REFLECTIONS ON THE DIFFICULTIES OF ENFORCING INTERNATIONAL JUSTICE

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1. INTRODUCTION

As we honor the Thirtieth Anniversary edition of this *journal*, I have been asked to compile some reflections on the state of international law. My topic will be the subject of enforcement of international criminal law, focusing on mechanisms to enforce the gravest international crimes—at a minimum, genocide, war crimes, and crimes against humanity.1

The enforcement of this subset of international criminal law, as with ensuring respect for international human rights law,2 depends to a great extent upon the will of states. States must generally create the relevant laws.3 These may take the form of treaties.

1 Efforts to prosecute these crimes are roughly referred to as the field of "international justice," a subset of the field of international criminal law, which covers additional crimes such as terrorism, trafficking, piracy, etc. This Article uses the terms "international criminal law" and "international justice" somewhat interchangeably.

2 Abuses such as genocide, war crimes, and crimes against humanity are also human rights violations. Many of the same problems that this Article discusses regarding enforcement of those crimes can be seen in the gaps in jurisdiction and mechanisms to enforce violations of international human rights law.

3 States may also sometimes be bound to international law that they did not necessarily participate in creating, through the formation of customary international law. See Restatement (Third) of Foreign Relations Law of the United States § 102(2) (1987) ("Customary international law results from a general and consistent practice of states followed by them from a sense of legal..."

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created at the international level (such as the Convention on the Prevention and Punishment of the Crime of Genocide ("Genocide Convention")), participation in the creation of non-binding documents that may become binding over time (such as the 1948 Universal Declaration of Human Rights ("UDHR")), or the enactment of domestic laws to implement international criminal and human rights laws. States must provide the resources and backing that would enable domestic courts to prosecute international crimes at the national level (if there are to be such prosecutions), to adjudicate civil damages claims related to such

obligation.") It does not require absolutely consistent state practice for such formation. See Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.) 1986 U.C.C. 11, 98 (June 27) ("The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule. In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules . . . ."). While a "persistent objector" state would not be bound, a state that did not exist while the custom was in formation could be:

The principle of consent is highlighted by the 'non-consenting state' or the 'persistent objector' principle: a state that has clearly declared its rejection of a norm or principle of international law while it was in the process of development is not bound by it . . . . [B]y contrast, a new state . . . can be [bound] . . . only in so far as we deem [international obligations] to have been converted into customary law.


5 Many of the provisions of the UDHR are recognized as customary international law:

Some international lawyers believe that the UDHR forms part of customary international law and is a powerful tool in applying diplomatic and moral pressure to governments that violate any of its articles. The 1968 U.N. International Conference on Human Rights advised that the UDHR constitutes an obligation for the members of the international community to all persons.


6 At least, such implementation is necessary if a country has a "dualist system" whereby treaties are not directly incorporated into national law. See generally JEFFREY L. DUNOFF, STEVEN R. RATNER & DAVID WINTMAN, INTERNATIONAL LAW: NORMS, ACTORS, PROCESSES, A PROBLEM-ORIENTED APPROACH 267-68 (2d ed. 2006) (discussing monist and dualist systems).
abuses (if such claims are to be allowed), and/or to hear cases of human rights abuses. States sometimes have a choice whether or not to subject their citizens, and thereby also state actors, to the jurisdiction of a tribunal to hear criminal cases (such as the International Criminal Court ("ICC") or a hybrid tribunal), or the jurisdiction of a regional court that adjudicates human rights abuses. States are asked to self-report in submitting reports to human rights bodies, and are charged with leadership in lodging criticisms, before such bodies. Finally, if there are to be prosecutions at the national or international level, it is also states that must cause the arrests of the individuals concerned.

Given that state actors often violate human rights and international criminal law, or are complicit in such abuses and crimes, it is significant that there is a partially-functioning system of enforcement at all. What incentive do states have to do "the right thing" when it may mean criminal or civil exposure regarding the actions (or non-actions) of state actors? Sometimes, presumably, states feel the moral imperative to take the correct path. Sometimes, perhaps, a state will do so to force a second state

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7 There are three regional human rights courts: the European Court of Human Rights, the Inter-American Court of Human Rights and the (extremely nascent) African Court of Human and Peoples' Rights.


9 States made up the widely criticized United Nations Commission on Human Rights, now replaced by the U.N. Human Rights Council.

10 Human rights law requires states to take actions to protect individuals from human rights abuses by private actors. See, e.g., Velásquez Rodríguez Case, 1988 Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 172 (July 29, 1988) (holding that a human rights violation not directly imputable to a state because it was committed by a private actor can lead to "international responsibility of the State... because of the lack of due diligence to prevent the violation or to respond to it... "). Similarly, international criminal responsibility may also be based on non-action. For example, non-action can form the basis of command responsibility charges where individuals under a commander's effective control commit crimes that the commander knew or should have known about and did not take necessary and reasonable measures to prevent and/or punish. See, e.g., Nahimana v. Prosecutor, Case No. ICTR 99-52-A, Judgment, ¶ 484 (Nov. 28, 2007) (listing the elements of command responsibility). Non-action, for example, may also form the basis of international criminal responsibility for "aiding and abetting" a crime where an "approving spectator," usually in a position of authority, stands by and permits crimes to occur. See, e.g., Prosecutor v. Muvunyi, Case No. ICTR 2000-55A-T, Judgment and Sentence, ¶ 472 (Sept. 12, 2006) (describing the responsibility of an "approving spectator").
into compliance (perhaps given an assumption, correct or not, that the first state faces little, or less, exposure than the state it wishes to compel). Sometimes, also, states do not join the system of enforcement, or do not do so with any seriousness—either not ratifying relevant treaties, ratifying them only with extensive reservations, not joining optional protocols (or not lodging declarations) that would expose the state or its citizens to jurisdiction, not creating domestic means of enforcement or not providing sufficient political or financial backing to such mechanisms, not submitting (or not submitting in good faith) reports on human rights violations in their countries, or even working to oppose mechanisms to enforce international criminal law.

