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International Justice for International Crimes: An Idea whose Time Has Come

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International criminal justice really began at Nuremberg in 1945, after an inauspicious start at Versailles in 1919. But little happened during the Cold War, and only in the 1990s, driven by a human rights movement that had refocused its energy on the rights of victims and concerns about impunity and accountability, did the efforts revive. The United Nations pioneered the activity, with three *ad hoc* tribunals. In 2002, a permanent institution, the International Criminal Court, began its operations. Concerns about the fairness of such proceedings have featured since the earliest days. In balance, both Nuremberg and its modern-day successors deliver acceptable judgments from a due process standpoint, although problems remain. Also troubling is an emphasis on convictions based upon paradigms that approach vicarious liability. This enhances the probability of conviction, but weakens the stigma of guilt and ultimately compromises the historical legacy. There is also a recent tendency to focus upon non-state actors, prosecuting rebels and terrorists rather than crimes of state.

'The first tribunal [in history] must have been summary and brutal; it was nevertheless the beginning of a great thing,' remarked Georges Clemenceau at the Paris Peace Conference, speaking of efforts to establish an international criminal court that culminated in provisions of the Treaty of Versailles.[1] Although there are isolated historical examples going back to the middle ages, the 'special tribunal' proposed in article 227 of the Treaty of Versailles, to be composed of judges from five countries, one named by each of the victorious powers, and the other international military tribunals made up of members of the military tribunals of the states concerned, described in article 229, initiated the modern

phenomenon of international criminal justice. The institutions contemplated under the Treaty of Versailles were never established. Instead, a compromise was reached whereby a handful of Germans accused of war crimes were judged at Leipzig by the Supreme Court of the Weimar Republic.[2]

This inauspicious beginning was followed by the triumph of Nuremberg. There are legends of a discussion between Churchill, Stalin and Roosevelt, in Tehran in 1943, on how to deal with Nazi leaders. Stalin famously is said to have won the day, calling for a show trial and defeating Churchill's initial proposal for summary executions.[3] Later, Justice Robert Jackson, the United States Supreme Court judge who negotiated the Charter of the Nuremberg Tribunal and then served as one of its prosecutors, warned that 'if you are determined to execute a man in any case, there is no occasion for a trial. The world yields no respect to courts that are merely organized to convict.'[4] Many modern students of the trials tend to stigmatise the Nuremberg and Tokyo trials, and the subsequent proceedings undertaken by United States Military Tribunals,[5] as 'victor's justice'.[6] The credibility of the Tokyo tribunal was not helped by the dissenting judgments, which cast a shadow over some of its legal foundations.[7] The Chief Justice of the United States Supreme Court, Harlan Fiske Stone, savaged the Nuremberg proceedings as a 'high-grade lynching party'.[8]

But it is surely unreasonable to expect international justice in its first serious incarnation to meet the high standards of due process recognized by international law at the end of the 20th century. One of the great apologists for the Nazis, David Irving, is Nuremberg's harshest critic. Typical of his other writings, his study of the Nuremberg trial[9] contains isolated bits of new information and occasional insights that sugar-coat scurrilous assertions unsupported by verifiable authorities, a feature of his writing that was already demonstrated by Richard Evans in the famous libel trial.[10] Nuremberg is the bone that sticks in Irving's throat, and for good reason. Even on a procedural level, it still stands up rather well in terms of fairness and substantive justice when put alongside the efforts of the present day.

A four-decade long hiatus interrupted the march of international justice. Things began to revive only at the end of the 1980s, when a resolution of the United Nations General Assembly authorized the International Law Commission to renew the work on an international criminal court that it had put on ice back in the early 1950s.[11] Two factors contributed to this. First, the end of the Cold War changed the atmosphere in the United Nations, enabling middle-sized powers, who found security in international law, to thrive. Second, the increasingly powerful human rights movement had begun to develop a victim-oriented discourse that required states to ensure that perpetrators of atrocities were brought to justice.

