

## Perspectives on International Criminal Justice

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*Fiat Iustitia Pereat Mundus*

“Let there be justice, though the world perish.”

—Immanuel Kant (1795)

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## INTRODUCTION

Laws and legal systems are to be distinguished from their justice values. They have existed in organized societies as far back as anthropological studies have been able to record, but their substantive justice meanings and contents have varied from society to society, as well as within each society over time. Justice meanings and contents are reflected in the laws and legal systems of the world over some five thousand years; however, legal systems often reflect pragmatic social control mechanisms exercised by rulers to further their own goals. Within different civilizations the convergence between laws and legal systems on the one hand, and moral and social justice values on the other, have depended on a variety of social, political, and economic factors, and on the interactions between these factors.

The history of law reflects the occasional migration of legal concepts from one civilization to the other, as in the case of Roman law's absorption of certain philosophical and legal concepts from ancient Greece.<sup>1</sup> This was followed by the influence of Roman law on some Western European legal systems, such as the English Common Law after the Norman Conquest in 1066, which in turn had an impact on the legal systems of countries colonized by England. In addition, European colonialism saw the transfer of continental legal systems to Asian and African countries. As a result of this complex historical process, most of the world's legal systems have belonged to a few major families of law, thus engendering some harmonization among them.<sup>2</sup>

This historical process has in turn had an impact on international criminal justice (ICJ), which borrowed from the major families of law in order to form its substantive and procedural law. This is evident in the "general part" of criminal law as applied by international criminal tribunals, which relies on comparative law techniques to deduce principles and norms common to the major families.<sup>3</sup> Similarly, the harmonization of criminal procedural laws in many contemporary legal systems reflects the impact of international human rights law.<sup>4</sup> In turn, the procedural aspects of international criminal law (ICL) as applied by

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1. *See generally* COLEMAN PHILLIPSON, 1 THE INTERNATIONAL LAW AND CUSTOM OF ANCIENT GREECE AND ROME (1911).

2. *See generally* RENÉ DAVID, MAJOR LEGAL SYSTEMS IN THE WORLD TODAY (John E.C. Brierley trans., Stevens & Sons 3d ed. 1985) (1964).

3. *See* M. CHERIF BASSIOUNI, INTRODUCTION TO INTERNATIONAL CRIMINAL LAW 259 (2003).

4. *See* Jean Pradel, *Procédure pénale comparée dans les systèmes modernes: Rapports de synthèse des colloques de l'ISISC*, 15 NOUVELLES ETUDES PENALES (1998).

international criminal tribunals reflect general principles of procedural law.<sup>5</sup> A comparative analysis of national constitutions demonstrates not only a high level of harmonization among individual rights, but also a high level of harmonization between the constitutions and international instruments on the protection of human rights.<sup>6</sup> Consequently, laws and legal systems in contemporary times manifest a higher level of congruence with moral and social values than at any other time in history.

The contemporary quest for ICJ demonstrates a high level of demand by international civil society and by some governments. This is due to the convergence of shared moral and social values of constituencies supporting ICJ and intergovernmental agencies' policies on maintaining international peace and security. However, while this demand for ICJ has increased in postmodern times, its supply is still low, notwithstanding the establishment of several ICJ institutions in the past fifteen years.

ICJ processes have historically evidenced a tension between the interests of power and wealth represented by states and the commonly shared moral and social values of the international community.<sup>7</sup> More often than not, considerations of states' power and wealth interests clash with the moral and social values sought to be attained by ICJ.<sup>8</sup> At times, however, these divergent values and interests also converge. Whenever such convergence occurs, it may be because the power and wealth interests of states temporarily give way to the imperatives of commonly shared moral and social values of the international community, or because these interests are deemed to be better served by states' acceptance of the goals of ICJ. This uncertainty is reflected in the processes of ICJ.

Just as laws and legal systems have developed through processes of accretion and borrowing from other societies' experiences, so has ICJ.

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5. See BASSIOUNI, *supra* note 3, at 583–84.

6. For a list of constitutions that have been comparatively analyzed as such, see *id.* at 664–65.

7. See M. Cherif Bassiouni, *Combating Impunity for International Crimes*, 71 U. COLO. L. REV. 409 (2000); M. Cherif Bassiouni, *The Perennial Conflict Between International Criminal Justice and Realpolitik*, 22 GA. ST. U. L. REV. 541 (2006). For more information on *realpolitik* and contemporary manifestations of imperialism, see generally CHALMERS JOHNSON, *THE SORROWS OF EMPIRE: MILITARISM, SECRECY, AND THE END OF THE REPUBLIC* (2004); PHILIPPE SANDS, *LAWLESS WORLD: AMERICA AND THE MAKING AND BREAKING OF GLOBAL RULES FROM FDR'S ATLANTIC CHARTER TO GEORGE W. BUSH'S ILLEGAL WAR* (2005).

8. See M. Cherif Bassiouni, *International Criminal Justice in Historical Perspective: The Tension Between States' Interests and the Pursuit of International Justice*, in *THE OXFORD COMPANION TO INTERNATIONAL CRIMINAL JUSTICE* 131 (Antonio Cassese ed., 2009).

ICJ, however, has also been shaped by political considerations, as is evidenced by the UN Security Council's establishment of post-conflict justice mechanisms in the last fifteen years. Prior to 1992, the Council did not address post-conflict justice issues, deeming them to be beyond the scope of its mandate under Chapter VII of the UN Charter, namely, that which directly concerns peace and security as perceived by the Council and its five permanent members. Since 1992, however, the Security Council has established two ad hoc international criminal tribunals for the conflicts in the former Yugoslavia<sup>9</sup> and Rwanda,<sup>10</sup> and mixed model tribunals for Sierra Leone,<sup>11</sup> Kosovo,<sup>12</sup> Timor-Leste,<sup>13</sup> Cambodia,<sup>14</sup> Bosnia and Herzegovina,<sup>15</sup> and Lebanon.<sup>16</sup> The Security Council did not act in pursuit of post-conflict justice between 1948 and 1992 due to political considerations, and the fact that it has acted so selectively since 1992 is equally attributable to politics. The Security Council has acted with such inconsistency because of its failure to understand the mechanisms of post-conflict justice and its failure to develop consistent policies and practices.

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9. Statute of the International Criminal Tribunal for the Former Yugoslavia, S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/RES/827 (May 25, 1993) [hereinafter ICTY Statute].

10. Statute of the International Tribunal for Rwanda, S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg., U.N. Doc. S/RES/955 (Nov. 8, 1994) [hereinafter ICTR Statute].

11. Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, U.N.-Sierra Leone, Jan. 16, 2002, 2178 U.N.T.S. 138. The Special Court was endorsed by the UN Security Council in S.C. Res. 1400, U.N. Doc. S/RES/1400 (Mar. 28, 2002).

12. S.C. Res. 1244, U.N. Doc. S/RES/1244 (June 10, 1999); *see also* U.N. Interim Administration Mission in Kosovo, *On the Authority of the Interim Administration in Kosovo*, U.N. Doc. UNMIK/REG/1999/1 (July 25, 1999).

13. S.C. Res. 1272, U.N. Doc. S/RES/1272 (Oct. 25, 1999); *see also* U.N. Transitional Administration in East Timor, *On the Organization of Courts in East Timor*, U.N. Doc. UNTAET/REG/2000/11 (Mar. 6, 2000).

14. Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, Royal Decree No. NS/RKM/1004/006 (2004) (Cambodia), *available at* [http://www.eccc.gov.kh/english/cabinet/law/4/KR\\_Law\\_as\\_amended\\_27\\_Oct\\_2004\\_Eng.pdf](http://www.eccc.gov.kh/english/cabinet/law/4/KR_Law_as_amended_27_Oct_2004_Eng.pdf).

15. The War Crimes Chambers was created in 2003 at the Peace Implementation Council Steering Board Meeting and underwent extensive negotiations until its adoption on January 6, 2005. The Court is subject to the 1977 Criminal Code of the Socialist Federal Republic of Yugoslavia rather than the new criminal and procedural codes of Bosnia and Herzegovina. The Court also applies the European Charter on Human Rights, ratified by Bosnia and Herzegovina in 2002. *See* PARAM-PREET SINGH, HUMAN RIGHTS WATCH, *NARROWING THE IMPUNITY GAP: TRIALS BEFORE BOSNIA'S WAR CRIMES CHAMBER* (2007).

16. S.C. Res. 1757, U.N. Doc. S/RES/1757 (May 30, 2007); *see also* The Secretary-General, *Report of the Secretary-General on the Establishment of a Special Tribunal for Lebanon, delivered to the Security Council*, U.N. Doc. S/2006/893 (Nov. 15, 2006).

Throughout history ICJ has progressed both as a result of unforeseen circumstances and because individuals—whether rulers, reformist intellectuals, or activists—were able to bring about progressive developments. There have also been historical periods when rulers have caused the regression of ICJ. Thus, ICJ has ebbed and flowed with the currents of history, and contemporary gains in ICJ must not be taken for granted.

The history of humankind is made of different strands; some are intertwined and even merge with one another, others remain separate and distinguishable threads. The difference between the moral qualities within these strands is not always easily identifiable. To distinguish between what is right from what is wrong, or what is good from what is evil, purely on the basis of what history in its various aspects and periods appears to be, is a judgmental undertaking. Considering the diversity of values that exists in human societies, it is inevitable that what is considered good or evil by the international community is neither uniformly agreed upon, nor predictably or consistently acted upon. This is evident in the historic pursuit of identifying commonly shared values that can be uniformly applied to all states and to all peoples. It is also evident in states' decisions on ICJ questions, which more often than not reflect concerns for power and wealth rather than concerns for the common good of the international community. State policies and practices are, however, made by leaders and not by abstract entities. Thus, it is a human factor that most determines the course of history, even though events uncontrolled by individuals sometimes overtake human agency.

The cumulative record of history is an indispensable guide to the future, but as time progresses, generational gaps expand and what remains in the collective consciousness of succeeding generations is little more than sound bites. These are unlikely to instruct us very much about the lessons of the past, leading the philosopher George Santayana to observe that “those who cannot remember the past are condemned to repeat it.”<sup>17</sup> And so it is for that reason so many of the human tragedies and injustices of the past continue to recur.