Over sixty years after the founding of the United Nations, some of the basic purposes and principles of the U.N. Charter, including protecting human rights and suppressing aggression,11 are not being sufficiently fulfilled. The system that exists to enforce the gravest international crimes (which are themselves extremely serious human rights violations) as well as other human rights violations is uneven, haphazard, and politicized. Sometimes the gravest violators are prosecuted, and sometimes they are not, depending in part upon whether there is jurisdiction (geography), politics, and (sometimes) the perceived high cost of creating or sufficiently funding tribunals to prosecute the crimes. There needs to be far more equitable and thorough enforcement regarding the gravest crimes and human rights abuses at the international and national levels to rectify this situation and start to “level the playing field.” Is this statement premised upon a naïf belief in the efficacy of international law? The Author will assert that international law does matter,12 and that as there is gradually

11 The “purposes” and “principles” of the U.N. Charter include: “to take effective collective measures . . . for the suppression of acts of aggression or other breaches of the peace” and to “promote[e] and encourag[e] respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.” U.N. Charter art. 1, paras. 1, 3.

12 While it is beyond the scope of this Article to fully set forth this position, it is helpful to remember the words of international legal scholar Louis Henkin:

Violations of [international] law attract attention and the occasional important violation is dramatic; the daily, sober loyalty of nations to the law and their obligations is hardly noted. It is probably the case that almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time. Every day nations respect the borders of other nations, treat foreign diplomats and citizens
increasing enforcement of international criminal law (particularly, prosecutions of genocide, war crimes and crimes against humanity), one can be optimistic that this could usher in an new era in which fewer of these crimes are committed and the basic purposes and principles of the U.N. Charter are more systematically fulfilled. While proof is difficult to assemble that would-be violators of the gravest crimes are subject to deterrence, it may be assumed that if there are not the requisite laws and system of enforcement (or if there are significant gaps in that system, as exists today), the gravest crimes will simply continue. Such crimes have been tolerated in the past, and it was in response to those crimes, in part, that the U.N. Charter was created; it should not be that such crimes still continue today, more than sixty years later.

Section 2 of this Article commences with a discussion of the evolution of the system of international justice (i.e., the subset of international criminal law focusing, at minimum, on the prosecution of the crimes of genocide, war crimes and crimes against humanity). Section 3 discusses some of the current weaknesses of that system, focusing in particular on jurisdictional limitations as well as numerical restrictions sometimes placed on prosecutions before existing tribunals, despite the mass nature of the atrocities at issue. Finally, Section 4 puts forth suggestions for strengthening this system to enforce grave international crimes. The Article concludes by arguing that, while from the perspective of a state, subjecting one's nationals and officials to criminal enforcement and/or civil human rights adjudication may not be

and property as required by law, observe thousands of treaties with a hundred countries.


15 Given the significant gaps in the existing system of enforcement (discussed below), it should come as no surprise that deterrence does not necessarily work at present, or that there is not sufficient deterrence.

14 The crime of genocide, for example, has been committed in Darfur, Sudan, by “Janjaweed” militia forces, backed and assisted by the Sudanese Government and military. See Jennifer Trahan, Why The Killing In Darfur Is Genocide, 31 FORDHAM INT'L L.J. 990 (2008).

15 See supra text accompanying note 1. This Article uses the phrase “at minimum” because there is growing momentum from many states around the world that this troika of crimes should be joined by a fourth: the crime of aggression.
perceived as in the state's short-term best interests, it arguably does further its long-term best interests.

2. AN OVERVIEW OF THE EVOLUTION OF THE FIELD OF INTERNATIONAL JUSTICE

International law often develops in response to the gravest atrocities, and so it was with the creation of the U.N. Charter in 1945, the Universal Declaration of Human Rights in 1948, the 1948 Genocide Convention, the four 1949 Geneva Conventions; and the establishment of the International Military Tribunal at Nuremberg ("Nuremberg Tribunal") and the International Criminal Tribunal for the Far East ("Toyko Tribunal"), all following on the heels of World War II. The existence of these treaties, declaration and tribunals perhaps comprised the greatest leap forward towards a system of enforcement of international criminal and human rights law that we have seen. Evolution of a system of international justice once again took a leap forward with


17 One can see parallel developments in the history of international law. The Lieber Code of 1863 (an early codification of the laws of war) was adopted during the American Civil War. See Francis Lieber, INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD, NO. 100 (1898) (describing, inter alia, conditions for martial law, how to deal with enemy property, scouts, exchange of prisoners, and parole); Peter Maguire, LAW AND WAR: AN AMERICAN STORY 36 (2000) (describing how U.S. General Halleck wrote to Columbia Professor Francis Lieber in December of 1862 to request the definition of guerrilla war, to which Lieber responded with two essays, one on guerrilla war and one that became the basis for the Lieber Code). The development of the International Committee of the Red Cross and the precursor conventions to the four 1949 Geneva Conventions resulted after publication of the account by a Swiss businessman, Henry Dunant, of the horrors of the 1859 Battle of Solferino, part of the Second War for Italian Independence. See Int'l Commn. of the Red Cross, From the Battle of Solferino to the Eve of the First World War (Dec. 28, 2004), available at http://www.icrc.org/web/eng/siteeng0.nsf/html/57JNVP (discussing the observations of Henry Dunant during the Battle of Solferino in 1859 and his vision that led to the founding of the Red Cross). The creation of the League of Nations and a Permanent Court of International Justice to adjudicate disputes between states followed World War I. See International Court of Justice, History, http://www.icj-cij.org/court/index.php?l=1&ep2=1 (last visited Mar. 6, 2009) (discussing the creation of the Permanent Court of International Justice).
the creation by the U.N. Security Council of the International Criminal Tribunal for the former Yugoslavia ("ICTY") and the International Criminal Tribunal for Rwanda ("ICTR")—but only after the international community stood by and allowed tragedy on a vast scale once again to occur almost unimpeded. The field of international justice took another leap forward with the 1998 agreement on, and 2002 entry into force of, the Rome Statute of the International Criminal Court.