The first call went out in 1990, when Margaret Thatcher and George Bush Snr. proposed an international tribunal to try Saddam Hussein for aggression

committed against Kuwait.[12] The idea did not go much further at the time, but it certainly indicated an openness to international justice that had not been seen since the 1940s. Two years later, as war raged in the Balkans, there were renewed calls for an international tribunal. In February 1993, the United Nations Security Council recognized the principle of an international criminal tribunal to deal with serious violations of international humanitarian law committed in the former Yugoslavia.[13] By May, the Secretary-General had prepared a draft Statute, which the Security Council adopted without change.[14] A year later, genocide in Rwanda led to the creation of a second *ad hoc* body, the International Criminal Tribunal for Rwanda.[15]

The two *ad hoc* tribunals, for the former Yugoslavia and Rwanda, are now in their 'completion phase'.[16] Expensive and cumbersome, they have nevertheless surpassed expectations in terms of their ability to bring the main perpetrators to justice. One by one, with only a few exceptions, the villains have been brought to The Hague or to Arusha to stand trial. Sometimes their surrender has been the result of political and economic pressure upon states like Croatia and Serbia, who crave admission to the European Union. The two men widely believed to be most responsible for the worst single atrocity of the wars, the Srebrenica massacre of July 1995, remain at large. And the star suspect, Slobodan Milosevic, died peacefully in his prison cell when he was well into the fifth year of a trial whose end was barely in sight.

A third United Nations war crimes tribunal was established in 2002, this time in a collaborative partnership with the host state, Sierra Leone, at its own request. But the attraction of this new model was its relatively low cost compared with the two earlier institutions. In order to ensure that its work would be completed within a reasonable time, the Security Council insisted that it prosecute only 'those who bear the greatest responsibility'.[17] However, with the resources with which it was provided, it could hardly endeavour to do more. It has been less than four years since the Special Court for Sierra Leone was established, and already much of its work has been completed. Early in 2006, it was handed the prize suspect that it had coveted from the beginning, former Liberian President Charles Taylor. At about the same time, the Security Council asked the Secretary-General to prepare for the establishment of a second 'special court', somewhat analogous to the one for Sierra Leone. This one is to deal with the February 2005 assassination of Lebanese politician Rafiq Hariri.[18]

The United Nations tribunals stand at the heart of a much broader range of activity, variously described as 'accountability', 'anti-impunity' and 'post-conflict justice'. Several national courts have worked at bringing offenders to justice for war crimes and other atrocities. Often, but not always, they are handsomely supported by donors from the north. Many of them are also staffed by jurists from abroad. Where classic criminal justice is inadequate or apparently

impossible, sometimes because of political compromises that are part of a peace process, societies have turned to quasi-judicial or simply non-judicial mechanisms, such as truth and reconciliation commissions and various forms of what criminologists call 'restorative justice'. A recent resolution of the United Nations Security Council '*[r]eaffirms* that ending impunity is essential if a society in conflict or recovering from conflict is to come to terms with past abuses committed against civilians affected by armed conflict and to prevent future such abuses, *draws attention* to the full range of justice and reconciliation mechanisms to be considered, including national, international and "mixed" criminal courts and tribunals and truth and reconciliation commissions, and *notes* that such mechanisms can promote not only individual responsibility for serious crimes, but also peace, truth, reconciliation and the rights of the victims'.[19]

From an ideological standpoint, these developments over the past decade and a half have been driven by an important change in focus within the international human rights movement. It is now well understood that the protection of such core human rights as the right to life and to dignity, and the prohibition of inhumane treatment, imposes positive obligations upon states. Not only must they refrain from such practices in a direct sense, they must also ensure that individuals who perpetrate atrocities are brought to justice. This is often expressed as a right of victims, and it has had a powerful influence on the debate. The logic of such positions has led tribunals to declare that amnesties, which were once well-accepted as useful tools in peace processes, are not only inherently suspect but even, in the most extreme manifestation of this view, absolutely forbidden by law.[20]