Some lessons have been learned in the pursuit of ICJ, but, as the popular saying goes, the wheel has to be periodically reinvented as if it had never before existed. As Niccolò Machiavelli observed in his

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17. GEORGE SANTAYANA, 1 *THE LIFE OF REASON: REASON OF COMMON SENSE* 284 (1905).

sixteenth-century seminal work, *The Prince*, the most difficult thing to change is change itself.<sup>18</sup>

## I. LAW AND LEGAL SYSTEMS IN HISTORICAL PERSPECTIVE

Legal systems have existed interruptedly throughout the past five thousand years, as evidenced by their presence in the world's forty major civilizations.<sup>19</sup> These early codes and legal systems include those of the Egyptian Civilization, as early as 3100 BCE with Pharaoh Menes' law on the unification of Upper and Lower Egypt; the Mesopotamian law of Urukagina around 2380 BCE, which focused on banning corruption, and the 1790 BCE Code of Hammurabi, which covered a variety of topics; the Assura Code of the Assyrians promulgated in 1075 BCE, which—like their Mesopotamian neighbors' Code of Hammurabi—covered criminal, civil, and commercial matters; the first written Chinese law code, the Kang Gao, promulgated by King Wu Zhou in the eleventh century BCE; the Greek legal systems that evolved between the fifth and first centuries BCE, and their influence on the Roman law system, whose own evolution led to the Justinian Code of 529 CE; and the Indian Laws of Manu created between 200 BCE and 200 CE. These are only some examples of laws and legal institutions that appeared early on in the history of law.

The fact that laws and legal systems have existed for so long does not presuppose that they necessarily reflect certain values embodied in the meaning of justice as it is perceived in the moral and social values of different civilizations. On the contrary, for most of this five-thousand-year history, laws and legal systems have mostly been tools of social control used by those in power to dominate their opponents. Whatever margin of real justice existed in these systems was applied to interpersonal relations, to give the ruled masses a modicum of justice among themselves. The interests of the power structure and the privileges of the ruling elite were otherwise always safeguarded.

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18. NICCOLÒ MACHIAVELLI, *THE PRINCE* (Luigi Ricci trans., Oxford Univ. Press 1935) (1532).

19. See generally ANDRÉ AYMARD & JEANNINE AUBOYER, *L'ORIENT ET LA GRÈCE ANTIQUE* (1953); CHARLES FREEMAN, *EGYPT, GREECE, AND ROME: CIVILIZATIONS OF THE ANCIENT MEDITERRANEAN* (1996); H. PATRICK GLENN, *LEGAL TRADITIONS OF THE WORLD* (2d ed. 2004); MICHAEL GRANT, *THE ANCIENT MEDITERRANEAN* (1969); JEAN IMBERT ET AL., *HISTOIRES DES INSTITUTIONS ET DES FAITS SOCIAUX* (1956); JACQUES-HENRI PIRENNE, *PANORAMA DE L'HISTOIRE UNIVERSELLE* (1963); ARNOLD TOYNBEE, *A STUDY OF HISTORY* (1961); H.G. WELLS, *THE OUTLINE OF HISTORY* (3d ed. 1921); JOHN HENRY WIGMORE, *A PANORAMA OF THE WORLD'S LEGAL SYSTEMS* (Library ed. 1936) (1928).

Ancient Greece, particularly the city-state of Athens, practiced democracy during the fifth to the first centuries BCE, with some exceptions.<sup>20</sup> Then, as now, it was axiomatic that democracy needed a system based on the rule of law to achieve its goals. The Romans, who borrowed certain values and concepts from Greece, developed in their own right an extraordinary legal system based on positive law.<sup>21</sup> Specific laws were distinguished by subject-matter categories, and had to be coherent with applicable doctrinal or dogmatic constructs and interpreted in accordance with certain legal methods in order to enhance the certainty of the law and the consistency of its application. Roman law is the historic foundation of more than half the world's contemporary legal systems, and thus has had a profound impact on ICL. Most contemporary criminal law systems and ICL follow the Roman law principles of legality: *nullum crimen sine lege, nulla poena sine lege*.<sup>22</sup>

The linkage between democracy and the rule of law developed by ancient Greece is one of the pillars of contemporary ICJ, particularly in the topic of post-conflict justice. Providing for post-conflict justice, including prosecution for international crimes, is a necessary step in the rehabilitation of failed states and the reconstruction of states devastated by conflict. It is the first stage toward rebuilding sustainable justice systems capable of delivering justice services to society and ensuring that the rule of law controls governance issues. The quest for democracy can only be achieved through an effective rule-of-law system of government, and when that is attained, conflicts are lessened and their harmful consequences are reduced.<sup>23</sup>

## II. THE ORIGINS OF JUSTICE VALUES

The three Abrahamic faiths of Judaism, Christianity, and Islam have all posited justice as a divine characteristic and a human aspiration.

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20. See generally RAPHAEL SEALEY, A HISTORY OF THE GREEK CITY STATES CA. 700–338 B.C. (1976).

21. See PHILLIPSON, *supra* note 1; see also CICERO, DE OFFICIIS, (G.P. Goold ed., Walter Miller trans., Harvard Univ. Press 1975).

22. This translates as “no crime without law, no punishment without law.” JEFFREY L. DUNOFF ET AL., INTERNATIONAL LAW: NORMS, ACTORS, PROCESS (2d ed. 2006). For a discussion of legal philosophy and the principles of legality, see M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW 89, 123 (2d rev. ed. 1999).

23. See DEMOCRACY: ITS PRINCIPLES AND ACHIEVEMENT (Inter-Parliamentary Union ed., 1998).

Other faith-belief systems, such as Greek and Roman mythology, have also posited justice as one of their highest values.

In the holy scriptures of Abrahamic faiths, the divine is described as a God of Justice because justice is the basis on which God judges people for their deeds and intentions, and rewards and punishes people both on this Earth and in the hereafter. Even though the divine is characterized by compassion and mercy, as well as love, justice seems primary, if for no other reason than the realization that compassion and mercy follow a justice determination of some sort. The divine prescriptions on justice reveal a higher and deeper meaning of justice than what a literal reading of the Torah, Old Testament, or Qur'an would reveal. This meaning is reflected in the pursuit of certain ultimate values.

Theological, philosophical, and juridical interpretations of these holy scriptures reveal over a period of some 3,200 years, starting with the exodus of the Jews from Egypt under Moses' leadership, a consistent search for the values, meanings, and contents of justice. What these writings also reveal, however, is ambivalence toward the unqualified universal application of these values, meanings, and contents to all, including those who are not of the same faith. The extension of justice values to a universal or cosmopolitan society is a product of the eighteenth-century Age of Enlightenment and sees its confirmation in the contemporary era of globalization and the subsequent aspiration for human rights.<sup>24</sup> Nevertheless, seldom have legal systems in the past five thousand years evidenced the supremacy of the rule of law in governance and the prevalence of justice and fairness for all in their respective societies. More significantly, legal systems have not reflected the acceptance of a universal concept of justice and fairness applicable to all members of the human race.

Though national and international justice goals have been pursued by many constituencies in the last two centuries, they have not yet been attained in most contemporary societies. Despite an evolution over some five thousand years, national justice systems remain a work in progress. Thus, it can hardly be expected that ICJ, which was put into practice less than one hundred years ago, could be anything more than a work in progress itself. Furthermore, if history is instructive, ICJ's future course may not necessarily be linear, and its growth is likely to be anything but

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24. See THE AGE OF ENLIGHTENMENT: THE EIGHTEENTH CENTURY PHILOSOPHERS 27–29 (Isaiah Berlin ed., 1956); WILL DURANT & ARIEL DURANT, THE AGE OF REASON BEGINS 646–47 (1961).



consistent. It is of little wonder that ICJ, as described below, is progressing slowly, unevenly, and in a disorderly way.

As with all ideals embodied in norms and enforced through institutions, the currents of history at certain times and places run deep and strong, while at other times and places they are shallow and stagnant. In the fifth century BCE, ancient Greece heralded the values of justice that were later reflected in Roman law and, in turn, in Western legal systems. In time, these values have become universally recognized, albeit not universally applied. They are reflected in such precepts as: equality of the law for all and equality of all before the law; the individualization of criminal responsibility; rejection of revenge-taking; the imperative of a fair trial before an impartial judicial body; and penalties that befit the crime.

These justice values were first reflected in Greek mythology. Themis was an oracle at Delphi who became known as the “goddess of divine justice.” The name “Themis” meant that the goddess derived her good counsel from the law of nature rather than from human ordinance, thus acknowledging the existence of a higher and better law than that posited by humans. In 458 BCE, Aeschylus brought out the precept of individual justice in his *Oresteia* trilogy, where the goddess of justice stands up against the historic custom of collective vengeance, and replaces it with individual accountability.<sup>25</sup> This transformative concept of justice was designed to prevent never-ending revenge-taking and continued violence that only resulted in more human suffering. Individual responsibility replaced collective responsibility, the former to be established by an impartial judge on the basis of fair and open proceedings with popular participation.

The Romans modeled their goddess of justice after the Greeks and referred to her as *Iustitia*. Her depiction, similar to that of the Greeks, is of a blindfolded woman carrying the scales of justice in one hand and a sword in the other. The blindfold symbolizes the closing of the eyes to favoritism, bias and prejudice, thereby achieving impartiality, equality, and fairness. The sword symbolizes the enforcement of justice’s outcomes.

Themis had two daughters, Dika and Astraea, who were also known as goddesses of justice; unlike their mother, however, they were not of divine justice. Astraea was a daughter of Zeus and was deemed to be the last of the immortals living with humans during the Iron Age, which

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25. See W.B. Stanford, *Introduction to AESCHYLUS, THE ORESTEIA* 21–23 (Robert Fagles trans., Penguin Books 1977).

was believed to be the world's final stage before it entered the utopian Golden Age. This did not occur, however, because the world succumbed to the wickedness of humans. At that point, Astraea ascended to heaven and became the constellation Virgo. The scales of justice, which she carried as her mother's heir, became the Virgo's sign. Justice went to the skies because it could not stay on earth, as evil had prevailed over good, which made justice on earth impossible. Yet in the constellation of stars, Virgo with its scales of justice was to remain visible to humans as inspiration. Perhaps when good triumphs over evil, Astraea will leave the skies and return to earth, and justice will be established for all and enforced against all. In the meantime, justice remains a visible and hopeful symbol just outside human reach.

