clear that the rationale for recognition of crimes against humanity was to punish crimes that were either authorized by Nazi law or tolerated by the authorities. Isn't that why Article 6(c) of the Charter of the International Military Tribunal concludes with the words "whether or not in violation of the domestic law of the court where perpetrated"? Over the decades, the rationale for prosecuting crimes against humanity has been that such atrocities generally escape prosecution in the state that normally exercises jurisdiction, under the territorial or active personality principles. International crimes, and crimes against humanity in particular, were created so that such acts could be punished *elsewhere* so that impunity could be addressed effectively.

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[36] Prosecutor v. Tadic, Case No. IT-94-1-A, Judgment, para. 654 (June 12, 1999).

[37] M. Cherif Bassiouni, Crimes Against Humanity in International Criminal Law 7, 114–19 (1992).

We do not, by and large, have the same problem with respect to "non-state actors." Most states are both willing and able to prosecute the terrorist groups, rebels, mafias, motorcycle gangs, and serial killers who operate within their own borders. At best, international law is of assistance here in the area of mutual legal assistance. But, to take the most celebrated example and the one to which Professor Bassiouni alludes, if the surviving 9/11 terrorists or their accomplices are ever captured, their crimes will surely be addressed in a most diligent and determined manner by the U.S. justice system. In other words, there is a functional or utilitarian logic to Professor Bassiouni's interpretation of Article 7(2). Those who argue for the broader view should be summoned to explain *why* the international community would have created such a costly and sophisticated mechanism to address broad categories of "non-state actors" whose crimes are very adequately dealt with by existing national justice systems.

Professor Bassiouni's theory is certainly inconvenient for the Office of the Prosecutor of the International Criminal Court that, for the first time in the history of international criminal justice, has focused the attention of an international tribunal on actors that are neither states nor state-like entities. Three different "situations" are being investigated pursuant to so-called "self-referrals," by Uganda, the Democratic Republic of the Congo (DRC), and the Central African Republic. The idea that states might refer cases against themselves, so to speak, pursuant to Articles 13(a) and 14 of the Rome Statute, had never occurred to the drafters when the Court was being created. The Court's entrepreneurial prosecutor, Luis Moreno Ocampo, has essentially solicited such referrals from the states concerned. Although the referral does not mean Moreno Ocampo is foreclosed from investigating crimes committed by the leaders of the states themselves (something he can do anyway, in accordance with Article 15 of the Statute), it would appear that there is an understanding between prosecutor and state that the investigation is to focus on the non-state actors. The day Ocampo turns his attention to the authorities in the referring state, rather than to the rebels that they are fighting, will be the day when the enthusiasm of certain states for self-referral comes to a shuddering halt.

Cherif Bassiouni might answer that the prosecutor is barking up the wrong tree, given that under a narrow reading of Article 7 of the Rome Statute, he cannot pursue the non-state actors in Uganda, the DRC, and the Central African Republic for crimes against humanity. It is important to understand that this is not an accidental or inadvertent consequence of Professor Bassiouni's interpretative approach to Article 7(2). Rather,

it is the perfectly coherent and logical result of a vision of international criminal law that sees states and those who work for them, rather than the enemies of states (i.e., rebel groups, non-state actors), at the heart of the rationale for the existence of the entire system. If Uganda wants to prosecute its rebels, why does it need the International Criminal Court? It has a perfectly functional criminal justice system. A recent judgment of the Ugandan Constitutional Court, issued in early June 2005, struck down death penalty provisions in the country's criminal legislation on the basis of a provision in the Constitution. The Ugandan Court showed courage and maturity, and proved that the country's judicial system is not the type contemplated by the word "unable" in Article 17 of the Rome Statute. Impunity for the atrocities of the Lord's Resistance Army in northern Uganda is not a consequence of a lack of resolve to bring the culprits to justice, or of the country's courts to deal with offenders. The explanation is rather more banal: they simply cannot catch them. The International Criminal Court was not established with such situations in mind.

The other issue lurking in the debate about non-state actors, the prosecution of terrorists, is flagged by Professor Bassiouni in his recent book. He warns against using crimes against humanity against al-Qaeda. But in the weeks that followed September 11, 2001, many recognized authorities in the field of international law described the attacks as a "crime against humanity." The U.N. High Commissioner for Human Rights, Mary Robinson, used this characterization,[38] as did London barrister Geoffrey Robertson[39] and French legal academic Alain Pellet.[40] Antonio Cassese was somewhat more circumspect, observing cautiously that "it may happen that States gradually come to share this characterisation."[41] Other writers discussed the matter without taking any real position, implying that it was perhaps so obvious as to require no discussion.[42] Among non-governmental organizations, Human Rights Watch spoke of

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[38] Mary Robinson, High Commissioner for Human Rights, Transcript of press briefing (Sept. 2001).

[39] TIMES, Sept.18, 2001, at 18.

[40] LE MONDE, Sept. 21, 2001, at 12.

[41] Antonio Cassese, *Terrorism Is Also Disputing Some Crucial Legal Categories of International Law*, 12 EUR. J. INT'L L. 993, 995 (2001).

[42] N.J. Schrijver, *Responding to International Terrorism: Moving the Frontiers of International Law for "Enduring Freedom"?*, 48 NETH. INT'L L. REV. 271 (2001); Mark Drumbl, *Judging the 11 September Terrorist Attack*, 24 HUM. RTS. Q. 232 (2002).

crimes against humanity, although the International Commission of Jurists was more hesitant and equivocal.[43] None of these sources provided any significant rationale for their conclusions.

Advocates of describing the September 11 events as crimes against humanity sometimes argue that the text of Article 7 of the Rome Statute should be interpreted broadly and flexibly. In this way, unclear cases, like the twin towers attacks, are to be made to fit within the definition. They have obviously forgotten the terms of Article 22(2) of the Statute, which reads: "The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted." But aside from concerns about fairness to the accused, supporters of the International Criminal Court should consider the damage that an excessively liberal interpretation may do to the ratification campaign. The danger of "flexible" or "expansive"[44] interpretation of the definition of crimes against humanity is surely very much in the minds of the many states that have signed the Statute but hesitated at ratification, as well as those that never signed at all.

Cherif Bassiouni's perspective on the state plan or policy element in crimes against humanity is not a popular one. Fortunately for international law, he is a man who has never been inclined to tailor his views with an eye to fashion. He has set out his position with clarity and candor. Looked at coldly and objectively, his arguments are stronger and more convincing than those of writers and judges who posit what ultimately amounts to an unmanageably broad approach to crimes against humanity. In its landmark ruling on crimes against humanity of June 28, 2005, the Supreme Court of Canada considered the issue of whether there was a state plan or policy element. It noted Professor Bassiouni's position with considerable deference[45] but also acknowledged that the ICTY Appeals Chamber was taking the law in a different direction. "It seems that there is currently no requirement in customary international law that a policy underlie the attack, though we do not discount the possibility that customary international law may evolve over time so as to

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[43] Roderico Andreu-Gueran, *Terrorisme et droits de l'homme*, REV. INT'L COMMISSION OF JURISTS 31 (2002).

[44] The Darfur Commission argues for "expansive interpretation" of the concept of genocide. *See Report of the International Commission, supra* note32, para. 501.

[45] Mugesera v. Canada (MCI), [2005] 2 S.C.R.100, 157.

incorporate a policy requirement," said the Supreme Court of Canada.[46] At the very least, this prescient observation confirms the legitimacy of the ongoing debate on the question and manifests a degree of skepticism about the position of the Appeals Chamber. Moreover, the Supreme Court of Canada also acknowledges the persuasive strength and validity of Professor Bassiouni's position.

[46] *Id.* para. 158.

CHAPTER 13

"THE ONLY THING LEFT IS JUSTICE": CHERIF BASSIOUNI, SADDAM HUSSEIN, AND THE QUEST FOR IMPARTIALITY IN INTERNATIONAL CRIMINAL LAW

*Diane Marie Amann**

"Suddenly, the only thing left is justice." Thus did Professor M. Cherif Bassiouni explain why the United States, stung by its failure to find the weapons of mass destruction that were said to compel invasion of Iraq, shifted focus to the trial of deposed dictator Saddam Hussein.[1] Yet these words have a broader application: stripped of irony, they serve as a maxim for Bassiouni's own career. His first works, published in the 1960s, examined the role of justice in society.[2] In ensuing decades Bassiouni worked to deploy justice as a weapon against the mayhem of Cold War proxy conflicts and civil wars marked by genocide and ethnic cleansing. His academic writings, experts' reports, and active participation aided the development of a network of justice norms and institutions designed to regulate the commission and consequences of crimes that warrant international condemnation.

Others likewise worked to promote the cause of international criminal justice. Individuals, among them many of the contributors to this volume, organizations, and nation-states all played essential parts. Still, Bassiouni's role deserves particular attention. His *œuvre* displays remarkable breadth, treating issues as diverse as anti-war demonstrations, *ad hoc*

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[1] *Interview: Cherif Bassiouni*, RELIGION & ETHICS NEWS WKLY., Feb. 13, 2004, http://www.pbs.org/wnet/religionandethics/week724/interview2.html [hereinafter *Bassiouni Interview*].

[2] *E.g.*, M. CHERIF BASSIOUNI, CRIMINAL LAW AND ITS PROCESSES: THE LAW OF PUBLIC ORDER (1969); M. Cherif Bassiouni, *International Extradition: The American Experience and a Proposal*, 15 WAYNE L. REV. 733 (1968).

international criminal tribunals, cross-border offenses, and crimes against humanity.[3] His treatise and related works on the law of international extradition are must-cites.[4]

A central concern of Bassiouni's career has been the lot of victims of human rights violations. A frequent author on victims' issues, he served as U.N. expert on victim restitution, compensation, and rehabilitation.[5] His U.N.-commissioned investigations into sexual violence and other international crimes committed during the Balkan wars prepared the way for establishment of the first *ad hoc* tribunal since the Nuremberg era.[6] Thereafter, Bassiouni chaired the Drafting Committee at the diplomatic conference that produced the Rome Statute of the International Criminal Court, a body with some power to award reparations to victims.[7]

Perhaps less well noted, but well worth noting, is the consistency with which Bassiouni's work has negotiated the tension inherent in the interplay of criminal justice and human rights, that is, between the keen

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[3] *See, e.g.*, M. CHERIF BASSIOUNI, THE LAW OF DISSENT AND RIOTS (1971); M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW (2d rev. ed. 1999); M. Cherif Bassiouni, *From Versailles to Rwanda in 75 Years: The Need to Establish a Permanent International Criminal Court*, 10 HARV. HUM. RTS. J. 11 (1997); *International Drug Trafficking and Money Laundering*, 82 AM. SOC'Y INT'L L. PROC. 444, 445–46 (1988) (remarks by M. Cherif Bassiouni).

[4] *See* M. CHERIF BASSIOUNI, INTERNATIONAL EXTRADITION AND WORLD PUBLIC ORDER (1974)).

[5] *See, e.g.*, M. Cherif Bassiouni, *International Recognition of Victims' Rights, in* TERRORISM, VICTIMS, AND INTERNATIONAL CRIMINAL RESPONSIBILITY 96 (2003); M. Cherif Bassiouni, *The Protective of 'Collective Victims' in International Law, in* INTERNATIONAL PROTECTION OF VICTIMS 181 (M. Cherif Bassiouni ed., 1988); *The Rights to Restitution, Compensation and Rehabilitation for Victims of Grave Violations of Human Rights and Fundamental Freedoms, Final Report of the Special Rapporteur, Mr. M. Cherif Bassiouni*, U.N. Doc. E.CN.4/2000/62 (Jan. 18, 2000).

[6] M. CHERIF BASSIOUNI & MARCIA MCCORMICK, SEXUAL VIOLENCE: AN INVISIBLE WEAPON OF WAR IN THE FORMER YUGOSLAVIA (1996); M. Cherif Bassiouni, *Commission of Experts Established Pursuant to Security Council Resolution 780: Investigating Violations of International Humanitarian Law in the Former Yugoslavia*, 5 CRIM. L.F. 279 (1994). *See* M. Cherif Bassiouni, *Introduction to Developments in the Law: International Criminal Law*, 114 HARV. L. REV. 1943, 1953 and n.41 (2001) (discussing role of experts' commission in international criminal justice project).

[7] Rome Statute of the International Criminal Court arts. 75 and 79, U.N. Doc. No. A/CONF.183/9 (July 17, 1998) [hereinafter ICC Statute]. Notably, he criticized these provisions as insufficient to "satisfy most legal codifications" of victims' rights. M. Cherif Bassiouni, *Negotiating the Treaty of Rome on the Establishment of an International Criminal Court*, 32 CORNELL INT'L L.J. 433, 465 (1999).

desire to punish perpetrators of atrocity and the fundamental principle that every suspect receive fair and just treatment. That tension has come to fore with the recent revival of efforts to bring perpetrators of the world's worst crimes to account in judicial fora bound to apply international criminal law.

Three such fora are the International Criminal Tribunals for Rwanda and for the former Yugoslavia, founded on an *ad hoc* basis in the early 1990s, and the permanent International Criminal Court that began operations in 2002.[8] In each, an internationally negotiated body of law is applied by internationally selected judges and prosecutors who hold court at sites outside the national territory under scrutiny. Other novel fora operate within a particular country such as those established in East Timor, Kosovo, Sierra Leone, and Cambodia.[9] These mixed or hybrid tribunals apply statutes—some imposed by international bodies, others drafted jointly by national and extra-national figures—that enumerate internationally recognized offenses. Each such tribunal features other international components: often it receives considerable funding from sources outside the country where atrocities occurred, and often it includes nationals from other countries in its judges, prosecutors, or staff. Not infrequently commentators have distinguished these categories, so that only tribunals composed entirely of international judges are called "international," while those featuring a mixed national-interna-

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[8] *See* ICC Statute, *supra* note 7; Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg., Annex, U.N. Doc. S/RES/955 (Nov. 8, 1994), *as amended, available at* http://www.ictr.org/ENGLISH/basicdocs/statute.html; Statute of the International Criminal Tribunal for the former Yugoslavia, S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., Annex, U.N. Doc. S/RES/827 (May 25, 1993), *as amended, available at* http://www.un.org/icty/legaldoc/index.htm. *See also* Diane Marie Amann, *The International Criminal Court and the Sovereign State, in* GLOBAL GOVERNANCE AND INTERNATIONAL LEGAL THEORY 185, 187–89 (Ige F. Dekker & Wouter G. Werner eds., 2004) (setting forth history of adoption and entry into force of ICC Statute) [hereinafter Amann, *ICC*].

[9] *See* Draft Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea, U.N. GAOR 3d Comm., 57th Sess., Annex, Agenda Item 109(b), U.N. Doc. A/57/806 (2003); Section 10 of the United Nations Transitional Administration in East Timor (UNTAET) Regulation No. 2000/11 on the Organization of Courts in East Timor, U.N., 55th Sess., at 4, U.N. Doc. UNTAET/REG/2000/11 (2000), *available at* http://www.un.org/peace/etimor/untaetR/Reg11.pdf; Statute of the Special Court for Sierra Leone, *available at* http://www.sc-sl.org/scsl-statute.html; United Nations Interim Administration in

tional bench are called "internationalized."[10] Though useful for some purposes, that distinction obscures that each forum rests at a different point on a spectrum of internationality. Each is one of several judicial mechanisms available to serve the international criminal justice project. This chapter, which focuses analysis on a phenomenon recurrent throughout that larger project, generally refers to both the international-bench and the mixed-bench options as "international" tribunals.[11]

These recent efforts at international criminal justice are laudatory, for they have provided venues for adjudication of the kind of atrocities that not long ago passed into history without punishment of the culprits nor redress for the victims. Yet these efforts have had their share of blemishes. No doubt because of the unspeakable nature of the crimes alleged, or perhaps even out of fear that a wily demagogue might figure a way to win at trial, some participants in the international justice project seemed to prefer securing retribution to reinforcing fairness. France's leading human rights organization, for example, began a release with this slogan: "*Garantir les droits des victimes avant tout!*"[12] Taken literally, the ideal of guaranteeing victims' rights above all implies an uncritical celebration of

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Kosovo (UNMIK) Regulation No. 2000/64 (Dec. 15, 2000), *available at* http://www.unmikonline.org/regulations/2000/reg64-00.htm.

[10] *E.g.*, INTERNATIONALIZED CRIMINAL COURTS: SIERRA LEONE, EAST TIMOR, KOSOVO, AND CAMBODIA (Cesare P.R. Romano et al. eds., 2004); Sylvia de Bertodano, *Current Developments in Internationalized Courts*, 1 J. INT'L CRIM. JUST. 226 (2003).

[11] To subsume all such tribunals within international criminal justice is consistent with other scholarly treatments. *See, e.g.*, Jacob Katz Cogan, *International Criminal Courts and Fair Trials: Difficulties and Prospects*, 27 YALE J. INT'L L. 111, 127–28 (2002) (discussing in analysis of "international criminal courts" an example that lies closer to the national end of the spectrum than even most hybrid tribunals: the panel of Scottish judges who presided in the Netherlands at the trial of Libyans charged with bombing a plane in Lockerbie); Laura A. Dickinson, *Using Legal Process to Fight Terrorism: Detentions, Military Commissions, Internaational Tribunals, and the Rule of Law*, 75 S. CAL. L. REV. 1407, 1411 (2002) (analyzing not only hybrid tribunals, but also "internationalized military commission[s]," as "alternative 'quasi-international' models" for adjudication of terrorism-related offenses); Mark A. Drumbl, *Collective Violence and Individual Punishment: The Criminality of Mass Atrocity*, 99 NW. U. L. REV. 539, 542–44 and nn.12–19, 551 (2005) (characterizing all such tribunals as "[i]nternational [c]riminal [l]aw [i]nstitutions"); Patricia M. Wald, *Accountability for War Crimes: What Roles for National, International, and Hybrid Tribunals?*, 98 AM. SOC'Y INT'L L. PROC. 192, 192 (2004) (analyzing past and predicting future of different "individual accountability mechanisms for war crimes and crimes against humanity").

[12] Fédération Internationale des Ligues des Droits de l'Homme, *Assemblée des Etats parties à la Cour pénale internationale*, Sept. 2, 2004, *available at* http://www.fidh.org/article.php3?id_article=1867.

the expansion of inter-state power that would undermine the 20th century's global revolution in the rights of the accused, thus risking treatment that is less than fully fair to accused individuals.[13]

Moments when the balance between retribution and fairness seemed askew pointed to what may be called an "impartiality deficit" in international criminal justice. The term derives from "democracy deficit," the label by which multi-lateral institutions are faulted for lack of accountability mechanisms, such as popular elections, common in modern constitutional states.[14] The label already has spread to other contexts: one now reads of a "social deficit" seen to arise out of globalization on a capitalist model and of a "pluralistic deficit" marked by an inability to represent the interests of individuals and groups within a legal or political system.[15] Critics have extended the notion of democratic deficit to a centerpiece of the international criminal justice project, the International Criminal Court.[16] In contrast, the impartiality deficit critique assumes that the international community acted appropriately when it sought to supplant the decades of impunity that followed post-World War II trials with a new era of international criminal adjudication. Indeed, it is in the hope of improving the quality of international criminal justice mechanisms that the impartiality deficit critique exposes instances in which

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[13] *See, e.g.*, Diane Marie Amann, *Harmonic Convergence? Constitutional Criminal Procedure in an International Context*, 75 IND. L.J. 809, 815–45 (2000) (tracing developments in defense rights) [hereinafter Amann, *Convergence?*].

[14] *See, e.g.*, Douglas Lee Donoho, *Democratic Legitimacy in Human Rights: The Future of International Decision-Making*, 21 WIS. INT'L L.J. 1, 5–29 (2003) (analyzing criticism); J.H.H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403, 2417–19, 2429–31, 2465–74 (1991) (tracing critique in Europe). The critique was extended beyond the context of intergovernmental institutions, to a national government itself, in Jamin Raskin, *A Right-to-Vote Amendment for the U.S. Constitution: Confronting America's Structural Democracy Deficit*, 3 ELECTION L.J. 559 (2004).

[15] *See* Serena Baldin, *Pluralistic Deficit and Direct Claims to European Constitutional Courts*, 12 IND. J. GLOBAL LEGAL STUD. 711 (2005); Luigi Malferrari, *The Functional Representation of the Individual's Interests before the EC Courts: The Evolution of the Remedies System and the Pluralistic Deficit in the EC*, 12 IND. J. GLOBAL LEGAL STUD. 667 (2005); Jean-Louis Andreani, *Le déficit social européen et la Constitution*, LE MONDE, Apr. 2, 2005, *available at* http://www.lemonde.fr/web/article/0,1-0@2-631760,36-634232,0.html.

[16] Madeline Morris, *The Democratic Dilemma of the International Criminal Court*, 5 BUFF. CRIM. L. REV. 591, 592 (2002) (questioning "the democratic accountability of the ICC itself"); *see* David Golove, *The New Confederalism: Treaty Delegations of Legislative, Executive, and Judicial Authority*, 55 STAN. L. REV. 1697, 1697–99 (2003) (listing ICC as one institution that gives rise to democracy deficit critique, in an article favorable to international cooperation).

defendants were denied any component of this injunction of the International Covenant on Civil and Political Rights: "In the determination of any criminal charge against him, . . . everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."[17]

The Covenant's guarantee points to a variety of questions that may be analyzed within the concept of impartiality deficit. One might examine several tribunals to see whether they meet a single fairness criterion, such as the duty of judges to act without bias.[18] Alternatively, one might assess a single tribunal in light of several criteria. This chapter pursues the latter course, applying the impartiality deficit critique to a tribunal that Professor Bassiouni helped to plan, the Iraqi High Criminal Court that at this writing stands poised to try persons charged with responsibility for torture, killings, and other crimes of repression over a 35-year period.[19] Chosen over options much closer to the "international" end of

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[17] International Covenant on Civil and Political Rights, art.14(1), Dec. 16, 1966, G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 49, U.N. Doc. A/6316 (1967) [hereinafter Covenant or ICCPR]. Iraq ratified the ICCPR in 1971, while Hussein was in power. *See Ratification of International Human Rights Treaties—Iraq*, http://www1.umn.edu/humanrts/research/ratification-iraq.html. *See* M. Cherif Bassiouni, *Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions*, 3 DUKE J. COMP. & INT'L L. 235, 267–85 (1993) (setting forth domestic and international fair trial provisions) [hereinafter Bassiouni, *Justice*].

This chapter views scrutiny as "a sign of the maturation of the international judicial system, as the system begins to exhibit the traits and adhere to the same standards of fairness and impartiality of domestic systems." Ruth Mackenzie & Philippe Sands, *International Courts and Tribunals and the Independence of the International Judge*, 44 HARV. INT'L L.J. 271, 275 (2003). Implicit in that statement is the fact that components of the impartiality deficit critique also may be applied to evaluate criminal justice within particular nation-states. *See, e.g.*, Patricia M. Wald, *Reflections on Judging: At Home and Abroad*, 7 U. PA. J. CONST'L L. 219, 231 (2004) (referring to criticism of unelected U.S. judges).

[18] *See* Diane Marie Amann, *Impartiality Deficit and International Criminal Judging, in* ACCOUNTABILITY FOR ATROCITY (William A. Schabas & Ramesh Thakur eds., 2007).