From within this broad range of activities aimed at holding accountable perpetrators of serious violations of human rights has emerged what is arguably the most important new international institution since the establishment of the United Nations, the International Criminal Court. The *Rome Statute of the International Criminal Court* was adopted on 17 July 1998 and entered into force on 1 July 2002, after obtaining its 60th ratification. One hundred states are now parties to it. The judges and the Prosecutor were elected in 2003.[21] By mid-2005 the Court had issued its initial arrest warrants.[22] In March 2006, a Congolese warlord, its first suspect, was taken into custody in The Hague.[23]

Fairness and international justice

Concerns about fairness have plagued international justice since the earliest days. The Nuremberg trial of the International Military Tribunal was roundly criticised, for example, because it relied largely on written testimony produced as affidavits and not subject to cross-examination. There is no doubt that the extraordinary

length of the contemporary proceedings – trials often last a year or more – is a result of such concerns. Eyewitness testimony in open court has become the rule. The trials often revolve around meticulous examination of relatively isolated incidents, such as a single rape or other act of abuse. Judgments often run to many hundreds of pages and review the factual issues in excruciating detail.[24] Attempts to expedite matters have encountered resistance from those who are concerned that they may lead to injustice.

The Milosevic trial, which suddenly ended with the almost predictable death from natural causes of its star defendant, an ageing smoker with high blood pressure, provides several examples of the difficulties in ensuring a fair trial. Amongst other things, it featured a quite startling complaint about fairness by one of the distinguished judges of the Tribunal's Appeals Chamber. In a dissenting opinion, Judge David Hunt wrote: 'This Tribunal will not be judged by the number of convictions which it enters, or by the speed with which it concludes the Completion Strategy which the Security Council has endorsed, but by the fairness of its trials. The Majority Appeals Chamber Decision and others in which the Completion Strategy has been given priority over the rights of the accused will leave a spreading stain on this Tribunal's reputation.'[25] Judge Hunt was complaining about the admission in evidence of written statements given by potential witnesses to investigators. He felt that pressure from the Security Council to wind up the Tribunal's activities was compromising the fairness of the proceedings.

Another difficult issue concerning fairness arose when one of the trial judges, Richard May, became fatally ill. The Rules of Procedure and Evidence initially adopted by the Tribunal, in early 1994, specified that, in the event one of the three judges was unable to continue with a trial, it would start again from the beginning unless the defendant consented to its continuation with a substitute judge. The Rules were changed in December 2002, as the Milosevic trial was completing its first year of hearings. The amended Rule allowed for a trial to continue with a replacement judge even if the accused did not consent. Under the revised version, the remaining two judges could decide to proceed with a substitute judge 'if, taking all the circumstances into account, they determine unanimously that doing so would serve the interests of justice'. In such a case, the new judge, assigned by the President, is required to certify that he or she has familiarised himself or herself with the record of the proceedings. At the time, the President of the Tribunal explained that the amended Rule could only be applied in a relatively short trial. But views changed when Judge May announced he was resigning, and with little hesitation the remaining two judges agreed to continue with a replacement, despite the absence of the defendant's consent.[26] Judge Iain Bonomy rapidly reviewed the voluminous materials of this lengthy trial and then certified that he was ready to proceed.

Perhaps the most troubling issue concerning the fairness of the proceedings was a decision denying Milosevic the right to represent himself and ordering that court-appointed counsel take charge of his defence. In early 2003, the Prosecutor had unsuccessfully applied for such a ruling, but her application was dismissed in a judgment signed by presiding Judge May.[27] The decision explained that the Tribunal's procedure was essentially adversarial in nature, leaving the control of the defence case in the hands of the defendant. It referred to the Tribunal's Statute, which affirms that an accused has the right 'to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing'.[28] A year later, after the Prosecutor had concluded her case, and with Judge May dead and buried, the three-judge bench reconsidered the earlier ruling. It reassessed the applicable law, and concluded that the rule on self-representation was not absolute.[29] Of course, this was never really in doubt. It has always been admitted that a defendant may forfeit the right to defend himself or herself in person by misbehaviour in the courtroom. However, there was no serious allegation that Milosevic was not conducting himself appropriately. Rather, the judges said that because he was in poor health, this had occasioned delays in the proceedings. They ordered two British barristers, Steven Kay and Gillian Higgins, to take over the defence. But Milosevic refused to cooperate with Kay and Higgins, and they answered that in any event they could not act in defence of an accused without instructions as to how the case should be presented. Subsequently, the Appeals Chamber modified the ruling, designating Kay and Higgins as 'standby counsel' but letting Milosevic continue to run the case as he saw fit.[30]