### III. OF WAR AND PEACE, AND OF INTERESTS AND VALUES

Historically, wars, and in particular total wars, have brought about enormous human devastation and have almost never been followed by any form of post-conflict justice. Recently, we have found ourselves in a new generation of warfare,<sup>26</sup> which has also brought an enormous amount of human suffering with very little post-conflict justice, except in the last fifteen years, as described below.<sup>27</sup>

Humankind, since the Biblical account of Cain's murder of his brother Abel, has found itself engulfed in violence.<sup>28</sup> What started with brother against brother turned to family against family, tribe against

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26. For the history of warfare, see generally GEOFFREY BEST, *HUMANITY IN WARFARE* (1980); GEOFFREY BEST, *WAR AND LAW SINCE 1945* (1994); JOHN KEEGAN, *A HISTORY OF WARFARE* (1994); JOHN KEEGAN, *THE ILLUSTRATED FACE OF BATTLE* (Viking Press 1988) (1976); MARTIN VAN CREVELD, *THE TRANSFORMATION OF WAR* (1991). Since shortly after the end of World War II, conflicts between states have increasingly involved insurgent groups and non-state actors. In these conflicts, referred to either as conflicts of a non-international character or as purely internal conflicts, the participation of non-state actors seems correlated to the increased number of civilian victims. In some respects, this shows the inability of international humanitarian law to induce compliance and deter violations of its norms in conflicts involving non-state actors. See M. Cherif Bassiouni, *The New Wars and the Crisis of Compliance with the Law of Armed Conflict by Non-State Actors*, 98 J. CRIM. L. & CRIMINOLOGY 711, 727–34 (2008). This is not to say, however, that state actors have committed fewer violations than non-state actors, or that state actors as opponents cause less victimization of noncombatants and civilian populations. See, e.g., U.N. Human Rights Council, Fact-Finding Mission on the Gaza Conflict, *Human Rights in Palestine and Other Occupied Arab Territories*, ¶¶ 62, 328–64, 1192–98, U.N. Doc. A/HRC/12/48 (Sept. 15, 2009) (detailing the incursions of Israel into Lebanon and Gaza in 2006 and 2009, respectively).

27. See *infra* Part VIII.B.

28. See generally JARED DIAMOND, *GUNS, GERMS AND STEEL: THE FATES OF HUMAN SOCIETIES* (1999).

tribe, and nation against nation. As the number of those engaged in violence has increased, so have the harmful consequences. Limited war gave way to total war. The term “total war” means war that does not distinguish between combatants and noncombatants, or between civilian property and military targets. Scorched-earth warfare and indiscriminate killing and destruction of all that is perceived as enemy, irrespective of humanitarian considerations, developed almost in tandem with more destructive weaponry, from the cannon to the atomic bomb. But total war originated long before artillery was so devastatingly used during the French Revolution and Napoleonic Wars between 1792 and 1815.<sup>29</sup> Alexander (356–323 BCE), Julius Caesar (100–44 BCE), and Hannibal (248–182 BCE), all practiced total war long before Napoleon.<sup>30</sup> Rome also practiced total war during its Punic Wars with Carthage (264–241 BCE, 218–201 BCE, 149–146 BCE), which led to Carthage’s total destruction, as the Roman Senator Cato the Elder urged in his oft-repeated statement to the Roman Senate: *Carthago delenda est* (Carthage must be destroyed). And so it was.

Between around 2000 BCE and the fourteenth century CE, total war was sporadically practiced by Persians, Spartans, Romans, Vandals, Goths, Mongols, and Crusaders. During the Middle Ages, spanning the fourteenth to seventeenth centuries, wars were far less devastating in terms of their consequences.<sup>31</sup> The French Revolution and Napoleonic Wars brought total war to new heights in terms of casualties, both military and civilian, and the destruction of civilian property. A brief lull followed from 1815 to 1914, until World War I resulted in an estimated twenty million military casualties. It caused such revulsion in Europe that it was dubbed “the war to end all wars.” No sooner had World War I ended in 1919, though, than the winds of war started blowing again, and World War II began in 1939 and ultimately resulted in an estimated forty million casualties and the wholesale destruction of cities, including the Japanese cities of Hiroshima and Nagasaki, where the two atomic bombs killed 200,000 civilians.<sup>32</sup> Beyond the scope of

29. See DAVID A. BELL, *THE FIRST TOTAL WAR: NAPOLEON’S EUROPE AND THE BIRTH OF WARFARE AS WE KNOW IT* 7–9, 18 (2007); DAVID G. CHANDLER, *THE CAMPAIGNS OF NAPOLEON* 134–43 (1966); J. CHRISTOPHER HEROLD, *THE AGE OF NAPOLEON* 45 (Mariner Books 2002) (1963). See generally THOMAS CARLYLE, *THE FRENCH REVOLUTION* (Random House 1989) (1837); FRANK MCLYNN, *NAPOLEON* (1997).

30. See JOHN A. LYNN, *BATTLE: A HISTORY OF COMBAT AND CULTURE* 1–27 (2003).

31. See PEACE AND WAR IN ANTIQUITY (Alexander Souter ed., Augustine FitzGerald trans., 1931) (describing the number of combatants and limited duration of wars during the Middle Ages).

32. See SEAN L. MALLOY, *ATOMIC TRAGEDY: HENRY L. STIMSON AND THE DECISION TO*

anything in history, this was truly total war. The world reacted with shock to the Nazi atrocities and, in particular, to the Jewish Holocaust, which saw the extermination of some six million Jews in the most inhumane ways known to history.<sup>33</sup> The world community vowed “never again,” but alas the promise was never fulfilled.<sup>34</sup>

In a soon-to-be-published worldwide study directed by this author, it has been ascertained that between 1945 and 2008 there were an estimated 313 conflicts, which collectively resulted in the killing of an estimated one hundred million persons, excluding other human and material harm.<sup>35</sup> This is five times the number of casualties resulting from “the war to end all wars,” and more than twice the casualties of the war that was to be “never again.” Only in very few cases has the Security Council acted to prevent these conflicts, limit their progress, or bring them to a halt. The post-conflict justice outcomes of these conflicts have also been selective, and few and far between. The number of amnesty laws issued by states after a given conflict far exceeds the number of prosecutions.<sup>36</sup> These *de jure* or *de facto* amnesties have covered, in whole or in part, almost all of these conflicts. International and national prosecutions have been selective and limited in both number and duration. The symbolic number of those who were prosecuted represent less than one percent of the pool of those who could have been prosecuted for core international crimes.<sup>37</sup> The study also shows that less than one percent of the victims of these crimes have received any form of redress or compensation.<sup>38</sup> Truth commissions have been established in less than ten percent of these conflicts, and they have operated for short periods of time with limited resources and limited impact. Education, recordation, and memorialization programs have been so few that it is impossible to assess them, let alone measure their importance.<sup>39</sup> The conclusion is that the international community

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USE THE BOMB AGAINST JAPAN 138–42 (2008).

33. See LUCY S. DAWIDOWICZ, *THE WAR AGAINST THE JEWS, 1933–1945*, at xiii–xviii (1975); STEPHAN LANDSMAN, *CRIMES OF THE HOLOCAUST: THE LAW CONFRONTS HARD CASES*, at ix–xi (2005).

34. See SAMANTHA POWER, “A PROBLEM FROM HELL”: AMERICA AND THE AGE OF GENOCIDE 503–04 (2002).

35. See *THE PURSUIT OF INTERNATIONAL CRIMINAL JUSTICE: A WORLD STUDY ON CONFLICTS, VICTIMIZATION, AND POST-CONFLICT JUSTICE* (M. Cherif Bassiouni ed., forthcoming 2009) (detailing a project of the International Institute for Higher Studies in Criminal Sciences, Siracusa, Italy that was funded by a grant of the European Union).

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

and national legal systems have hardly addressed the requirements of post-conflict justice. Consequently, whatever the deterring and preventive effects of post-conflict justice mechanisms may be, they have largely been lost. This may well have contributed to the high levels of human and material harm arising out of the various forms of conflicts identified in the study.<sup>40</sup>

War is a dominant feature in the history of humankind, and there have always been those who have advocated war and those who have opposed it. Theologians and philosophers have sought support for their positions in religious beliefs or understandings of the Law of Nature and the Nature of Man. There were those, like Thomas Hobbes, who believed that it is in the nature of things for war to be a perpetual feature in the affairs of man,<sup>41</sup> and those, like Immanuel Kant, who believed that man's challenge is to reach perpetual peace.<sup>42</sup> Between those who believe that war is a permanent feature of international relations interrupted by periods of peace, and those who believe that peace is the permanent feature of humankind interrupted by war, there has been a wide range of views. To resolve the differences between these visions and perceptions of war and peace is impossible. Adding to the difficulty is the intransigence of nations and groups that perceive their beliefs and claims to be exclusive, righteous, and superior to those of others. The debate over the legitimacy of the resort to armed force is intractable. From the Middle Ages to the present, that legitimacy debate has underscored the excesses of unilateralism and the prevalence of exceptionalism.<sup>43</sup> The mighty have seldom been persuaded to give up

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40. It is noteworthy that neither the United Nations nor any other international governmental organization has kept a database on world conflicts and their impacts. Moreover, only a few studies by social and behavioral scientists exist on the causes of conflicts and the means to both prevent them and limit their harmful consequences. It is as if some power has been able to keep all of this away from the public's knowledge. To some, this may seem intentional, because if the general public had knowledge of these conflicts, how they occurred, and what their consequences were, governments would be pressured to act to prevent them. Without such public knowledge, governments have fewer external constraints in deciding when to act or not to act, and how they should behave in situations that disrupt peace and cause human harm.

41. See THOMAS HOBBS, *LEVIATHAN* 98–102 (Michael Oakeshott ed., Touchstone 1997) (1651).

42. See IMMANUEL KANT, *TOWARD PERPETUAL PEACE AND OTHER WRITINGS ON POLITICS, PEACE, AND HISTORY* 67–85 (Pauline Kleingeld ed., David L. Colclasure trans., Yale Univ. Press 2006) (1795).

43. Legitimacy has been the cornerstone of arguments made for and against the “just war” ever since that concept developed with the naturalists in the early Middle Ages. It continues to be an issue in distinguishing between lawful combatants and “terrorists.” See M. Cherif Bassiouni, “*Terrorism*”: *Reflections on Legitimacy and Policy Considerations*, in *VALUES & VIOLENCE: INTANGIBLE ACTS OF TERRORISM* 233, 248–50 (Ibrahim A. Karawan, Wayne McCormack &

their power only because virtue requires it. The only alternative left, both then and now, has been to try limiting the harm resulting from war. Thus the concept of humanism in the conduct of war emerged and, in time, it was rephrased as humanitarianism in order to lessen the moral overtones of the former nomenclature. This development, with earlier roots, is largely the product of the Age of Enlightenment, which brought about a new and higher level of concern for humanism; however, the dilemma of war and peace persisted. How to address it, and also how to minimize human harm, made the *jus ad bellum* and the *jus in bello* a functional tandem. How to open up a legal space for these two concepts in the thick of the supremacy of states' unilateral political decision-making was, and continues to be, a difficult challenge.

In international relations, there are no enduring values as in the case of interpersonal relations. For states, there are mostly shifting interests of a passing nature. The states' goals of power and wealth are in frequent contrast with the human goals of justice and peace aspirations. The protagonists of state interests all too often prevail over those advocating justice and peace.