While the notion of enforcing international crimes through an international or internationalized tribunal was not new at the time of the creation of the Nuremberg Tribunal—having precursors, for example, in (unrealized) plans for an international tribunal after World War I—the Nuremburg Tribunal is essentially the modern starting point for the system of international justice that we have today. While the Nuremburg Tribunal was no doubt a flawed institution (with even graver flaws to be found at its companion tribunal, the Toyko Tribunal), the historic importance of creating an internationalized tribunal to enforce grave international crimes cannot be overstated. Due to the existence of the Nuremburg Tribunal as well as evolution of the laws of war, no longer will there occur the kind of debate that took place prior to the creation of the Nuremburg Tribunal between U.S. Secretary of the Treasury, Henry Morgenthau Jr., and U.S. Secretary of War, Henry L. Stimson, as to whether top Nazi leaders should receive trials, or should be summarily shot. (The United Kingdom as well as the

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19 For discussion of the creation of the Tribunal, see GARY JONATHAN BASS, STAY THE HAND OF VENGEANCE: THE POLITICS OF WAR CRIMES TRIBUNALS 147-205 (Princeton University Press 2000) (discussing the Nuremburg Tribunal). See also Matthew Lippman, Nuremberg: Forty-Five Years Later, 7 CONN. J. INT'L L. 1, 37 (1991) ("The International Military Tribunal at Nuremberg was composed of judges from the Allied Powers and was not, as its name suggests, an international court.")
20 See Bass, supra note 19, at 58-105 (discussing the failed effort at the end of World War II to create an international tribunal).
22 See Bass, supra note 19, at 150-51 (discussing the extensive debate between President Roosevelt's cabinet members regarding whether senior Nazi officials should be tried or summarily executed).
Soviet Union, preferred mass executions,\(^23\) and it was only through an inadvertent turn of events that the United States resolved upon trials.\(^24\) Of course, a majority of focus of the main trial at Nuremberg\(^25\) was upon "crimes against the peace"—now referred to as the "crime of aggression"—not the abominations of the Holocaust.\(^26\) While the Nuremberg Tribunal was flawed—it certainly imposed "one-sided" justice\(^27\) and would not measure well against contemporary fair trial requirements\(^28\)—it necessarily created significant precedent in trying top leaders implicated in war crimes, crimes against humanity, and crimes against the peace through an internationalized tribunal.\(^29\)

\(^23\) See id. at 147, 158-59 (according to the account of Gary Bass, the U.K. favored executing around 50-100 top Nazi leaders, whereas the U.S.S.R. preferred executing 50,000-100,000; in the United States, the debate went so far as to ponder whether American soldiers would participate in executing 2,500 individuals).

\(^24\) It was the leaking to the press of the Morgenthau Plan (which involved mass executions) that brought about its downfall, but not because of the mass-execution aspect of the plan; rather, it was Morgenthau's "pastoralization proposals" that prompted the outcry. See id. at 168-69 (discussing the collapse of the Morgenthau Plan).

\(^25\) There was one main trial at Nuremberg in which twenty-two defendants were indicted on seventy counts. Lippman, supra note 19, at 21-22.

\(^26\) Bass, supra note 19, at 203 ("To the American and British governments, the trials were largely about aggression.").

\(^27\) Only former Axis leaders were tried, subjecting both the Nuremberg and Tokyo Tribunals to accusations of "victor's justice." See Robert H. Jackson, Opening Address for the United States (Nov. 21, 1945), in Michael R. Marrus, THE NUREMBERG WAR CRIMES TRIALS 1945-46: A DOCUMENTARY HISTORY 81 (1997) ("Unfortunately, the nature of these crimes is such that both prosecution and judgment must be by victor nations over vanquished foes . . . . Either the victors must judge the vanquished or we must leave the defeated to judge themselves.").


\(^29\) The crime of genocide was not tried before the Nuremberg Tribunal. See The United States of America, The French Republic, The United Kingdom of Great Britain and Northern Ireland, and the Union of Soviet Socialist Republics v. Hermann Wilhelm Göring, et al., Indictment, International Military Tribunal, Oct. 6, 1945, in Marrus, supra note 27, at 57-70 (including counts for conspiracy, crimes against peace, war crimes and crimes against humanity). Agreement on the definition of the crime of genocide occurred with adoption of the 1948 Genocide Convention, after the Nuremberg Tribunal finished its work.
This precedent set by the Nuremberg Tribunal (and, to a lesser extent, the Tokyo Tribunal) largely sat dormant until the U.N. Security Council revived it with the creation of the ICTY and ICTR in 1993 and 1994, respectively. While the response of creating a tribunal to enforce grave crimes can never provide an adequate substitute for prompt international action to prevent such crimes (something wholly lacking in the case of Rwanda), the creation of these institutions meant that the legacy of Nuremberg did have importance for the modern era—at least the crimes of genocide, war crimes, and crimes against humanity (but not the crime of aggression) would be enforceable (at least if committed in Rwanda and neighboring countries during 1994, and the former Yugoslavia commencing in 1991). Convincing states to shoulder their burden and arrest those indicted by the tribunals (particularly those indicted by the ICTY) became a difficult undertaking that required years of sustained pressure by, among others, the United States and the EU, as well as the diligent attention of the Tribunal Prosecutors. This undertaking was recently advanced by the arrest

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30 Because of the (arguably greater) flaws of the Tokyo Tribunal, the field of international justice is usually referred to as starting with the work of the Nuremberg Tribunal.

31 See supra note 18.

32 The present day counterpart, of course, is Darfur, Sudan, where there has been a referral of the situation to the ICC but neither prompt nor effective action to stop the crimes. See S.C. Res. 1593, ¶ 1, U.N. Doc S/RES/1593 (Mar. 31, 2005) (referring situation to the ICC and deciding that the Government of Sudan and all parties to the conflict in Darfur shall cooperate with the ICC).

of Radovan Karadžić, although Ratko Mladić remains at large from the ICTY, along with various accused from the ICTR.