These three examples – admission of written witness statements, replacement of a judge in the middle of a trial, and denying an accused the right to act in his own defence – all raise serious questions about the overall fairness of the proceedings. It is indeed extraordinary for a judge on the case to speak of a 'spreading stain' on the reputation of a Tribunal, as Judge Hunt did in his dissenting opinion. But while such concerns are legitimate here, as they were at Nuremberg, it would be overstating things to dismiss either the Milosevic trial or Nuremberg as unfair. Both had their flaws, certainly, but calling them 'high-grade lynching parties' is hyperbolic. None of the shortcomings in the Milosevic trial seriously compromised justice being done. It does not seem that the written witness statements distorted the evidence in such a way as to pervert the judges' ability to assess the facts. As for the replacement judge, he succeeded in mastering the earlier evidence and allowed the trial to continue without wasting unnecessary time. Finally, the Appeals Chamber crafted a workable compromise with respect to assigned counsel. The two court-appointed barristers developed a reasonably healthy working relationship with the defendant, filing motions on his behalf and in his own interest. Milosevic did not endorse the motions, but nor did he object to them.

The biggest problem with the trial was its inordinate length. Justice delayed is justice denied, runs the old saw. A defendant has a right to a speedy trial, and that means the proceedings themselves should not be unreasonably protracted. In the Milosevic case, the Prosecutor made strategic decisions that added considerably to the length of the hearing. For example, she might well have proceeded with respect to the initial indictment alone, which concerned Kosovo in 1998 and 1999. But two years after first indicting Milosevic, the Prosecutor applied for a second indictment concerning events in Croatia that had taken place a decade earlier. Shortly afterwards, a third indictment was added with respect to the war in Bosnia and Herzegovina. The great delay in taking the Croatia and Bosnia cases was never adequately explained. This has even led to speculation about political manipulation, given that Milosevic had been a reliable interlocutor at the Dayton Peace Negotiations, in late 1995. Whatever the explanations for the stale indictments, the lack of urgency in charging Milosevic for atrocities in Croatia and Bosnia suggested, at the very least, that they were less important than the Kosovo case. Kosovo was much clearer because the atrocities were carried out by Serb police and soldiers under the ultimate and clearly defined command of the country's president, Slobodan Milosevic. With hindsight, a trial confined to Kosovo would have been concluded in less than two years, with Milosevic probably convicted of crimes against humanity. Not only would it have recognised the right of an accused to a speedy trial, it would also have provided the victims with a measure of justice and left the world with a judgment of historic proportions.

Issues of fairness go beyond procedural matters and also engage what is sometimes called 'substantive due process'. A trial is unfair if the charges themselves lack a legal basis. At the very first negotiations concerning international criminal justice, at the Paris Peace Conference, this question was raised by the American delegates. They challenged the proposal that, in addition to charges of violating the laws and customs of war, the Germans should also be prosecuted for breaching 'elementary principles of humanity'. According to the Americans, '[t]he laws and customs of war are a standard certain to be found in books of authority and in the practice of nations. The laws and principles of humanity vary with the individual, which, if for no other reason, should exclude them from consideration in a court of justice, especially one charged with the administration of criminal law.'[31]

A quarter of a century later, at Nuremberg, issues of substantive fairness presented themselves in essentially similar complaints, that prosecution for 'crimes against humanity' and 'crimes against peace' amounted to retroactive justice. The great historic challenge to war crimes prosecution was by the Nazi defendants, who claimed that the Nuremberg tribunal was applying retroactive criminal law:

> 'It was urged on behalf of the defendants that a fundamental principle of all law – international and domestic – is that there can be no punishment of crime without a pre-existing law. "Nullum crimen sine lege. Nulla poena sine lege". It was submitted that ex post facto punishment is abhorrent to the law of all civilised nations, that no sovereign power had made aggressive war a crime at the time the alleged criminal acts were committed, that no statute had defined aggressive war, that no penalty had been fixed for its commission, and no court had been created to try and punish offenders.'[32]