Political realism, however, is not necessarily in contrast with the human goals of justice and peace aspirations. There are situations in which they coincide, although these are rare and far between. Political realists do not seek peace and justice for their inherent moral and human values, but for what political, social, or economic goals they can enhance. Thus, what distinguishes political realism from other philosophies and approaches to international relations is its purpose. This type of realism reflects a Hobbesian model of international relations as opposed to a Kantian one, although both aspired to higher values. Hobbes profoundly stated, first in *De Cive* and later in *Leviathan*, that the state of nature a war of all against all.<sup>44</sup> This cosmopolitan observation, which reflected the state of total war that has periodically marred the landscape of humankind, is still relevant to contemporary times. Similarly, when Kant in 1795 argued in *Perpetual Peace* that commerce was the antidote to war, he was setting the stage

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Stephen E. Reynolds eds., 2008); M. Cherif Bassiouni, *Legal Control of International Terrorism: A Policy-Oriented Assessment*, 43 HARV. INT'L L.J. 83, 88–91 (2002); M. Cherif Bassiouni, *Terrorism: The Persistent Dilemma of Legitimacy*, 36 CASE W. RES. J. INT'L L. 299, 300–03 (2004); see also JEAN BETHKE ELSHTAIN, JUST WAR AGAINST TERROR: THE BURDEN OF AMERICAN POWER IN A VIOLENT WORLD 20–23 (2003).

44. THOMAS HOBBS, ON THE CITIZEN 30 (Richard Tuck & Michael Silverthorne eds., 1998); HOBBS, *supra* note 41, at 100.

for our era of globalization. In that work, he stated: “it is the *spirit of trade*, which cannot coexist with war.”<sup>45</sup>

The perennial tug-of-war between *realpolitik*, which serves states’ interests, and the human values of justice and peace, which serve individuals, has, with few exceptions in history, favored the former over the latter. In the last two decades, this trend has shifted in the direction of emphasizing justice and peace goals for the international community. This shift reveals a commonality between states’ interests and commonly shared human values. The era of globalization and human rights protections has brought these otherwise conflicting interests and values closer together. Whether for moral or economic reasons, peace is preferable over war, and justice is a better way of governing the affairs of human societies than force.<sup>46</sup>

*Realpolitik*, however, has not given up on controlling the processes of peace and justice. This is accomplished in contemporary times by indirect methods such as controlling the images and perceptions which have an impact upon public opinion. More importantly, *realpolitik* is accomplished by politically manipulating the bureaucracies and financial resources of international institutions. Such political manipulations can make it difficult for ICJ institutions to function fairly and effectively, thus achieving *realpolitik* goals even when the appearance of ICJ is projected as being a functioning reality.

In human affairs, there is no such thing as uncompromising peace or absolute justice. Experience indicates that everything is relative and subject to the balancing of competing values and interests. With respect to ICJ, the complex question is whether common grounds can be found and a bottom line drawn. This is necessary in order to have some objective parameters likely to enhance fairness, predictability, and consistency of outcomes. Presumably, the contents of the 1948 Universal Declaration of Human Rights,<sup>47</sup> which reflect human values,

45. KANT, *supra* note 42, at 92 (emphasis in original).

46. This approach reveals how a naturalist approach to international criminal justice can be consonant with utilitarianism. See generally JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (J.H. Burns & H.L.A. Hart eds., Oxford Univ. Press 1996) (1789); JOHN STUART MILL, UTILITARIANISM AND THE 1868 SPEECH ON CAPITAL PUNISHMENT (George Sher ed., 2d ed. Hackett Publishing 2001) (1863). For a somewhat different perspective, see JOHN RAWLS, THE LAW OF PEOPLES WITH “THE IDEAL OF PUBLIC REASON REVISITED” 113–20 (1999); JOHN RAWLS, A THEORY OF JUSTICE 7–17 (1971). For a drastically different perspective, see LLOYD L. WEINREB, NATURAL LAW AND JUSTICE 184–224 (1987). For a comparative historical approach, see CARL JOACHIM FRIEDRICH, THE PHILOSOPHY OF LAW IN HISTORICAL PERSPECTIVE 206–14 (2d ed. 1963).

47. Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess.,

articulate the international community's commonly shared values. As to the bottom line that the international community has also presumably drawn, it is reflected in the criminalization of genocide, crimes against humanity, war crimes, torture, slavery and slave-related practices, and terrorism. Nevertheless, the schism remains wide between these values and the norms that embody them, and their effective enforcement. This is evident in the occasional historic manifestations of ICJ enforcement, which reflect selective enforcement, double standards, and exceptionalism for the benefit of the powerful and wealthy states, as well as their nationals. It is also reflected in the Security Council's practices concerning matters of peace and security and ICJ.

The progress made by ICJ as described below cannot, however, be underestimated. What was so evident during Robespierre's Reign of Terror in the French Revolution was echoed in the early 1940s by China's Mao Zedong: "[t]ruth comes out of the barrel of a gun."<sup>48</sup> In contrast, since 1945, some heads of state and other senior government officials who carried out such policies found themselves in front of international criminal tribunals; some were executed and others imprisoned.<sup>49</sup> The rule of might is gradually losing ground to the rule of law, and accountability is gaining over impunity.

What has changed over time is not that peace and justice goals predicated on their intrinsic moral values have triumphed over states' interests, but rather that *realpolitik* has adapted itself to these goals because of its ability to co-opt institutions of peace and justice whenever necessary to serve its purposes. A cynical French expression refers to this as *plus ça change, plus c'est la même chose* (the more it changes, the more it is the same thing). An ever more cynical Italian description appears in Giuseppe Tomasi di Lampedusa's *Il Gattopardo*, whose character Tancredi states, "[i]f we want things to stay as they are, things will have to change."<sup>50</sup> Consequently, change in international affairs is sometimes ushered in to keep things unchanged.

#### IV. THE ORIGINS OF INTERNATIONAL CRIMINAL LAW

It is generally understood that the first internationally recognized crimes were piracy in the seventeenth century, and slavery in the

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1st plen. mtg., U.N. Doc. A/810 (Dec. 10, 1948).

48. See ALBERT PARRY, *TERRORISM: FROM ROBESPIERRE TO ARAFAT* 224 (1976).

49. See *infra* Part IX.

50. GIUSEPPE TOMASI DI LAMPEDUSA, *THE LEOPARD* 40 (Archibald Colquhoun trans., Knopf Doubleday Publishing Group 1991) (1959).



nineteenth century. But constraints on the means and methods of warfare have been the subject of attention by scholars and experts since the fifth century BCE.<sup>51</sup> Between 1815 and 2008, 267 international conventions applicable to twenty-eight categories of international crimes have been adopted.<sup>52</sup>

In historical terms, what we now call “war crimes” have preceded all other international crimes. Whether inspired by religious values, codes of chivalry as first developed in the Hindu *Laws of Manu* of the second century BCE<sup>53</sup> and later in the Christian European states of the Middle Ages,<sup>54</sup> or whether reflected in pragmatism as reflected in Sun Tzu’s *The Art of War* in the sixth century BCE,<sup>55</sup> constraints on the conduct of warfare developed in tandem with constraints on the resort to war. Necessarily, the exigencies of enforcement arose. Those who violated these norms had to be punished if these norms were to have any meaning. This was the beginning of ICJ, the objective of which is prevention through deterrence.

The formula of “crimes against the Laws of God and Man” was first developed by theologians and jurists between the twelfth and fourteenth centuries based on a diverse historical background. It originated in natural law with St. Thomas Aquinas, a Frenchman, whose inspiration was St. Augustine of Hippo, a Tunisian. Both Augustine and Aquinas were particularly inspired by Aristotle, a Greek, and his studies regarding what constitutes a just war, as well as his studies exploring ethics. Aquinas’ natural law doctrine as applied to the *jus in bello* and *jus ad bellum* were expounded upon between the fourteenth and eighteenth centuries by jurists like Gentili, da Legnano, Baldus, Ayala, Grotius, de Victoria, Pufendorf, and de Vattel, mostly based on the Christian states’ experiences during the three Crusades (1095–1192) and other warring experiences between and among these states.<sup>56</sup> The Third

51. See generally M. Cherif Bassiouni, *The Evolution of International Humanitarian Law and Arms Control Agreements*, in A MANUAL ON INTERNATIONAL HUMANITARIAN LAW AND ARMS CONTROL AGREEMENTS 1 (M. Cherif Bassiouni ed., 2000).

52. 1 INTERNATIONAL CRIMINAL LAW 134 (M. Cherif Bassiouni ed., 3d ed. 2008).

53. THE LAWS OF MANU (Georg Bühler trans., Motilal Banarsidass 1964).

54. See generally M.H. KEEN, THE LAWS OF WAR IN THE LATE MIDDLE AGES (1965); PEACE AND WAR IN ANTIQUITY, *supra* note 31.

55. SUN TZU, THE ART OF WAR 76 (Samuel B. Griffith trans., Oxford Univ. Press 1971).

56. See generally BALTHAZAR AYALA, DE JURE ET OFFICIIS BELLICIS ET DISCIPLINA MILITARI LIBRI III (1582), *reprinted in* 1 CLASSICS OF INTERNATIONAL LAW NO. 2 (James Brown Scott & John Westlake eds., John Pawley Bate trans., 1912); ALBERICO GENTILI, DE JURE BELLI LIBRI TRES (1612), *reprinted in* 2 CLASSICS OF INTERNATIONAL LAW NO. 16 (James Brown Scott ed., John C. Rolfe trans., 1933); SAMUEL PUFENDORF, DE JURE NATURAE ET GENTIUM LIBRI OCTO (1688), *reprinted in* 1 CLASSICS OF INTERNATIONAL LAW NO. 17 (James

Crusade (1187–1192) in particular, had an indelible effect on the European Christian Naturalists, because Salah el-Din el-Ayoubi forced the surrender of the Crusaders besieged in Jerusalem, and gave them all safe-conduct. In 1187, the defeated Crusaders were permitted to leave unscathed from Jerusalem with whatever belongings they could carry, including their weapons.

This was quite a contrast to what the Crusaders did to the Jews and Muslims in the Holy Land when the Crusaders came to occupy it.<sup>57</sup> On more than one occasion, the Crusaders massacred entire communities and pillaged or burned their property. The Christian rulers at the time considered protection under the “laws of God and Man” applicable only to their own people. Thus, when the Muslims extended their laws of God to others, it was a breakthrough. Earlier in 634 CE, Abu Bakr, the first Caliph to succeed Prophet Muhammad, gave instructions to the troops fighting the Roman Byzantine Empire in what is now Syria and Lebanon.<sup>58</sup> In this historically unprecedented set of instructions, he admonished the soldiers to spare enemy noncombatants, particularly the aged, women and children, and the combatants’ wounded and sick. He instructed his troops to respect Christian and Jewish places of worship, and prohibited the destruction of fruit-bearing trees and crops. The Muslim laws and practices were subsequently embodied in the writing of al-Shaybani, called the *Siyar*, which was published in the fourteenth century.<sup>59</sup> Some of the writings of the Christian naturalists mentioned above explicitly or implicitly referred to these practices. From then until now, the struggle continues for the universality of international humanitarian law and international human rights law, as well as for their enforcement through ICJ. Many of these norms have become universally accepted, although not universally respected and enforced.