[19] *See* http://law.case.edu/saddamtrial/documents/IST_statute_unofficialenglish.pdf [hereinafter Court Law or Law]; Iraqi High Criminal Court Rules for Proceedings and evidence gathering, *available at* http://law.case.edu/saddamtrial/documents/IST_rules_procedure_evidence.pdf [hereinafter Court Rules]. News media in the United States reported that these instruments were "adopted without fanfare by the transitional Iraqi National Assembly" in fall 2005. *Compare* Henry Weinstein & Richard Boudreaux, *Hussein Will Not Be Allowed to Represent Himself at Trial*, L.A. TIMES, Sept. 21, 2005, at A5 [hereinafter, Weinstein & Boudreaux, *Represent*] (stating

the spectrum of international criminal justice mechanisms, by this variant a bench most likely comprising only national judges is to decide, in a Baghdad courthouse, whether defendants committed crimes defined in accordance with international criminal law.[20] This chapter will evaluate the Court in light of the impartiality deficit critique once it has set out the concerns key to that critique. Initial implementation of the Court occurred in a manner so devoid of basic guarantees, the chapter will show, that there seemed little likelihood that the accused would receive either the appearance or reality of a fair trial. It scarcely came as a sur-

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adoption date as August 11) *with Unofficial English Translation of the new IST Statute*, http://law.case.edu/saddamtrial/content.asp?id=2 (stating that documents were adopted "in September 2005"). Thereafter, I learned that in fact the only English translation available in late 2005 was inaccurate; that is, that the version published in the *Iraqi Official Gazette* differs in its numbering of paragraphs from the unofficial English translations. Because the latter were the only documents available in English at this writing, and because the content appears virtually the same in both the official Arabic and the unofficial English versions, I chose to use the unofficial English translation in this article. I am indebted to David E. Guinn, Executive Director, International Human Rights Law Institute, DePaul University College of Law, Chicago, and to Mohamed AbdelAziz GadelHak Ibrahim, senior fellow at that Institute and a judge in the Egyptian Ministry of Justice, for their assistance in determining the differences between the official Arabic and unofficial English versions.

In the version used, the documents have been translated from Arabic into English, sometimes roughly so, as indicated by the fact that one document speaks of the "Higher," the other of the "High," Court. In an effort to minimize confusion, this chapter uses the title as stated in Weinstein & Boudreaux, *Represent, supra*, and generally refers to the entity as "the Court." *See also infra* text accompanying notes 54–58 (outlining evolution from tribunal to the Court).

On the date for trial as of this writing—that is, as of the end of September 2005—see *Hussein's Trial Set for Oct. 19; Defense Objects*, L.A. TIMES, Sept. 5, 2005, at A3 [hereinafter *Defense Objects*]. On Bassiouni's involvement in this project, see *infra* text accompanying notes 33–41, 91–100.

[20] *See infra* notes 37 and 93 and accompanying text (describing variety of options considered or recommended in planning stages of Iraqi tribunal); *infra* notes 35–41 and 53–57 and accompanying text (detailing design of option chosen). The mix of international and national components, no doubt coupled with the international character of the invasion out of which the Court emerged, has prompted others as well to examine Iraqi tribunal proposals in light of international law or prior efforts at international criminal justice. *See, e.g.*, Jose E. Alvarez, *Trying Hussein: Between Hubris and Hegemony*, 2 J. INT'L CRIM. JUST. 319 (2004); Amnesty Int'l, *Iraq: Iraq Special Tribunal—Fair Trials Not Guaranteed*, May 13, 2005, *available at* http://web.amnesty.org/library/Index/ENGMDE140072005; Ilias Bantekas, *The Iraqi Special Tribunal for Crimes Against Humanity*, 54 INT'L & COMP. L.Q. 237 (2004); Anthony D'Amato, *Trying Saddam: The Iraqi Special Tribunal for Crimes against Humanity*, JURIST, Dec. 15, 2003, http://jurist. law.pitt.edu/forum/forumnews132.php.

prise that Bassiouni—again straddling the divide between the victims' and defendants' rights—has said as much.

I. UNFORTUNATE HALLMARKS OF IMPARTIALITY DEFICIT

On one matter, the concerns of democracy deficit and impartiality deficit overlap. At issue in both critiques is granting new institutions powers once reserved for the nation-state, the unit of the global order that, in its liberal incarnation, claims authority delegated it by the same sovereign populace to which it is accountable through democratic processes of deliberation. Establishment of the new institutions provoked democratic deficit critics to query the source of institutional authority, the means by which institutional decisions are made, and the institutional mechanisms for review and revision of decisions. Surely these questions pertain to international criminal tribunals empowered to combat crime with force—forcible investigation, arrest, detention, and trial, and on conviction, deprivation of property, incarceration, or, in one case, execution.[21] Thus, it is appropriate in the course of an impartiality deficit inquiry to ask: Who authorized this body, and these officers, to pursue this particular person? Why has the tribunal's jurisdiction been framed in this particular way? Who is demanding, and who is exempted from, prosecution? Who may contribute to the prosecution strategy? Is the tribunal process sufficiently transparent to admit answers to such questions?

A critique of impartiality deficit, unlike that of democracy deficit, does not end with those overarching concerns. The former gives great scrutiny to procedures as well as structure, in the hope of assuring that proceedings against persons accused of infamous crimes will be initiated and conducted with the professionalism and dispassionate detachment required to assure a fair trial. Thus, an impartiality deficit inquiry encompasses matters such as these: the validity and circumstances of detention; the presence or absence of official comment on the culpability of an accused; the degree to which the tribunal's founding documents are clear and crafted to ensure the fulfillment of recognized criminal justice standards; provisions for qualification, selection, and, if needed, discipline or dismissal of court officers; the reliability of the evidence adduced; and, finally, the measures taken, if any, to assure a vigorous defense.

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[21] *See infra* notes 45–46, 79–81, 97 and accompanying text (discussing capital punishment and impending trials of deposed Iraqi leaders).

On each of these points some of the new tribunals have been found lacking some of the time. Certain states and individuals have lodged objections regarding authority and accountability.[22] Of particular concern are the devils in the details—those defects that have occurred more than once during the first decade of the new era of adjudication.

Trash-talking—declarations that a suspect is guilty of heinous crimes and so deserves harsh punishment—has marked more than one tribunal proceeding. Sometimes the comments came from the political leaders who were funding and establishing the tribunals; at other times, it came from officers of the tribunal. In the early days of the *ad hoc* Yugoslavia Tribunal, for example, in what one critic called "a foray into the province of the Prosecutor," judges appointed to preside at trials of persons charged with genocide campaigned for the arrest of those same persons.[23] Such *ex camera* proclamations risk infringing on the internationally recognized presumption of innocence[24] and furthermore undermine the appearance of impartiality that a tribunal must maintain if it is to win public respect.

There have been instances of prolonged detention, at times on uncertain grounds, either without judicial review or with a review that is

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[22] *See, e.g.*, Diane Marie Amann & M.N.S. Sellers, *The United States and the International Criminal Court*, 50 AM. J. COMP. L. 381, 381–91 (supp. 2002) (listing reasons that some in the United States opposed the ICC); Morris, *supra* note 16, at 592 (setting forth a democracy deficit critique of the ICC). *But see* Amann, *ICC, supra* note 8, at 190–94 (disagreeing with critique).

[23] Sylvia de Bertodano, *Judicial Independence in the International Criminal Court*, 15 LEIDEN J. INT'L L. 409, 417 (2002) (referring to press release issued by judges of the International Criminal Tribunal for the former Yugoslavia); *see* Marlise Simons, *Italian Issues a Warning At War Crimes Tribunal*, N.Y. TIMES, July 26, 1996, at 12 (quoting "public outburst" by the then-President of the Yugoslavia Tribunal, that failure to capture fugitive indictees would send the message, "'Go ahead! Kill, torture, maim! Commit acts of genocide! . . . You may enjoy impunity!'"). For a more recent instance in which a judge joined with other officers to promote a tribunal, see *Sierra Leone: Truth and Reconciliation*, RELIGION & ETHICS NEWS WKLY., Jan. 10, 2003, http://www.pbs.org/wnet/religionand ethics/weekly619/p-cover.html (quoting, *inter alia*, Geoffrey Robertson, then President of the Special Court for Sierra Leone).

[24] *See* Hum. Rts. Comm., *General Comment No. 13 (Art. 14(2) of the ICCPR*), U.N. Doc. HRI/GEN/1/Rev.1 at 14 (1994) ("by reason of the presumption of innocence, the burden of proof for the charge is on the prosecution" and "[n]o guilt can be presumed until the charge has been proved beyond reasonable doubt"); *see also* Amann, *Convergence?, supra* note 13, at 824 and nn.97–98 (detailing codification in regional and international instruments of presumption of innocence); Bassiouni, *Justice, supra*

less than searching.[25] Foday Sankoh, leader of the rebels who waged a horrific civil war in Sierra Leone throughout the 1990s, spent many, many months in custody before he was charged, for the simple reason that the Special Court for Sierra Leone was not established until nearly two years after his arrest.[26] An Appeals Chamber at first ordered the release of Jean-Bosco Barayagwiza, held on charges of genocide by the *ad hoc* Rwanda Tribunal, on account of the nature and length of his pre-trial detention. When the Rwandan government threatened no longer to cooperate with the tribunal, however, that order was rescinded.[27]

At times there has been cause for concern about the qualifications, independence, or impartiality of some tribunal officers. A number of statutes omit a requirement that prosecutors, registrars, and judges be impartial. Nor do they prescribe procedures for removal if an officer manifests bias, generally or in a specific case. Some say little about the expertise required of judges—notwithstanding that litigation of the complex crimes enumerated in these statutes, pertaining to factual situations that seize the emotions, via evidence that is at the same time overwhelming and incomplete, demands jurists of the highest caliber.

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note 17, at 265 (discussing national and international articulations of innocence presumption).

[25] An international standard of requisite justifications and conditions for detention may be found in ICCPR, *supra* note 17, Article 9. *See also* Diane Marie Amann, *Guantánamo*, 42 COLUM. J. TRANSNAT'L L. 263, 331–23 (2004) (discussing international and regional jurisprudence respecting detention); Bassiouni, *Justice, supra* note 17, at 254–62 (detailing international and national guarantees of security of the person and freedom from arbitrary detention).

[26] *See* Letter dated 6 March 2002 from the Secretary-General Addressed to the President of the Security Council, U.N. SCOR, 56th Sess., Attachment: Statute of the Special Court for Sierra Leone, at 29, U.N. Doc. S/2002/246 (2002); Michael Peel, *Rebel leader dies awaiting trial in Sierra Leone*, FIN. TIMES (London), July 31, 2003, at 9 (stating that Sankoh, who had been arrested in May, was charged after Special Court Statute took effect in March 2002).

[27] Prosecutor v. Barayagwiza, Appeals Decision, Case No. ICTR-97-19-DP (Nov. 3, 1999), *and* Barayagwiza v. Prosecutor, Request for Review or Reconsideration, Case No. ICTR-97-19-AR72 (Mar. 31, 2000), *discussed in* Allison Marston Danner, *Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court*, 97 AM. J. INT'L L. 510, 530–32 (2003), *and* William A. Schabas, *International Decisions: Barayagwiza v. Prosecutor*, 94 AM. J. INT'L L. 563 (2000). In a decision that was on appeal at this writing, an ICTR Trial Chamber that found Barayagwiza guilty of genocide, incitement to genocide, and a crime against humanity deemed him deserving of a life sentence, yet reduced the term to thirty-five years, minus time served, because of the lengthy pretrial detention. Prosecutor v. Nahimana, Case No. ICTR-99-52-T, paras. 1093, 1106–1107 (Dec. 3, 2003).

It must be said, too, that the evidence by which some persons were convicted during the first decade of renewed commitment to international criminal justice was not always as sound and solid as one would like. Zoran and Mirjan Kupreskic served four years in jail before the Yugoslavia Tribunal's Appeals Chamber ruled that the Trial Chamber's opinion did not support their convictions for the crime of persecution.[28] Another Appeals Chamber freed General Tihomir Blaskic, who had been sentenced to 46 years in prison, after the post-conviction release of documents from Croatia's archives showed him to have played a lesser role in the incidents at bar.[29]

Though the reasons for such miscarriages of justices are many, one reason is a systemic tendency to discount the role that a competent and vigorous defense plays in assuring a fair trial. Statutes and other founding documents, for instance, embody the now considerable consensus regarding the names and elements of international crimes. But they evince less consensus about what fairness guarantees are essential. Moreover, the statutes typically permit a balancing of the rights of the accused against those of victims, and that has led to decisions that risked undercutting the guarantee of a meaningful defense.[30] More fundamentally, not one statute provides for a defense organ. In stark contrast with those national systems in which an indigent defendant is guaranteed the state-paid assistance of a public defender or legal aid lawyer, in all but one tribunal there is no Office of the Defense, and in many there has

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[28] Prosecutor v. Kupreskic, Case No. IT-96-16-A, Appeals Chamber Judgment (Oct. 23, 2001), *discussed in* Diane Marie Amann, *International Decisions: Prosecutor v. Kupreskic*, 96 AM. J. INT'L L. 439 (2002).

[29] Prosecutor v. Blaskic, Case No. IT-95-14-A, Appeals Chamber Judgment (July 29, 2004) (reducing sentence to nine years); *see* Marlise Simons, *Hague War Crimes Tribunal Frees a Convicted General*, N.Y. TIMES, July 30, 2004, at A4 (reporting that Blaskic, who had served eight years in custody pending trial, would be released immediately).

[30] Inclusion of such a provision in the statute of the first post-Nuremberg tribunal prompted controversy. *Compare* Monroe Leigh, *The Yugoslav Tribunal: Use of Unnamed Witnesses Against Accused*, 90 AM. J. INT'L L. 235 (1996) (criticizing *Prosecutor v. Tadic*, Case No. IT-94-1-T, Trial Chamber Decision on the Prosecutor's Motion Requesting Protective Measures (Aug. 10, 1995), *reprinted in* 7 CRIM. L.F. 139 (1996), for permitting prosecution to withhold from defense identity of certain witnesses) *with* Christine M. Chinkin, *Due Process and Witness Anonymity*, 91 AM. J. INT'L L. 75 (1997) (supporting decision).

been little oversight of defense counsel.[31] Some conduct of some attorneys thus has been unethical or ineffective.[32]

Having identified a cluster of failings that recurred in the first decade of revived adjudication of atrocity, it is time to examine a newcomer to the international criminal justice project.

II. IMPARTIALITY DEFICIT AND THE IRAQI HIGH CRIMINAL COURT

A first draft statute for a special Iraqi tribunal was produced by Professor Bassiouni before a U.S.-led coalition invaded Iraq.[33] This was well before Hussein's arrest on December 13, 2003, and well before the next-day release of a videotape of a rubber-gloved medic looking for lice on Hussein's disheveled head and examining Hussein's mouth much as a buyer would prod a plowhorse on market day.[34] Days before Hussein's

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[31] In one mixed tribunal, a Defence Unit was established by *Defence Office*, Rule 45, Special Court for Sierra Leone, Rules of Procedure and Evidence (last amended May 29, 2004), *available at* http://www.sc-sl.org/scsl-procedure.html. *See* Sylvia de Bertodano, *Report on Defence Provisions for the Special Court for Sierra Leone*, Feb. 28, 2003, http://www.specialcourt.org/SLMission/NPWJDocs/DefenceReportSdBFEB03.html (evaluating unit) [hereinafter de Bertodano, *Defence*]; John R.W.D. Jones et al., *The Special Court for Sierra Leone: A Defence Pespective*, 2 J. INT'L CRIM. JUST. 211 (2004) (same). On difficulties that have arisen out of the more typical practice of making defense matters one among the many duties of a tribunal administrator, see, e.g., D'Amato, *supra* note 20 (recounting own experiences as defense counsel at the Yugoslavia Tribunal); James Blount Griffin, Note, *A Predictive Framework for the Effectiveness of International Criminal Tribunals*, 34 VAND. J. TRANSNAT'L L. 405, 445 n.305 (2001) (writing of detainee hunger strike occasioned by Rwanda Tribunal registrar's policy regarding appointment of counsel).

[32] *E.g.*, de Bertodano, *Defence, supra* note 31 (reporting on U.N. determination that staff of one *ad hoc* tribunal "had repeatedly requested and received kickbacks" from defense counsel, and stating that attorneys had split fees with the defendants who chose them). *See* Bassiouni, *Justice, supra* note 17, at 280–82 (discussing international and national guarantees of effective assistance of counsel).

[33] Gary Young, *Iraqi Nuts and Bolts of Hussein's War Crimes Trial*, NAT'L L.J., Dec. 22–29, 2003, at 6 ("Bassiouni wrote the first draft of the statute, prepared prior to the U.S. invasion, while he was a member of the U.S. State Department's future of Iraq project."); *see Bassiouni Interview, supra* note 1 (describing involvement).

[34] For excerpts of the taped examination, see *Saddam Capture Videos: Dec. 14, 2003, available at* http://www.cbsnews.com/stories/2003/12/14/politics/main588441.shtml; *accord* John Hendren, *Pentagon Labels Hussein a POW, Conferring Him Special Rights*, L.A. TIMES, Jan. 10, 2004, at A1 (reporting that Detlev Vagts, Harvard law professor, called dissemination of these images "a rather aggravated violation" of international humanitarian law). On Hussein's arrest, see John F. Burns, *U.S. Officers Display the 'Rathole' Where Hussein Hid*, N.Y. TIMES, Dec. 16, 2003, at A21; *'We Got Him,' and Then a Call by American and Iraqi Officials for Reconciliation*, N.Y. TIMES, Dec. 15, 2003, at A18.

capture, a Statute of the Iraqi Special Tribunal for Crimes Against Humanity had been adopted.[35] Almost two years later, and just weeks before the first trial was to begin, this Statute was revoked and replaced by a Court Law establishing the Iraqi High Criminal Court.[36] Most provisions in the Court Law and its predecessor were the same. Calls for a new *ad hoc* international or hybrid tribunal were rebuffed in favor of a national forum with distinctly international components.[37] The Court was to have jurisdiction over not only certain violations of national law, but also genocide, crimes against humanity, war crimes; definitions of these latter crimes conformed to definitions recognized under international criminal law.[38] National and perhaps international judges, sitting in a national courtroom, would apply international criminal law in the course of considering allegations of internal and cross-border crimes that could date back as far as 1968.[39] Bassiouni's imprint seemed especially dis-

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[35] Statute of the Iraqi Special Tribunal, art. 1(a), issued Dec. 10, 2003, http://www.cpa-iraq.org/audio/20031210_Dec10_Special_Tribunal.htm [hereinafter Statute or IST Statute or Tribunal Statute].

[36] *See supra* note 19 (discussing Court Law and Court Rules, both adopted in fall 2005).

[37] *See* Eric Stover, Hanny Megally & Hania Mufti, *Bremer's 'Gordian Knot': Transitional Justice and the US Occupation of Iraq*, 27 HUM. RTS. Q. 830, 838–43 (2005) (detailing steps surrounding establishment of tribunal). On calls for a tribunal closer to the "international" end of the spectrum, see, e.g., Diane F. Orentlicher, *Venues for Prosecuting Saddam Hussein: The Legal Framework*, ASIL INSIGHTS, Dec. 2003, http://www.asil.org/insights/insigh124.htm (preferring hybrid option); Kenneth Roth, *Now, Try Him in an International Court*, INT'L HERALD TRIB., Dec. 15, 2003, 2003 WLNR 560015; Joshua Rozenberg, *Trial in Iraq Could Result in Execution*, DAILY TELEGRAPH (London), Dec. 15, 2003, at 4 (reporting that "human rights campaigners have argued for a one-off international court"); *Iran MP Says Trial of Saddam 'Travesty of Justice,'* BBC MONITORING MIDDLE EAST, July 11, 2004, 2004 WL 84715110 (reporting on Iranian official's demand for international tribunal); Neil A. Lewis, *Bush Leaves Unclear Role of Iraqis In Any Trial*, N.Y. TIMES, Dec. 16, 2003, at A20 (citing support of some international lawyers for an international tribunal). Such a tribunal had been considered during the administration of President George H.W. Bush, but the proposal never was implemented. *See* Florence Barreth, *Quel tribunal serait le mieux à même de juger impartialement Saddam Hussein?*, LE TEMPS (Geneva, Switz.), Jan. 27, 2004, 2004 WL 71318394.

[38] *See* Court Law, *supra* note 19, art. 1(Second) (setting forth crimes within jurisdiction); *compare id.*, arts. 11–13 (defining genocide, crimes against humanity, and war crimes) *with* ICC Statute, *supra* note 7, arts. 6–8 (containing quite similar definitions for same offenses). The few national crimes within the Court's jurisdiction included manipulation of the judiciary, harm to national resources, use of force against an Arab country. Court Law, *supra* note 19, art. 14.

[39] Court Law, *supra* note 19, arts. 28 and 4 (Third) (mandating that "[t]he judges, investigative judges," and other court employees "must be Iraqi nationals," but per-

cernible with respect to one innovation. Alone among the international tribunals, in this Court an investigating judge was to conduct the early stages of the investigation without preference for either party to the case.[40] Bassiouni long had argued that the investigating judge—by tradition a fixture of criminal procedure in civil law systems—is essential to assure that the rights of the accused are protected in the early stages of the litigation.[41] Notwithstanding this innovation, in the course of implementation each of the unfortunate hallmarks of impartiality deficit made an appearance even before the first trial commenced.

Invective followed fast upon Hussein's arrest, and it did not abate as his trial date neared. At a news conference, even as he promised a transparent process that would "stand international scrutiny," U.S. President George W. Bush emphasized that Iraqis "were the people that were bru-

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mitting appointment of "non-Iraqi judges" in limited circumstances); *id.*, art. 1(Second) (authorizing jurisdiction over offenses "committed since July 17, 1968 . . . in the territory of the Republic of Iraq or elsewhere," and listing as offenses within Court's jurisdiction genocide, war crimes, cries against humanity, and war crimes, as well as certain violations of national law); *id.*, arts. 11–13 (defining international crimes in accordance with crimes with ICC Statute, *supra* note 7, arts. 6–8.

For commentary on nearly identical provisions that were set forth in IST Statute, *supra* note 35, see, e.g., Amnesty Int'l, *supra* note 20, § 2.1, (noting vagueness of founding documents on whether judges are obliged to apply internationally recognized standards); Bantekas, *supra* note 20, at 241–44 (discussing potential for *ex post facto* problems should prosecutors choose to litigate decades-old incidents); Yuval Shany, *Does One Size Fit All?*, 2 J. INT'L CRIM. JUST. 338, 342, 344 (2004) (raising same issues, and further viewing mix of international and domestic components "inconsistent"). *But see* Michael P. Scharf, *Is It International Enough?*, 2 J. INT'L CRIM. JUST. 330 (2004) (calling for addition of more international components).

[40] Court Law, *supra* note 19, arts. 3(First)(C), 8.

[41] *E.g.*, Amann, *Convergence?*, *supra* note 13, at 851 n.261 (quoting Letter from M. Cherif Bassiouni, Professor of Law, DePaul University, to Author (Mar. 21, 1999) (expressing concern that defense rights might not be protected when the prosecutor has the sole duty to investigate, as with "'a mass grave investigation . . . in a far away place which is not accessible to the defense,'" and contending that appointment of a neutral, investigating judge could help regulate prosecutors' conduct and ensure disclosure to defendant of all relevant information); *see id.* at 833 n.145, 837, 850 (providing further commentary on investigating judge and analogous posts).

Another characteristic of criminal proceedings in civil law countries was added in mid-2005. In authorizing "[f]amilies of victims and Iraqi persons harmed" to file a lawsuit that could be adjudicated by the Court, Court Law, *supra* note 19, Article. 22, Iraq moved toward a *partie civile* framework, unknown to the common law yet familiar in civil law systems. *See, e.g.*, Amann, *Convergence?*, *supra* note 13, at 838 and n.183, 844–45 n.226 (discussing *partie civile*).

talized by this man. He murdered them. He gassed them. He tortured them. He had rape rooms. And they need to be very much involved in the process."[42] Soon after he told journalist Diane Sawyer, "'Saddam Hussein deserves the ultimate punishment.'"[43] Bush's comments paled next to those of some Iraqi leaders. One Governing Council member said of Hussein, "'He must be tried first—and executed first.'"[44] When newly installed President Jalal Talabani said in spring 2005 that he would not sign a death warrant if Hussein were convicted, other politicians called for his resignation.[45] Talabani did an about-face, and a London tabloid published photos of detainee Hussein naked save for his jockey briefs,[46] as trial approached.

Such berating ran counter to the law's guarantee that a defendant is presumed innocent unless and until proved guilty. And yet it seemed unavoidable given the suffering wrought by the crimes charged. These facts underscored the difficulty of trying a former head of state on charges like genocide and crimes against humanity. Leaders responsible for such crimes will have ruled by force and terror, of course, but also by force of personality. Few will have had the opportunity to wield tools of terror unless they possessed a perverse charisma, and it must be expected that they will exploit that charisma at trial. To cite one example, televised hearings of the trial of Slobodan Milosevic so rekindled support that the deposed president was elected to the Serbian Parliament while in the

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[42] *From Bush, Promise of 'Transparent' Justice*, N.Y. TIMES, Dec. 16, 2003, at A18.