Meanwhile, the ICTY and ICTR have set extremely significant precedents with their indictments and proceedings against, inter alia, former Serbian President Slobodan Milošević commencing when he was still head of state, former prime minister of the Interim Government of Rwanda Jean Kambanda, and former President of the so-called Republika Srpska Radovan Karadžić. Additionally, the Tribunal judges have issued extremely significant jurisprudence, recognizing the role of rape as a war crime, a crime against humanity, and a means of committing genocide, and producing a wealth of jurisprudence not only as to the parameters of genocide, war crimes, and crimes against humanity, but also individual and command responsibility, and other important topics, such as fair trial rights.

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34 Karadžić was President of the so-called Republika Srpska, within Bosnia-Herzegovina, and has been charged with genocide, crimes against humanity, and war crimes based on, inter alia, the Srebenica massacre, in which an estimated 7,000-8,000 Bosnian men and boys were executed, and the shelling and sniping that killed and wounded thousands of civilians in Sarajevo. See: Prosecutor v. Karadžić, Case No. IT-95-5-18, Amended Indictment (Apr. 28, 2000), available at http://www.icty.org/x/cases/karadzic/ind/en/kar-a000428e.pdf.

35 See Persons Indicted by the ICTY for War Crimes, http://www.icty.org/x/cases/accusedatlarge/english.pdf (last visited Apr. 10, 2009). Mladić was Chief of Staff of the Bosnian Serb Army (VRS), and has been indicted for genocide, crimes against humanity, and war crimes. Id.


Ambitious plans for a global criminal court were finalized in the summer of 1998, in Rome, Italy, where 103 countries signed the so-called “Rome Statute” of the International Criminal Court, thereby agreeing to create the first permanent international criminal court. These countries all shared the basic vision of the need for global enforcement of the worst crimes. Interestingly, states also included the crime of “aggression” in that vision, agreeing that the ICC would have jurisdiction to enforce that crime, but working out a definition and the preconditions to the exercise of jurisdiction became too complex at that time; the Rome Statute provides that the ICC may only exercise jurisdiction over the crime when an amendment to the Statute defining the crime and the exercise of jurisdiction is agreed upon and ratified. Whether such an amendment can be agreed upon should be determined at a review conference by States Parties to the Rome Statute currently scheduled to take place in 2010.

While the ICC’s Office of the Prosecutor has been diligently investigating crimes in several countries, with thirteen arrest warrants issued to date by the Pre-Trial Chambers, there are presently four such individuals in The Hague’s Detention Facility. The ICC faces the same difficulty as other international or hybrid tribunals: such tribunals do not have arrest capabilities, but remain dependent upon states to conduct arrests. A state that

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58 The “preconditions to the exercise of jurisdiction” refers to the procedure for commencing an investigation and/or prosecution. Much of the debate revolves around whether only the Security Council could trigger such an investigation and/or prosecution, whether the ICC Prosecutor on his own could initiate, or some alternative to either of those. For a discussion of the state of negotiations, see Discussion paper on the crime of aggression proposed by the Chairman (revision June 2008), International Criminal Court. Assembly of States Parties, ICC-ASP/6/SWGCA/2 (May 14, 2008), available at http://www.icc-cpi.int/library/asp/ICC-ASP-6-SWGCA-2_English.pdf.

39 See Rome Statute of the International Criminal Court art. 52, July 1, 2002, 2187 U.N.T.S. 90 [hereinafter Rome Statute] (“The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 . . . ”); see also id. arts. 121(4)-(5) (amendment procedures).


41 They are Dyilo, Katanga, Chui, and Bemba.
has interest in arresting indictees will presumably do so (if able), while a state that does not—such as a state where the crimes were referred by the Security Council—can be expected not to conduct arrests, leaving it rather uncertain how individuals subject to ICC arrest warrants in the latter scenario will be apprehended (if at all).42

To date, 108 states have ratified the Rome Statute, thereby agreeing that the ICC may prosecute crimes committed in their territories or by their nationals if their national courts are “unwilling” or “unable” to do so.43 Because, however, several significant and powerful countries, such as Russia, China, the United States, India, and Pakistan, have not ratified the Rome Statute, the ICC’s jurisdiction forms something of a “patchwork.” At present, the gravest crimes committed in certain states could face enforcement by the ICC, but the gravest crimes committed in other states will not. Nor does the power of the Security Council to refer cases to the ICC suffice to fill in the gaps.44 Because the permanent members of the U.N. Security Council have veto power on substantive votes,45 three of the permanent members would be in a position to veto a potential referral to the ICC regarding crimes committed on their territories or by their nationals, or crimes committed on the territories or by the nationals of closely allied non-member countries.46

In reaction to certain perceived weaknesses of the ICTY and ICTR—including their geographic distances from the populations of the countries where the crimes occurred47 and the perceived

42 This predicament is currently at issue regarding the arrest warrants issued for individuals alleged to have committed atrocities in Sudan. As mentioned above, the situation in Sudan was referred to the ICC by the Security Council, not at Sudan’s initiation. Given that there are warrants outstanding against Sudan’s President and a Sudanese minister, it appears unlikely those individuals will be arrested in the near future.

43 See Rome Statute, supra note 39, art. 12.2(a)-(b) (providing for jurisdiction over nationals from ratifying countries and as to crimes committed in the territory of ratifying countries); see also id. art. 17 (covering “complementarity” and the standards for measuring “unwilling” and “unable”).

44 See id. art. 13(b) (providing for Security Council referrals).

45 See U.N. Charter art. 27 (establishing voting procedures).

46 Those three permanent members (all presently non-parties to the Rome Statute) are the United States, Russia, and China. The U.K. and France, by contrast, are ICC member states; thus, ICC jurisdiction already exists over their nationals and crimes committed in their territories.