Relying upon the writings of the great jurist Hans Kelsen,[33] the International Military Tribunal held:

> 'In the first place, it is to be observed that the maxim nullum crimen sine lege is not a limitation of sovereignty, but is in general a principle of justice. To assert that it is unjust to punish those who in defiance of treaties and assurances have attacked neighbouring states without warning is obviously untrue, for in such circumstances the attacker must know that he is doing wrong, and so far from it being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished.'[34]

Although formally professing rigid adherence to the *nullum crimen* principle, in practice judges at the *ad hoc* tribunals have taken a relatively relaxed approach, much in the spirit of their predecessors at Nuremberg, and in keeping with the liberal interpretation adopted by the European Court of Human Rights.[35] Rather than insisting on a precise text applicable at the time the crime was committed, the human rights tribunals require that the law be foreseeable and that it be accessible. Judge Sidhwa answered the charge of retroactivity in his separate opinion in the trial of Dusko Tadic: '[A]ll "would-be" accused were on notice, through Resolutions of the Security Council, to refrain from committing such crimes. If they chose to do so, they cannot complain of a statute that now pursues their heinous action.'[36]

Substantive fairness issues also present themselves in the willingness of the Tribunals to convict persons for crimes that it is not certain they truly intended to commit. It has always been a principle of criminal justice that acts alone are insufficient for a conviction. An accused person must also be shown to intend to commit the crime. One manifestation of this is our rejection of concepts of collective guilt and collective punishment. Of course, the Tribunals do not indulge in collective punishment in the classic sense. But they will allow a person to be convicted for the crimes committed by another under certain circumstances. For example, pursuant to the various statutes of the contemporary tribunals, a commander or superior may be found guilty of a crime committed by a subordinate, to the extent that the accused 'had reason to know that the subordinate was about to commit such acts'.[37] Although initially heralded as the magic bullet to ensure convictions, 'command responsibility' has proven to be of little real significance. With rare exceptions, defendants have invariably been found guilty

of actually perpetrating the crimes in question, obviating the need to rely on this form of vicarious criminal liability.[38]

The judges themselves have developed a doctrine known as 'joint criminal enterprise', by which a person may be convicted of the crimes committed by others on condition that he or she participate in a common activity with a prohibited purpose. Then, the accused is guilty not only for the crimes he or she personally commits, but also for all crimes committed by his or her associates in crime to the extent these were 'reasonably foreseeable'. For example, Milosevic was charged with a 'joint criminal enterprise' whose purpose was 'the forcible and permanent removal of the majority of non-Serbs, principally Bosnian Muslims and Bosnian Croats, from large areas of the Republic of Bosnia and Herzegovina'.[39] The Prosecutor argued that he was therefore responsible essentially for every atrocity committed during the conflict because he knew 'about everything that was being done' and that he had insisted upon being informed 'about everything that was going to the front line'.[40]

All of this helps prosecutors get convictions, but it also results in devalued convictions that begin to resemble the situation of Al Capone being sent to Alcatraz for evading payment of income tax. This does no good for the historical legacy of justice, and provides grist to the mill of future David Irvings, who will argue that there was never any real direct evidence of involvement in atrocities. Indeed, Irving's main thesis has always been that while Nazi atrocities may have taken place, Hitler did not know of them. Relying on 'command responsibility' or 'joint criminal enterprise' as a basis for conviction invites such claims.

However, such approaches are also vulnerable to charges of unfairness. Of course, the accused is guilty of *something*. The concept of 'joint criminal enterprise' requires that there be participation in a form of common activity having an illegal purpose. But the fact that Milosevic may have been part of a plan to drive non-Serbs out of parts of Bosnia and Herzegovina cannot automatically turn him into a perpetrator of genocide. After all, the victorious Allies agreed at Potsdam, in 1945, to drive Germans out of parts of Poland and other parts of Eastern Europe. Borrowing the language of the Milosevic indictment, this amounted to a common plan aimed at 'the forcible and permanent removal of the majority of Germans from large areas of Poland'. The expulsions were carried out with considerable violence and much loss of life, and they were certainly 'forcible'. But no reasonable person would suggest that, as a consequence, Truman, Atlee and Stalin might be convicted of genocide. Ultimately, the 'joint criminal enterprise' approach to prosecution, or 'JCE' as it is now called by Tribunal insiders, might just as well mean 'Just Convict Everyone'.