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Brown Scott ed., C. H. Oldfather & W.A. Oldfather trans., 1933); FRANCISCUS DE VICTORIA, DE INDIS ET DE IVRE BELLI REFLECTIONES (1696), *reprinted in* 1 CLASSICS OF INTERNATIONAL LAW NO. 7 (James Brown Scott ed., John Pawley Bate trans., 1917).

57. *See generally* AMIN MAALOUF, CRUSADES THROUGH ARAB EYES (Jon Rothschild trans., Schocken Books 1985) (1984).

58. *See* MAJID KHADDURI, WAR AND PEACE IN THE LAW OF ISLAM 102 (1955); Hilaire McCoubrey, *Humanitarianism in the Laws of Armed Conflict*, in INTERNATIONAL HUMANITARIAN LAW: THE REGULATION OF ARMED CONFLICTS 1, 9 (1990) (referring to the humanitarian practices of Abu Bakr and Salah el-Din el-Ayyoubi during the Fourth Crusade); *see also* Bassiouni, *supra* note 51, at 9.

59. The cases and practices of Muslim conduct in war were taught by Al-Shaybani in the eighth century and were written in a digest by el-Shahristani, whose first known publication was in Hyderabad in 1335–36. Bassiouni, *supra* note 51, at 9 n.28.

International criminal law, which has developed so rapidly in the last century, has come to encompass crimes that have an essentially transnational character.<sup>60</sup> These crimes do not affect international peace and security and are not of a nature that shocks the conscience of humankind as do genocide and crimes against humanity. They include drug trafficking, cybercrime, and organized crime, to mention only a few. States enforce these crimes through their domestic criminal justice systems and through the international duty to prosecute or extradite and to provide interstate mutual cooperation in the investigation and prosecution of these crimes. In other words, this international enforcement requires the “indirect enforcement” system, in contrast to the “direct enforcement” system, which pertains to certain international crimes such as genocide, crimes against humanity, and war crimes. The latter are enforced through international tribunals, in addition to national systems. ICJ’s contemporary meaning essentially addresses these international crimes.

The combination of national and international prosecutors for what has come to be called “core international crimes”—namely, genocide, crimes against humanity, and war crimes—is referred to in the statute of the International Criminal Court (ICC) as “complementarity.”<sup>61</sup> The ICC complements national criminal justice systems whenever a given system is “unwilling or unable” to carry out its enforcement obligations.<sup>62</sup> But if these assumptions do not materialize—then what? States may not fulfill their international obligations to prosecute, extradite to other states willing to prosecute, or simply may not cooperate with the ICC. Moreover, the ICC may turn out to be unable to address the increased demands placed upon it by unfolding events. Will that be the decline of ICJ or maybe even the end of the ICJ that we have come to know so far? Will something new emerge that reflects new realities in a global society?

## V. FROM TRIBALISM TO SUPRA-NATIONALISM

Six million years ago, when *Homo sapiens* tribes came to Europe from Africa and encountered their European Neanderthal counterparts,

60. See BASSIOUNI, *supra* note 3, at 227–31.

61. Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90. For a comparison between the ICC and national justice systems, see *id.* arts. 1, 17. See also M. CHERIF BASSIOUNI, 1 THE LEGISLATIVE HISTORY OF THE INTERNATIONAL CRIMINAL COURT: INTRODUCTION, ANALYSIS, AND INTEGRATED TEXT 128–31 (2005).

62. Rome Statute, *supra* note 61, art. 17.

they began the journey toward contemporary globalization. As the journey progressed, tribes became nations, some nations became empires, and all had their rise and fall, or their transformation. War, commerce, and other interests brought nations and peoples together. In time, peoples and nations became more interdependent, and this interdependence, in turn, has brought about the need for an expanded role of ICL and ICJ in world affairs. Different concepts emerged in different civilizations to reflect this need. From the ancient Greeks' vision of the world constituting a single community (albeit only for those who shared their same values of civilization) to the cosmopolitan vision of the Age of Enlightenment,<sup>63</sup> followed by an international vision after the Treaty of Westphalia in 1648,<sup>64</sup> (which with some exceptions prevails to date), we have reached the era of globalization and supra-nationalism. As this historical process developed, it was inevitable that ICL norms would be followed by enforcement modalities that relied on national criminal justice systems, an international mechanism, and, whenever needed, international investigatory, prosecutorial, and adjudicating institutions.

In the first century BCE, Cicero posited in *De Republica* the notion that "[t]here is in fact a true law—namely, right reason—which is in accordance with nature, applies to all men, and is unchangeable and eternal. . . . It will not lay down one rule at Rome and another at Athens."<sup>65</sup> This notion reflected the natural law conception of the Greek stoics who envisioned the world as a single community. Later, the Romans recognized the existence of a *civitas maxima*, namely, a higher body politic for which they developed the *jus cogens*, the law binding upon all. Neither one of these conceptions, however, was intended to apply to the human race as a whole. Their universal application encompassed only Romans and those others that Rome recognized as deserving of inclusion. This selective application was also part of the Greek approach. The universal application of Aristotelian natural law was applied to those who shared the values of the Greek civilization.

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63. See generally THE AGE OF ENLIGHTENMENT, *supra* note 24; DURANT & DURANT, *supra* note 24.

64. See generally BEYOND WESTPHALIA?: STATE SOVEREIGNTY AND INTERNATIONAL INTERVENTION (Gene M. Lyons & Michael Mastanduno eds., 1995); DEREK CROXTON & ANUSCHKA TISCHER, THE PEACE OF WESTPHALIA: A HISTORICAL DICTIONARY (2002); WILLIAM P. GUTHRIE, THE LATER THIRTY YEARS WAR: FROM THE BATTLE OF WITTSTOCK TO THE TREATY OF WESTPHALIA (2003).

65. MARCUS TULLIUS CICERO, ON THE COMMONWEALTH 215–16 (George H. Sabine trans., Ohio State Univ. Press 1929).

This narrower version of the law's universality survived until the twentieth century, when the League of Nations Covenant included a definition of international law in the Statute of the Permanent Court of International Justice in 1919 that included "general principles of law recognized by civilized nations."<sup>66</sup> At the time, there were only seventy-four states in existence, and the major Western powers were the arbiters of which nations were deemed "civilized."<sup>67</sup> The exclusion of colonized African and Asian states from that category was intended to justify the Western powers' colonization of other nations. The same language exists in Article 38 of the International Court of Justice's Statute of 1945,<sup>68</sup> but the words "civilized nations" no longer have the selective meaning they once had. Thus, the Roman law concept of *jus cogens* became universal.<sup>69</sup> This was first recognized by the Permanent Court of International Justice, and since then by the International Court of Justice, as that higher source of law whose norms supersede national ones, and that are therefore binding upon all states.

A supra-national conception of law necessarily means there is a *civitas maxima*, a higher body politic than individual states. The *civitas maxima*, from which *jus cogens* derives, translates into an international community that has the prerogative of imposing international norms that supersede national ones.<sup>70</sup> Roman law's *jus cogens* became a universal legal concept applicable to certain international crimes from which no state can derogate. The earlier Roman law concept of a *civitas maxima* became the source of the contemporary maxim *aut dedere aut judicare*, which translates into the international obligation to prosecute or extradite for certain international crimes. This latter concept was first developed by Hugo Grotius in 1625 in *De Jure Belli ac Pacis*.<sup>71</sup> It is

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66. Statute of the Permanent International Court of Justice art. 38(3), Dec. 16, 1920, 6 L.N.T.S. 379.

67. See M. Cherif Bassiouni, *A Functional Approach to "General Principles of International Law,"* 11 MICH. J. INT'L L. 768, 768 (1990).

68. Statute of the International Court of Justice art. 38(3), June 26, 1945, 59 Stat. 1031, 33 U.N.T.S. 993.

69. See Gordon Christenson, *Jus Cogens: Guarding Interests Fundamental to International Society*, 28 VA. J. INT'L L. 585 (1988); Gordon Christenson, *The World Court and Jus Cogens*, 81 AM. J. INT'L L. 95, 95 (1987).

70. For a discussion of *civitas maxima*, see M. CHERIF BASSIOUNI & EDWARD M. WISE, *AUT DEDERE AUT JUDICARE: THE DUTY TO EXTRADITE OR PROSECUTE IN INTERNATIONAL LAW* 28–30 (1995); Gerhard O.W. Mueller, *International Criminal Law: Civitas Maxima*, 15 CASE W. RES. J. INT'L L. 1 (1983).

71. HUGO GROTIUS, *DE JURE BELLI AC PACIS LIBRI TRES* (Francis W. Kelsey trans., Clarendon Press 1925) (1646).

now the foundation of ICL and ICJ, both of which depend on state cooperation.

The institutionalized recognition of the existence of an international community manifested itself in the collective security system of the League of Nations in 1919, followed by the United Nations in 1945, whose Chapter VII gives virtually unlimited powers to the Security Council to act in connection with threats to, and maintenance of, international peace and security. This supra-national role of the Security Council has had a significant effect on ICJ. Recall, for instance, the historically unprecedented decision of the Council to establish the International Criminal Tribunal for the former Yugoslavia (ICTY) in 1994,<sup>72</sup> and the International Criminal Tribunal for Rwanda (ICTR) in 1995.<sup>73</sup> These institutions, whose establishment was not provided for in the UN Charter, developed through their respective statutes and jurisprudence, based on interpretations of customary international law with respect to the definition and contents of international crimes, elements of criminal responsibility, and criminal procedures. These norms are presumably the international counterpart of national legal systems' "special part," "general part," and "procedural part" of their criminal laws.<sup>74</sup> They are derived from "general principles of law." ICJ is therefore the inheritor of certain national legal concepts and practices.

## VI. THE PARADIGMS OF INTERNATIONAL LAW AND THEIR EVOLUTION

International law is essentially the product of state actors acting on behalf of their respective states' interests. Contemporary international law is the counterpart of the Roman law's *jus gentium*, the law of all peoples. Unlike Roman law, however, which reflected the interests of the Romans, modern international law is intended to reflect the interests of the international community of states and its peoples. Even in this era of globalization, international law remains under the long shadow of the Westphalian paradigm, which was founded on the legal fiction of coequal state sovereignty, limiting the penetration of international law into national legal systems.<sup>75</sup> Thus, states are left with the power of unilateralism. This world order model is characterized by what Thomas

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72. See ICTY Statute, *supra* note 9.