[43] *See The Penalty for Saddam*, TIMES UNION (Albany, N.Y.), Dec. 18, 2003, at A20 (quoting comment Bush made in television interview with Sawyer). Assignment of guilt did not begin with the Bush administration, however. *See* David J. Scheffer, *The Case for Justice in Iraq*, Sept. 18, 2000, http://www.fas.org/news/iraq/2000/09/iraq-000918.htm (declaring, in speech by Clinton administration ambassador for war crimes issues, that "it is beyond any possible doubt that Saddam Hussein and the top leadership around him have brutally committed war crimes and crimes against humanity for years," then calling for them to stand trial).

[44] Rajiv Chandrasekaran, *Iraqi Planners Hope to Start Trial by Spring*, WASH. POST, Dec. 16, 2003, at A1 (quoting Mowaffak Rubaie, "a council member who had been arrested and tortured by Hussein's secret police").

[45] Jamie Tarabay, Associated Press, *Saddam must die, president of Iraq told*, CHI. SUN-TIMES, Apr. 19, 2005, at 3.

[46] *See Tyrant's in His Pants*, SUN (London), May 20, 2005, at 1 (showing unclothed Hussein); *U.S. Transfers Najaf Control*, NEWSDAY, Sept. 7, 2005, at A23 (reporting that Talabani said on Iraqi television that "'Saddam deserves a death sentence 20 times a day'").

prisoner's dock at The Hague.[47] Hussein's first televised court appearance likewise confounded those who would demonize him. Footage showed a man who was well groomed, not unattractive, sometimes even avuncular. His gestures conveyed attitudes that varied from pensiveness to outrage, a performance that prompted a blogger to declare: "As an actor, Saddam Hussein has a range and gravitas that have drawn comparisons with Walter Matthau."[48] Hussein's rhetoric was deviously defiant. Asked his name, he said: "'I am Saddam Hussein al-Majid, the President of the Republic of Iraq.'" When the judge replied, "'No, you're the former President," Hussein countered, "'No. President. Current. It is the will of the people.'" Asked where he resided, he said, "'I live in each Iraqi's house.'" Then, later, "'This is all theater. The real criminal is Bush.'"[49]

One attribute of international criminal justice may encourage such histrionics. Since Nuremberg, many tribunals have been granted jurisdiction that excluded consideration of offenses by one side to a conflict. The few instances in which tribunals exercised statutory power to consider allegations against more than one side sparked what one might call "victors' ire";[50] more frequently, lopsided framing invited dismissal of tribunals' work as "victors' justice."[51] Though often too harsh, the latter

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[47] Scharf, *supra* note 39, at 334–35.

[48] Caption below photo of Hussein accompanying *Dubya in Fahrenheit 9/11: A Star Is Born*, SATIRIC PRESS, July 5, 2004, http://www.satiricpress.com/sp/archive/2004-07-5/a_fahrenheit911.asp.

[49] The quotes are drawn from Charlie Savage, *Trial Seen to Hold Potential Risks, Upside for Bush*, BOSTON GLOBE, July 2, 2004, at A17; *Saddam Defiant in Court*, ALJAZEERA.NET, July 1, 2004, http://english.aljazeera.net/NR/exers/554FAF3A-B267-427A-B9EC-54881BDE0A2E.html; *Transcript: Saddam's Arraignment*, FOX NEWS, July 1, 2004, http://www.foxnews.com/printer_friendly_story/0,3566,124433,00.html [hereinafter, *Transcript*]. For excerpts of this appearance, see *Saddam Capture Videos: Day in Court, available at* http://www.cbsnews.com/stories/2003/12/14/politics/main588441.shtml.

[50] *See, e.g.*, Lee A. Casey, *The Case Against the International Criminal Court*, 25 FORDHAM INT'L L.J. 840, 848–49 (2002) (providing, in article by former U.S. official and frequent opponent of international criminal justice projects, critical account of prosecutorial inquiry into allegations that the United States' 1999 bombing campaign had violated the Yugoslavia Tribunal's statute); Joseph Kambanda, *Is the Special Court Truly Independent and Impartial?*, CONCORD TIMES (Sierra Leone), Dec. 11, 2003, 2003 WNLR 7739031 (criticizing prosecution by Special Court for Sierra Leone of incumbent government minister described "as a hero of the decade long civil war" against rebel forces).

[51] This concept of one-sidedness, which provided the title for RICHARD H. MINEAR, VICTORS' JUSTICE: THE TOKYO WAR CRIMES TRIAL (1971), also was applied to the

brand has given defendants a means to undercut tribunals' legitimacy. An example was the use of an unclean hands, or *tu quoque*, defense at Nuremberg. Karl Donitz, a top admiral in Hitler's Navy, was alleged a war criminal in part because he had let shipwrecked enemy submariners die at sea. In his defense he elicited an admission of similar behavior from his American counterpart, Chester A. Nimitz—whose conduct lay beyond the jurisdiction of the Nuremberg tribunal and never was adjudicated in any other forum.[52]

Many hands enabled repression in Iraq. They are not only Iraqi hands, but also, by all accounts, American, and British, and others. None of the latter ever will be hauled before the Iraqi High Criminal Court, however, because the Statute was framed to exempt any suspect who is

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Nuremberg tribunal. *See* ALPHEUS THOMAS MASON, HARLAN FISKE STONE: PILLAR OF THE LAW 714–19 (1956) (writing that Stone, Chief Justice of the United States at the time that Supreme Court Justice Robert H. Jackson took leave from the Supreme Court to serve as Chief U.S. Prosecutor at Nuremberg, called the trial a "'high-grade lynching party'"); Danilo Zolo, *Back to the Nuremberg Paradigm?*, 2 J. INT'L CRIM. JUST. 313, 316–18 (2004) (embracing vengeance critique expressed by Hans Kelsen and others in Nuremberg era); *see also* Amann, *Convergence?, supra* note 13, at 820 and n.72 (citing similar criticism). Some have transferred the label to more recently established tribunals. *See* Dickinson, *supra* note 11, at 1407, 1465 and n.256 (citing use of victors' justice complaint with respect to adjudication in the Balkans); Megan A. Fairlie, *Rulemaking from the Bench: A Place for Minimalism at the ICTY*, 39 TEX. INT'L L.J. 257, 259 n.8 (2004) ("Although the Tribunal's success in its attempt to avoid being perceived as the representative of victors' justice is a matter for debate, it is doubtful whether any amount of international involvement could counter claim that its existence derives, in part, from the fact that 'sovereign equality of states simply does not exist.'") (quoting Ivan Simonovic, *The Role of the ICTY in the Development of International Criminal Adjudication*, 23 FORDHAM INT'L L.J. 440, 454–55 (1999)); Makau Mutua, *From Nuremberg to the Rwanda Tribunal: Justice or Retribution?*, 6 BUFF. HUM. RTS. L. REV. 77, 79–82 (2000) (criticizing recent *ad hoc* tribunals on victors' justice grounds). *But see* Mark S. Ellis, *Bringing Justice to an Embattled Region—Creating and Implementing the "Rules of the Road" for Bosnia-Herzegovina*, 17 BERKELEY J. INT'L L. 1, 2 (1999) (contending that because "the Yugoslav Tribunal is part of an international security regime that functions on behalf of the entire international community," its "mandate is much broader than the 'victors' justice' associated with a military tribunal").

[52] United States v. Goring, Judgment (Int'l Mil. Tribunal, Nuremberg, Sept. 30–Oct. 1, 1946), *reprinted in* 22 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 411, 559 (1948) (finding Donitz guilty yet declining to consider this charge at sentencing, in part on account of "the answer to interrogatories by Admiral Nimitz that unrestricted submarine warfare was carried on in the Pacific Ocean by the United States from the first day that nation entered the war"); *see* TELFORD TAYLOR, ANATOMY OF THE NUREMBERG TRIALS 399–410, 496 (1992) (discussing

not an "Iraqi national or resident of Iraq."[53] Conduct by the coalition that invaded Iraq received further exemption on account of the Court Law proviso that the Court's temporal jurisdiction ends with May 1, 2003—the very day that Bush declared "Mission Accomplished" in Iraq and before the incidents of detainee abuse memorialized by perpetrator-photographers at Abu Ghraib prison.[54] Even at a time when the founding document explicitly granted jurisdiction over offenses connected with Iraq's war against Iran—in aid of which Hussein received weapons from the United States—the preliminary articulation of likely charges omitted mention of that war.[55] All mention of the conflict had been deleted from the Court's charter by the time Hussein was set to face his first trial.[56] In short, the Court was implemented in a way that left members of the invasion coalition unaccountable for their actions. In the pres-

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case). *Cf.* D'Amato, *supra* note 20 (stating that the "unjust decision against Admiral Doenitz has ever since been a black mark against public receptivity of the Nuremberg results").

[53] Court Law, *supra* note 19, art. 1(Second). The Court Law further distinguished among Iraqis, imposing a categorical ban on appointment to any Court office of any "person who was previously a member of the disbanded Ba'ath Party," the party of Hussein. *Id.*, art. 33.

[54] Court Law, *supra* note 19, art. 1(Second) (stating temporal jurisdiction); Anne E. Kornblut, *Bush Proclaims a Victory*, BOSTON GLOBE, May 2, 2003, at A1. *See* Diane Marie Amann, *Abu Ghraib*, 153 U. PA. L. REV. 2085 (2005) (analyzing failure of legal constraints to prevent abuse at hands of U.S. forces at Abu Ghraib and elsewhere); Human Rights Watch, *Leadership Failure: Firsthand Accounts of Torture of Iraqi Detainees by the U.S. Army's 82nd Airborne Division*, Sept. 2005, http://hrw.org/reports/2005/us0905/us0905.pdf (divulging statements by soldiers that, in 2003 and 2004, members of their unit routinely subjected Iraqi detainees to beatings, humiliation, and other abuse).

[55] *Compare* IST Statute, *supra* note 35, Article 1(b) (extending tribunal's jurisdiction to "crimes committed in connection with Iraq's wa[r] against the Islamic Republic of Iran") *with* Anton La Guardia, *The Charges*, DAILY TELEGRAPH (London), July 2, 2004, at 4 (listing seven charges, none pertaining to Iran-Iraq war).

For one account of the U.S. role in the Iraq-Iran war, see Christopher Marquis, *Rumsfeld Made Iraq Overture in '84 Despite Chemical Raids*, N.Y. TIMES, Dec. 23, 2003, at A10. *Cf.* Bantekas, *supra* note 20, at 252 and n.93 (citing other incidents that accused might seek to mention to coalition countries' "embarrassment"); *Bassiouni Interview*, *supra* note 1 (stating that "the United States, particularly in the Reagan era, was not only providing Iraq with equipment but also with intelligence information," and noting that several countries had done business with Hussein's Iraq).

[56] *See* Court Law, *supra* note 19, art. 1(Second) (stating only that Court's jurisdiction extends to crimes committed "in the territory of the Republic of Iraq or elsewhere," thus deleting explicit references in IST Statute, *supra* note 35, Article 1(b), to Iraq's wars against Iran and Kuwait).

ence of considerable U.S. influence over formation of the Court and in the absence of any other forum for determining U.S. accountability, it was inevitable that Hussein would seek to put the United States on trial.[57]

At that first hearing Hussein raised other issues of impartiality deficit, asking the judge, "'What resolution, what law formed this court?'"[58] He received no reply; indeed, no satisfactory reply may have been available. For at the time of the hearing and even as the first trial date neared, wishfulness underpinned references to a "government" of Iraq. At its inception the Tribunal Statute was authorized by the occupying Coalition Provisional Authority.[59] Administration, appointment of officials, and drafting of procedural and evidentiary rules were delegated to the Authority-appointed Iraqi Governing Council, a transitional body whose sovereign authority and powers had an uncertain basis in law.[60] Then

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[57] Jurists also have raised framing questions. *See Bassiouni Interview, supra* note 1 (stating that because Iraqis harbored "a great deal of resentment against the West" for its thirty-year silence and its imposition of sanctions in the 1990s, "[j]ustice to them will require bringing out these facts as well"); Balakrishnan Rajagopal, *Trying Saddam*, NATION, Apr. 5, 2004, at 6 (judging what was then called the Iraqi Special Tribunal "flawed because it prevents any inquiry into the human rights violations committed by the West, including the United States, in Iraq"); Zolo, *supra* note 51, at 315–16 (stressing U.S. "hegemonic role" in process of establishment and implementation, and questioning U.S. status "as a champion of human rights" given its opposition to the ICC and its detention center at Guantánamo); H. Rajan Sharma, *The Law of Empire?*, FRONTLINE (India), Feb. 26–Mar. 11, 2005, http://www.frontlineonnet.com/fl2205/stories/20050311002202100.htm (describing impending trial of Hussein and others as "another instance of the Bush administration's self-serving distaste for the rule of law").

[58] *Transcript, supra* note 49.

[59] *See* Bantekas, *supra* note 20, at 239–40 (detailing relationship between Authority and Governing Council in adoption process, as well as conflict between Statute and Iraq's Interim Constitution); Orentlicher, *supra* note 37 (noting "concerns whether the Iraqi Governing Council . . . may lawfully create such a court," and relating in addendum statement of Red Cross official that United States would not violate international humanitarian law were it to turn Hussein over to a tribunal that satisfied requirements of due process); Jordan J. Paust, *The United States As Occupying Power over Portions of Iraq and Special Responsibilities under the Laws of War*, 27 SUFFOLK TRANSNAT'L L. REV. 1, 15 (2003) (stating as a matter of international law that at time Statute was adopted "[t]he United States could . . . agree with other occupying forces and/or a new legitimate regime in Iraq to set up an international military commission or tribunal with proper procedures and rights to due process").

[60] IST Statute, *supra* note 35, arts. 4(d), 5(c), 5(f)(3), 7(b), 37. *See* Alvarez, *supra* note 20, at 320 (asserting that the manner in which tribunal was established "denies it the legitimacy of other localized accountability efforts, from some national trials and truth commissions, to innovative attempts like Rwanda's Gacaca proceedings").

came the Iraqi Interim Government, a group of appointees to whom the Authority handed sovereignty in June 2004. That too was far from an independent, deliberative government. Balloting in January 2005 established a National Assembly of Iraqis, some of whom were elected anonymously for security reasons. The primary purpose of that Assembly was not to function as a full and permanent government, but rather to write a constitution to be presented to the electorate.[61] It was the National Assembly that adopted the Court Law in fall 2005, at a time when Iraq was in a transitional, pre-constitutional phase. Thus, there remained concern that even as its first trial loomed, the Court was not yet a "tribunal established by law" within the meaning of the international civil rights Covenant.[62]

The detention of Hussein likewise seemed inconsistent with international standards. Initially, and quite properly, U.S. military personnel held Hussein as an enemy prisoner of war protected by the Third Geneva Convention.[63] But the U.S. Department of Defense declared that status at an end once sovereignty was transferred and Hussein learned of charges against him. At this point the Iraqi Governing Council assumed "legal custody" of Hussein, although the United States retained "physical custody."[64] Given that U.S. military officials continued to hold Hussein,

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[61] *See* Ashraf Khalil, *Iraqi Lawmakers Approve Charter, Mourn Member*, L.A. TIMES, Sept. 19, 2005, at A3 (stating that its adoption of final draft rendered the National Assembly "a lame-duck body; preparing the constitution was its primary mission and it will dissolve within months regardless of whether the document passes").

[62] *See* ICCPR, *supra* note 17, art. 14(1), *quoted supra* text accompanying note 14; *Cf.* Paust, *supra* note 59, at 20–22 (detailing difficulties with trying Hussein on account of the uncertain nature of government in Iraq). *But see* Michael Byers, *Saddam's Trial Risks Delivering a Dubious Justice*, FIN. TIMES (London), June 20, 2005, at 11 (contending that National Assembly enjoyed sovereign authority to try Hussein, but questioning Tribunal's "dubious" origins).

[63] Douglas Jehl, *Hussein Given P.O.W. Status: Access Sought*, N.Y. TIMES, Jan. 10, 2004, at A1; *see* Convention (No. III) Relative to the Treatment of Prisoners of War, 75 U.N.T.S. 135 (setting forth rules for detention of enemy prisoners of war during an armed conflict).

[64] *See* Neil A. Lewis & David Johnston, *Hussein, in Jail, Reportedly Said Little of Value*, N.Y. TIMES, July 2, 2004, at A1 (reporting on charges and transfer); Donna Miles, *Saddam Hussein's Capture: One Year Later*, AM. FORCES PRESS SERV., Dec. 13, 2004, *available at* http://defendamerica.mil/specials/dec2004/Saddam/ (writing that, according to U.S. Defense Department spokesman, "Saddam is in the physical custody of Multinational Forces Iraq officials, although the Iraqi interim government maintains legal custody" and that "Saddam's status as an enemy prisoner of war ended after an Iraqi judge notified him on June 30 that he was facing criminal charges under the Iraqi criminal code").

it seemed unlikely that the United States would deliver him to any proceeding that did not meet its full approval.[65] Compounding this peculiar status were conditions of detention. Even after he was deemed no longer a prisoner of war (POW), Hussein appears to have had little contact with anyone but his captors and the International Committee for the Red Cross.[66] Published reports gave no indication that Hussein ever received judicial review of the lawfulness of his detention.[67] He was not permitted to see an attorney until a year after his arrest and did not learn of the charges to be adjudicated in his first trial until after he had spent an additional six months in custody.[68]

There were serious questions about the independence and impartiality of judges and other Court officers. Several were assassinated.[69] The Court Law omitted any mechanism for dismissing a judge who exhibited

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[65] *Cf.* John F. Burns, *Hussein Tribunal Shaken by Chalabi's Bid to Replace Staff*, N.Y. TIMES, July 20, 2005, at A9 (quoting unnamed "Iraqi official" of warning by "American official . . . that the United States, which holds Mr. Hussein and more than 80 of his top associates in military prisons . . . would 'take them to The Hague'" if tribunal "wrangling continued").

[66] *See* Miles, *supra* note 64 (stating that the Red Cross visited Hussein twice during his first year in detention). A former Iraqi official held along with Hussein reportedly wrote: "'We have been in prison for a long time, cut off from our families. No contacts, no telephone, no letters. Even the parcels that our families send us are not passed on to us.'" Gerard Davet & Fabrice Lhomme, *Les avocats français de Tarek Aziz lancent une pétition internationale*, LE MONDE, Sept. 18, 2005, http://www.lemonde.fr/web/article/0,1-0@2-3218,36-690070@51-627391,0.htm), *translation available in Westlaw, allnewsplus library, at* 9/19/05 WORLD NEWS CONNECTION (NEWSWIRE) 15:58:06.

[67] *Cf.* Paust, *supra* note 59, at 20–21 (arguing that in the absence of an Iraqi government, U.S. courts should have reviewed Hussein's detention). As used in this chapter, "published report" refers to English-language publications generally available on legal research databases.

[68] *Defense Objects, supra* note 19; Robert F. Worth, *Saddam Hussein Sees Lawyer for First Time Since Capture*, N.Y. TIMES, Dec. 17, 2004, at A14 [hereinafter Worth, *Lawyer*]. *Cf.* Amnesty Int'l, *supra* note 20, § 1 (criticizing conditions of detention); U.S. Inst. of Peace, *Building the Iraqi Special Tribunal*, Special Report 122, at 11 (June 2004), *available at* http://www.usip.org/pubs/specialreports/sr122.pdf (recommending development of comprehensive rules for detention).

[69] Bantekas, *supra* note 20, at 253 ("Despite the anonymity of its members and the 24-hour surveillance, five potential members of the Tribunal have been killed since July 2004."); Robert F. Worth, *2 from Tribunal for Hussein Case Are Assassinated*, N.Y. TIMES, Mar. 1, 2005, at A1 (reporting shooting deaths of tribunal judge and lawyer); Worth, *Lawyer, supra* note 68 (reporting that "a number" of judges in the ordinary national courts were killed in last months of 2004). *See* Richard Goldstone, *The Trial of Saddam Hussein: What Kind of Court Should Prosecute Saddam Hussein and Others for Human Rights Abuses?*, 27 FORDHAM INT'L L.J. 1490, 1505–06 (2004) (contending that

bias in a particular case—though Iraqi officials ousted judges for other reasons.[70] In spite of the unique challenge of presiding over charges of crimes against humanity and similar charges, the Court Law did not require that judges be experts in either complex litigation or international law.[71] Truth be told, the tragedies that had befallen the country had left the Iraqi bar sorely lacking in such experts,[72] and both U.S. and Iraqi leaders showed a distinct reluctance to welcome non-Iraqi experts to the Court's bench.[73]

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because of ongoing insurgency, "to put on a trial in Baghdad today is just beyond any thought"); Human Rights Watch, *Memorandum to the Iraqi Governing Council on 'The Statute of the Iraqi Special Tribunal,'* Dec. 2003, § E(2), http://hrw.org/backgrounder/mena/iraq121703.htm [hereinafter Human Rights Watch, *Memorandum*] (expressing similar concerns about lack of security).

[70] *See* Amnesty Int'l, *supra* note 20, § 5.1 (setting forth concerns about independence and impartiality); Human Rights Watch, *Memorandum, supra* note 69, § A (same). *See also* John F. Burns, *Trials of Some of Hussein's Aides to Start Within Weeks; His Is Expected in 2006*, N.Y. TIMES, Feb. 10, 2005, at A6 (reporting that U.S.-appointed interim prime minister had "moved to control the court by dismissing senior tribunal officials and appointing his own loyalists"); John F. Burns, *Hussein Tribunal Shaken by Chalabi's Bid to Replace Staff*, N.Y. TIMES, July 20, 2005, at A9 (stating that tribunal was "thrown into turmoil" when the uncle of an administrator fired months earlier subsequently dismissed "nine senior staff members" and threatened "to dismiss 19 others, including the chief investigative judge").

[71] Court Law, *supra* note 19, art. 5 (stating that judges "shall be of high moral character, integrity and uprightness" who "possess experience in criminal law," meet conditions of specified domestic laws, and are either active or retired judges or Iraqi lawyers with at least 15 years at the bar).

[72] For commentators' positions regarding international components, see *supra* note 37 and accompanying text. On the capability of the Iraqi bar, *compare* Neil A. Lewis, *Bush Leaves Unclear Role of Iraqis In Any Trial*, N.Y. TIMES, Dec. 16, 2003, at A20 (quoting Yale law dean Harold Hongju Koh on Iraqi bar) *with* Alvarez, *supra* note 20, at 327–28 (stating that "jury is still out" on whether "Iraq, once a legitimate government is in place, would be capable, albeit with international assistance, of handling these cases").

[73] The charter approved by the Coalition Provisional Authority did not require appointment of "international" judges, as have statutes of other mixed tribunals; rather, it stated that "[t]he Governing Council, if it deems necessary, can appoint non-Iraqi judges who have experience in the crimes encompassed in this statute." IST Statute, *supra* note 35, art. 4(d). The charter that the Iraqi National Assembly later adopted as a substitute cut back further, so that appointment of non-Iraqi judges appeared permissible only "in the event that a state is one of the parties in a complaint." Court Law, *supra* note 19, art. 4(Third). Similarly, though the IST Statute, *supra* note 35, Article 6(b), mandated appointment of "non-Iraqi nationals to act in advisory capacities or as observers to" the judges, the Court Law, *supra* note 19, Article 7(Second), rendered such appointments discretionary.