When the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia first developed the 'joint criminal enterprise' doctrine, it noted that similar approaches were widely accepted in domestic criminal justice

systems. The Appeals Chamber passed perhaps too quickly over one of the exceptions to this general trend. It was obviously aware that the Supreme Court of Canada had declared the concept of 'joint criminal enterprise' to be unconstitutional, on grounds that it violated principles of substantive fairness or due process, because it cited the relevant cases in a footnote.[41] The Appeals Chamber ought to have been more troubled by the fact that one of the world's most distinguished constitutional courts has decided that it is unfair to convict a person of a very serious crime, such as murder, without evidence beyond a reasonable doubt that he or she truly intended to commit such a crime. And what the Supreme Court of Canada has held with regard to serious ordinary crimes applies in spades when it comes to genocide or crimes against humanity.

Do international crimes require state involvement?

Crimes are perpetrated by individuals, not states. Famously, the International Military Tribunal at Nuremberg stated: 'Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.'[42] But this does not mean there is no connection between individual criminality and state policy. International criminal justice was developed to ensure the prosecution of crimes committed with state complicity, involvement or tolerance. Genocide, crimes against humanity, war crimes and crimes against peace were all 'crimes of state', even if the specific perpetrators were individuals. It is precisely because they were 'crimes of state' that they went unpunished by the state that would normally exercise jurisdiction.

International law has responded to this problem of impunity, which results from state involvement in the planning and perpetration of such crimes, in two main ways. First, it has recognized that such crimes may be prosecuted elsewhere than in the state where they were committed, under the principle known as universal jurisdiction. Universal jurisdiction was originally developed so as to ensure repression of crimes committed in no fixed place, or on the high seas, and constituted an exception to the general rule by which crimes may only be prosecuted by the state where they were committed. But while today essentially uncontested in international law, universal jurisdiction is exercised only in the rarest of cases, such as those of Eichmann and Pinochet.[43] Second, prosecution is also ensured by the establishment of international criminal tribunals. The association between international justice and State involvement is to some extent implied in the *Rome Statute of the International Criminal Court*, in that it authorises the International Criminal Court to exercise jurisdiction when the state that would ordinarily exercise jurisdiction has failed to bring perpetrators to justice.

In recent years, there has been a considerable weakening in the association between state policy and international crime. This may not necessarily be a good thing for international justice. One of the forms this weakening takes is in prosecutorial policy. This has never been much of an issue in the past. There was no debate about the fact that the crimes addressed at Nuremberg and Tokyo were 'crimes of state'. Even the more recent incarnations of international justice, the tribunals for the former Yugoslavia, Rwanda and Sierra Leone, have been concerned essentially with acts committed as part of a state policy, or the policy of a state-like entity exercising control over a territory and persecuting civilians found therein.

However, the Prosecutor of the International Criminal Court has decided to put the emphasis on what international law sometimes describes as 'non-state actors'. The explanation is not hard to find. It is simply easier to go after rebel groups than governments, because in such cases the governments themselves are happy to provide assistance to international justice. The first situation investigated by the Prosecutor provides an example. In late 2003, Prosecutor Luis Moreno Ocampo essentially solicited a referral by Uganda to the International Criminal Court of the nearly two-decade long civil war in the north of the country. The letter of referral made reference to the 'situation concerning the "Lord's Resistance Army" [LRA] in northern and western Uganda'. The Prosecutor responded to Uganda indicating his interpretation that 'the scope of the referral encompasses all crimes committed in northern Uganda in the context of the ongoing conflict involving the [LRA]'.[44]