73. See ICTR Statute, *supra* note 10.

74. See BASSIOUNI, *supra* note 3, at 259, 583.

75. See generally THE AGE OF ENLIGHTENMENT, *supra* note 24; DURANT & DURANT, *supra* note 24.

Hobbes described in the seventeenth century as a model of chaotic states' relations, which are essentially guided by interests and limited by unilateral prudent judgment and external constraints left to every state's discretionary judgment.<sup>76</sup> Thus, the state of world affairs is marked by the chaos of self-identified state interests that, with few exceptions, are not subject to collective constraints except as agreed upon by states. This model of world order is characterized by the unilateral resort to force in settling inter-state differences. Nevertheless, progress has been achieved in the last century as states' interests and the values that their societies embrace have become less divergent. This convergence demanded greater conformity by states to certain human aspirations and also greater conformity to the expectations of the higher good of an international community consisting not only of states, but also of peoples and individuals. This is the premise of the United Nations' system of collective security entrusted to the authority of the Security Council and the veto power of its five permanent members.

Spurred by contemporary economic globalization, states' international cooperation in almost all fields, including ICJ, has increased. In some areas, it has given rise to collective decision-making processes, as evidenced in many intergovernmental organizations. Among the developments in which state sovereignty has given way to collective interests and values are those which have occurred in economics and finance, as well as in the fields of human rights and ICL. All of these fields have been driven by ideas reflecting certain values that in time have acquired an incrementally higher level of recognition by more diverse constituencies of the international community. Progress in the fields of human rights and ICL is the result of a process of accretion that has strengthened ideas about human values derived from the experiences of many civilizations. Admittedly, progress in these fields has been slower and more painstaking than in the economic and financial fields, which offer tangible inducements, while ICL offers only intangible ones.

History also records that this evolutionary process of ICL and human rights usually starts with the emergence of an idea, which then grows in its acceptance by different constituencies, followed by a stage of prescriptive articulation that eventually leads to the stage of proscriptive normative formulation, ripening into the establishment of enforcement

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76. See HOBBS, *supra* note 41. See generally KEYSTONES OF DEMOCRACY (2005) (compiling the views of John Locke, Jean Jacques Rousseau, and Thomas Paine on the state of nature, war, and civil government).

mechanisms. The evolution of an idea from its intellectual inception to its proscriptive and enforcement stages goes through intermediate stages and may even find itself transformed or altered from its original meaning or intended purpose. Chief among the reasons for the transformation or alteration of ideas are a mixture of values and interests whose interaction occasionally favors the one over the other. Equally significant, however, are the imprints of historic events and circumstances and of those individuals whose contributions have impacted the course of human events. During the course of this evolution, there are multiple processes involving diverse participants, operating in different arenas, employing multiple strategies and tactics, and pursuing different value-oriented goals. In postmodern times, the international community, consisting of states, intergovernmental organizations, and international civil society, has played an increasing role in the arena of ICJ by articulating commonly shared values and interests, developing norms, and establishing international institutions intended to accomplish certain goals.

It is noteworthy that time and again throughout history, individuals have defied power paradigms and have been able to cause unexpected outcomes. Thus, notwithstanding the inexorable power of historic events, which like turbulent rivers are capable of sweeping away everything in their course, individuals have at times been capable of stopping and even reversing the course of powerful flows. How individuals can make such differences is not only somewhat of a mystery, it is above all a great symbol of hope that the most intractable paradigms can be altered by individuals. This is evidence that there is no such thing as the inevitability that state interests will always prevail, and that justice will always be sacrificed at the altar of state interests.

## VII. THE ROLE OF INTERNATIONAL CRIMINAL JUSTICE

ICJ has played a small part in the events that have shaped the course of history. On occasion, ICJ has appeared on the scene of international relations sometimes like the *deus ex machina*, which emerges unexpectedly on the scene in Greek tragedies to bring about the right ending. In that role, ICJ is the champion of good over evil, though not necessarily to the exclusion of the attainment of political goals sought by those who have allowed the *deus* of justice to come onto the scene of international relations.



In post-conflict justice situations, balancing between ICJ and other political goals is always a *sui generis* exercise, because every conflict is *sui generis*. Indeed, there is no post-conflict justice modality, or combination of modalities, that can be said to fit all situations. Since there is no “one-size-fits-all” model, the choice of a given modality or combination of modalities of post-conflict justice mechanisms will vary in each situation.<sup>77</sup> The selection of post-conflict modalities, and particularly prosecutions—whether by international, mixed model international/national, or national institutions—has almost always been conditioned by non-justice considerations. Among them are the pursuit of peace between states and reconciliation among peoples. While these goals are essentially political, they also reflect values which cannot be underestimated, let alone ignored. ICJ cannot be viewed as a system that functions entirely without consideration for other broader concerns such as peace and reconciliation. ICJ must, therefore, be viewed within the broader goals of justice in response to the needs of certain societies at a given time and place, and also in the context of the common good in a global society.

It should be noted that there is nothing inherently incompatible between politically oriented goals and the achievement of the higher value of justice for the purposes of advancing the common good and, in particular cases, advancing goals pertaining to other positive outcomes, such as peace and reconciliation. As in all matters involving different and sometimes difficult goals, the balance between justice and positive political goals is hard to achieve, if for no other reason than because the former is predicated on certain values which cannot be compromised, while the latter is based on certain interests which can only be based on compromise. To reconcile the two is impossible, but to conciliate between them is possible. If the demands of peace come first, then those of justice can follow. The latter is not compromised, just deferred. This is conciliation. The contradiction arises when the imposition of political settlements removes the options of post-conflict justice. The shortcoming of this approach is that it ignores the lessons of history,

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77. See RUTI G. TEITEL, *TRANSITIONAL JUSTICE* 6 (2000) (arguing that legal responses to atrocities are defined in part by the political and historical context of the regime that committed the atrocity). See generally *ACCOUNTABILITY FOR ATROCITIES: NATIONAL AND INTERNATIONAL RESPONSES* (Jane E. Stromseth ed., 2003) (exploring the different historical, legal, and political situations surrounding accountability for atrocities committed during armed conflicts); *POST-CONFLICT JUSTICE* (M. Cherif Bassiouni ed., 2002) (providing an account of the variety of remedial proceedings and philosophical approaches that have been employed in international criminal tribunals).

which teach that there is ultimately no peace without justice. Human injustices never disappear simply through the achievement of a settlement by political leaders; they continue to exist in a state of limbo that frequently bring these injustices back to the forefront of reality. The consequence is the absence of real peace or renewed conflict. Justice is therefore an essential component of peace.

The goals of ICJ include: prevention through deterrence; retribution through selective prosecution, which is presumed to have some general deterrent effect; and providing victims with a sense of justice and closure. However, these goals are nearly impossible to assess. What is left is the symbolism of selective prosecutions and its presumed impact on peace, or a return to normalcy in war-torn societies. The assumption that international criminal prosecutions are likely to produce a deterrent effect, and therefore prevent further criminal actions, is untested. It is based on the general assumptions of deterrence that exist in domestic criminal justice systems. There is, however, anecdotal data that the prospects of international criminal prosecutions bring about some deterrent effect in a given conflict, as was the case in the conflict in the former Yugoslavia from 1991 to 1995. In all other situations of international prosecutions, however, the deterrent effect was nonexistent because these prosecutions occurred after the given conflict came to an end. Presumably, the cumulative experience of post-conflict prosecutions produces a deterrent effect in connection with future conflicts. This, however, is yet to be scientifically established.

One of the most important and yet overlooked goals of ICJ is to bring closure to victims and provide them with redress. However, it was not until 2006 that the General Assembly adopted the resolution, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.<sup>78</sup> Because the Principles and Guidelines are new and not mandatory, they have yet to be applied at the international and national levels. The acknowledgement of the Principles and Guidelines is, however, a sign of progress. What is noteworthy is that they provide for ICJ as a

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78. Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, G.A. Res. 60/147, U.N. Doc. A/RES/60/147 (Mar. 21, 2006) [hereinafter Principles and Guidelines]; see also M. Cherif Bassiouni, *International Recognition of Victims' Rights*, 6 HUM. RTS. L. REV. 203 (2006) (tracing the history of the United Nations' adoption of the 2006 Resolution, exploring the effects of the Resolution, and highlighting the shortcomings of the Resolution in affording victims meaningful redress).

victim's right; however, in the recent history of ICJ, victims' rights have hardly been addressed.<sup>79</sup>

ICJ's other components include the recordation of the harmful consequences of conflicts and the development of measures designed to prevent future conflicts. This is why ICJ has to be viewed in a more comprehensive manner; namely, ICJ should integrate all or most of the post-conflict justice mechanisms developed in the last few decades. Moreover, ICJ has to be integrated in the modalities of peacemaking, peacekeeping, and humanitarian assistance, and so far that has not been the case. Political considerations have kept separate that which needs to be integrated.

Legal outcomes arising out of the changing paradigms described above can be assessed by using different measurements, such as normative developments. For example, between 1815 and 2008, there have been 267 conventions falling within the meaning of ICL.<sup>80</sup> However, consider the following: (1) after over fifty years of deliberations, there is no international convention on aggression whose prohibition is in the UN Charter;<sup>81</sup> (2) there is no international convention on crimes against humanity since that concept arose in 1919 after World War I and was prosecuted at the International Military Tribunal (IMT) and International Military Tribunal for the Far East (IMTFE) after World War II;<sup>82</sup> (3) there is no definition of terrorism or a comprehensive convention on the subject since that topic developed in the League of Nations in 1937 and was picked up by the United Nations in 1969;<sup>83</sup> and (4) there is no international criminal code since discussions on a UN Draft Code of Offences Against the Peace and Security of Mankind began in 1947.<sup>84</sup> Instead, we have a hodgepodge

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79. Principles and Guidelines, *supra* note 78.

80. 1 INTERNATIONAL CRIMINAL LAW, *supra* note 52, at 134.

81. See M. Cherif Bassiouni & Benjamin B. Ferencz, *The Crime Against Peace and Aggression: From Its Origins to the ICC*, in 1 INTERNATIONAL CRIMINAL LAW 207 (M. Cherif Bassiouni ed., 3d ed. 2008). See generally YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE (3d ed. 2001).

82. See POWER, *supra* note 34; Egon Schwelb, *Crimes Against Humanity*, 23 BRIT. Y.B. INT'L L. 178 (1946). See generally M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW (2d rev. ed. 1999); GEOFFREY ROBERTSON, CRIMES AGAINST HUMANITY: THE STRUGGLE FOR GLOBAL JUSTICE (2d ed. 2002).