The Court Law fell short in other respects as well. Although tribunals in Europe and the United States have established that criminal conviction must be supported by proof beyond a reasonable doubt, the Law said nothing about the burden of persuasion that prosecutors would have to meet.[74] In stating that Iraq's national laws would apply in the absence of a controlling statutory provision, the Law provided little comfort. It left open the possibility that—as was allowed in the criminal courts under Hussein—statements made in response to uncounseled, perhaps even coercive, interrogation could be used as evidence against a defendant.[75] Rules of Procedure and Evidence left many such questions unresolved.[76]

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[74] *See* Court Law, *supra* note 19, art. 19(Second) (stating only that "[t]he accused is presumed innocent until proven guilty before the Court in accordance with this Statu[t]e"); Bantekas, *supra* note 20, at 249 n.78 (stating that under Iraqi Criminal Procedure Law, which would seem to apply in absence of more specific provision, "Arts 203 and 213 . . . provide only that guilt will be pronounced 'if the court is satisfied'"). *See* Amnesty Int'l, *supra* note 20, § 5.6.4 (criticizing absence of duty to apply reasonable doubt standard); Human Rights Watch, *Briefing Paper: The Iraqi Special Tribunal: Rules of Procedure and Evidence Missing Key Protections*, Apr. 22, 2005, http://hrw.org/english/docs/2005/04/22/iraq10522.htm (same) [hereinafter Human Rights Watch, *Briefing*].

[75] *Compare* Revised Version of the Iraqi Special Tribunal Rules of Procedure and Evidence, art. 79(D), Dec. 23, 2004, *English translation available at* http://law.case.edu/war-crimes-research-portal/pdf/IST_Rules _of_Procedure_and_Evidence.pdf (permitting a chamber to "exclude evidence if its probative value is substantially outweighed by the potential for unfair prejudice, considerations of undue delay, waste of time, or needless presentation of cumulative evidence," yet omitting coercion or effect that admission of evidence would have on Court's integrity as a ground for exclusion) [hereinafter IST Rules] *and* Court Rules, *supra* note 19, Rule 59(Fourth) (similar provision, though in a rough English translation that does not track legal terminology for concepts expressed) *with* ICC Statute, *supra* note 7, Article 69(4) (setting forth general balance, yet also requiring exclusion of "[e]vidence obtained by means of a violation of this Statute or internationally recognized human rights . . . if . . . [t]he violation casts substantial doubt on the reliability of the evidence" or "admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings"). *See* Amnesty Int'l, *supra* note 20, § 5.6.1 (citing absence of proscription against torture or rule excluding tainted evidence); Bantekas, *supra* note 20, at 245–46 (criticizing IST Statute's omission of any defenses "save for that of superior orders"); Colum Lynch, *U.N. Refuses to Assist Iraqis With War Crimes Trials*, WASH. POST, Oct. 23, 2004, at A18 (reporting on interplay of evidentiary rules). *Cf.* Bassiouni, *Justice, supra* note 17, at 262–66 (describing national and international proscriptions against torture and similar treatment).

[76] Court Rules, *supra* note 19. These replaced the IST Rules, *supra* note 75, which, although adopted at the end of 2004, received little attention outside Iraq until months later. Amnesty Int'l, *supra* note 20, § 1 (stating, in commentary published in May 2005, that IST Rules did not alleviate all fair trial concerns); Human Rights

The evidence itself appeared problematic. Many of the hundreds of thousands of victims of the prior regime were said to be buried in hundreds of mass graves. Investigators, most of them affiliated with the U.S.-sponsored Regime Crimes Liaison Office, found it difficult to exhume graves to the standards required for valid evidentiary purposes. Confounding their efforts were the insurgency, who remained strong more than two years after invasion, and the simple desire of survivors to give proper burials to their dead.[77] As with any trial of long-ago events, there was a risk that the memories and perceptions of some eyewitnesses might have deteriorated. As with any trial of a defendant alleged to be a master of manipulation, there were also risks that underlings would refuse to turn state's evidence and that documents identifying who gave orders to do evil might no longer exist. Indeed, there were disturbing reports that in post-invasion Iraq there was a brisk and distorted market in documents whose authenticity might prove hard to establish.[78]

Compounding these case-building problems was the decision of the Iraqi Governing Council to reverse a Coalition Provisional Authority order that had abolished the death penalty in Iraq. Some in the United States and Britain spoke of a desire to respect Iraqi sovereignty or an aversion to repeating the "'paradox'" of accountability after the 1994 massacres in Rwanda—that commanders of high rank tried before a special international tribunal received sentences no worse than life in prison while ordinary national courts ordered execution of the low-level persons

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Watch, *Briefing, supra* note 74 (same, in memorandum published in April 2005). Neither that version nor a prior, provisional draft seemed to have governed procedures at Hussein's first court appearance. A[ntonio] C[assese], *Saddam Hussein's First Hearing*, 2 J. INT'L CRIM. JUST. 927, 927 (2004).

[77] *See* Human Rights Watch, *Iraq: State of the Evidence*, Nov. 2004, at 2–3, 21–37, http://www.hrw.org/reports/2004/iraq1104/iraq1104.pdf (outlining difficulties related to forensic evidence, including the "over 250 mass graves" located in the year after the invasion of Iraq) [hereinafter Human Rights Watch, *Evidence*]; *see also Bassiouni Interview, supra* note 1 (describing problems with gathering, preserving, and processing evidence for trials in Iraq); Russell A. Miller, *Before the Law: Military Investigations and Evidence at the Iraqi Special Tribunal*, 13 MICH. ST. J. INT'L L. 107 (2005) (that the fact that coalition forces were leading investigations at same time they were gathering intelligence and fighting insurgency rendered evidence infirm from a litigation perspective); Stover, Megally & Mufti, *supra* note 37, at 836–37 (writing of problems caused by families' exhumation of graves).

[78] *See* Human Rights Watch, *Evidence, supra* note 77, at 4–21 (discussing problems with documentary evidence); Stover, Megally & Mufti, *supra* note 37, at 837–38 (stating likelihood "that a substantial number of faked or forged materials were being injected into the documentation pool").

who carried out the commands.[79] Those arguments aside, it is beyond dispute that the decision to charge Hussein and others with crimes punishable by execution deprived the Court of aid and expertise that could have helped to produce fair proceedings. On account of that decision, the United Nations refused to allow its advisers to help. Thus, no current U.N. employee could share with Iraqis lessons learned from work as a judge, prosecutor, or administrator at an *ad hoc* tribunal.[80] Human rights groups withheld endorsement, and coalition partner Great Britain withdrew aid, once defendants were said again to risk capital punishment.[81]

A prime safeguard against that irreversible penalty is, of course, a robust defense. Yet in the first years, the likelihood that an accused before the Court would receive effective assistance of counsel, as that term is understood in rights jurisprudence, seemed slim.[82] Rules issued in December 2004 provided for establishment of a Defense Office, but no subsequent published reports indicated that such an office was in fact operating.[83] Defendants would require counsel since the National Assembly revoked a provision that would have permitted self-representation.[84] A story published earlier that year reported that 2,000 attor-

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[79] *See* Vanessa Blum, *Iraqi War Crimes Tribunal Still a Work in Progress*, S.F. RECORDER, Jan. 27, 2005, at 3 (quoting British attorney regarding "'Rwandan paradox'"); Jonathan Finer & Naseer Nouri, *Capital Punishment Returns to Iraq*, WASH. POST, May 26, 2005, at A16 (writing that the U.S. embassy Baghdad said that "as a sovereign nation, Iraq could determine its own criminal penalties," yet noting that in the same time period Britain had urged Iraq to abolish capital punishment).

[80] Lynch, *supra* note 75.

[81] *See* Blum, *supra* note 79 (reporting on the retraction of help from Britain and human rights organizations); Doug Saunders, *Reckoning*, GLOBE & MAIL (Toronto), Dec. 4, 2004, at F3 (discussing opposition by Human Rights Watch). One scholar argued, based on a parsing of then-applicable law, that the August 2004 order that reinstated capital punishment in Iraq could not be invoked to authorize death sentences by the tribunal, which was established by law prior to that date. Michael Bohlander, *Can the Iraqi Special Tribunal Sentence Saddam Hussein to Death?*, 3 J. INT'L CRIM. JUSTICE 463 (2005). The explicit revocation in Court Law, *supra* note 19, Article 37, of IST Statute, *supra* note 35, and IST Rules, *supra* note 75, may have represented an effort to obviate such retroactivity problems.

[82] *See supra* notes 30–31 and accompanying text (discussing standards regrading assistance of counsel); *see also* Strickland v. Washington, 466 U.S. 668 (1984) (enunciating two-part test to determine whether representation met standards of U.S. Constitution).

[83] The Defense Office first was described in IST Rules, *supra* note 75, Rule 49, and later reestablished in Court Rules, *supra* note 19, Rule 30.

[84] Court Law, *supra* note 19, art. 19(Fourth)(D) (according an accused the rights

neys, 400 of them Americans and Europeans, were standing in line to defend Hussein.[85] The assertion was hard to believe. However, it was then quite true that more than one person claimed to be Hussein's attorney. Various family members apparently had retained various teams of defense lawyers. Some attorneys volunteered their services, at times with statements that evinced strategies of political posturing, and not strategies of legal defense against very serious charges. Among the volunteers was Jacques Verges, a French attorney whose prior clients included Carlos the Jackal and Klaus Barbie.[86] Verges also purported to represent Iraq's former deputy prime minister, Tariq Aziz, once rumored to have negotiated a plea agreement that would require him to testify against Hussein.[87] True or not, for a single attorney to assist these potentially adversarial co-defendants posed an obvious conflict of interest. Yet nothing seemed to preclude such a course of action, for the Court's founding documents said little with respect to attorney's ethical obligations.[88] In the end, it was Hussein's family that dismissed attorneys so that as trial approached a single Iraqi attorney was responsible for representation.[89] He faced the daunting prospect of defending a reviled client, with whom he was

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"to procure legal counsel of his choosing" and "to receive assistance that allows him to procure legal counsel without financial burden," yet omitting additional right that had been set forth in IST Rules, *supra* note 75, Article 20(d)(4), "to defend himself in person"). *See* Weinstein & Boudreaux, *Represent, supra* note 19 (discussing elimination of self-representation right).

[85] *Iraqi Lawyer to Represent Saddam*, ALJAZEERA.NET, July 5, 2004, http://english.aljazeera.net/NR/exeres/554FAFA-B267-427A-B9EC-54881BDE0A2E.html (visited Feb. 22, 2005) (quoting member of team hired by Hussein's wife) [hereinafter *Iraqi lawyer*].

[86] *See* Sarah Elton, *Devil's Advocate*, GLOBE & MAIL (Toronto), June 26, 2004, at F3. Other volunteers included the daughter of Libyan leader Moammar Qaddafi, see *Iraqi lawyer, supra* note 85, and a former U.S. Attorney General, see Ramsey Clark, *Why I'm Willing to Defend Hussein*, L.A. TIMES, Jan. 24, 2005, at B9.

[87] *See* Elton, *supra* note 86; Associated Press, *Ex-Aide Denies He Will Testify in Hussein's Trial*, N.Y. TIMES, Dec. 25, 2004, at A9.

[88] Court Rules, *supra* note 19, Rule 31 (stating that the Court "shall take the necessary legal measures" and "may" notify an attorney's bar disciplinary authority if the attorney's "conduct became aggressive and dreadful or harmful to the Iraqi High Court and disrespectful of its authority and consideration or obstructing to the procedures").

[89] Awadh Al-Taiee, Neil Macdonald & Dhiya Rasan, *Saddam's Family Rebuilds Defence Team*, FIN. TIMES (London), Aug. 10, 2005, at 9.

accorded only limited access, on infamous charges announced fewer than three months before the scheduled trial date.[90]

III. CHERIF BASSIOUNI AND THE QUEST FOR IMPARTIALITY IN INTERNATIONAL CRIMINAL JUSTICE

Professor Bassiouni has traveled much of the journey toward trial of Iraqi Ba'athists whose 35-year reign was marked by state-sponsored violence that claimed more than a million Iraqi lives.[91] Having led a multinational inquiry into Balkan war crimes, Bassiouni agreed to do the same with respect to Iraq. But a global, "political undertone to the issue of justice," to quote his own words, surfaced and squelched the proposal for an Iraq inquiry.[92] Years later, as the Bush administration readied for invasion, Bassiouni worked on a U.S. State Department post-conflict justice project, an aspect of which was the drafting of a charter for a tribunal that would subject captured Iraqi leaders to criminal prosecution.[93] His

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[90] *See Defense Objects, supra* note 19 (citing statement by "legal advisor to Hussein's family" that schedule "'undercut defense capability to review the case'" to prepare for first trial, relating to a single massacre in a town north of Baghdad); *see also* Richard Boudreaux & Henry Weinstein, *Hussein Defense in Chaos as Trial Nears*, L.A. TIMES, Sept. 29, 2005, at A1 (reporting that defense counsel was "only beginning to study the prosecution's evidence," and so had asked to postpone the first trial). It was reported that trials regarding other incidents would follow. *See* Leila Nadya Sadat, *New Developments Regarding the Prosecution of Saddam Hussein by the Iraqi Special Tribunal*, ASIL INSIGHTS, Aug. 5, 2005, http://www.asil.org/insights/2005/08/insights050805.html. Should a trial result in a death sentence, however, Court Law, *supra* note 19, Article 27(B), required that punishment "be executed within 30 days of the date when the judgment becomes final and non-appealable," and forbade any authority to "grant a pardon or mitigate punishment issued by the Court."

[91] Bassiouni has cited estimates "that between 100,000 to 300,000 Iraqis had been killed by the regime in torture chambers and in extrajudicial execution," and that there were an estimated additional "700,000 to a million Iraqis who died in the wars with Iran, with Kuwait, with the Kurds, with the Shias." *Bassiouni Interview, supra* note 1; *see* Human Rights Watch, *Evidence, supra* note 77, at 22 and n.47 (referring to internal violence against "Kurdish, Shi'a, and Marsh Arab populations, resulting in the disappearance—and, most certainly, the deaths—of between 250,000 and 290,000 people").

[92] *Bassiouni Interview, supra* note 1. *Cf.* M. Cherif Bassiouni, *Justice and Peace: The Importance of Choosing Accountability over Realpolitik*, 35 CASE W. RES. J. INT'L L. 191, 191 (2003) (writing that absent the constraints of international criminal justice states resort to *Realpolitik*, a "pursuit of political settlements unencumbered by moral and ethical limitations" that often allows impunity and thwarts redress of victims).

[93] *Bassiouni Interview, supra* note 1 (quoting Bassiouni's statement that his proposal included options for an *ad hoc* tribunal like those established for Rwanda and the for-

efforts led to adoption of the Statute of the Iraqi Special Tribunal for Crimes Against Humanity just days before the arrest of deposed President Saddam Hussein.[94]

Bassiouni welcomed the tribunal as an institution with the potential both to help establish the rule of law in Iraq and to show the Arab world "that dictators and tyrants who abuse their people will not be able to get away with it."[95] He "bristle[d]" at predictions—frequently made by other international lawyers—that Hussein could not receive a competent trial from "Iraqi judges, perhaps supplemented by judges from other Arab countries."[96] Parting company with the United Nations, human rights organizations, and many international lawyers, he agreed "absolutely" that the tribunal ought to have the death penalty as an option.[97]

From the outset, however, Bassiouni withheld unqualified support. He ventured concern that in framing jurisdiction to encompass three decades, the Tribunal Statute invited Hussein to expose the unclean hands of Americans and others to such an extent that "the legitimacy of the case falls apart . . . [a]nd suddenly Saddam is not only a martyr but a hero in the Arab world."[98] The Statute's hodgepodge of adversarial elements familiar to the common law, inquisitorial elements familiar to the civil law, and international human rights standards had generated a system that Bassiouni deemed "largely incomprehensible." Even as he levied this criticism, Bassiouni chided those who focused on procedural short-

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mer Yugoslavia, a hybrid tribunal like the Special Court for Sierra Leone, and "a purely national Iraqi tribunal, using the existing Iraqi legal system and structure, but with international support and reinforcement").

[94] *See supra* text accompanying notes 33–40 (discussing events surrounding Statute's adoption).

[95] *Bassiouni Interview, supra* note 1.

[96] Young, *supra* note 37; *see supra* note 72 and accompanying text (citing these predictions).

[97] *Bassiouni Interview, supra* note 1. Availability of capital punishment was essential, he elaborated, because in that society, without the death penalty the people will not feel there is a closure. The symbolism of the death penalty there is that it brings to closure within that society that terrible experience that they have gone through. And it prevents the resurgence of revenge. It prevents the resurgence of Saddam and his Baathist loyalists, who are then capable of bringing about a civil war in the future.

Id.

[98] All quotations and references in this paragraph are from *Bassiouni Interview, supra* note 1.

comings and ignored inadequacies in the gathering of essential evidence and formulation of prosecution strategy. "If the situation remains as it is," Bassiouni warned not long after adoption of the Statute, "I think it's going to be a bungled deal."

Subsequent developments did little to alter this prediction, and so in the summer of 2005 Bassiouni published a memorandum warning Iraq's prime minister that "the trials of Saddam and his associates are in serious danger of appearing illegitimate to the Iraqi population and the broader Arab and Muslim worlds," both because the United States' influence remained apparent to Arab observers and because the Statute invited Hussein to exploit that influence.[99] To counter the danger of illegitimacy, he urged Iraqis, in effect, to reinforce national control of the tribunal. Judges should be reappointed, he advised, in order that their authority derive from Iraqis and not from the U.S.-led Coalition Provisional Authority and its Iraqi appointees. In Bassiouni's view, no trial should begin until a case was truly ready to be litigated. Moreover, it should be

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[99] Unless otherwise indicated, all references and quotations in this paragraph are from Memorandum to Ibrahim al-Jafaari, Prime Minister of Iraq, from M. Cherif Bassiouni, Re: Prosecuting Saddam Hussein, FOREIGN POL'Y, July 2005, http://www.foreignpolicy.com/story/php?story_id=3120. Most of the recommendations set forth in the memorandum were restated in an article that was in production stages at the time this chapter was written. *See* M. Cherif Bassiouni, *Post-Conflict Justice in Iraq: An Appraisal of the Iraqi Special Tribunal*, 38 CORNELL INT'L L.J. 327 (2005).

During the first years of implementation, Bassiouni also expressed concern about U.S. conduct, in the name of fighting terror, in another country in the region. In his capacity as a U.N. expert, he spoke out about "the importance of immediately investigating" allegations "of serious violations by the Coalition forces" in Afghanistan; among them:

> arrest and detention of nationals and foreigners without legal authority or judicial review, sometimes for extended periods of time, forced nudity, hooding and sensory deprivation, sleep and food deprivation, forced squatting and standing for long periods of time in stress positions, sexual abuse, beatings, torture, and use of force resulting in death.

Report of the Independent Expert on the Situation of Human Rights in Afghanistan, M. Cherif Bassiouni, para. 44, at 17–18, E/CN.4/2005/122 (Mar. 11, 2005); *see also id.*, paras. 45–46, at 18 (detailing other instances of prolonged detention in substandard conditions and "accounts of actions that fall under the internationally accepted definition of torture"). Reportedly under U.S. pressure, the United Nations ended Bassiouni's mandate. *See* Nick Meo, *UN Investigator Who Exposed US Army Abuse Forced Out of His Job*, INDEPENDENT (London), Apr. 25, 2005, at 30. That deflective treatment of reports of abuse akin to that in U.S. detention centers in Iraq, see *supra* note 54 and accompanying text, added weight to Bassiouni's assertions that the U.S. imprint impaired efforts to win public acceptance for efforts to put Hussein on trial.

a trial of "a few specific and well-documented instances of abuse," as Iraqis by then were favoring, and not the mega-trial of all the regime's crimes that the United States preferred. To "[k]eep Saddam in [c]heck," Bassiouni called for deletion of the Statute's guarantee of a defendant's right to self-representation. He opposed appointment of any "foreign judges" as "an insult to Iraqis," no less than it would be to Germans were a French judge to preside over trials in Germany.[100] Finally, he identified a need for justice mechanisms that would complement criminal trials, in particular, an Iraqi truth commission that would "document and analyze political violence committed by the old regime" and a victim compensation regime that could help to "create a popular base of support for the trials."

Events thereafter indeed pointed to an Iraqi effort to recalibrate the balance between national and international elements and influence. The Special Tribunal was retitled a High Criminal Court, within which no non-Iraqi observers would be required and no non-Iraqi judges would be permitted unless a case implicated a state other than Iraq. The coalition-influenced instruments that had mandated foreign observers and allowed wider use of foreign judges were revoked and new Court Law and Court Rules adopted in their place. Judges were reappointed, and defendants were stripped of any right to self-representation.[101]

It seemed unlikely that these changes would put an end to the impartiality deficit evident in the first years of implementing what initially was called the tribunal. Bassiouni's call for complementary institutions appears not yet heeded; however, judges were reappointed by adoption of the Court Law. It does seem plausible—assuming that the Iraqi National Assembly acted properly when it adopted new founding instruments[102]—that the endorsement by that elected body of Court laws and

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[100] *Accord* Reynolds Holding, *War-crimes Tribunals Complex, Costly*, S.F. CHRON., Dec. 16, 2003, at A1 (quoting Bassiouni as stressing, just days after adoption of the Tribunal Statute, that "'[u]nlike Rwanda or Yugoslavia, where the legal system was either destroyed by war or rudimentary to begin with, Iraq has a fundamentally sound system of law'").

[101] *See* Court Law, *supra* note 19, arts. 5(Fifth)(D), 33 (providing that appointments of judges and other officials of the tribunal "are legally approved," providing that they are not revealed to be members of Hussein's Ba'athist Party, all of whom are excluded from working for the Court). For all other changes discussed in this paragraph, see *supra* notes 19, 36–38, and 83 and accompanying text.

[102] *See supra* notes 58–61 and accompanying text (noting uncertainty of status of government in pre-constitutional Iraq).

judges enhanced legitimacy. But that alone could not dispel concerns about judges' qualifications and independence. Adoption of a new charter also may have placed Iraqis' stated intention to permit the death penalty on more solid ground—an intention that already had prompted some countries, some non-governmental organizations, and the United Nations to withhold forensic expertise and other litigation assistance. Any rejoinder that such assistance is unnecessary would be folly. At this writing, after all, the gravamen of the substantive law that this newborn Court must interpret and apply remains international, not domestic, criminal law. The intention to permit execution of anyone whom the Court should convict has had yet another detrimental effect, one that lies at the core of the impartiality deficit critique. It has provoked Iraq's president and others to proclaim a blood thirst that burst the presumption of innocence and gave license to sundry encroachments on the rights of the accused. The denial to defendants of any right to self-represent, for instance, as well as the push to go forward with a first trial on charges only recently tendered to defendants and before a Defense Office appeared to be operating, exposed the persistence of impartiality deficit in this newest institution within the international criminal justice project.

Likewise persistent, therefore, was the basic challenge of international criminal justice—as Bassiouni has done throughout his career, to negotiate the abiding tension between the process due to suspects and the due desire to punish authors of atrocity. In the worst cases, this may seem impossible. Yet if the international project is to go forward, the negotiation must be attempted. To paraphrase Bassiouni:[103] when all that is left is justice, one must use its tools not to answer the siren call of vengeance, but rather to strive for a genuine, and impartial, justice.

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[103] *See supra* text accompanying note 1.

CHAPTER 14

USING INTERNATIONAL HUMAN RIGHTS LAW TO BETTER PROTECT VICTIMS OF TRAFFICKING: THE PROHIBITIONS ON SLAVERY, SERVITUDE, FORCED LABOR, AND DEBT BONDAGE

*Anne Gallagher**

Like many international lawyers under a certain age, it was as a student that I made my first acquaintance with Professor Bassiouni's work. Back then, his vision of a functioning international criminal system seemed to be the stuff of dreams. Two decades later, as a teacher and practitioner, I cite his work as an example of how dreams can become reality—provided we care enough and can inspire others to care as well.

I began working on trafficking in 1997 as a human rights lawyer in the United Nations. We did not have much to work with. Trafficking was, at best, a marginal and marginalized issue of the less-than-influential international human rights system. In terms of standards, there were a couple of brief references in two treaties and one long-ago agreement nobody cared about. Understanding and commitment, at both national and international levels, was almost non-existent.