47 The ICTY sits in The Hague; the ICTR sits in Arusha, Tanzania. The problems created by the distance between the tribunals and countries where the
high cost of the tribunals— the international community developed a new model for prosecuting the gravest crimes: the "hybrid" tribunal. This form of tribunal consists of a mixture of national and international features. Such tribunals have been created in Sierra Leone, Cambodia, East Timor, Kosovo, and Bosnia-Herzegovina. In response to the cost issue, at least two of the tribunals—the Special Court for Sierra Leone and the Extraordinary Chambers in the Courts of Cambodia—were given jurisdiction only to prosecute those who bear "the greatest responsibility" or who are "most responsible" for the crimes at issue. In practical terms, this has translated into nine prosecutions before the Special Court and is anticipated to result

crimes occurred could have been ameliorated by having effective outreach program at the tribunals unfortunately, both the ICTY and ICTR were created without such programs and were thus late in developing outreach strategies.

As others have pointed out, the cost of the tribunals pales in comparison to the cost of peacekeeping operations. See Neil Kritz, Where We Are and How We Got Here: An Overview of Developments in the Search for Justice & Reconciliation, in THE LEGACY OF ABUSE: CONFRONTING THE PAST, FACING THE FUTURE 28, 28-9 (2002) (noting how expensive it is to maintain effective peacekeeping forces). Additional peacekeeping operations could well have become necessary had, for example, Karadžić and Mladić not been marginalized from continuing to play active roles regarding Republica Srpska by the filing of indictments against them and resulting eventual ostracism.


The Special Court originally issued indictments against fourteen individuals, but some have died or are presumed dead. The Armed Forces Revolutionary Council ("AFRC") trial (against three individuals) and the Civil Defense Forces ("CDF") trial (against two individuals) are complete. The Revolutionary United Front ("RUF") trial (against three individuals) has finished its trial stage. Former Liberian President Charles Taylor, currently on trial before
in five or more prosecutions before the Extraordinary Chambers.\textsuperscript{52}
Other goals behind the creation of this form of tribunal include involving more nationals from the countries where the crimes occurred in the staffing of all parts of the tribunals, and having the tribunals sit in the countries where the crimes occurred so prosecutions may be more immediate to the primary victim and perpetrator populations. The Special Court is generally also credited with revitalizing the notion that having a robust outreach program as an important component of a tribunal's work.\textsuperscript{53}

Prosecutions of genocide, war crimes, and crimes against humanity, may of course also be possible before a country's own domestic courts, although experience to date in this regard is mixed. It is generally the inability of the national courts to try these types of cases (for example, against former or current high level government or military figures) that is the reason one turns to an international or hybrid tribunal; if the domestic courts were able to try such cases fairly, one would not need such a tribunal.\textsuperscript{54} A variety of factors will impact whether or not such domestic prosecutions are possible, including political will, the capacity of the domestic courts (which may be weakened after a period of mass atrocities or war), and/or the existence or complication of amnesty grants. Some countries may choose an approach that is more oriented towards ascertaining the truth and instead create a truth commission or "truth and reconciliation" commission;\textsuperscript{55}

\textsuperscript{52} Five indictments have been issued by the Extraordinary Chambers although more may follow depending on how the dispute between the international prosecutor (who seeks additional indictments) and the national prosecutor (who does not) is resolved.

\textsuperscript{53} The outreach effort was spearheaded by the Special Court's first Prosecutor, an American, David M. Crane.

\textsuperscript{54} The notion that an international tribunal is not needed where a country can try such cases is the basis for the complementarity principle found in the Rome Statute. A case becomes inadmissible before the ICC where domestic courts are willing and able to investigate and/or try the case. Rome Statute, supra note 39, art. 17.

\textsuperscript{55} The South African Truth and Reconciliation Commission is one such example, although there have been many others. For background on truth commissions, see PRISCILLA B. HAYNER & TIMOTHY GARTON ASH, UNSPEAKABLE TRUTHS: FACING THE CHALLENGE OF TRUTH COMMISSIONS (2001).
others may utilize updated versions of traditional justice mechanisms in trying large numbers of perpetrators.56

It may also be possible to enhance the capacity of the domestic courts by creating a particularized tribunal or chamber for the prosecution of grave crimes, as has recently been done in Iraq, with the creation of and trials before the Iraqi High Tribunal ("IHT").57 Prosecutions may also occur in the domestic courts of states other than those where the crimes occurred, through the use of universal jurisdiction.58

Rwanda took such an approach. With the challenge of trying an estimated hundreds of thousands (potentially over a million) suspected perpetrators of the 1994 Genocide, Rwanda adopted the traditional "Gacaca" reconciliation mechanism for use in its present day "Gacaca" trials. For background on Gacaca and how it is functioning, see INTERNATIONAL INSTITUTE FOR DEMOCRACY AND ELECTORAL ASSISTANCE, TRADITIONAL JUSTICE AND RECONCILIATION AFTER VIOLENT CONFLICT: LEARNING FROM AFRICAN EXPERIENCES 25-61 (2008).

The IHT's record to date appears somewhat mixed. Compare MICHAEL A. NEWTON & MICHAEL P. SCHAEF, ENEMY OF THE STATE: THE TRIAL AND EXECUTION OF SADDAM HUSSEIN (2008) (presenting a generally favorable accounting of the Tribunal's work), with NEHAL BHUTA, JUDGING DURIJ; THE FIRST TRIAL BEFORE THE IRAQI HIGH TRIBUNAL (Human Rights Watch ed., 2006), available at http://www.hrw.org/en/reports/2006/11/19/judging-duijal-0 ("The evolution of the IHT over the past three years has given rise to serious concerns about its capacity to fairly and effectively try these massive crimes in a manner that is consistent with international criminal law and fair trial standards."). This Author has a nuanced assessment of the tribunal's work, finding some aspects flawed and some parts successful (e.g., the merits of the Trial Chamber Judgment, particularly in the "Anfal" trial). See Jennifer Trahan, A Critical Guide to the Iraqi High Tribunal's Anfal Judgment: Genocide Against the Kurds, 30 MICH. J. INT'L L. 305 (2009); Jennifer Trahan, Enemy Of The State: The Trial and Execution of Saddam Hussein, CORNELL J.L. & PUBL. POLY (forthcoming 2009) (book review). The IHT has been assisted in its trials primarily by the United States, through its Regime Crimes Liaison Office in Baghdad.