The *Rome Statute* provides that a case before the International Criminal Court may be initiated by the Security Council, by the Prosecutor himself or by a state party to the statute. It had been generally assumed that when a state party took a case, it did so against another state. After all, until the final week of the negotiations on the Rome Statute, the draft provision spoke of a state party 'complaint',[45] although the language was changed to 'referral' at the last minute, without explanation and without any apparent desire to change the meaning.[46] Use of the word 'complaint' made it clear enough that a state could not go against itself. But that would make no sense anyway, because a state that complained against itself would demonstrate its willingness to prosecute. It was never the intent that the International Criminal Court make itself available to states as an alternative that they could call upon when, perhaps because of political considerations, they found it inconvenient to render justice themselves. Nevertheless, Prosecutor Ocampo now blithely notes that the statute says 'referral', and asks why a state cannot refer a case on its own territory.

NGOs have been critical not so much of the innovative interpretation of the *Rome Statute* itself as of its one-sided consequences in practice. They have argued that Ocampo should also go after the pro-government forces and militias, notably the official Uganda People's Defence Force (UPDF), because they too are responsible for atrocities.[47] But to this, the Prosecutor answers that the rebels are

guilty of more numerous crimes, and that they are therefore where the focus should lie. The Prosecutor has provided some summary indications to explain his decisions in terms of the priorities of investigation and prosecution with respect to the Uganda situation. In a speech to legal advisors of Ministries of Foreign Affairs, delivered in New York on 24 October 2005, the Prosecutor said:

> In Uganda, the criterion for selection of the first case was gravity. We analysed the gravity of all crimes in Northern Uganda committed by all groups – the LRA, the UPDF and other forces. Our investigations indicated that the crimes committed by the LRA were of dramatically higher gravity. We therefore started with an investigation of the LRA.[48]

A month later, in his address to the Assembly of States Parties, the Prosecutor stated:

> In Uganda, we examined information concerning all groups that had committed crimes in the region. We selected our first case based on gravity. Between July 2002 and June 2004, the Lord's Resistance Army was allegedly responsible for at least 2200 killings and 3200 abductions in over 850 attacks. It was clear that we must start with the LRA.[49]

Nevertheless, the problem of impunity in Uganda does not lie with the rebels. Of course, apprehending the LRA leaders poses a challenge. But if they can be arrested, there is certainly no difficulty bringing them to justice before the Courts of Uganda. Unlike some states in sub-Saharan Africa, Uganda has a sophisticated criminal justice system with a proudly independent judiciary.[50] The problem with impunity in Uganda resides in the fact that pro-government forces are committing atrocities. This is not being addressed by either the country's national justice system or by the International Criminal Court. The priority of the Court should be on perpetrators who are being sheltered by Uganda, and who are protected by its authorities. Interestingly, while the International Criminal Court Prosecutor was pursuing his cooperative relationship with the current rulers of Uganda, on 19 December 2005 the International Court of Justice made an innovative ruling finding the Ugandan regime responsible for human rights abuses and serious violations of international humanitarian law.[51]

The shifting focus away from a linkage between state policy and international criminal justice can also be seen in the definitions of crimes themselves. The historic definitions of genocide and crimes against humanity do not explicitly refer to any state plan or policy. The question simply did not present itself, because this seemed implied. Prosecutions followed the classic paradigm, targeting senior state officials for crimes that the state itself had refused, for manifestly obvious reasons, to pursue.

The issue arose, apparently for the first time, in an early case before the International Criminal Tribunal involving a severely disturbed Serb racist who

was the principal executioner in the Luka camp, in northwest Bosnia, over a two-week period. Goran Jelisic was shown to have systematically killed Muslim inmates, as well as some Croats. The victims comprised essentially all of the Muslim community leaders. He was charged with genocide as both an accomplice and as a principal perpetrator. Examining the evidence, the Trial Chamber 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 Moslems. It said that Jelisic could in no way be an accomplice to genocide because it had not been proven that genocide was 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 Moslem population.[52]

After dismissing the charge of complicity, the Trial Chamber turned to whether or not Jelisic could have committed genocide acting alone, as the direct 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 because the evidence was insufficient. But 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 organised plan or policy of a state or similar entity.[53] 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.[54]

In *most* cases? Are there *any* examples that might correspond to genocide being committed in the absence of a state plan or policy? A year later, the Appeals Chamber relied upon its finding with respect to genocide in making a similar conclusion with respect to crimes against humanity.[55]

The best recent example 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.[56]

The Commission did not challenge the case law of the International Criminal Tribunal for the former Yugoslavia, and did not exclude the possibility that an individual acting alone might have committed genocidal acts.[57] In practice, however, it attempted to answer the question posed by the Security Council, that is, were acts of genocide committed in Darfur, by looking for evidence of a plan or policy devised by the Sudanese state.