While the revolution in trafficking is a shadow of what has happened in international criminal law more generally, the changes over the past five years are truly remarkable: A comprehensive international treaty on trafficking has been finalized and ratified by 112 countries. Regional treaties covering Europe and South Asia have also been developed. Trafficking has been linked, in the Statute of the International Criminal

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Court, with both war crimes and crimes against humanity. With help from Professor Bassiouni and his associates at DePaul, the United Nations has developed a detailed set of principles and guidelines on trafficking. Most countries in most regions have either changed their criminal code or enacted new laws to prevent, suppress, and punish human trafficking.

Professor Bassiouni spoke out and wrote on trafficking and related exploitation long before it was fashionable for respectable international lawyers to do so. In this way, he was instrumental in getting international law—and international lawyers—to take trafficking seriously. More specifically, his work on international criminal law, in particular his research into enslavement as an international crime, has proved to be extremely important in the construction of a new legal regime around human trafficking. The following chapter has been inspired by Professor Bassiouni's work and by his unwavering commitment to justice for victims of the very worst crimes.

I. UNDERSTANDING TRAFFICKING AND ITS PLACE IN HUMAN RIGHTS LAW

The primary function of the international lawyer is to identify, as precisely and practically as possible, what states are required to do, or not to do, as a matter of international law. In all cases, this requires a degree of conceptual understanding of the nature of the problem that law seeks to address. In relation to trafficking, such a conceptual understanding has proven to be highly elusive. As recently as 2000, the term "trafficking" was being used by government officials, inter-governmental organizations, non-governmental organizations (NGOs), and the media interchangeably with other phrases connected to unfortunate migration outcomes including illegal migration, forced migration, and migrant smuggling. Until December of that same year, a plethora of definitions was being wheeled out for examination, each faithfully reflecting the interest and prejudices of its promoters. The resulting confusion was not improved by a discourse that was contradictory, highly moralistic, often factually incorrect, and based upon extremely shaky empirical foundations.

Against this rather discouraging backdrop, the considerable progress that has been made in articulating the nature of the trafficking phenomenon is remarkable. While policymakers and their advisors still occasionally confuse trafficking with other forms of migration, and while research standards remain comparatively abysmal, there is a growing foundation of common understanding on what exactly is happening,

where and to whom. Trafficking is now widely agreed to be a process of moving people within and (especially) between countries for the express purpose of exploiting them. In the case of adults, this will necessarily involve some form of deception or coercion, but just moving, selling, or receiving a child with intent to exploit is now considered enough to constitute trafficking.[1] It is accepted that trafficking affects, to a greater or lesser degree, all regions and most countries of the world, the only constant factor being the disparity in wealth and opportunity between countries of origin and countries of destination. It is agreed that the profile of the victim and the end purposes of trafficking are open-ended and ever-changing because both are ultimately determined on the basis of profit considerations. Women, men, and children are trafficked into every situation and industry in which money can be made through the exploitation of human beings. It is further agreed that the crime of trafficking suits the structure and functioning of organized criminal groups, although the extent of their involvement appears highly regional. There is a growing understanding of the gender aspects of trafficking—not just in terms of women and men being subject to very different forms of trafficking, but also in relation to the whole range of factors that underlie national and international responses.

Trafficking was a matter for international human rights law long before it became an issue of migration or of transnational organized crime.[2] However, human rights law, apart from two solid references, does not contain a comprehensive prohibition against trafficking.[3] The ques-

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[1] Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, *Report of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime*, at art. 3(a) and 3(c), Annex II, U.N. Doc.A/55/383 (2000) [hereinafter Trafficking Protocol].

[2] Between 1904 and 1933, four different international conventions dealing with the (white slave) traffic in women and girls were concluded. In 1949, these were mostly consolidated into one instrument: the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others. Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, July 25, 1951, 96 U.N.T.S. 271.

[3] The Women's Convention obliges states parties to take all appropriate legislative and other measures to suppress all forms of traffic in women and exploitation of the prostitution of women. Convention on the Elimination of all Forms of Discrimination Against Women art. 6, Sept. 3, 1981, 1249 U.N.T.S. 13. The Convention on the Rights of the Child requires states parties to "take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form" (Article 35). Children are also to be pro-

tion of whether or not such a prohibition exists, or whether it can be inferred, or whether other prohibitions that *do* exist can be made to fit the trafficking phenomenon can only be answered (tentatively), with reference to a myriad of human rights instruments and standards. Despite these difficulties, a careful analysis of human rights law with this goal in mind is ultimately a productive exercise. This is because trafficking goes to the very heart of what human rights law is trying to prevent. From its earliest days to the present, human rights law has loudly proclaimed the fundamental immorality (and unlawfulness) of one person appropriating the legal personality, labor, or humanity of another. Human rights law has battled the demons of discrimination on the basis of race and sex; it has demanded equal or at least key rights for aliens; it has decried and outlawed arbitrary detention, forced labor, debt bondage, forced marriage, and the commercial sexual exploitation of children and women; it has championed freedom of movement and the right to leave and return to one's own country. While the task of separating out the important bits from a huge range of legal instruments is a daunting one, there can be no doubt that the spirit of the entire corpus of human rights law rejects, absolutely, the practices and results that are integral to the human trafficking process.

Despite this overwhelmingly positive assessment, international human rights law has not, on balance, been especially useful to victims of trafficking. Rarely are even the most clear-cut and uncontested provisions (e.g., those relating to slavery, debt bondage, forced marriage, and forced labor) advanced in relation to a situation of trafficking. When such connections are made, their purpose is often rhetorical and, even when presented by legal scholars, lacking in legal justification. While many examples could be cited, perhaps the most telling of these relates to the human rights treaty bodies—the key enforcement mechanisms of

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tected from all forms of economic exploitation (Article 32), sexual exploitation, and sexual abuse (Article 34). States parties are therefore also required to take all appropriate national, bilateral, and multi-lateral measures to prevent the inducement or coercion of a child to engage in any unlawful sexual activity; the exploitative use of children in prostitution or other unlawful sexual practices; the exploitative use of children in pornographic performances and materials (Article 34) and the illicit transfer and non-return of children abroad (Article 11). The convention further requires states parties to "take all appropriate measures to promote physical and psychological recovery and social integration of a child victim of . . . any form of . . . exploitation . . . in an environment which fosters the health, self-respect and dignity of the child" (Article 39). Convention on the Rights of the Child, G.A. Res. 44/2, U.N. Doc. A/44/49 (Nov. 20, 1989).

the international human rights system. While the issue is raised with increasing frequency in the context of human rights treaty-body work, none of the relevant committees has managed to tie trafficking to a violation of a specific right in a specific treaty. Perhaps this is because trafficking is just too complicated. Perhaps it is because the norms themselves are devoid of sufficient content to support their application to real life. Perhaps the situation is aggravated by the fact that traffickers are generally bad people and bad organizations, not bad governments.

The primary purpose of this chapter is to flesh out several of the strongest and clearest human rights norms that could be applied to trafficking by the international human rights system, international and regional tribunals, and national criminal justice agencies. These norms include the prohibition on slavery and the slave trade, the prohibition on forced labor, and the prohibition on debt bondage. The exercise is necessarily a selective one and does not purport to reflect the full corpus of international human rights law relevant to trafficking.[4] The underlying rationale for this approach lies in the fact that even the most promising recent international legal developments do not appear to have made the process of prosecuting traffickers and protecting victims much easier. Perhaps it is time for us to go back to basics. Perhaps this is an opportune moment to take out of cold storage our oldest, strongest, and most widely accepted laws to determine whether (and, if so, to what extent) they can be used against this especially persistent and virulent criminal phenomenon.

II. THE PROHIBITION ON SLAVERY AND SERVITUDE

The link between trafficking and traditional chattel slavery[5] is immediately obvious. Both practices involve the large-scale movement of individuals, generally across national borders for exploitative purposes. Both are primarily conducted by private entities for private profit. Both seek to secure control over individuals by minimizing personal autonomy. Neither system can be sustained without massive and systematic violations of human rights.

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[4] Examples are prohibitions on discrimination and rights protecting certain groups such as non-citizens, migrant workers, women, and children.

[5] "Chattel" slavery refers to the right of the "owner" to treat slaves as possessions, especially in terms of their sale or transfer to others. Weissbrodt and Dottridge, *infra* note 21, para. 18.

For present purposes, two aspects of slavery are particularly relevant. The first relates to the fact that slavery generally takes place outside the "public" realm. The prohibition on slavery and servitude has been called a "paradigmatic example" of a state's obligation to protect against non-state interference with human rights. The relevance of international human rights law to situations in which the state is not the immediate agent of harm is a key issue when it comes to identifying precise legal obligations and responsibilities of states in the context of trafficking. Second, and more specifically, is the question of whether the prohibition on slavery can accommodate trafficking. In other words, is it possible to sustain an argument that trafficking is a form of slavery and that trafficking is therefore subject to the same strict legal prohibition as exists in respect of slavery and the slave trade? These and related issues are considered in detail below.

International Instruments Relevant to Slavery and Servitude

In its "classic" form, slavery and the slave trade involved the open trading (buying, selling, and transportation) of individuals, in massive numbers, for the purpose of exploiting their labor for profit. These practices have existed throughout history in different cultures and, until several centuries ago, were legal, commonplace aspects of society and commerce in many parts of Africa, the Americas, Asia, and the Ottoman Empire.[6] Slavery was also not rejected by traditional religious doctrine. For example, the Hebrew Bible,[7] the New Testament[8] and the *Qur'an*[9] all

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[6] For a detailed account of slavery and the slave-trade during the 18th and 19th centuries, see JAMES WALVIN, BLACK IVORY: A HISTORY OF BRITISH SLAVERY (1992).

[7] Freamon extracts the following passage from Leviticus, which relates an instruction received by Moses from God on Mount Sinai: "Slaves, male and female, you may indeed possess, provided you bring them from among the neighbouring nations. You may also buy them from among aliens who reside with you and from their children who are born and reared in your land. Such slaves you may own as chattels, and leave to your sons as their hereditary property, making them perpetual slaves. But you should not lord it harshly over any of the Israelites, your kinsmen." Leviticus, 25:44–46, *cited in* Bernard K. Freamon, *Slavery, Freedom and the Doctrine of Consensus in Islamic Jurisprudence*, 11 HARV. HUM. RTS. J. 1, 31 n.120 (1998) [hereinafter Freamon].

[8] Freamon notes that there is no indication, in the New Testament, that abolition of slavery is seen as an immediate moral task. He cites the following extract from a letter of Paul to the Ephesians: "5. Slaves, obey your masters with the reverence, the awe and the sincerity you owe to Christ . . . 9. Masters, act in a similar way towards your slaves. Stop threatening them. Remember that you and they have a master in heaven who plays no favourites." Ephesians, 6:5, 9, *cited in* Freamon, *supra* note 7, at 31 n.121.

[9] For a detailed examination of traditional Islamic law (specifically the *Qur'an* as the revealed text) as it related to the practice of slavery, see Freamon, *supra* note 7.

accepted the institution of slavery and sought its regulation and humanization rather than outright abolition.

Freedom from slavery was one of the first rights to be recognized under public international law, with prohibitions on slavery and the trading in slaves being a central feature of more than 75 multilateral and bilateral conventions from the early 19th century onwards.[10] Professor Bassiouni's 1991 study of slavery as an international crime remains the clearest and most comprehensive annotation of these instruments, including their individual and collective legal weight.[11]

While economic considerations clearly played a role, the driving force behind states' early efforts to abolish the official slave trade was essentially a moral imperative, derived from impulses that found their basis in religious and secular principles emerging during the European enlightenment,[12] including "the idea of the natural rights of man."[13] International abolitionist sentiment was fueled by the work of the British and Foreign Anti-Slavery Society—an organization that has been described as "the first moral entrepreneur . . . to play a significant role in world politics generally and in the evolution of a global regime specifically."[14]

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[10] For example, the Peace Treaties of Paris (1814 and 1815), the Declaration and Final Act of the Congress of Vienna (1815), the Declaration of Verona (1822), bilateral treaties between Great Britain and France (1831, 1833, and 1845), the Treaty of London (1841), the Treaty of Washington (1862), the General Act of the Berlin Congo Conference (1885), which affirmed that "trading in slaves is forbidden in conformity with the principles of international law," the General Act of the Brussels Conference (1890) and the Convention of St. Germain-en-Laye (1919). For a detailed examination of relevant international and state practice during the eighteenth and nineteenth century, see J.H.W. VERZIJL, INTERNATIONAL LAW IN HISTORICAL PERSPECTIVE 238–60 (1976).

[11] M. Cherif Bassiouni, *Enslavement as an International Crime*, 23 N.Y.U. J. INT'L L. & POL. 445 (1991). *See also* Nina Lassen, *Slavery and Slavery-like Practices: United Nations Standards and Implementation*, 57 NORDIC J. INT'L LAW 197, 197–98 (1988) [hereinafter Lassen]. For a detailed examination of relevant international and state practice during the 18th and 19th century see VERZIJL, *supra* note 10, at 238–60.

[12] Ethan A. Nadelmann, *Global Prohibition Regimes: the Evolution of Norms in International Society*, 44 INT'L ORG. 479, 493, 497 (1990).

[13] NORMAN HAMPSON, THE ENLIGHTENMENT 153 (1968), *cited in* Nadelmann, *id.*, at 493. Note that the 1822 Declaration of Verona states that slave trading is contrary to principles of justice and humanity. Bassiouni, *supra* note 11.

[14] Nadelmann, *supra* note 12, at 495. For further commentary on the contribution of the British and Foreign Anti-Slavery Society, see SUZANNE MIERS, BRITAIN AND THE ENDING OF THE SLAVE TRADE 31 (1975).

The mandate of the League of Nations expressly included suppression of the slave trade and the prohibition of forced labor.[15] The 1926 Convention on Slavery,[16] which was drafted under League auspices, is now widely recognized as the first modern international treaty for the protection of human rights.[17] The convention defines slavery as "the status or condition of a person over whom any or all of the powers attaching to the rights of ownership are exercised."[18]

Slave trade is defined as including:

> [A]ll acts involved in the capture, acquisition or disposal of a person with intent to reduce him to slavery; all acts involved in the acquisition of a slave with a view to selling or exchanging him; all acts of disposal by sale or exchange of a slave acquired with a view to being sold or exchanged, and, in general, every act of trade or transport in slaves.[19]

States parties are required to take all necessary steps to prevent and suppress the slave trade and to work towards the abolition of slavery in all its forms.[20] Importantly, the "forms" of slavery to be covered by the convention were not specified beyond the definition as set out above. While the general view is that this early convention was prompted by and linked to

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[15] Under Article 22 of the Covenant of the League of Nations "the Mandatory must be responsible for the administration of the territory under conditions which will guarantee . . . the prohibition of abuses such as the slave trade." Covenant of the League of Nations art. 22 (June 28, 1919).

[16] Convention on Slavery, Mar. 9, 1927, 60 L.N.T.S. 253 (amended Dec. 7, 1953) [hereinafter 1926 Slavery Convention].

[17] MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 146 (1993). *See also* H. LAUTERPACHT, INTERNATIONAL LAW AND HUMAN RIGHTS 334–35 (1950). The convention was drafted in response to a recommendation (subsequently endorsed by the General Assembly) of the temporary Slave Commission—a body established by the League in 1922 for the purpose of ascertaining the extent of slavery and making proposals for its eventual eradication.

[18] 1926 Slavery Convention, *supra* note 16, art. 1.

[19] *Id.*, art. 1(2).

[20] *Id.*, art. 1(2). The League established a Standing Advisory Committee to oversee implementation of the convention. The convention itself continued to exist after the demise of the League by virtue of a protocol elaborated under U.N. auspices which entered into force in 1957. Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery Apr. 30, 1957, 266 U.N.T.S. 3 [hereinafter Supplementary Convention].

continuing manifestations of chattel slavery, limited evidence does exist of an intention on the part of the drafters to widen the scope of practices falling within the prohibition.[21]

The Universal Declaration of Human Rights, adopted by the General Assembly in 1948, provides that "[n]o-one shall be held in slavery or servitude. Slavery and the slave-trade shall be prohibited in all their forms."[22] In 1949, work began within the United Nations on the elaboration of a new legal instrument—one that would address itself to certain institutions and practices resembling slavery as well as aiming at the abolition of the legal status of slavery.[23] The result was the Supplementary Convention on the Elaboration of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery,[24] which entered into force in

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[21] In a study prepared for the Sub-Commission on Protection and Promotion of Human Rights (then the Sub-Commission on Prevention of Discrimination and Protection of Minorities), Weissbrodt and Dottridge argue that the references to "any or all of the powers of ownership" and to "abolition of slavery in all its forms" indicate that the convention does in fact cover a broad range of practices. They point to a report of the Temporary Slavery Commission of the League of Nations indicating that references to domestic slavery and similar conditions were being omitted from the 1926 convention on the grounds that "such conditions come within the definition of slavery contained in the first article and that no further prohibition of them in express terms was necessary. This provision applies not only to domestic slavery but to all those conditions mentioned by the temporary Slavery Commission . . . i.e. debt slavery, the enslaving of persons disguised as adoption of children and the acquisition of girls by purchase disguised as payment of dowry," Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, Contemporary Forms of Slavery, Working Paper, U.N. Doc. E/CN.4/Sub.2/2000/3 (May 26, 2000) (*prepared by* David Weissbrodt and Anti-Slavery International) [hereinafter Weissbrodt and Dottridge]. It should be noted however, that an observation of ECOSOC's *Ad Hoc* Committee of Experts on Slavery, also cited by Weissbrodt and Dottridge, that the definition of slavery contained in the 1926 convention "did not cover the full range of practices related to slavery . . . many of which had been identified by the League of Nations when preparing the . . . Convention," appears to contradict their assertion relating to the inclusive nature of the 1926 definition. *Id.*, para. 13.

[22] Universal Declaration of Human Rights art. 4. G.A. Res. 217A, U.N. GAOR, 3d Sess., 1st plen. mtg. U.N. Doc.A/1810 (Dec. 10, 1948) [hereinafter Universal Declaration of Human Rights]. *See also* Nina Lassen, *Article 4, in* THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: A COMMENTARY 90 (Asbjorn Eide, Gudmunder Alfredsson et al. eds., 1992).

[23] The decision to develop a new legal instrument was made following a recommendation of a special Committee on Slavery, set up by the General Assembly through its Resolution 278 (III) of May 13, 1949. *Report of the Ad Hoc Committee on Slavery*, 2d Sess., U.N. Doc. E/1988, at 25, 29. Recommendation B1, *cited in* Lassen, *supra* note 22.

[24] Supplementary Convention, *supra* note 20.

1957. The central feature of this convention is its extended application to the institutions and practices of debt bondage, serfdom, servile forms of marriage, and exploitation of children that are all held to be *similar to slavery*. States parties are required to abolish these institutions or practices "whether or not [they] are covered by the definition of slavery" as set out in Article 1 of the 1926 Slavery Convention.[25] In addition to retaining this earlier definition of slavery and the slave trade, the Supplementary Convention adds a new concept—a person of "servile status," which is intended to differentiate a "slave" from a victim of one of the institutions or practices referred to as "slave-like."[26] States parties are required to bring about progressively, and as soon as possible, the complete abolition or abandonment of slave-like institutions and practices as well as to ensure their criminalization "where they still exist and *whether or not* they are covered by the [1926] Convention's" definition of slavery.[27] Article 4 of the Convention states that "[a]ny slave who takes refuge on board any vessel of a State party to this Convention shall *ipso facto* be free."[28]

The International Covenant on Civil and Political Rights (ICCPR) reiterates the prohibition on slavery and the slave trade as set out in the Universal Declaration.[29] Both the Universal Declaration and the ICCPR further stipulate that no person shall be held in *servitude*[30]—a term that, while not defined by either instrument, is generally seen to be separate from[31] and broader than slavery, referring to "all conceivable forms of

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[25] *Id.*, art. 1.

[26] *Id.*, art. 7(b).

[27] *Id.*, art. 1 (emphasis added).

[28] *Id.*, art. 4. This provision (expanded to include "[a]ny slave taking refuge on board any ship, whatever its flag") was subsequently included in Convention II of the Geneva Conference of 1958 on the High Seas and in the U.N. Convention on the Law of the Sea. *See* Convention on the High Seas art. 13, Apr. 29, 1958, 450 U.N.T.S. 6465. *See also* U.N. Convention on the Law of the Sea art. 99, Dec. 10, 1982, 1833 U.N.T.S. 397.

[29] International Covenant on Civil and Political Rights, G.A. Res. 2200 (XXI) art. 10, U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966) [hereinafter ICCPR].

[30] Universal Declaration of Human Rights, *supra* note 22, art. 8(2).

[31] Drafters of the ICCPR decided to change the formulation of the Universal Declaration by separating "slavery" and "servitude" on the grounds that they were two different concepts and should therefore be dealt with in separate paragraphs. MARC. J. BOSSUYT, GUIDE TO THE *TRAVAUX PREPARATOIRES* OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 164 (1987).

domination and degradation of human beings by human beings."[32] Another interpretation separates the two concepts according to relative severity: "Slavery indicates that the person concerned is wholly in the legal ownership of another person, while servitude concerns less far-reaching forms of restraint and refers, for instance, to the total of the labour conditions and/or the obligations to work or to render services from which the person in question cannot escape and which he cannot change."[33] The provisions of the ICCPR relating to both slavery and servitude are non-derogable, that is, they cannot be suspended by a state, even in times of emergency.[34] Slavery and the slave trade are prohibited under the African Charter[35] and the American Convention.[36] The

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[32] NOWAK, *supra* note 17, at 148. Nowak cites the relevant *travaux preparatoires* of the ICCPR to support his argument that "servitude" covers slavery-like practices involving economic exploitation such as debt bondage, servile forms of marriage and all forms of trafficking in women and children. *See also* BOSSUYT, *supra* note 31, at 167. That interpretation can be justified (at least for debt bondage, servile forms of marriage and trafficking in children) by reference to the 1957 convention, which defines a person of "servile status" as being a victim of such practices. Servitude has not, however, been mentioned in any of the conventions dealing with trafficking until the Palermo protocol. *See* Trafficking Protocol, *supra* note 1. On the history of the term "servitude" with reference to Article 4 of the Universal Declaration, see Lassen, *supra* note 8, at 210 and sources cited.

[33] P. VAN DIJK & G.J.H. VAN HOOF, THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 242 (1990) (discussing Article 4 of the European Convention on Human Rights). The European Commission on Human Rights has endorsed this interpretation by indicating that "in addition to the obligation to provide another with certain services, the concept of servitude includes the obligation on the part of the 'serf' to live on another's property and the impossibility of changing his condition." Van Droogenbroeck v. Belgium, 44 Eur. Ct. H.R. (ser. B) at 30 (1980). See also the discussion below of the 2005 judgment of the European Court in Siladian v. France. Note that in the United States, the crime of "involuntary servitude" has been specifically linked to "forced labor." *See* United States v. Bradley, 390 F.3d 145 (1st Cir. 2004).

[34] ICCPR, *supra* note 29, art. 4(2).

[35] African Charter on Human and People's Rights art. 5, G.A. Res. 35/197, 35 U.N. GAOR Supp. No. 48, U.N. Doc. A/35/48 (June 27, 1981) [hereinafter African Charter] ("Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man, particularly slavery, slave trade torture, cruel, inhumane, or degrading treatment and punishment shall be prohibited.").

[36] American Convention on Human Rights art. 6, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123. [hereinafter American Convention] ("No-one shall be subjected to slavery or to involuntary servitude which are prohibited in all their forms, as are the slave trade and trafficking in women.").

European Convention prohibits both slavery and servitude.[37] The prohibition on slavery is expressly non-derogable in both the European Convention and the American Convention.[38] In addition, the intrinsic inalienability of personal freedom means that consent is irrelevant with regard to both slavery and servitude. In other words, it is not possible for any individual to contract herself or himself into a situation of slavery or servitude.[39]

As detailed by Professor Bassiouni, the principle instruments of international humanitarian law also contain very explicit prohibitions against slavery and the slave trade during situations of armed conflict.[40] In the context of both humanitarian law and human rights law, slavery has been identified: as an international crime, when committed by private or public officials against any person; as a war crime, when committed by a belligerent against the nationals of another belligerent; and as a crime against humanity, when committed by a public official against any person.[41]

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[37] European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 4(1), Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter European Convention] ("No-one shall be held in slavery or servitude.").