83. See INTERNATIONAL TERRORISM: MULTILATERAL CONVENTIONS, 1937–2001, at xxv, 5–6 (M. Cherif Bassiouni ed., 2001) (arguing that the United Nations has taken a piecemeal approach to terrorism and has addressed specific acts, such as the use of chemical weapons, instead of formulating a comprehensive and coherent definition of terrorism).

84. See BASSIOUNI, *supra* note 61, at 30 (noting that efforts to codify major international crimes started in 1947 and “ended inconclusively” in 1996 as a result of political failures).

collection of some 281 conventions from 1815 to date, addressing twenty-eight categories of international crimes with many overlaps, gaps, inconsistencies, and ambiguities.<sup>85</sup>

Conversely, ICJ has made significant progress since 1994 with the establishment of international and mixed-model institutions of ICJ in the former Yugoslavia,<sup>86</sup> Rwanda,<sup>87</sup> Sierra Leone,<sup>88</sup> Kosovo,<sup>89</sup> Timor-Leste,<sup>90</sup> Cambodia,<sup>91</sup> Bosnia and Herzegovina,<sup>92</sup> Lebanon,<sup>93</sup> and with the establishment of the ICC.<sup>94</sup> Never before in history has so much been achieved in such a short period of time. But by 2012, all of these institutions, as discussed below,<sup>95</sup> will come to an end, save for the ICC. When the latter will be the only surviving international criminal judicial institution, the real test of its survivability will begin.

#### VIII. THE HISTORICAL STAGES OF INTERNATIONAL CRIMINAL JUSTICE

ICJ made its way into international practice in two historical periods and is about to enter its third. The first period ranges from 1268 until 1815, the second from 1919 until what will likely be 2012, and the third impending stage will follow 2012.

##### A. *The First Stage*

The first period, which could prosaically be called the early historic period, is characterized by three major events occurring in 1268, 1474, and 1815, respectively.

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85. See M. Cherif Bassiouni, *The Normative Framework of International Humanitarian Law: Overlaps, Gaps and Ambiguities*, 8 TRANSNAT'L L. & CONTEMP. PROBS. 199, 202 (1998) (arguing that "ambiguities and gaps" in norms of international crimes have resulted from the "haphazard evolution of criminal law" and the hesitancy of UN member states to risk criminalizing the internal conduct of their own governments).

86. See S.C. Res. 827, ¶ 2, U.N. Doc. S/RES/827 (May 25, 1993).

87. See S.C. Res. 955, ¶ 1, U.N. Doc. S/RES/955 (Nov. 8, 1994).

88. See S.C. Res. 1400, *supra* note 11, ¶ 9.

89. See S.C. Res. 1244, *supra* note 12, ¶ 14.

90. See S.C. Res. 1272, *supra* note 13, ¶ 2.

91. See Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea art. 2, Royal Decree No. NS/RKM/1004/006 (2004) (Cambodia), available at [http://www.eccc.gov.kh/english/cabinet/law/4/KR\\_Law\\_as\\_amended\\_27\\_Oct\\_2004\\_Eng.pdf](http://www.eccc.gov.kh/english/cabinet/law/4/KR_Law_as_amended_27_Oct_2004_Eng.pdf).

92. See SINGH, *supra* note 15.

93. See The Secretary-General, *Report of the Secretary-General on the Establishment of a Special Tribunal for Lebanon*, ¶¶ 6–10, delivered to the Security Council, U.N. Doc. S/2006/893 (Nov. 15, 2006).

94. See generally 1–3 BASSIOUNI, *supra* note 61.

95. See *infra* Part VIII.C.

In 1268, the trial of Conradin von Hohenstaufen, a German nobleman, took place in Italy when Conradin was sixteen years of age.<sup>96</sup> He was tried and executed for transgressing the Pope's dictates by attacking a fellow noble French ruler, wherein he pillaged, and killed Italian civilians at Tagliacozzo, near Naples. The latter was deemed to constitute crimes "against the laws of God and Man." The trial was essentially a political one. In fact, it was a perversion of ICJ and demonstrated how justice could be used for political ends. The crime—assuming it can be called that—was in the nature of a "crime against peace," as that term came to be called in the Nuremberg Charter's Article 6(a), later to be called aggression under the UN Charter.

Conradin, of the German von Hohenstaufen Dynasty, succeeded his father, Conrad IV, at the age of two as the titular Duke of Swabia, King of Jerusalem, and King of Sicily. The Kingdom of Sicily at the time included Naples, and was frequently referred to as the Kingdom of the Two Sicilies. The Italian Pope Clement IV, who held strong hostilities against the German Hohenstaufens, offered this kingdom to the French Charles d'Anjou. Conradin rebelled against the papal decision and led his German troops across the Alps seeking to regain the Kingdom of the Two Sicilies, which greatly displeased the Pope. It was at Tagliacozzo that his army engaged in plunder and ultimately lost the battle. He was betrayed and captured by his inner circle and sold to Charles, who brought him to Naples and tried him for treason, as well as for the plunder and killings of civilians at Tagliacozzo. Conradin was charged with *lèse majesté* for his defiance of the Pope and was consequently excommunicated. He was then beheaded along with his companion, Frederick of Baden, the titular Duke of Austria, as well as a number of his German followers. Conradin's defense, conducted by a Neapolitan jurist, was that, because he was the legitimate contender to the throne of the Kingdom of the Two Sicilies, he should not be considered as having acted in a sacrilegious manner against the will of the Pope, and that he should be considered a prisoner of war, which would free him from responsibility for the plunder and murder. Of the four judges, only one ordered the death penalty while the other three remained silent. This was clearly a political trial. The Pope and Charles sought justification for the removal of the Kingdom of the Two Sicilies from the suzerainty of a German noble family to the Bourbons, who were French and

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96. See STEVEN RUNCIMAN, *THE SICILIAN VESPERS: A HISTORY OF THE MEDITERRANEAN WORLD IN THE LATER THIRTEENTH CENTURY* 115–16 (1958).

Spanish. This arrangement sat better with the Italian Pope who, like the Bourbons, was a Mediterranean.

The second trial of this historic period was that of Peter von Hagenbach in 1474 in Breisach, Germany.<sup>97</sup> Peter was a Dutch *condottiere*—the equivalent of a modern mercenary leader. Peter was hired by the Duke of Burgundy to raise an army to occupy the city of Breisach and exact taxes from its population. The Duke had acquired the city in exchange for services rendered to the Holy Roman Empire. Uninterested in the fate of the distant German townspeople, the French Duke ordered Peter to collect massive exactions. When the townspeople rebelled, the Duke ordered Peter to sack, pillage, rape, and burn the city. Peter obeyed his superior's orders, as was expected at the time.<sup>98</sup>

The attack on Breisach was so horrendous that the news spread throughout the empire, bringing about an uncommon consensus that this situation was a “crime against the laws of God and Man.” The leaders of the twenty-six member states of the Holy Roman Empire, either in person or through representatives, acted as international judges to prosecute Peter, a Dutchman, for crimes committed in Germany on the order of a French head of state. For all practical purposes and in accordance with contemporary standards, this established the first international criminal tribunal.

At the trial, Peter sought to exhibit the written orders of the Duke of Burgundy, but the judges refused to allow him to do so. Allowing this evidence would have conveyed the impression that subordinates in Peter's position should not execute the orders of their superiors when they are so manifestly “against the laws of God and Man.” The court declined to articulate this possibility, and, in fact, this duty of conscience would not emerge in ICL for another 471 years, when the IMT Charter was adopted in London in 1945. Accordingly, the court's refusal to accept Peter's defense shielded the Duke from responsibility. Peter was sentenced to be drawn and quartered, a particularly brutal method of inflicting death.

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97. See Howard S. Levie, *The Rise and Fall of an Internationally Codified Denial of the Defense of Superior Orders*, 30 REVUE DE DROIT MILITAIRE ET DE DROIT DE LA GUERRE 183, 185, 193 (1991). See generally AMABLE-GUILLAUME-PROSPER BRUGUIERE DE BARANTE, HISTOIRE DES DUCS DE BOURGOGNE DE LA MAISON DE VALOIS, 1364–1477 (1854).

98. It was only under Article 8 of the Nuremberg Charter in 1945 that the defense of obedience to superior orders was eliminated in ICL. See generally YORAM DINSTEIN, THE DEFENCE OF ‘OBEDIENCE TO SUPERIOR ORDERS’ IN INTERNATIONAL LAW (1965); EKKEHART MULLER-RAPPARD, L’ORDRE SUPÉRIEUR MILITAIRE ET LA RESPONSABILITÉ PÉNALE DU SUBORDONNÉ (1965).

Peter's trial and punishment served multiple purposes. Peter's punishment was deserved, since he should have known the limits of the "laws of God and Man." Being, in effect, "employed" to commit such deeds was no excuse by any moral standards. Was the defense of superior orders a valid legal excuse? Morally, no, but that was man's law at the time. Weighing these considerations, the Breisach judges may have intended to uphold morality over law because morality, in some situations, outweighs human concepts of legality.<sup>99</sup> Their decision also served other purposes.

In 1474, the political goal of preserving the Holy Roman Empire by refusing to denounce a fellow head of state was achieved in Breisach. In so doing, the Breisach judges also upheld certain values by denouncing what was done to the helpless civilian population and by prosecuting its chief perpetrator. Thus, a justice goal was achieved.<sup>100</sup>

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99. In 1947, some 473 years after Peter's trial, the same dichotomy arose in the American trials held at Nuremberg and conducted pursuant to Control Council Law No. 10. The two cases, *United States v. Alstötter* and *United States v. Brandt*, are commonly referred to as *The Justice Case* and *The Medical Case*, respectively. See 3 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 3 (1948) (discussing *The Justice Case*); 1 *id.* at 3 (1949) (discussing *The Medical Case*). A total of six American state court judges found the operators of the Nazi justice system guilty of justifying discriminatory laws against the Jews, and found the Nazi doctors who had performed inhuman medical experimentations on Jews, gypsies, and the mentally ill guilty of "crimes against humanity." See THE NAZI DOCTORS AND THE NUREMBERG CODE: HUMAN RIGHTS IN HUMAN EXPERIMENTATION 4 (George J. Annas & Michael A. Grodin eds., 1992).

The unarticulated basis for their convictions was that jurists and doctors could not violate their higher ethical laws under the cover of positive law. See 3 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, *supra*, at 979; THE NAZI DOCTORS AND THE NUREMBERG CODE: HUMAN RIGHTS IN HUMAN EXPERIMENTATION, *supra*, at 104. Doctors who take the Hippocratic Oath pledge that they will save lives, not destroy them. Lawyers also take an oath to uphold the law, meaning the higher purposes of the law. These jurists stretched the interpretation of Nazi laws to such extremes that they made lawful that which they had to know was unlawful. Thus, they violated the very essence of law, general legal principles, and legal norms that existed in Germany until the Nazi regime revoked them.