Whether a universal jurisdiction case occurs depends largely on whether a perpetrator (or suspected perpetrator) has traveled into a country with such a law and been brought to the attention of the authorities. While such cases are important, they do not result in any systematic examination of the crimes that occurred, nor are they the result of a prosecutorial strategy that the accused represents one of the worst perpetrators who should be tried. For background on universal jurisdiction, see NEHAL BHUTA & JURGEN SCHLHR, UNIVERSAL JURISDICTION IN EUROPE: THE STATE OF THE ART (Human Rights Watch ed., 2006), available at http://www.hrw.org/en/reports/2006/06 /27/universal-jurisdiction -europe.
3. AN ASSESSMENT OF THE CURRENT SYSTEM OF INTERNATIONAL
JUSTICE

The system of enforcement regarding the crimes of genocide,
war crimes, and crimes against humanity leaves some significant
gaps in jurisdiction. First, the crime of aggression—recognized by
the Nuremberg Tribunal as "the supreme international crime
differing only from other war crimes in that it contains within itself
the accumulated evil of the whole"—cannot at the present date be
prosecuted. Second, in terms of significant numbers of
prosecutions at the international level, this occurred at the ICTY
(where 161 were indicted) and the ICTR (where ninety-one were
indicted), but the modern trend is to prosecute far fewer
individuals (such as nine or five), even following upon mass
atrocities. Third, there are countries where mass crimes have
occurred in the past, but there is no international or hybrid tribunal
(such as the Democratic Republic of the Congo and Afghanistan):

59 INT'L MILITARY TRIBUNAL, 22 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE
THE INTERNATIONAL MILITARY TRIBUNAL 427 (1948).

60 United Nations, International Criminal Tribunal for the Former
Yugoslavia, http://www.icty.org/sections/TheCases/KeyFigures (last visited

61 See United Nations, International Criminal Tribunal for Rwanda,
http://www.icty.org/sections/ENGLISH/quicklaw/detainee.htm (last visited
Mar. 26, 2009) (listing eight cases awaiting trial, twenty-nine cases in progress, seven cases on
appeal, twenty-eight cases completed, six detainees acquitted, two cases transferred to a national jurisdiction, two released (five total were released but three were completed cases), one deceased (three total were deceased, but two were completed cases); thirteen in large, but excluding one arrest for false testimony and one for contempt of court). Approximately one-hundred and sixty
individuals were prosecuted before the Special Panels for Serious Crimes in the
Dili District Court in East Timor, but those prosecutions were wholly one-sided, prosecuting almost exclusively Timorese militia implicated in war crimes and crimes against humanity committed in East Timor in 1999, but not the Indonesian military and civilians behind those crimes. See HUMAN RIGHTS WATCH, JUSTICE
DENIED FOR EAST TIMOR: INDONESIA'S SHAM PROSECUTIONS, THE NEED TO
STRENGTHEN THE TRIAL PROCESS IN EAST TIMOR, AND THE IMPERATIVE OF
/etimor1202bg.htm.

62 There were an estimated 500,000 victims of the Sierra Leone civil war, and
an estimated 1.7 million Cambodian dead at the hands of the Khmer Rouge.
Interview with David M. Crane, Former Chief Prosecutor of the Special Court for
Sierra Leone (on file with author) (relying upon NGO estimates); Yale University,
Cambodian Genocide Program, http://www.yale.edu/cgp/ (last visited Jan. 25,
2009) (noting that approximately 1.7 million people lost their lives, representing
21% of the country's population).
because the ICC does not have retroactive jurisdiction it cannot prosecute crimes that occurred prior to July 1, 2002. Fourth, the jurisdiction of the ICC is limited to crimes committed in, or by the nationals of, 108 countries (a significant number, but one that leaves out some very powerful countries), and the possibility of Security Council referral, as explained above, will not fully remedy that gap. Fifth, even where the ICC possesses jurisdiction, it was not designed to prosecute any large number of individuals in any one situation: rather, it is expected to operate more akin to the Special Court and Extraordinary Chambers, prosecuting a few of the presumably gravest perpetrators and leaving further prosecutions to nationals courts (or not to occur at all if those courts lack the required capacity or political support). Sixth, because of the ICC’s existence, the international community may be reluctant to create additional international or hybrid tribunals out of the fallacious notion that the ICC can address all international-level prosecutions of genocide, war crimes, and crimes against humanity.

Altogether, this leaves a situation where in some countries perpetrators of genocide, war crimes, and crimes against humanity might be prosecuted by an international or hybrid tribunal (if they are among the highest level perpetrators); in other countries, there is no jurisdiction, so even top level perpetrators cannot be tried internationally (unless they travel to a country with universal jurisdiction laws). Whether there is a Security Council referral to the ICC depends in part on politics, and national judiciaries in countries where such crimes have occurred are still not necessarily able to prosecute these types of high-level cases, and, in fact, often

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63 Jurisdiction may start later depending on the date a state ratified the Rome Statute. See Rome Statute, supra note 39, art. 11(2) (“If a State becomes a Party to this Statute after its entry into force, the Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of this Statute for that State ….”). See also id. art. 12(2) (“For each State ratifying, accepting, approving or acceding to this Statute after the deposit of the 60th instrument of ratification, acceptance, approval or accession, the Statute shall enter into force on the first day of the month after the 60th day following the deposit by such State of its instrument of ratification, acceptance, approval or accession.”).

64 As noted above, the ICC will only exercise jurisdiction if national courts are “unwilling” or “unable” to do so, under the “complementarity” principle. Rome Statute, supra note 39, art. 17(1)(a). Accordingly, if the ICC is exercising jurisdiction regarding a particular situation, that necessarily means that a decision has been made that national courts are “unwilling” or “unable” to do so. Given that fact, it seems rather precarious to expect such courts to be able to conduct further prosecutions in the future.
are in no position to prosecute, with any semblance of fair trial protections, low-level offenders either.