[38] *See id.* art. 15(2); *see also* American Convention, *supra* note 36, art. 27(2).

[39] This issue came before the drafters of the both the 1956 Slavery Convention and the ICCPR in the context of proposals to add the qualification "involuntary" to servitude. The proposal was rejected, in both instances, on the grounds that "it should not be possible for any individual to contract himself into bondage." U.N. Doc. A/2929/33, *cited in* FRANCIS G. JACOBS & ROBIN C.A. WHITE, THE EUROPEAN CONVENTION ON HUMAN RIGHTS 77–78 (2d ed. 1996) [hereinafter JACOBS & WHITE]. The European Commission on Human Rights has confirmed that "[p]ersonal liberty is an inalienable right which a person cannot voluntarily abandon." Report of the Commission in the *Vagrancy Cases*, July 19, 1969, Series B, No. 10, 91, *confirmed by* the European Court of Human Rights *in* De Wilde, Ooms and Versypt v. Belgium, Series A, No. 12 June 18, 1971.

[40] For a full listing of (and detailed commentary on) the provisions of international humanitarian law relating to slavery, forced labor and similar practices, see Bassiouni, *supra* note 11, at 492–517.

[41] Nuremberg Charter art. 6(c), Charter of the Tokyo War Crimes Tribunal art. 5, *cited in* INTERNATIONAL COMMISSION OF JURISTS, COMFORT WOMEN—AN UNFINISHED ORDEAL 169 (1994). *See also* paras. 23–67, Special Rapporteur, *Systematic Rape, Sexual Slavery and Slavery-like Practices During Armed Conflict, Update to the Final Report* E/CN.4/Sub.2/2000/21 (submitted by Gay J. McDougall) [hereinafter McDougall Report].

"Enslavement" is punishable as a crime against humanity under the Statute of the International Criminal Tribunal for the former Yugoslavia,[42] the International Criminal Tribunal for Rwanda,[43] and the Special Court for Sierra Leone.[44] The establishment of the International Criminal Court (ICC) has significantly supplemented the international legal framework for prosecuting international crimes in times of conflict and in times of peace—including those involving sexual violence.[45] The ICC has jurisdiction over genocide, war crimes, crimes against humanity, and the crime of aggression.[46] The jurisdiction of the Court is limited to situations where national systems fail to investigate or prosecute, or where they are "unable" or "unwilling" to do so genuinely.[47] The Statute provides for individual criminal responsibility for persons who commit, attempt to commit, order, solicit, induce, aid, abet, assist, or intentionally contribute to the commission of a crime within the Court's jurisdiction.[48] Enslavement is also listed as a constituent act of crimes against humanity. The Statute provides that "'[e]nslavement' means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children."[49]

What Is the Legal Status of the Prohibition on Slavery and the Slave Trade? Has Trafficking Been Assimilated to this Prohibition?

In view of its unequivocal, universal character, the prohibition on slavery is now recognized as a supreme rule of customary international

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[42] Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY) art. 5, S.C. Res. 827, U.N. Doc. S/Res/827 (Nov. 3, 1993).

[43] Statute of the International Criminal Tribunal for Rwanda (ICTR) art. 3, S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994).

[44] Agreement for and Statute of the Special Court for Sierra Leone art. 2 (Jan. 16, 2002) *available at* http://www.sc-sl.org/scsl-statute.html.

[45] For a useful consideration of the ICC's Statute within the context of sexual violence during armed conflict, see McDougall Report, *supra* note 41, paras. 23–43.

[46] Rome Statute of the International Criminal Court arts. 5(1)(b), 5(2), 6, U.N. Doc. A/CONF. 183/9 (July 17, 1998) *available at* www.un.org/law/icc/statute/ romefra.htm [hereinafter Rome Statute].

[47] *Id.*, art. 17.

[48] *Id.*, art. 25.

[49] *Id.*, art. 7(2)(c). Note that "trafficking" is not defined in the Statute.

law,[50] a legal obligation *erga omnes*,[51] and part of *jus cogens*—a fundamental norm of international law.[52] However, as Bassiouni notes in his study of *jus cogens* and *obligations erga omnes* in the context of international criminal law, a solid legal basis for identifying both the relevant norms and the consequences of their violation is yet to be secured.[53] Certainly, in

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[50] That slavery and the slave trade, in their classic forms are forbidden by customary international law would appear to be beyond serious dispute. Traditional "chattel" slavery has totally disappeared as a legitimate system and state practice, as evidenced by the universal prohibition on slavery, is unequivocal. As Rassam notes, no state dares assert that it does not have an international legal obligation to prohibit slavery. A. Yasmine Rassam, *Contemporary Forms of Slavery and the Evolution of the Prohibition of Slavery and the Slave Trade under Customary International Law*, 39 VA. J. INT'L L. 311 (1999).

[51] A legal obligation *erga omnes* is considered to be universal in character—giving every state a legal interest in its protection and a capacity to bring suit against another state in the International Court of Justice—irrespective of whether it has suffered direct harm. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (1990), § 902. The basis for this doctrine is a statement of the International Court of Justice in the Barcelona Traction case:

> [A]n essential should be drawn between the obligations of a State towards the international community as a whole and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature, the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*. . . . Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide [and] also from the principles and rules the basic human rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law . . . others are conferred by international instruments of a universal or quasi-universal character.

Barcelona Traction, Light & Power Co., Ltd. (Belgium v. Spain), 1970 I.C.J. 3, paras. 33–34 (Second Phase).

[52] The concept of *jus cogens* is encapsulated in the definition of "peremptory norm of general international law" contained in Article 53 of the 1969 Vienna Convention on the law of Treaties: "a norm accepted and recognised by the international community as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." Vienna Convention on the Law of Treaties art. 50, May 22, 1969, 1969 Y.B. I.L.C., ii. 247–49, 261, 266. In *Barcelona Traction*, the International Court of Justice indicated that the prohibition on slavery is a *jus cogens* norm and that such norms give rise to obligations *erga omnes*. *See* Barcelona Traction, *id.* at paras. 33–34. *See also* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 (1987). For a highly relevant discussion of the gendered nature of the doctrine of *jus cogens,* see Hilary Charlesworth & Christine Chinkin, *The Gender of Jus Cogens*, 15 HUM. RTS. Q. 63 (1993).

[53] M. Cherif Bassiouni, *International Crimes:* Jus Cogens *and Obligations* Erga Omnes, 59 LAW & CONTEMP. PROBS. 63 (1996).

relation to all three categories set out above, there has been a general failure to identify the substantive content of the norm relating to slavery. Does the prohibition, as set out in various legal texts, apply only to traditional "chattel" slavery or can it be interpreted more widely? Is there any evidence that the customary norm has evolved, over time, to encompass other institutions and practices such as debt bondage recognized in international instruments as "slavery-like practices" as well as additional ones such as trafficking? These are critical questions and one that commentators have, thus far, not provided adequate insight into. The following paragraphs seek to analyze the evidence, both historic and contemporary, with a view to determining whether trafficking and related exploitation can, as a matter of law, be rightfully assimilated to slavery—either through interpretation of relevant treaty provisions or through an analysis of the customary law-making process.

In terms of interpreting the treaty-based prohibition on slavery, it is important to acknowledge the careful manner by which states have confined the concept of slavery. As noted above, states have meticulously separated the traditional concept of slavery (involving the permanent destruction of an individual's juridical personality)[54] from the range of practices identified as analogous or otherwise similar to slavery. The fact that trafficking was not even identified as an analogous or similar practice but was dealt with through a different set of instruments lends considerable weight to the argument that states never intended the prohibition to extend to this particular practice. An examination of relevant *travaux préparatoires* confirms this position. In relation to the ICCPR, for example, there are clear indications that the reference to the slave trade was not

[54] A 1953 report of the U.N. Secretary-General to the Economic and Social Council concluded that in the absence of any precise indication in the *travaux preparatoires* to the 1926 Slavery Convention (which delineates the still-accepted definition), it might reasonably be assumed that the drafters had in mind the power of master over slave recognized in Roman law (*dominica potestas*). The characteristics of this status include its permanence, the absolute nature of the power exercised, the products of labor of the individual becoming the property of the master without any compensation commensurate to the value of the labor, the transferability of ownership, and the fact that it is inherited by descendants of persons holding such status. *Report of the Secretary-General on Slavery, the Slave Trade and Other Forms of Servitude*, paras. 36 and 1, *cited in* Lassen, *supra* note 11, at 204–05. Drafters of the ICCPR also noted, in the context of discussions on Article 8 of that instrument, that the term "slavery" implied the destruction of the juridical personality. BOSSUYT, *supra* note 31, at 167. On the concept generally as recognized in Roman law, see W.W. BUCKLAND, A MANUAL OF ROMAN PRIVATE LAW 37 (2d ed. 1957).

meant to encompass trafficking in women.[55] It is therefore difficult to argue, even through a comparison of the treatment of trafficked persons with the treatment of traditional slaves,[56] that the treaty-based concept of slavery includes trafficking and related exploitation.

If the prohibition on slavery as contained in relevant treaties cannot be interpreted as including trafficking, then it is necessary to turn to customary international law. It is clear that the relevant customary norm, at least in its original form, was restricted, in the manner set out above, to traditional chattel slavery. As there is not strong evidence that the prohibition extended to practices similar to slavery,[57] it is not useful, at this

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[55] During the drafting process, a suggestion was made to substitute "trade in human beings" for "slave trade," in order that this provision would cover traffic in women as well. The suggestion was rejected on the grounds that the clause should be only dealing with the slave trade as such, U.N. Doc. E/CN.4/SR.199, paras. 101(F), 102(GB), 103(F), U.N. Doc. E/CN.4/SR.93, at 3–4, *cited in* BOSSUYT, *supra* note 31, at 165.

[56] A number of commentators have attempted this comparison, arguing that the identifying features of classical slavery are in fact present in many cases of modern-day trafficking. Weissbrodt and Dottridge contend that, "The circumstances of the enslaved person are crucial to identifying what constitutes slavery." For them, the relevant markers include the degree of restricting of the right to movement; the degree of control exercised over the individual's belongings and the existence of informed consent and a full understanding of the nature of the relationship between the parties. Weissbrodt and Dottridge, *supra* note 21, para. 19. These markers are subsequently referred to as "these elements of control and ownership,"—a somewhat misleading characterization as the identified elements do not actually address ownership *of a person*, a critical aspect of chattel slavery. *Id.*, para. 20. Subsequent discussion makes clear that for Weissbrodt and Dottridge, the removal of choice and control from an individual and its passing to a third party is in fact the central identifying element. *Id.* Others have looked outside international law for guidance on whether trafficking and related practices are, in fact, true forms of slavery. Freamon, for example, cites the three identifiers integral to the accepted sociological definition of slavery: "(1) the dishonour of the slave in the cultural and social sphere, (2) 'natal alienation,' or the cutting off of linguistic familial and cultural ties with one's ancestors; and (3) a situation where the slave condition is an alternative to death at the choice of the master." Freamon, *supra* note 7, at 6, citing ORLANDO PATTERSON, SLAVERY AND SOCIAL DEATH (1982), Freamon quotes from Patterson's conclusion that slavery is therefore "the permanent, violent domination of natally alienated and generally dishonoured persons" and not just a legal status but one "structured and defined by the relative power of the interacting persons." While the traditionally accepted legal and sociological identifiers of slavery may be applicable to *some* trafficking cases, *some of the time*, it is submitted that the general practice of trafficking, particularly its typically temporary character, does not fit comfortably within either of these paradigms.

[57] Bassiouni takes a different position on this point, arguing that "the prohibition against slavery *and slavery-related practices* have achieved the level of customary inter-

point, to pursue an argument that trafficking fell within the customary norm on the basis of its status as a slave-like practice. The question to be asked in the present context is therefore a straightforward one. What is the evidence, if any, that trafficking and related exploitation have been assimilated into the concept of slavery, in relation to which an international legal prohibition has been confirmed to exist in customary international law? There is no one test for determining the existence of a customary international legal rule. However, it is widely accepted that evidence is required of state practice that itself is based on a sense of legal obligation (*opinio juris*). State practice can be extrapolated from a number of different sources, including through policy statements and opinions of government officials, national legislation and judicial decisions, and the work of inter-governmental organizations such as the United Nations. It is more important for such practice to be "general and consistent" than for an extended duration[58] and, for the entire test to be satisfied, that it arises out of a sense of legal obligation, not merely through habit or convenience. In the present context therefore, it is necessary to examine the content of the prohibition on slavery presently recognized in customary international law. Does state practice, supported by the necessary level of *opinio juris*, confirm a revised, extended understanding of the concept of slavery to include practices such as trafficking?

The difficulties associated with identifying non-treaty-based human rights norms are well known. Both state practice and *opinio juris* are rarely capable of objective measurement, and partiality of the evaluator will almost inevitably affect his or her assessment. Added to this is the unfamiliarity of many commentators in this field with anything more than the most superficial aspects of the "test" for custom. As a result, current analyses provide little, if any, clarity on the place of trafficking within the customary international law prohibition on slavery. Some writers have advanced (generally weak) anecdotal evidence in support of the contention that trafficking and forced prostitution are themselves forms of slavery and therefore prohibited under international law.[59] Others have

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national law and have attained *jus cogens* status." Bassiouni, *supra* note 11, at 445 (emphasis added).

[58] In the *North Sea Continental Shelf* case, the International Court of Justice held that state practice can be short in duration if it has been extensive and virtually uniform. North Sea Continental Shelf Case (F.R.G. v. Denmark), 1969 I.C.J. 3 (Feb. 20).

[59] Lassen, for example, points to Resolutions 1981/40 and 1983/30 of the U.N. Economic and Social Council (which refer to "this form of slavery" and "the enslavement of women and children" in the context of trafficking and forced prostitution)

reached this same conclusion without any analysis or supporting argument.[60] A number of leading authorities, including both Professor Bassiouni and the High Commissioner for Human Rights, have argued that trafficking for forced labor and forced prostitution constitutes a modern form of slavery.[61] As early as 1974, the U.N. Working Group on

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as evidence of such practices being subject to the same legal effect as "classical" slavery. Lassen, *supra* note 11, at 210. More recently, Morrison has noted that a resolution of the 1998 session of the Working Group on Contemporary Forms of Slavery explicitly declares that "trans-border trafficking of women and girls for sexual exploitation is a contemporary form of slavery and constitutes a serious violation of human rights," JOHN MORRISON, THE TRAFFICKING AND SMUGGLING OF REFUGEES: THE END GAME IN EUROPEAN ASYLUM POLICY 61 (2000). The authors of a report published by the Ludwig Boltzmann Institute for Human Rights (Vienna) also rely on the pronouncements of the working group to support their claim that: "Trafficking in women and children has been recognised as a form of slavery and the international anti-slavery treaties also cover trafficking." KATHARINA KNAUSS, ANGELIKA KARTUSCH & GABRIELE REITER, COMBAT OF TRAFFICKING IN WOMEN FOR THE PURPOSE OF FORCED PROSTITUTION 23 (2000) [hereinafter KNAUSS ET AL.].

[60] For example, Farrior refers to the definition of slavery contained in the 1926 Convention and comments that "[v]ictims of trafficking for prostitution would fit this definition." Stephanie Farrior, *The International Law on Trafficking in Women and Children for Prostitution: Making it Live up to its Potential*, 10 HARV. HUM. RTS. J. 213, 221 (1997). Bunch equates *forced prostitution*—the most commonly cited outcome of trafficking with slavery: "[a]busing women physically . . . is sometimes accompanied by other forms of human rights abuse such as slavery (forced prostitution.)" Charlotte Bunch, *Transforming Human Rights from a Feminist Perspective, in* WOMEN'S RIGHTS, HUMAN RIGHTS: INTERNATIONAL FEMINIST PERSPECTIVES 15 (Julie Peters & Andrea Wolper eds., 1995). Inglis refers to the European Convention's Article 4 prohibition on slavery, servitude, and forced labor and, without further examination, states that "[t]he practice of trafficking clearly fits within this prohibition." Shelley Case Inglis, *Expanding International and National Protections Against Trafficking for Forced Labour Using a Human Rights Framework*, 7 BUFF. HUM. RTS. L. REV. 55 n.21 (2001). Malone, also without explanation, states that "[t]he practice of trafficking clearly fits within [the European Convention Article 4] prohibition." Linda A. Malone, *Economic Hardship as Coercion Under the Protocol on International Trafficking in Persons by Organized Crime Elements*, 25 FORDHAM INT'L L.J. 54, 59 (2001). Corrigan asserts that "The United Nations recognises trafficking as a form of slavery and condemns slavery as a violation of human rights." While several of her citations support the second proposition, none provides direct support for her first assertion. Katrin Corrigan, *Putting the Brakes on the Global Trafficking of Women for the Sex Trade: An Analysis of Existing Regulatory Schemes to Stop the Flow of Traffic*, 25 FORDHAM INT'L L.J. 151, 154 (2001).

[61] Professor Bassiouni has referred to trafficking as "this cruel form of modern slavery." M. Cherif Basssiouni, *A Global Perspective on Trafficking, in* IN MODERN BONDAGE; SEX TRAFFICKING IN THE AMERICAS 97 (2002) [hereinafter Bassiouni, *Global Perspecitive*]. As High Commissioner for Human Rights, Mary Robinson referred to trafficking as "a subterranean, criminal-dominated . . . form of modern slavery." Frances Williams, *Action Urged to Combat Traffic in Humans*, FIN. TIMES, July 23, 2002.

Contemporary Forms of Slavery expressed the view that trafficking had been recognized as a form of slavery and that "the international anti-slavery treaties also cover trafficking."[62] The Special Rapporteur on Violence Against Women has adopted this position, stating that "[t]he conditions under which many trafficked women are forced to work . . . must be considered, without a doubt, to be within the realm of slavery and slavery-like practices."[63] Unfortuntely, few such pronouncements have been accompanied by a legal analysis of the claimed norms or by an examination of the consequences of equating trafficking with slavery.

How do these contentions stand up to the traditional methodology for determining customary international law? State practice is, at best, mixed and generally inconclusive. While most states have outlawed slavery, very few have used this prohibition in their efforts to combat trafficking and related practices such as forced prostitution. Conversely, the growing trend to enact national legislation on trafficking may be seen as a tacit acknowledgement, on the part of many states, that existing anti-slavery provisions are inadequate or inappropriate for application to trafficking. Certainly, prohibitions on slavery in national legislation have rarely been used to prosecute trafficking cases.[64]

She did not, however, make a direct link between trafficking and the prohibition on slavery in her carefully drafted RECOMMENDED PRINCIPLES AND GUIDELINES ON HUMAN RIGHTS AND HUMAN TRAFFICKING, submitted to the Economic and Social Council in 2002 (E/2002/68/Add.1 (2002)). *See also* Council of Europe, Opinion of the Steering Committee for Equality Between Women and Men (CDEG) on Parliamentary Assembly Recommendation 1325 91997, *cited in* John Cerone, *State Accountability for the Acts of Non-State Actors: The Trafficking of Women for the Purposes of Sex Industry Work* (unpublished paper, on file with the author). Weissbrodt and Dottridge state: "The trafficking of persons today can be viewed as the modern day equivalent of the slave trade of the last [sic] century." Weissbrodt and Dottridge, *supra* note 21, at add. 1, para. 25. In a subsequent discussion on trafficking, they later conclude, somewhat confusingly, that "there are various methods of procuring or enticing a person into slavery or servile status for the purposes of prostitution or other forms of exploitation." *Id.* para. 33.

[62] U.N. Working Group on Contemporary Forms of Slavery, Commission on Human Rights Sub-Commission on Prevention of Discrimination and Protection of Minorities, U.N. Doc. E/CN.4/Sub 2/AC.2/1991/1/Add 1 *in* KNAUSS ET AL., *supra* note 59, at 23.

[63] *Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences*, U.N. Doc. E/CN.4/1997/47 (Feb. 12, 1997).

[64] Italy provides one known exception. However, it is relevant to note that Italy has recently enacted specific anti-trafficking legislation and will therefore presumably be no longer relying on the slavery provisions of its penal code. The United States has

State practice, along with the necessary *opinio juris,* can also be adduced from existing treaty law as well as the work of representative organs and organizations such as the United Nations. The following paragraphs provide an overview of relevant developments within the United Nation's main legal and political bodies including the human rights treaty bodies, the Commission on Human Rights, and the General Assembly. More limited consideration is given to the relatively lower profile, less representative and correspondingly less politically and legally relevant Working Group on Contemporary Forms of Slavery.[65] This overview is followed by a review of recent legal developments outside the traditional human rights field.

The Human Rights Committee has, on a number of occasions, linked trafficking with violations of Article 8 of the ICCPR. In relation to Macau, for example, the Committee expressed its concern at

> [r]eports on the extent of trafficking in women in Macau and on the large numbers of women from different countries who are being brought into Macau for the purpose of prostitution. The Committee is extremely concerned at the inaction by the authorities in preventing and penalising exploitation of these women and that, in particular, immigration and police officials are not taking effective measures to protect these women and to impose sanctions on those who are exploiting women through prostitution *in violation of Article 8 of the Covenant.*[66]

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also occasionally used its slavery laws to prosecute trafficking-related offenses. *See, e.g.*, United States v. Ingalls, 73 F.Supp.76 (S.D. Cal. 1947); United States v. Booker, 655 F.2d 562 (4th Cir. 1981). The United States has also recently enacted specific anti-trafficking legislation under which such crimes are now prosecuted. Australia incorporated anti-slavery provisions into its criminal code in the late 1990s in part to respond to the growing number of Asian women forced into debt bondage in the Australian sex industry. The legislation was unsuccessful in terms of securing prosecutions and, in the face of mounting public criticism, the government enacted a specialized anti-trafficking law in 2005.

[65] In attempting to ascertain evidence of *opinio juris* and state practice through the work of the various organs of the United Nations, it is important to recognize at the outset that not all such organs are of equal value as evidentiary source. The author distances herself from the tendency of many writers in this field to accord primary weight to the deliberations and conclusions of the Working Group on Contemporary Forms of Slavery, a sub-group of the Sub-Commission on Protection and Promotion of Human Rights with little perceptible influence over the thinking or behavior of states on this issue. *E.g.*. Rassam, *supra* note 49, at 340–42.

[66] *Concluding Comments on Portugal (Macau),* U.N. Doc. CCPR/C/79/Add.77, para.

The Committee does not indicate which part of Article 8 (slavery, servitude, or forced labor) is relevant in this context. However, the following statement by the Committee in relation to Italy is more specific:

> It is noted with appreciation that the judiciary has begun to treat offences concerning trafficking in women and others for the purposes of prostitution as acts which can be assimilated to slavery and contrary to international and national law. These statements linking trafficking to slavery are additional to a number of other recent pronouncements of the Committee relating to obligations on state parties in relation to the criminalization of trafficking and protection of trafficked persons.[67]

An examination of the recent practice of the United Nation's relevant political organs reveals a tendency (more lately modified) to link trafficking with slavery. In their consideration of the issue of trafficking, both the General Assembly and the Commission on Human Rights have repeatedly encouraged ratification and implementation of the international slavery conventions.[68] In 1995, the General Assembly decided to focus the next International Day for the Abolition of Slavery (December 2, 1996) on the problem of trafficking in human persons, especially

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13 (1997). The General Comment also included recommendations to the government regarding prevention of trafficking, punishment on traffickers, and protection for victims. *See also Concluding Observations on Serbia and Montenegro*, U.N. Doc. CCPR/CO/81/SEMO, para. 16 (2004); *Concluding Observations on Latvia*, U.N. Doc. CCPR/CO/79/LVA, para. 12 (2003).

[67] *See, e.g., Concluding Observations on Greece*, U.N. Doc. CCPR/CO/83/GRC, para. 10 (2005); *Concluding Observations on Kenya*, U.N. Doc. CCPR/CO/83/KEN, para. 25 (2005); *Concluding Observations on Albania*, U.N. Doc. CCPR/CO/82/ALB, para. 15 (2004); *Concluding Observations on Finland*, U.N. Doc. CCPR/CO/82/FIN, para. 3 (2004); *Concluding Observations on Lithuania*, UNM Doc. CCPR/CO/80/LTU, para. 14 (2004); *Concluding Comments on Brazil*, U.N. Doc. CCPR/C/79/Add.66 (1996) (discussing the positive aspects to Article 8 protection); *Concluding Comments on Dominican Republic*, U.N. Doc. CCPR/C/79/Add.37 (1995).