Lurking in the corridor here is the dubious suggestion that international criminal justice be used to prosecute terrorists for crimes against humanity. Procedurally, it requires prosecutors to redirect their fire away from states and to aim it at the enemies of states, just as Luis Ocampo has done in Uganda. Substantively, it necessitates definitions of crimes that do not insist upon a link between the act and a state policy. There is much momentum for such developments. In the weeks that followed 11 September 2001, many recognised authorities in the field of international law described the attacks as a 'crime against humanity'. The United Nations High Commissioner for Human Rights, Mary Robinson, used this characterisation,[58] as did the London barrister Geoffrey Robertson[59] and the French legal academic Alain Pellet.[60] Professor Antonio Cassese was somewhat more circumspect, observing cautiously that 'it may happen that states gradually come to share this characterisation …'[61]

Until relatively recently, international criminal justice was more of a historical footnote than a living entity. Aborted at Versailles, it later functioned at Nuremberg and Tokyo, but to mixed reviews. Post-war efforts to develop permanent institutions floundered when the Cold War began to heat up in the 1950s. But as Eric Hobsbawm's 'short twentieth century' came to an end, interest in international criminal justice revived, driven by the dynamism of a human rights movement whose focuses had become impunity and the rights of victims.[62] The United Nations has since established three international tribunals, all of them successful in the specific jurisdictions or territories to which they have been assigned. It has also prompted the development of 'hybrid' justice regimes, which mix elements of international justice with what are essentially national or domestic institutions. The culmination of the process is the International Criminal Court.

From an exceedingly modest proposal in the General Assembly in 1989,[63] derived from an atrophied provision of the 1948 Genocide Convention,[64] the idea of a permanent court has grown at a more rapid pace than even its most steadfast supporters have ever predicted. At every stage, the vast majority of participants

in the process of creating the Court have underestimated developments. For example, during the 1998 Rome Conference, human rights NGOs argued that a proposed threshold for entry into force of sixty ratifications was an American plot to ensure that the Court would never be created. Prominent delegations insisted that the Court could only operate if it had universal jurisdiction, predicting that a compromise by which it could only prosecute crimes committed on the territory of a state party to the statute or by a national of a state party to it would condemn it to obscurity and irrelevance. Countries in conflict or in a post-conflict peace process, where the Court might actually be of some practical use, would never ratify the *Rome Statute*, they argued.[65]

Yet less than a decade after the adoption of the *Rome Statute*, there are 100 states parties, 80 more than the safe threshold that human rights NGOs and many national delegations thought was necessary to ensure entry into force within a foreseeable future. As for the fabled universal jurisdiction, despite being limited to crimes committed on the territory of a state party, or by its nationals elsewhere in the world, the real Court now has plenty of meat on the bone. Many countries confronting serious internal and international conflict, including Sierra Leone, Colombia, Uganda, Democratic Republic of Congo, Cambodia, Macedonia and Burundi, have joined the Court. In other words, the lack of universal jurisdiction has proven no obstacle to the institution's operation. And on 20 March 2006, the first accused, Thomas Lubanga Dyilo, appeared in The Hague before a Pre-Trial Chamber of the Court, charged with war crimes committed on the territory of a state party to the *Rome Statute* subsequent to 1 July 2002.

Yet the undying, endemic negativism about the Court's future and success shows no signs of abating, despite these regular lessons from the reality of its existence. Few seem to have absorbed the wisdom of Victor Hugo: 'There is one thing stronger than all the armies in the world, and that is an idea whose time has come.'

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