4. Reflections on Future Challenges for International Justice

Without minimizing the extremely significant accomplishments in the field of international justice to date, there appears to be significant room for development. This Article focuses on three future challenges: (1) finalizing the definition of the crime of aggression; (2) developing acceptable alternative mechanisms so that in situations where tribunals are prosecuting only a few high level perpetrators, massive impunity gaps do not result; and (3) increasing ICC membership so there are no longer broad jurisdictional loopholes where the gravest crimes are likely not to be prosecuted.

4.1. Finalizing the Definition of Aggression

One hundred and eight state parties to the Rome Statute already agree that aggression is a crime over which the ICC should exercise jurisdiction. Indeed, the United States spearheaded prosecutions of that crime over sixty years ago before the Nuremberg and Tokyo Tribunals. The Assembly of States Parties to the Rome Statute should adopt a definition of the crime of aggression at their 2010 review conference. Only through

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65 See Rome Statute, supra note 39, art. 5(2) ("The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime."). The U.N. General Assembly took a significant step towards defining aggression in resolution 3314 of 1974. See G.A. Res. 3314, art. 1, U.N. GAOR, 29th Sess., Supp. No. 19, U.N. Doc. A/9619 (Dec. 14, 1974) ("Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner ...."). That 108 countries have ratified the Rome Statute, which creates jurisdiction over the crime, and that so many states are actively participating in negotiations regarding a definition of the crime suggests that there is serious momentum towards enforcing it. Observations of the Author from attending meetings of the ICC Preparatory Commission concerning the definition of the crime of aggression, and meetings of the Special Working Group on the Crime of Aggression.

66 It would be far more preferable for States Parties to adopt a definition of the crime as to which the Security Council does not control referrals (as some proposals would have it do); yet, if such a definition is impossible, which may be the price that must be paid to have this offense criminalized in the modern era, the definition should still be adopted.
adoption of such a definition and prosecutions of such a crime may the world start to fulfill the vision of the League of Nations, the 1928 Kellogg-Briand Pact, the U.N. Charter, and the Nuremberg and Tokyo Tribunals: there shall be no more aggressive wars. The prohibition of aggression and its criminalization is thus hardly a novel concept. Indeed, the U.N. Charter envisions that there will only be use of force in self-defense (under Article 51) or enforcement actions as authorized by the U.N. Security Council acting under its Chapter VII powers. Perhaps it is the final step of fully criminalizing aggression that might permit the Charter to function as it was intended, allowing fulfillment of one of its basic "purposes and principles"—the suppression of acts of aggression.

4.2. Developing Acceptable Alternative and Additional Mechanisms to the International Criminal Court

One must understand the limitations of the ICC, and have realistic expectations of what it can, and was designed to, achieve. The ICC will never be able to prosecute every case of genocide, war crimes, and crimes against humanity. If the international community's efforts result in few prosecutions being brought before "hybrid" tribunals or the ICC, does that suffice as the international community's commitment to international justice? Consider the case of Sierra Leone, where hundreds of thousands were slaughtered during the 1991-2002 civil war. Most crimes were committed face-to-face (without advanced weaponry) by many thousands of perpetrators who killed, maimed, and inflicted horrific atrocities, including almost unspeakable crimes of sexual violence. Without minimizing the significant achievement of the

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67 See e.g., Kellogg-Briand Pact art. 1, Aug. 27, 1928, 46 Stat. 2343, 91 L.N.T.S. 57, available at http://avalon.law.usc.edu/20th_century/kbpact.asp ("The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it, as an instrument of national policy in their relations with one another.").

68 See U.N. Charter art. 51, para. 1 ("Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security."); see also id. ch. VII.

69 U.N. Charter art. 1, para. 1.

70 Interview with David M. Crane, Chief Prosecutor for the U.N. War Crimes Tribunal for Sierra Leone (on file with author) (relying upon NGO estimates).

71 As recounted by Human Rights Watch.
Special Court in prosecuting nine perpetrators, including former Liberian President Charles Taylor, as well as perpetrators from all three of the main warring factions (including government forces), prosecuting nine individuals clearly leaves virtually all of those who actually inflicted the crimes unaccountable. Because of the existence of the amnesty provision in the Lomé Peace Accord (and/or a lack of political will to challenge the validity of Lomé in Sierra Leone’s domestic courts), there have been no domestic prosecutions. Has “international justice” sufficed in this situation?

Throughout the armed conflict in Sierra Leone from 1991 to 2001, thousands of women and girls of all ages, ethnic groups, and socioeconomic classes were subjected to widespread and systematic sexual violence, including individual and gang rape, and rape with objects such as weapons, firewood, umbrellas, and pestles. Rape was perpetrated by both sides, but mostly by the rebel forces. These crimes of sexual violence were generally characterized by extraordinary brutality and frequently preceded or followed by other egregious human rights abuses against the victim, her family, and her community. Although the rebels raped indiscriminately irrespective of age, they targeted young women and girls whom they thought were virgins. Many of these younger victims did not survive these crimes of sexual violence. Adult women were also raped so violently that they sometimes bled to death or suffered from tearing in the genital area, causing long-term incontinence and severe infections. Many victims who were pregnant at the time of rape miscarried as a result of the sexual violence they were subjected to, and numerous women had their babies torn out of their uterus as rebels placed bets on the sex of the unborn child.

The Special Court held that the Lomé Peace Accord was no impediment to its prosecutions, while (unfortunately) suggesting (in dicta) that it would preclude domestic prosecutions. See Prosecutor v. Kallon, Case No. SCSL-2004-15-AR72(E), Decision on Constitutionality and Jurisdiction (Mar. 13, 2004). See also Simon M. Meisenberg, Legality of Amnesties in International Humanitarian Law: The Lomé Amnesty Decision of the Special Court for Sierra Leone, 86 INT’L REV. RED CROSS 837, 847 (2004), available at http://www.icrc.org/Web/eng/siteeng0.nsf/htmllall/692F82/5File/icrc_836_meisenberg.pdf (arguing that the Lomé amnesty provision might be null and void vis-à-vis Sierra Leone’s domestic courts and arguing that the Special Court’s decision failed to address the “core question” of whether the amnesty provision of Lomé “violated international law”).