[68] *See* G.A. Res. 49/166, 976, U.N. Doc. A/RES/49/166 (Dec. 23, 1994); G.A. Res. 50/167, para. 6, U.N. Doc. A/RES/50/167 (Dec. 22, 1995); G.A. Res. 51/66, para. 2(a), U.N. Doc. A/RES/51/66 (Dec. 12, 1996); G.A. Res. 52/98, para. 3(a), U.N. Doc. A/RES/52/98 (Dec. 12, 1997); U.N. Commission on Human Rights, Res. 1996/24, para. 2(a), U.N. Doc. E/CN.4/1996/24 (Apr. 19, 1996); U.N. Commission on Human Rights, Res. 1997/19, para. 3(a), U.N. Doc. E/CN.4/1997/19 (Apr. 11, 1997); U.N. Commission on Human Rights, Res. 1998/30, U.N. Doc. E/CN.4/1998/30 (Apr. 17, 1998). It is difficult to determine whether the elimination of this reference in resolutions after 1997 (Assembly) and 1998 (Commission) is significant.

women and children.[69] The Commission on Human Rights has identified trafficking in children, sale of children, child prostitution, and child pornography as "modern forms of slavery."[70] The Commission also alluded to the slavery conventions and the prohibition on slavery and servitude in its consideration of "contemporary forms of slavery."[71] Member states of the United Nations, meeting in 1995 at the Fourth World Conference on Women, identified the elimination of trafficking as a strategic objective and, in this context, called on governments to "consider the ratification and enforcement of international conventions on trafficking in persons *and on slavery*."[72]

In this connection it is relevant to note the readiness of the Sub-Commission on Promotion and Protection of Human Rights (and, to a lesser extent, its parent body, the Commission on Human Rights) to characterize trafficking as a slavery-like practice and as a contemporary form of slavery. The Sub-Commission's Working Group on Contemporary Forms of Slavery is the only U.N. body with a specific mandate to deal with trafficking.[73] That mandate requires the working group to "review developments in the field of the slave-trade in all their practices and manifestations including the slavery-like practices of apartheid and colonialism, the traffic in persons and the exploitation of the prostitution of others as they are defined in the Slavery Convention of 1926, the Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery of 1956 and the Convention for the Suppression of Traffic in Persons and of the Exploitation

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[69] G.A. Res. 50/167, para. 12, U.N. Doc. A/RES/50/167 (Dec. 22, 1995).

[70] Commission on Human Rights, *Programme of Action for the Prevention of the Sale of Children, Child Prostitution and Child Pornography*, Annex Res. 1992/74, U.N. Doc. E/CN.4/Sub.2/1991/41 (Mar. 5, 1992).

[71] Commission on Human Rights, Res. 1999/46, pmbl. (Apr. 27, 1999). In the same resolution, the Commission called upon states to consider ratifying, if they have not already done so, the pertinent international instruments relating to slavery, the slave trade and slavery-like practices.

[72] Fourth World Conference on Women, Beijing, Chapter IV, Strategic Objective 131(a) (Sept. 8, 1995) (emphasis added).

[73] The establishment of the working group can be traced back to a 1966 resolution of the ECOSOC referring to the Commission on Human Rights "the question of slavery and the slave trade in all their practices and manifestations." U.N. Econ. & Soc. Council Res. [ECOSOC] 1126 (XLI) (1966). In 1974, a standing committee of experts, currently known as the Working Group on Contemporary Forms of Slavery, was established to deal with this issue. The working group is composed of five members of the Sub-Commission on Promotion and Protection of Human Rights. It meets once a year, immediately before the Sub-Commission's annual session.

of the Prostitution of Others."[74] Since its first meeting in 1975, the working group has not been overly constrained by its narrow mandate and has used the definitional uncertainties surrounding the concept of slavery to examine a broad range of human rights questions. In recent years these have included issues as diverse as child labor, incest, early marriage, debt bondage, child soldiers, sex tourism, reservations to the Women's Convention, and organ transplants. The working group has, however, repeatedly and consistently linked trafficking and forced prostitution with slavery—albeit with little or no legal justification or consideration of the implications of this characterization.

The recently concluded Protocol on Trafficking in Persons especially Women and Children Supplementing the U.N Convention on Transnational Organized Crime includes specific reference to slavery in its definition of trafficking. The definition refers to movement, through various means, for the purposes of exploitation (including, at a minimum, the exploitation of the prostitution of others, or other forms of sexual exploitation, forced labor or services, *slavery or practices similar to slavery*, servitude, or the removal of organs).[75] Several observations are warranted here. First, it could be argued that, conceptually, the definition does not seem to leave room for the possibility that trafficking itself is a form of slavery: slavery is identified as one of several end purposes for which a person may be trafficked. Second, the kind of exploitation that is traditionally linked to trafficking such as sexual exploitation and forced labor are separately identified from slavery and slave-like practices, thereby inferring that they are distinct from each other. On balance, however, the reference to slavery and slave-like practices in an instrument that deals solely and specifically with trafficking would appear to be sufficient to override these potential caveats. It could therefore be convincingly argued that the inclusion of slavery and slave-like practices in the definition of trafficking is strong evidence of state practice supported by *opinio juris* recognizing a substantive link between trafficking and slavery.

The 1998 ILO Convention on the worst forms of child labor,[76] calls for "immediate and effective measures to secure the prohibition and

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[74] Sub-Commission Res. 11 (XXVII), Economic and Social Council Decision 16 (LVI) (May 17, 1974).

[75] Trafficking Protocol, *supra* note 1, art. 3.

[76] General Conference of the International Labour Organization, Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (June 17, 1999) [hereinafter Child Labour Convention].

elimination of the worst forms of child labour as a matter of urgency"[77] including "*all forms of slavery or practices similar to slavery* such as the sale and trafficking of children, debt bondage and servitude and forced or compulsory labour."[78] It is possible to interpret this provision as a recognition that at least one of the listed practices is in fact slavery rather than the less legally significant "similar to slavery."

The strongest and most recent legislative connection between trafficking and slavery is provided by the European Convention on Trafficking in Human Beings,[79] adopted by the Committee of Ministers of the Council of Europe in May 2005 with the preamble to that convention specifically recognizing that "trafficking can lead to slavery."[80] Also significant is the 2000 Charter of Fundamental Rights of the European Union.[81] Article 5 of the charter, entitled "prohibition on slavery" includes a specific prohibition on trafficking in human beings.[82]

Current developments in international humanitarian law and international criminal law also provided a welcome entry point for arguments, including those advanced by Professor Bassiouni,[83] that contemporary situations of trafficking are connected, or even legally equivalent to slavery. One of the most significant of these developments is a decision of the International Criminal Tribunal for the former Yugoslavia (ICTY), which related to a charge of enslavement as a crime against humanity.[84] In this

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[77] *Id.*, art. 1.

[78] *Id.*, art. 3(a) (emphasis added).

[79] Committee of Ministers, Council of Europe, *Council of Europe Convention on Action Against Trafficking in Human Beings*, CM(2005)32 Addendum 1 final, pmbl., May 3, 2005 [hereinafter Council of Europe Convention].

[80] *Id.*

[81] The Charter of Fundamental Rights of the European Union, http://www.europarl.europa.eu/charter/pdf/text_en.pdf, is not a treaty but was "solemnly proclaimed" by the European Commission, the European Parliament, and the Council of the European Union in December 2000. Most, but not all of its provisions reflect the principles and rules contained in the European Convention on Human Rights.

[82] "No-one shall be held in slavery or servitude. No one shall be required to perform forced or compulsory labour. Trafficking in Human Beings is prohibited." *Id.*

[83] Bassiouni, *Global Perspective, supra* note 61.

[84] Prosecutor v. Kunarac et al., Case Nos. IT-96-23 T abd IT-96-23/1-T, Judgment of Trial Chamber II (Feb. 22, 2001) [hereinafter Kunarac Trial Chamber Judgment]. *See also* Prosecutor v. Kunarac et al., Case Nos. IT-96-23 and IT-96-23/1-A, Judgment on Appeal, paras. 106–124 (June 12, 2002) [hereinafter Kunarac Appeals Chamber Judgment].

instance, the Trial Chamber found the count of enslavement proved and, in its analysis, identified a number of elements to be of particular relevance.[85] Many of these elements are typically present in many reported cases of trafficking. The Appeals Chamber in the same case confirmed that the indica of slavery included "control of someone's movement, control of physical environment, psychological control, measures taken to prevent or deter escape, force, threat of force or coercion, duration, assertion of exclusivity, subjection to cruel treatment and abuse, control of sexuality and forced labour."[86] It further noted that consent is not a relevant element of the crime as it is "often rendered impossible or irrelevant by a series of influences such as detention, captivity or psychological oppression."[87]

Another recent and helpful boost to the argument that trafficking has become integrated into the international prohibition on slavery is provided by the Statute of the ICC) The ICC's Statute specifically includes both "enslavement" and "sexual slavery" as crimes. Enslavement is defined as "the exercise of any or all of the powers attaching to the right of ownership over a person." Enslavement includes "the exercise of such power in the course of trafficking in persons, in particular women and children."[88] Trafficking in this context is not defined. While the term "sexual slavery"[89] is also not defined, the accompanying guide to interpreting crimes within the ICC's ambit defines the *actus reus* of sexual slavery as:

> 1. The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending, or bartering such a person or persons or by imposing on them a similar deprivation of liberty.
>
> 2. The perpetrator caused such person or persons to engage in one or more acts of a sexual nature.[90]

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[85] Kunarac Trial Chamber Judgment, *supra* note 84, at paras. 542–543.

[86] Kunarac Appeals Chamber Judgment, *supra* note 84.

[87] *Id.*

[88] Rome Statute, *supra* note 46, art. 7(2)(c).

[89] Rome Statute, *supra* note 46, arts. 7(1)(a), 8(2)(b)(xxii), 8(2)(e)(vi).

[90] Report of the Preparatory Commission for the International Criminal Court, Addendum, *Finalised Draft Text of the Elements of Crimes*, U.N. Doc. PCN ICC/2000/INF/3/Add.2 (July 6, 2000).

Notably, the judgment of the ICTY referred to above goes even further than the ICC provisions relating to both enslavement and sexual slavery in its determination that commercial exchange and deprivation of liberty are not essential elements of the crime of enslavement.[91] In *Siliadin v France*, the European Court of Human Rights returned the discussion to the core definitional element of one exercising a genuine right of ownership over another—thereby reducing that person to an object. In this case, the Court held that being deprived of personal autonomy, even in the most brutal way, is not, of itself, sufficient to constitute slavery.[92]

Conclusion: Trafficking as Slavery

What conclusion can be drawn from this analysis of the customary international legal prohibition on slavery? The first and most certain finding is that in its original form, this customary norm included only "classical" or "chattel" slavery. Such practices connect directly to the minimum core content of the norm in relation to which no dispute exists. Certainly the international legal position is more equivocal in relation to the range of institutions and practices linked to but not identified as slavery. Despite evidence of a widening of the norm to embrace practices that go beyond chattel slavery, it remains difficult to sustain an absolute claim that trafficking, in all its modern manifestations, is included in the customary and *jus cogens* norm prohibiting slavery and the slave trade. Egregious cases of trafficking, involving clear elements of ownership not limited in time would provide the strongest base for arguing the existence of slavery and the consequential application of the slavery norm. More generally, a convincing argument could possibly be made that the legal prohibition on an apparently limited list of practices "similar" or "analogous" to slavery has been extended, through the necessary level of state practice and *opinio juris*, to include modern trafficking practices—

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[91] Kunarac Trial Chamber Judgment, *supra* note 84, paras. 542–543. For an important discussion of the consequences of the ICC adopting this narrower definition of sexual slavery, see Women's International War Crimes Tribunal, Trial of Japanese Military Sexual Slavery, Case No. PT-2000-I-T, paras. 620–631 (Dec. 4, 2001).

[92] Siliadin v. France, Eur. Ct. H.R. App. No. 73316/01, judgment of July 26, 2005. In this case the Court held that the applicant had been held in "servitude" within the meaning of Article 4 of the ECHR and that she had also been subject to forced labor. For a detailed analysis of the case including of the Court's finding that the state had breached its positive obligation to provide specific and effective protection against violations of the Convention, see H. Cullen, Siliadin v. France: *Positive Obligations under Article 4 of the European Convention on Human Rights*, HUM. RTS. L. REV. (2006).

particularly those involving children or debt bondage.[93] The decision of the European Court of Human Rights in *Siliadin v. France*[94] strengthens this position by extending the possibility of certain trafficking situations being characterized as servitude. This development goes well beyond the simple recognition of trafficking as a "contemporary form of slavery" that, while perhaps important in rhetorical terms, is without particular legal significance. In relation to each situation, trafficking as slavery and trafficking as "similar to slavery," it is clear that international law is in a state of flux and that changes to the customary norms are currently under way. The extent and effect of those changes remains to be seen. However, on balance, and taking into account recent developments in international criminal law, it appears that Bassiouni's position, linking the two practices and their relevant legal frameworks, is on the ascendancy.

III. THE PROHIBITION ON FORCED AND COMPULSORY LABOR AND DEBT BONDAGE

"Forced labor" is widely accepted as a typical end purpose of trafficking including in the international legal definition of trafficking contained in the Trafficking Protocol. Debt bondage (also referred to as "bonded labor") is commonly employed as a means of compelling trafficked persons to enter and remain in exploitative and abusive work situations. The following paragraphs examine the origin and content of the international legal prohibition on forced labor and debt bondage as well as their connections to both slavery and trafficking.

International and Regional Instruments Relevant to Forced Labor and Debt Bondage

The 1926 Slavery Convention was the first international legal instrument to refer to the (undefined) practices of forced and compulsory labor. States parties to the convention undertook to adopt all necessary measures to prevent compulsory or forced labor from *developing into conditions analogous to slavery*.[95] The definition of forced or compulsory labor,

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[93] This interpretation is strengthened by the reference in the ILO Worst Forms of Child Labor Convention to "all forms of slavery and practices similar to slavery, such as the sale and trafficking of children." Child Labour Convention, *supra* note 76, art. 3(a).

[94] *Supra* note 92.

[95] 1926 Slavery Convention, *supra* note 16, art. 5.

which was first articulated in the 1930 ILO Forced Labour Convention, is still widely accepted.[96] Under the 1930 convention, the term refers to "all work or service which is extracted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily."[97] The prohibition contains a subjective element (*involuntariness*) as well as objective requirements that are met when the state or a private individual orders personal work or service, and a punishment or sanction is threatened if the order is not obeyed.[98] The 1930 convention requires the criminalization of forced or compulsory labor[99] in all but a limited range of circumstances and imposes a duty on states parties to suppress the use of such practices within the shortest possible period[100] as well as to prosecute violations.[101] The ILO's 1957 Abolition of Forced Labor Convention[102] goes further, obliging states parties to take effective measures to secure the immediate and complete abolition of forced or compulsory labor.[103] States are to "[s]uppress and not make use of any form of forced or compulsory labor" that is used as a means of political coercion and economic development as well as racial, social, national, or religious discrimination.[104] Under both conventions, states parties are held accountable for the actions of corporations and private persons.[105] The Declaration on Fundamental Principles and Rights at Work, adopted by

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[96] The ILO definition would apply, for example, to the reference to forced labor contained in the recently concluded Trafficking Protocol, *supra* note 1.

[97] ILO Convention No. 29 (ratified by 171 states as June 24, 2007, http://www.ilo.org/ilolex/cgi-lex/ratifce.pl?C029.

[98] NOWAK, *supra* note 17, at 150, and sources cited.

[99] ILO Convention No. 29 *supra* note 97, art. 25.

[100] *Id.*, art. 1.1.

[101] *Id.*, art. 25.

[102] Abolition of Forced Labor Convention (ILO Convention No. 105), June 25, 1957, 320 U.N.T.S. 291.

[103] *Id.*, art. 2.

[104] *Id.*, art. 1.

[105] ILO Convention No. 129, *supra* note 97, art. 4(1): "The competent authority shall not impose or permit the imposition of forced or compulsory labour for the benefit of private individuals, companies or associations." ILO Convention No. 105 does not contain any specific reference to private parties. However, its application to private parties may be inferred from the obligation of states parties to suppress any form of forced or compulsory labor as a means of mobilizing and using labor for purposes of economic development, and as a means of labor discipline. *Id.*, art. 1, paras. (b), (c).

the International Labour Conference in 1998,[106] reiterates the obligation, on all ILO members, whether or not they have ratified the relevant conventions, to respect, promote, and realize the principles concerning fundamental rights including the elimination of forced or compulsory labor. The ILO's Governing Body has confirmed the application of the relevant conventions to forced labor exacted by private bodies and individuals, including slavery, bonded labor, and certain forms of child labor.[107]

The Universal Declaration on Human Rights indirectly addressed the issue of forced and compulsory labor in its provision that "[e]veryone has the right to work, to free choice of employment, to just and favourable conditions of work."[108] The right to employment, which an individual freely chooses and accepts, is also guaranteed in the International Covenant on Economic, Social and Cultural Rights.[109] The ICCPR makes direct reference to forced or compulsory labor in connection with its prohibition on slavery and servitude. Under the terms of this instrument, and subject to a number of carefully circumscribed exceptions, none of which would be relevant in the present context,[110] "no-one shall be required to perform forced or compulsory labor."[111] The ICCPR's prohibition on forced and compulsory labor is reflected in all the major regional human rights treaties except the African Charter.[112] In relation to the relevant

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[106] International Labour Conference (ILO), Declaration on Fundamental Principles and Rights at Work, 86th Sess., Geneva, June 18, 1998, 37 I.L.M. 1233.

[107] ILO Governing Body report, para. 32, ILO Doc. GB 265/2 (1996), *cited in* Weissbrodt and Dottridge, *supra* note 21, Add. 1 para. 11.

[108] Universal Declaration of Human Rights, *supra* note 22, art. 23.

[109] International Covenant on Economic, Social and Cultural Rights art. 6, Dec. 16, 1966, 993 U.N.T.S. 3. The Covenant also refers, in its Article 7, to the entitlement of everyone to "just and favorable conditions of work."

[110] For further discussion on these exceptions, see BOSSUYT, *supra* note 31, at 169–85 and NOWAK, *supra* note 17, at 151–57.

[111] ICCPR, *supra* note 29, art. 8(3).

[112] The European Convention, *supra* note 37, art. 4(2); and the American Convention, *supra* note 36 arts. 6(2) and 6(3). Note that in *Van der Mussele v. Belgium*, Application No. 1890/80, Judgment (merits) of November23, 1983, Eur. Ct. Hum. Rts. (A70)), the European Court of Human Rights stated that the term "forced" "brings to mind the idea of physical or mental constraint" (*id.*, para. 34). With regard to the term "compulsory," the Court found that there must be work exacted "under the menace of any penalty and also performed against the will of the person concerned" (*id.*). While the African Charter, *supra* note 35, does not specifically prohibit forced or compulsory labor, it does, in Article 15, protect the rights of all persons to "equitable and satisfactory working conditions."

article of the European Convention, the European Commission has indicated that the concept of forced or compulsive labor involves two necessary and distinct elements as follows: "that the work or service is performed by the worker against his will and, secondly, that the requirement that the work or service be performed is unjust or oppressive or the work or service itself involves avoidable hardship."[113]

What about debt bondage? This practice is defined in the Supplementary Convention as

> [t]he status or condition arising from a pledge by a debtor of his personal services or those of a person under his control as security for a debt, if the value of those services as reasonably assessed is not applied towards the liquidation of the debt or the length and nature of those services are not respectively limited and defined.[114]

Unlike forced labor, the definition makes no reference to the concept of voluntariness. It would appear, therefore, that international law does not envisage the possibility of an individual being able to consent to debt bondage. The convention identifies debt bondage as a practice which is *similar to slavery*[115] and defines a victim of debt bondage as "*a person of servile status.*"[116] States parties are required to take the necessary legislative and other measures to ensure the abolition of debt bondage[117] and are to criminalize the act of "inducing another person to place himself

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[113] Iverson v. Norway, 1963 Y.B. EUR. CONV. HUM. RTS. 278, 328.

[114] Supplementary Convention, *supra* note 20, art. 1(a). It should be noted that while the legal concept of debt bondage is clearly an important part of the anti-trafficking framework, its definition is limited in a number of important respects. The exploitative aspect of much cross-border trafficking, particularly into wealthy, difficult-to-access countries, is often the size of the original debt for travel. For example, a Thai woman may incur a debt of up to U.S. $50,000 for being taken to work in a brothel in Australia. The value of the services she is providing may well be assessed at commercial rates and applied towards liquidation of the debt. The length and nature of the services may also be defined and known to her. However, under the definition provided above, this would not be considered a situation of debt bondage, even if the original debt were twice this amount.

[115] *See id.* art. 1(a).

[116] *Id.* art. 7(b).

[117] *Id.* art. 1.

or a person dependent upon him into the servile status resulting from [debt bondage]."[118]

Debt bondage is said to be included within the prohibition on servitude contained in the ICCPR[119] and is identified as one of the "worst forms" of child labor prohibited by the Worst Forms of Child Labour Convention.[120] It is argued that debt bondage has, over time, been assimilated into the broader notion of forced labor and therefore within the ambit of ILO Convention No. 29[121] as well as, presumably, the ICCPR. There is also some limited support for the contention that extremely low wages are themselves a cause of both debt bondage and forced labor.[122]

The Distinction Between Slavery and Forced Labor

What is the difference between slavery and forced labor? A separation of these two concepts is clearly important. As noted above, the characterization of a situation or set of circumstances as "slavery" has very particular legal consequences as well as strong political and moral overtones. Forced or compulsory labor, on the other hand, while clearly prohibited under international law, does not carry anywhere near the same weight of approbation. The distinction between these two concepts has always been unclear in both theory and practice—although the history of their respective prohibitions confirms that states did perceive (and sought to uphold) a difference between them. The 1926 Slavery Convention, for example, requires states parties to take all necessary measures to "prevent compulsory or forced labour from developing into conditions analogous to slavery."[123] Some commentators have argued that, unlike slavery, which has traditionally been defined with reference to *legal ownership*, the core definitional feature of forced/compulsory labor is, as noted by the European

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[118] *Id.* art. 6.2.

[119] NOWAK, *supra* note 17, at 148. This interpretation is supported by the Human Rights Committee's consideration of issues of bonded labor. *See, e.g.*, U.N. Human Rights Committee, *Concluding Observations on India*, U.N. Doc. CCPR/C/79/Add.81, para. 29 (Apr. 8, 1997).

[120] Child Labour Convention, *supra* note 76, art. 3(a).

[121] Weissbrodt and Dottridge, *supra* note 21, para. 39.

[122] Weissbrodt and Dottridge take this position, citing a decision of the Supreme Court of India that any workers who were paid less than the minimum wage were bonded laborers. Weissbrodt and Dottridge, *supra* note 21, para. 17.

[123] 1926 Slavery Convention, *supra* note 16, art. 5.

Court, its *involuntariness.*[124] Some view the distinction as being one of degree, with the label "slavery" being reserved for the most egregious cases of economic exploitation: "[slavery] is completely unacceptable while [forced labor] is merely undesirable."[125] For others, the character of the oppressor is definitive: slavery is practiced by private individuals; forced or compulsory labor is exacted by the state or government.[126] The temporal factor has also been deemed relevant: slavery is a continual state of being; forced labor can arise incidentally or on a temporary basis.[127] It is unclear whether the recent, tentative linking of slavery and forced labor in the Statute of the ICC will operate to alter this well-established understanding of a separation between the two concepts.[128]

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[124] *See, e.g.*, Nowak, *supra* note 17, at 149.

[125] Bassiouni, *supra* note 11, at 468.