There has been a Sierra Leone Truth and Reconciliation Commission. See The Truth and Reconciliation Commission of Sierra Leone, The Final Report of the
One can anticipate similar questions arising in the countries where the ICC is pursuing cases. Does prosecuting four or five individuals really further international justice in any measurable way? Does it jump-start a national process? How do you answer victims or victims’ families who question why atrocities against their loved ones are not prosecuted? There is cause for concern. Cases are only admissible before the ICC if national courts are “unwilling” or “unable” to investigate and/or prosecute them. Thus, in any country where an ICC case is proceeding, it will have been determined that national courts are “unwilling” or “unable” to investigate and prosecute such cases. Will such countries really have the financial resources and political motivation to conduct additional prosecutions? Either more international and mixed tribunals will be needed in the future (and, arguably, some still to cover crimes of the past) or far more attention will need to be devoted to rebuilding domestic judiciaries and internationalizing specialized domestic chambers to conduct prosecutions in countries where mass crimes have occurred. Laudable as the goal of prosecuting those who bear “the greatest responsibility” or are “most responsible” for mass atrocities may be, a significant challenge will be to ensure that massive impunity gaps do not result where only a small number of individuals are prosecuted. One also needs to examine with a critical eye alternative or additional institutions intended to fill in that gap. Do truth commissions satisfy a country’s treaty obligations to “prosecute” or “extradite” some of the gravest crimes? Do alternative justice...
mechanisms contain enough fair trial protections to satisfy a country's treaty obligations? It is likely the case that the best alternative is the far less glamorous work needed to rebuild domestic judiciaries—perhaps through international assistance, and, in some cases, internationalizing specialized war crimes chambers.

4.3. Increasing International Criminal Court Cooperation and Membership

The final challenge is convincing the remaining non-member countries to cooperate with and join the ICC. Ratifying the Rome Statute is a strong statement that a country is willing to adhere to the rule of law regarding the gravest crimes. Increased cooperation and membership would also minimize or eliminate the massive jurisdictional gaps that the ICC faces, with the goal of more equitable and uniform application of international law. It is hardly a radical notion that a country's nationals (including government figures) should face criminal exposure if they commit genocide, war crimes or crimes against humanity. Indeed, the Genocide Convention and Geneva Conventions already mandate that countries that have ratified those conventions (as most have) prosecute genocide and grave breaches of the laws of war. Thus, the legal obligation to prosecute at least those crimes already exists. Most countries also already criminalize the acts underlying crimes against humanity. If a country is loath to see its nationals prosecuted before the ICC, rather than enacting, for example,
domestic legislation allowing its armed forces to liberate its nationals from The Hague (as the misnamed "American Service-Members' Protection Act" does),\textsuperscript{82} the country would have a simple choice: if its nationals commit crimes over which the ICC has jurisdiction (such as war crimes), it could investigate and prosecute them diligently itself, thereby rendering the case inadmissible before the ICC. Countries that profess adherence to the rule of law should be willing to join the community of states willing to make that commitment and agree that genocide, war crimes, and crimes against humanity will not be tolerated, wherever they occur.

Is it in the interest of states to take these steps outlined above? It may not always appear to be in their short-term interests, but perhaps it is in the long-term. Some countries may choose to become parties to the Rome Statute because they hope to use its jurisdiction to prosecute rebel groups.\textsuperscript{83} Other states perhaps do not join out of concern that members of their governments could face exposure. While not joining might be helpful to those particular individuals, in the long run, it is likely not helpful to the state. A state where these types of crimes do not occur (i.e., are successfully deterred), or, if they do occur, are prosecuted fairly and effectively (whether through an international tribunal or domestically), is undoubtedly a stronger state than one where such crimes are not prosecuted. Joining the ICC may force a state to take its own prosecutorial obligations seriously—obligations that already largely exist, as mentioned above, under the Genocide Convention and Geneva Conventions (as well as the Torture Convention).\textsuperscript{84} Countries that are able to undertake their own prosecutions would then have incentive to do so if they want to avoid prosecution of their nationals before the ICC. Countries where the judiciaries are truly too weak to conduct such prosecutions could be assisted by the ICC assuming jurisdiction over such cases. States would similarly be well-served by creating or strengthening domestic institutions to ensure that where

\textsuperscript{82} American Service-Members’ Protection Act, 22 U.S.C. § 7427(a) (2002) ("The President is authorized to use all means necessary and appropriate to bring about the release of any person [covered] ... who is being detained or imprisoned by, on behalf of, or at the request of the International Criminal Court.").

\textsuperscript{83} That certainly was the case regarding Uganda (a State Party to the Rome Statute) which referred the situation in Northern Uganda to the ICC—clearly in the hope of having the rebel Lord’s Resistance Army leaders prosecuted.

\textsuperscript{84} Genocide Convention, supra note 4, art. 6.
international or hybrid tribunals prosecute only a few high level perpetrators, additional domestic prosecutions may occur pursuant to internationally-accepted fair trial standards.

3. Conclusion

The field of international justice has achieved remarkable accomplishments over the last sixty years, and much of that progress has occurred only quite recently. This nascent field is undoubtedly not developing perfectly, and clearly has challenges for its future. It is imperative that NGOs, international scholars, and other institutions continue analyzing existing tribunals in order to understand their merits and flaws and develop models as to which are the most fair and effective. States must continue to recognize that prosecuting the worst crimes is a tremendously important task for the international community, one that, presently, domestic courts cannot yet shoulder successfully themselves. States must also be willing to provide the necessary funding for the work of international and hybrid tribunals; justice adjudicated fairly is not inexpensive. Where international or hybrid tribunals will not prosecute any significant number of individuals after mass atrocities have occurred, states must also work to assist in rebuilding domestic judiciaries and "internationalizing" domestic tribunals to conduct such prosecutions. States must also be willing to subject their nationals to the ICC's jurisdiction or assume jurisdiction over crimes themselves, so that all countries are subject to the rule of law regarding the gravest crimes.