[126] *See* Lassen, *supra* note 11, at 205 (citing an address by the Secretary of the Anti-Slavery Society: "forced labour is exaction of involuntary labour by the Government, whereas slavery is exaction of involuntary labour by an individual springing from that individuals right of property in the person compelled to work"). Nowak implicitly endorses this view with his comment that the prohibition on forced or compulsory labor as contained in Article 8 of the ICCPR is directed primarily at states—that in contrast with the prohibition on slavery, the *state* is being prohibited from compelling an individual to work against his or her own will. Nowak 1993, *supra* note 17, at 150. Gomien et al. uphold this interpretation in the context of their examination of the European Convention's prohibition on forced and compulsory labor: "The concepts of forced or compulsory labour are distinguishable in the sense that they may refer to duties imposed by the State but not by another private subject," DONNA GOMIEN, DAVID HARRIS & LEO ZWAAK, LAW AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND THE EUROPEAN SOCIAL CHARTER 121 (1996).

[127] JACOBS & WHITE, *supra* note 39, at 69. The authors go on to argue that the wording of the prohibition on slavery contained in Article 4.1 of the European Convention (*supra* note 37) indicates that both slavery and servitude are conceived of as questions of status. By contrast, the prohibition on forced or compulsory labor contained in Article 4.2 "is intended to protect persons who are at liberty." *Id.* This is also the position taken by the authors of the official commentary to the Charter of Fundamental Rights of the European Union: "[the prohibition on] forced or compulsory labour is intended to protect people who are at liberty. In contrast to slavery and servitude, which are continuing states, forced labour may arise incidentally or on a more temporary basis." EU NETWORK OF INDEPENDENT EXPERTS ON FUNDAMENTAL RIGHTS, COMMENTARY OF THE CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION, at 57 (2006), *available at* http://ec.europa.eu/justice_home/doc_centre/rights/charter/doc_rights_charter_en.htm#network_commentary.

[128] The Elements of the Crime Against Humanity of Enslavement refer to the perpetrator "exercising any or all of the powers attaching to the right of ownership such as by purchasing, selling, lending, or bartering such a person or persons, or by imposing on them a similar deprivation of liberty. It is understood that such deprivation of

The Relationship Between Trafficking, Forced Labor, and Debt Bondage

The relationship between trafficking and forced labor would appear to be an obvious one. However, while some commentators have casually linked trafficking with forced labor,[129] the international prohibition on forced and compulsory labor has, thus far, not been directly invoked at the international or regional level in relation to a situation of trafficking, forced prostitution, or exploitation of prostitution. Clearly the reluctance to identify typical end results of trafficking, particularly sex work, as labor is one reason for this failure to mount what would appear to be a fairly obvious line of attack. Another complicating issue could be presented by the concept of voluntariness, which, as noted by the European Court, is central to the definition of forced labor.[130] Can someone consent to or voluntarily enter into a coercive labor situation? It has been argued that an individual could be identified as a victim of trafficking for forced labor if that person was *not* fully informed as to the exploitative nature and coercive conditions of the work situation and was therefore unable to offer his or her labor voluntarily.[131] It follows from this line of argument that a fully informed individual may opt to work in exploitative circumstances "because other options are less socially and economically attractive."[132] In such a case, there could be no forced labor because there is no true "force." While this approach is appealing for its apparent simplicity, application would not be particularly easy. How can meaningful consent be ascertained? On which party should the burden of proving consent rest? Could a finding of meaningful consent serve as a barrier to prosecution of trafficking-related offenses such as restriction on freedom of movement, unsafe working conditions, and violence? Ultimately, is not the notion of consent to coercion counter-intuitive? These issues are yet to be explored in any depth and are unlikely to be resolved unless and until the international bodies charged with oversee-

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liberty may, in some circumstances, include exacting forced labor or otherwise reducing a person to servile status as defined in the [1956] Convention." Rome Statute *supra* note 46, art. 7(1)(c).

[129] Farrior, for example, sets out the ILO definition of forced labor and concludes, without further analysis, that: "[t]his definition may be construed as applicable to persons who have been trafficked." Farrior, *supra* note 60, at 223.

[130] *See supra* note 112.

[131] Inglis, *supra* note 60, Section D. This same point is made (in identical language) in Malone, *supra* note 60, at 62.

[132] Inglis, *supra* note 60, Section D. This same point is made (again in identical language) in Malone, *supra* note 60, at 63.

ing the various instruments outlined above make and explore the implications of a connection between trafficking and forced labor. A similar situation exists with regard to debt bondage. While the relationship between trafficking and debt bondage is both intuitive and empirically justified, little attention has been given to exploring the implications of this connection.

Conclusion: Trafficking as a Violation of International Human Rights Law

There is an inescapable link between trafficking and international human rights law. As noted in the introduction to this chapter, trafficking goes to the very heart of what human rights law is trying to prevent. The devil, however, is in the details. Ultimately, if we want to change behavior (surely the central goal of the international human rights project), then it is necessary to apply law to the problems it is supposed to help solve. This pre-supposes that we know, with some degree of certainty, what the rules actually are. States must understand what is required of them before it becomes possible for these same requirements to influence their decisionmaking. In relation to trafficking and human rights, we know there are laws, but we know them only in the most general terms. Very rarely can we actually apply those laws easily to real situations, involving real people in real countries. This lack of rigor, this absence of concrete detail, has provided a welcome escape clause for governments that, naturally enough, have things other than human rights to consider. As long as the law remains unclear, states can keep arguing about it. As long as the law remains unclear, states will not be brought to task for failing to apply it.

Linking trafficking to widely accepted international legal principles—principles that are also part of national and international legal traditions—is an important step in the process of normative clarification. As Professor Bassiouni's work continually reminds us, the prohibitions on slavery, the slave trade, servitude, forced labor, and debt bondage are among the oldest and least ambiguous of all international human rights laws. Their relevance to the trafficking context is indisputable. Recent legal and policy developments, not least those in Professor Bassiouni's field of international criminal law, have provided a solid foundation and justification for the application of these prohibitions by international, regional, and national legal systems. Such application would, without a doubt, contribute substantially towards ending impunity for traffickers and securing much overdue justice for victims.

CHAPTER 15

CHERIF BASSIOUNI, THE ICRC, AND INTERNATIONAL HUMANITARIAN LAW

*Yves Sandoz**

Apart from the fact that he has many good friends inside the International Committee of the Red Cross (ICRC), Cherif Bassiouni has had, and continues to have, close contact with the institution due to the numerous interfaces between some of his professional achievements and activities accomplished by the ICRC in the framework of its mandate. I will try hereafter to briefly describe the fruitful interactions between Cherif Bassiouni and the ICRC and their *"raison d'être."*

From the Geneva Conventions of 1949[1] and from the Statute of the International Red Cross and Red Crescent Movement,[2] the ICRC has received numerous mandates in order to enable the institution to accomplish protection, assistance, and monitoring activities, usually in time of armed conflict between states, but also in time of internal violence.

The ICRC's mandate concerns international humanitarian law (IHL) not only to the extent it is an agent of implementation of that law, but more generally, as mentioned in the Statutes cited above, in its obligation "to work to the faithful application" of IHL, including "tak[ing] cognizance of any complaints based on alleged breaches," "work[ing] for the

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[1] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 1, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea art. 2, Aug 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Parsons in Time of War art. 4, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

[2] Statutes of the International Red Cross and Red Crescent Movement, ICRC Conf. 25, Geneva (Oct. 1986) [hereinafter Red Cross Statutes].

understanding and dissemination of knowledge," and "prepar[ing] any development" of that law.[3]

Therefore the ICRC has: conceptual activities ("to prepare development"); communication and dissemination activities, including helping to interpret the law where it is not sufficiently clear ("to work for the understanding"); monitoring activities (in prisons, in occupied territories, and so forth); and direct operational activities (rehabilitating or establishing hospitals if necessary, going even in certain circumstances as far as to contribute to the restoration of the whole health system; bringing relief (essential goods) to populations in need; improving the situation in prisons; keeping or restoring the link between families and reuniting them when possible, and so forth).

In a great number of those fields of activities, the ICRC has had contacts and fruitful collaborations with Cherif Bassiouni.

I. REFLECTION ON AND DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW

One of the main weaknesses of IHL is its insufficient implementation. The first Geneva Convention adopted in 1864, which can be considered as the starting point of modern IHL, did not have any provision for its implementation. For the states adopting it, the principle *pacta sunt servanda* was deemed to be enough.

The convention, in spite of undeniable progress on the battlefield just after its adoption,[4] was then subject to numerous and important violations during the war of 1870. On the one hand, this reinforced the arguments of those who were skeptical about the idea of adopting any international norm aimed at mitigating the fate of non-combatants. On the other hand, it encouraged those who strongly believed in the importance of such norms to seek new ways to improve respect for them. The idea of an international criminal court came up, and the creation of such a court was even proposed in 1872 by Gustave Moynier, who was president of the ICRC, but it did not find broad support at that time.[5]

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[3] *See id.* art. 5, para. 2.

[4] *See* PIERRE BOISSIER, HISTOIRE DU COMITE INTERNATIONAL DE LA CROIX-ROUGE, DE SOLFERINA A TSOUSHIMA 238 (1978).

[5] *See id.* at 371.

During the successive development of IHL, the importance of reinforcing implementation was nevertheless recognized, and many norms were adopted and introduced in IHL at a preventive level. These included the obligation to translate the conventional texts and to adopt national norms to implement them and the inclusion of IHL in the training of soldiers and more broadly in the educational system. In addition, an obligation emerged to ensure better monitoring during armed conflicts, systems of protecting powers, a special role for the ICRC, the possibility of requiring enquiries when violations of IHL are alleged, and, finally, sanctions in the event of violation.

The system of sanctions set out in the Geneva Conventions of 1949 and additional Protocol I of 1977 makes a distinction between any breach of those conventions, for which the obligation at the international level is limited to the cessation of the violation by the party concerned (which can sanction the violation but has not the obligation to do so) and the grave breaches—which are enumerated—that the concerned party has the obligation to punish. On the international level, all states have an obligation to punish grave breaches even when they are committed outside of their sphere of competence: through the principle of universal jurisdiction, war criminals must be sought out and tried wherever they are, and a state party to the Geneva Conventions must therefore arrest any person on its territory who is suspected to have committed war crimes and then either bring this to judgment or extradite that person (the principle of *aut judicare aut dedere*).

The adoption of this system, which was an important development in the field of international penal law, was certainly rendered possible in 1949 by the response to the horrors committed during World War II. A strong sentiment had developed among the international community that some horrible acts could not remain unpunished, and this system was a response to those feelings. The approach adopted had the additional advantage of offering an alternative to the establishment of a permanent international criminal court on the model of the *ad hoc* Nuremberg Tribunal, and the majority of states were still reticent about such a creation.

In practice, these new rules were nevertheless very poorly implemented. An explanation of the reason for this inaction on the part of states would necessitate an in-depth analysis, which is beyond the scope of this chpater. Nevertheless, I will set out what I perceive to be the two main reasons.

The first one is the political tension existing during the period of the Cold War and the risk that the arrest of a suspected criminal of another country on its territory would provoke reprisals, as experienced at another level with the mutual expulsion of diplomats. The independence of justice was not guaranteed at the international level.

The second reason is that the system was established in 1949 only for international armed conflicts. States had made an important step forward in accepting some rules to be applied in internal conflicts through a special article in all four Geneva Conventions, Common Article 3. Before 1949, IHL did not apply at all to this type of conflict. But states were not yet ready to characterize the crimes committed in such conflicts as international. And as the majority of conflicts that occurred after this time were internal, the fact that the crimes committed during this type of conflict were not covered by the system was certainly also a factor that undermined its credibility.

But the idea that it is imperative to develop a strong system of sanctions on the international level, as an indispensable support to international law, and in particular to IHL in situations of armed conflict, was established. And it was here that Professor Bassiouni's dogged insistence on the importance of an international system of implementation and enforcement comes into play. Professor Bassiouni is the gardener who put all his incredible energy and enthusiasm into watering this seed and ensuring its growth and ultimate blossoming.

Professor Bassiouni organized and hosted numerous meetings and discussions at the International Institute of Higher Studies in Criminal Sciences in Siracusa, Italy, at which I had the privilege of joining other experts in discussing aspects of international criminal law—to establish new proposals or to work on new drafts. I must confess that I was sometimes among the skeptics, not seeing the possibility of any real breakthrough at the state level, especially in the atmosphere of the Cold War, which still prevailed at this period of time. But Professor Bassiouni remained confident: it was his position that it was important to go ahead, to examine the problems, to anticipate the possible difficulties, to be ready with solid and well-thought proposals to put on the table when the time would be ripe.

And this time came. Again, it was a sorrowful reality when abominable crimes were committed first in the former Yugoslavia, then in Rwanda. Of course, the motive of the Security Council in deciding to

establish international jurisdictions was not totally noble. Indeed, some observers saw it rather as a cheap way to excuse the failure of the Security Council to adequately respond to these crises and to protect the civilians on the spot. In addition, the Security Council had taken a decision only to establish two *ad hoc* tribunals, the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR).

But the occasion was there, and Professor Bassiouni understood the importance of those tribunals functioning well, not only in performing their respective mandates, but also in demonstrating the general utility of an international criminal court and giving a new impulse to the creation of a permanent one. That is probably one of the reasons why he agreed to involve himself in a very dangerous situation to prepare the material for the tribunal, agreeing to be a member of, then to chair, the U.N. Commission to Investigate Violations of International Humanitarian Law in the former Yugoslavia. During this phase, Professor Bassiouni and the staff of the ICRC found themselves working closely together. This interaction is discussed further below.

The idea that the *ad hoc* tribunals were an opportunity to go further, despite the intention of some of those who were behind their creation, proved to be correct. The *ad hoc* tribunals did play an important role in breaking down resistance to two ideas that had been considered taboo: the creation of a permanent international criminal court and the establishment of an international obligation to respond to crimes committed in non-international armed conflicts. The successful functioning of those two *ad hoc* tribunals, or at least of the ICTY, the effects of the ICTR being more disputable, in particular due to reasons linked with the context in which it works, gave a decisive impulse to the undertaking to create a permanent international criminal court. And the ICTY was a decisive factor in the acceptance by the international community that grave breaches of IHL (i.e., war crimes) could also be committed in non-international armed conflicts[6] and therefore that such crimes could be inserted into the Statute of this new court.

Then came the negotiation on the Statute of a permanent international criminal court.

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[6] In particular in the famous case of Prosecutor v. Tadic, Case No. IT-94-AR72 (Oct. 2, 1995).

The ICRC was deeply involved in this undertaking, seeing clearly the long-term importance of such a court in reinforcing the implementation of IHL through a credible system of sanctions. Another reason for its involvement was the maintenance of a coherent whole system, maintaining harmony between the wording of the grave breaches mentioned in IHL and the war crimes enumerated in the Statute.

For these reasons, the ICRC convened numerous informal working groups and there, again, the work of Cherif Bassiouni, and the close collaboration, based on mutual respect and confidence, which had existed between the ICRC and him for so many years, proved to be very helpful. And this was true not only in this preparatory phase but also during the final phase, the Diplomatic Conference that took place in Rome in the summer of 1998.

One does not always realize the exceptional achievement represented by the adoption of the Rome Statute after only six weeks of negotiation. We should certainly pay tribute to all those who contributed to the preparatory work and/or were involved in the negotiations phase. But two persons deserve a special mention, the chairman of this conference, Philippe Kirsch, and Cherif Bassiouni, who played a key role (1) through the material prepared by him during so many years, (2) in the organization of meeting of experts in the preparatory phase, and (3) as chairman of the drafting committee of the Diplomatic Conference. His knowledge and universally recognized competence in international criminal law were decisive—but not only because of his incomparable knowledge of the matters discussed. He also demonstrated a great sense of diplomacy, an impressive mixture of patience and firmness. He was for that reason a very precious and an indispensable support to President Kirsch. Both had, each with a different style, those precious ingredients, this exceptional intuition to know *"jusqu'où aller trop loin"* as we say in French ("how far to go too far").

How do we evaluate Professor Bassiouni's contribution to the Rome Statute? It is always difficult to give quantum responses to such a question. But we may say, at least, that it was a great contribution.

That being said, while the adoption of the Rome Statute is an important step forward, it is not the final one. There are provisions that demand clarification. The way to define aggression and to insert it as a crime covered by the Statute remains a very difficult task, and this Statute is rather turned towards the 20th century rather than the 21st, the great

challenges of the latter being probably—even more than war crimes, crimes against humanity, genocide or aggression—damage to the environment, corruption, and organized international criminality, not to speak of terrorism. Logically, the Statute should therefore be further developed.

But there we can see another risk. The criminalization of an action is only possible on the basis of norms that are clearly established in international law. This is particularly true in the field of environmental law, where there is an urgent need for strict international regulations, but where it is very difficult to find a consensus among states. These last years, international penal law has had a pulling effect on international law, but the locomotive must be sure that the cars remain behind it. In other words, international penal law is a tool to implement substantive international norms and must therefore adapt the speed of its development to those of those other norms.

Thus, the priorities for international penal law today are to increase the number of ratifications of, or adherences to, the Rome Statute and to ensure its positive implementation through the practical work of the International Criminal Court. It is through the involvement of this Court in the prosecution of the most important international crimes, and through the quality of its work, that it will demonstrate itself to be a reliable tool to fight impunity and gain credibility.

Therefore, it remains essential to continue the fieldwork that enquires into violations of IHL or of international human rights law as well as the complementary work to compensate and rehabilitate the victims. And it is with a consciousness of this that Professor Bassiouni has accepted central significant roles, first as Special Rapporteur, appointed by the U.N. Commission on Human Rights, on the right to restitution, compensation, and rehabilitation for victims of gross violations of human rights and fundamental freedoms, then as independent expert on human rights in Afghanistan, for the United Nations.

That leads to a few words on the relationship between Professor Bassiouni and the ICRC in the field.

II. WORK IN THE FIELD

I have not been directly involved in the relationship established by Professor Bassiouni with ICRC delegations in the field. It is clear nevertheless that the collaboration in Siracusa or Geneva, which took place for

a very long time before the field collaboration began, was a precious precedent: Cherif Bassioiuni and the ICRC leadership knew and trusted each other, and this mutual confidence has been particularly useful in the field. It has created a harmonious relationship, which has also meant a good mutual understanding of the limitations inherent in this collaboration.

In fact, there is a certain paradox in the mandate of the ICRC, which is not easy to understand. The institution devotes a lot of energy and resources to working toward a better implementation of IHL, but it is also and above all—at least in terms of financial engagement—directly active in the field to help the victims of armed conflicts. The possibility of accomplishing the second part of the mandate may place some constraints on the first. The ICRC does not have the means to impose its presence, even where there is a compulsory conventional obligation to accept it. The main tool of the ICRC is therefore to persuade the concerned parties to armed conflicts—international as well as non-international in nature—that its presence is not only useful because of its contribution to help each party to fulfill its obligations towards the victims of the armed conflict, but also because it will not have any detrimental effect on the parties themselves.[7]

In this regard, parties often have two main concerns. The first is centered on protection of their public image, the fear of humanitarian organizations criticizing their behavior. The second is more personal, the concerns that arise if members of those authorities have committed or are accountable for acts that are violations of international law, in particular, alleged war crimes or crimes against humanity. It is easy to understand that international humanitarian organizations would not be welcomed if they are considered a threat in this regard. For humanitarian organizations, there is a real and difficult dilemma. It is, of course, of prime importance to be present in order to help the victims in the field. But this presence cannot be a priority at any price, in particular when there are such serious and massive violations that the attempts to perform efficient work present significant hazards. The discussion on the "obligation to denounce" was, by the way, the center of many debates, often polemic, among humanitarian organizations, on the political level and in the media, in particular during the first years that the non-

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[7] *See* PAUL BONNARD, MODES OF ACTION USED BY HUMANITARIAN PLAYERS: CRITERIA FOR OPERATIONAL COMPLEMENTARITY (1999).

governmental organization (NGO) "Doctors Without Borders" was operating, because it questioned the ICRC, deeming it to be too discrete.

Today, we can say that although this controversy has not vanished, it is much less intense. Those who make it their priority to denounce any violation of international law—for example, aggression or violations of human rights or of humanitarian law—know that the price of such a politic is often the renouncement of the possibility of a presence in the field, for lack of consent of the parties to a conflict, or of security for delegates viewed as unfriendly by a part of the population as a consequence of such public pronouncements. On the other hand, one can also see a certain evolution in the ICRC doctrine, as the institution has clarified its position and made clear that the silence is not a basic principle and public pronouncements are not taboo:[8] in case of grave and renewed violations of IHL, the ICRC can go public if there are no better means to improve the situation.

This question is nevertheless still particularly delicate in the penal framework. It was recently raised, in particular in a case that was put forward to the ICTY. Could this tribunal force a delegate or an employee of the ICRC to be witness in a trial? For the ICRC, it was a vital issue; because if the parties to armed conflicts perceive the ICRC as not independent—that is, not able to take engagements concerning its public attitude—there is no doubt that they would often refuse the institution's offer of services. The ICRC made this independence a question of principle with the following argument: as the ICRC has received a mandate from the international community to protect and assist the victims of armed conflict, the perception that it is a kind of agent of the tribunal would break the relationship of confidence with the parties to armed conflicts, which is indispensable to fulfill this mandate with efficiency.

Quite convinced of the importance of international penal law and of the pertinence of international jurisdiction and having played an important role in the creation of the ICC, the ICRC found itself in a difficult position. It was not easy for the institution to defend its point of view in regard to its refusal to present evidence before the Court, which could be perceived as in contradiction with this conviction. But the ICTY ultimately accepted the ICRC's argument. That means that one must under-

[8] The present public doctrine on the attitude of the ICRC in case of violations of international humanitarian law has been published in ICRC, INT. REV. RED CROSS 728 (1998).

stand that if humanitarian action in the field and penal prosecution of war criminals has the same final goal, that is, to improve the humanitarian situation in armed conflicts, they have to be performed by different people and in separate ways.

All that demonstrates the institutional limits imposed on the possible relationship that Professor Basiouni could have with the ICRC delegates in the field, who could not transmit confidential information. Those limits can, of course, create some tensions between people working towards the same ideal, but information cannot be half-confidential. It is essential that the authorities know that the ICRC does what it says: trust is something very slowly established and very rapidly broken.

And it is precisely the long-term and friendly relationship established between Cherif Bassiouni and the ICRC that has permitted both to maintain a harmonious collaboration in the field—particularly in Afghanistan—with a good mutual understanding of the limits of its framework.

III. DISSEMINATION OF IHL

In addition to the elaboration of international law and to the work in situations of armed conflict, one can still add a third field of cooperation between Cherif Bassiouni and the ICRC, that is, the promotion and dissemination of IHL.

In the human rights field as well as for IHL, it is not enough to ensure that states adopt good norms. A constant effort is necessary in order to remind states of their obligation to respect those norms in all circumstances and to implement them on the national level, in particular through dissemination among all concerned persons.

For that reason, the ICRC, among its other activities, organizes numerous meetings or seminars for reflection on or dissemination of IHL. Professor Bassiouni has been a participant in many of these, contributing his deep knowledge and experience, as well as his remarkable capacity for synthesis.

But above all, Professor Bassiouni has himself organized, in his institute in Siracusa, a multitude of seminars or experts meetings, many of them on subjects related to IHL, and has regularly invited ICRC delegates to transmit their knowledge and experiences in this framework. His great ease in languages and his charisma allow him to chair those meetings with competence and elegance and to attract people of great qual-

ity from all over the world: he makes a success of each of them. In addition, the Egyptian origin of Professor Bassiouni was and still is of particular importance in reinforcing the knowledge and understanding of IHL in the Arab world and, for the ICRC, to reinforce its understanding of and its relationship with this part of the world.

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The many points of contact between Cherif Bassiouni and the ICRC have given me the chance to share privileged moments with him to discuss anything, to joke and laugh, to hear music. On the personal level, it has been a privilege for me to discover a rich personality behind such a great public man.

On the institutional level, the collaboration of Professor Bassiouni with the ICRC is a success story that will certainly continue further, with a common passion and devotion to improve, through the reinforcement of the international legal order, the fate of the countless people who are still victims of the weakness or of the violations of that order, in particular in the numerous armed conflicts that are still raging on our planet.

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