In no case since then have the higher ethical laws of the legal and medical professions been deemed superior to positive law. However, these higher principles could well be applied to the Bush administration lawyers whose advice led to the violation of the Constitution, international treaties, and the laws of the United States by justifying torture and "extraordinary rendition" practiced by the Central Intelligence Agency.

100. The values upheld in 1474 are now embodied in international humanitarian law, which was developed after Henri Dunant launched his Red Cross movement in Geneva in 1864. This movement, in turn, gave us the most universally recognized of all instruments, the Four Geneva Conventions of 1949 and their two 1977 Additional Protocols (which are less universally accepted). See Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, art. 2, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Geneva Convention I]; Convention for the Amelioration of the Condition of the Wounded, Sick

It was not until 1814 that another politicized manifestation of ICJ took place. In 1813 and 1814, the victorious European allies of Austria, England, Prussia, and Russia defeated Napoleon's forces at Leipzig and a few months later captured Paris. The victorious heads of states were monarchs. While they were resentful of the populist upstart Napoleon who usurped the title of Emperor, they nevertheless sought to pay homage to the title. Moreover, Napoleon had married the daughter of Austria's Emperor, who was one of the Allies. Consequently, the monarchs could not have Napoleon tried as a common criminal; instead they decided, without convening, to exile him to the island of Elba in the Mediterranean. A few months later, Napoleon escaped, tried to make a comeback, and was again defeated. This time, he was exiled to Saint Helena under the stern guard of England, where he died a few years later, allegedly poisoned by his captors.<sup>101</sup>

Napoleon was tried politically by the victorious monarchs and given a political sentence, even though he had ordered many acts that today would be called aggression, crimes against humanity, and war crimes. Many of his orders were reminiscent of what Peter did in 1474. While the customary war practices of states in the nineteenth century were far

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and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, art. 2, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Geneva Convention II]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 2, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention III]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 2, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Protocol II]. Earlier, however, these humanitarian values were reflected in the 1899 Convention with Respect to the Laws and Customs of War on Land, which was amended in 1907. Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 207 Consol. T.S. 277. The latter remains, to date, the foundation of customary international humanitarian law.

Henry Dunant is one of those individuals who made a difference in the affairs of humankind. What he and others advocated ripened into a unique universal concept that was transformed into binding international legal norms. The progress made since then is not to be underestimated. While their universal application is still far from being achieved, there is no sign that these normative gains are threatened by any effort to reverse them. Regrettably, only the United States under the Bush administration attempted this by arguing that "enemy combatants" in the "war against terror" are not subject to the Geneva Conventions. The U.S. Supreme Court in *Hamdan v. Rumsfeld* rejected this contention. *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); see also *Boumediene v. Bush*, 128 S. Ct. 2229 (2008) (holding that prisoners held at Guantanamo Bay have a right to habeas corpus under the U.S. Constitution).

101. See ROBERT ASPREY, *THE RISE OF NAPOLEON BONAPARTE* 405, 439–41 (2001). See generally BELL, *supra* note 29; CHANDLER, *supra* note 29; HEROLD, *supra* note 29; MCLYNN, *supra* note 29.



from humane, the excesses—even atrocities—ordered by Napoleon and committed by troops under his command, definitely qualified him for an international criminal prosecution for “crimes against the laws of God and Man.” In this case, however, *realpolitik* considerations prevailed over those of justice.<sup>102</sup>

For Napoleon, being exiled and imprisoned under English control was probably a worse penalty than death. The sentence was intended to deprive him of martyr status in the eyes of the French people and to deter a successor from plunging Europe into another war. Thus, his exile involved a valid and legitimate peace component. In the end, however, Napoleon did achieve hero status. His remains were buried in *Les Invalides* in Paris, and he remains, to the present day, the object of veneration by some of the French.

In 1814 and 1815, the goal of the allies was to bring peace and stability to Europe, not to redress the many injustices suffered by those who had been victimized by the Napoleonic Wars. The benefits of impunity also extended to Napoleon’s generals, who had committed atrocious crimes throughout his reign. Only one of these generals was prosecuted for what we would now call war crimes, and this was primarily because he remained loyal to Napoleon. All of the others, who could have been prosecuted for what even then was considered excessive use of force, got a pass. Some were even rewarded with new positions under Louis XVIII, who was restored to the throne in 1814.<sup>103</sup>

### B. *The Second Stage*

The second historic era started after World War I. The trial of Germany’s Kaiser Wilhelm von Hohenzollern had an almost seamless

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102. The case of Napoleon was the beginning of modern *realpolitik*, so masterfully articulated by the Austrian Chancellor Metternich at the Congress of Vienna in 1815. Metternich’s disciples and heirs continue along the same line in contemporary times, as evidenced in so many modern and postmodern conflict situations, such as Henry Kissinger, the architect of the political settlement to the Vietnam Conflict signed in Paris in 1973. Neither North Vietnamese nor Americans, except for Lieutenant William Calley, were prosecuted for war crimes, even though so many had occurred on both sides of the conflict. Even Calley, whose guilt was obvious, was subsequently pardoned by President Nixon. See generally MICHAL R. BELKNAP, *THE VIETNAM WAR ON TRIAL: THE MY LAI MASSACRE AND COURT-MARTIAL OF LIEUTENANT CALLEY* (2002); Jordan J. Paust, *My Lai and Vietnam: Norms, Myths and Leader Responsibility*, 57 MIL. L. REV. 99 (1972).

103. One of Napoleon’s generals, Jean-Baptiste Bernadotte, Marshal of France, though not known for having committed any of these abuses of force, was invited to become King of Sweden. He established the Royal line, which still provides Sweden with its monarchs today. See generally ALAN PALMER, *BERNADOTTE: NAPOLEON’S MARSHAL, SWEDEN’S KING* (1990).

continuity with the political trial and sentence of Napoleon in 1814. Nevertheless, some things changed, and a step forward was taken.

In 1919, the victorious Allies sought to punish Germany and its leaders for initiating World War I and for war crimes committed during the war. There was no question for the Allies that only those from Germany and perhaps Turkey would be prosecuted, even if the Allies had committed identical crimes.<sup>104</sup>

The 1919 Treaty of Versailles provided in Article 227 for the first time in history that a head of state, Germany's Kaiser Wilhelm von Hohenzollern, would be tried for what we now call aggression.<sup>105</sup> The similarity between the positions of Napoleon and Kaiser Wilhelm is striking. Kaiser Wilhelm was the grandson of Queen Victoria and the cousin of the Russian Emperor Nicholas, much as Napoleon was the son-in-law of the Emperor of Austria. Would the Allies prosecute a sitting head of state? The answer was no, but times had changed. It was no longer possible for heads of state to caucus and decide on political outcomes, as was the case with respect to Napoleon's exile, because heads of state had become somewhat accountable to public opinion. However, *realpolitik* is adaptable. The device used in 1919 was to draft Article 227 in such an artful manner that it would not be deemed legally enforceable, and yet at the same time, that it would convince public opinion of the serious intentions of the victorious Allies. The crime was defined in Article 227 as "the supreme offence against . . . the sanctity of treaties."<sup>106</sup> To European public opinion, it sounded just right. When the Allies sought to extradite the Kaiser from the Netherlands, however, the Dutch contended that no such crime existed in international law, and for that matter in any national legal system. Even though the Dutch bore the brunt of French and Belgian criticism, they were legally correct. England, however, was satisfied that it had contributed to the effort of ICJ, while ensuring that the favorite grandson of Queen Victoria would not be humiliated.<sup>107</sup> Significantly, these efforts preserved the precedent of complete head-of-state immunity, which lasted until 1945.

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104. See JACKSON NYAMUYA MAOGOTO, WAR CRIMES AND REALPOLITIK: INTERNATIONAL JUSTICE FROM WORLD WAR I TO THE 21ST CENTURY 62 (2004); M. Cherif Bassiouni, *World War I: "The War to End All Wars" and the Birth of a Handicapped International Criminal Justice System*, 30 DENV. J. INT'L. L. & POL'Y 244, 253 (2002).

105. Treaty of Peace Between the Allied and Associated Powers and Germany (Treaty of Versailles) art. 227, June 28, 1919, 2 Bevans 43, 225 Consol. T.S. 188.

106. *Id.*

107. See JAMES F. WILLIS, PROLOGUE TO NUREMBERG: THE POLITICS AND DIPLOMACY OF PUNISHING WAR CRIMINALS OF THE FIRST WORLD WAR 57 (1982).

The Treaty of Versailles also posited, in Articles 228 and 229, the prosecution of German war criminals before Allied tribunals; however, these tribunals were never established.<sup>108</sup> Instead, in 1920, the Allies agreed not to carry out the provisions of Articles 228 and 229 to establish an Allied war crimes tribunal and passed on the task to Germany. The tribunal chosen was the Supreme Court of Germany, sitting as a trier of facts in the city of Leipzig in 1923.<sup>109</sup> The political history of this tribunal is telling.

In 1919, the Allies' Commission to investigate the Responsibility of the Authors of the War and on Enforcement of Penalties had drawn up a list of some twenty thousand Germans to be tried for war crimes.<sup>110</sup> The list was subsequently reduced to 875, but Germany balked at this high number. In the end, the Allies agreed to bring that number down to forty-five. Even so, the German Prosecutor General indicted only twenty-two persons, and the Tribunal's highest sentence was a three-year prison term for one of the defendants.<sup>111</sup>

More significantly, the 1919 Commission urged the prosecution of Turkish officials for what it called "Crimes Against the Laws of Humanity" for the 1915 mass killing of Armenians in Turkey.<sup>112</sup> The United States and Japan, both members of the Commission, objected on the grounds that no such crime existed in positive international law, and that the alleged crime derived from natural law, which they rejected. The Commission's basis for postulating "Crimes Against the Laws of Humanity" was the preambular language of the 1907 Hague Convention, which stated:

Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the

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108. See MAOGOTO, *supra* note 104; Bassiouni, *supra* note 104, at 266–68.

109. See WILLIS, *supra* note 107, at 174. See generally GERD HANKEL, *DIE LEIPZIGER PROZESSE* (2003); CLAUD MULLINS, *THE LEIPZIG TRIALS* (1921).

110. See generally Div. of Int'l Law, Carnegie Endowment for Int'l Peace, *Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties: Report Presented to the Preliminary Peace Conference* (Pamphlet No. 32, 1919), reprinted in 14 AM. J. INT'L L. 95, 112–15 (1920).

111. Bassiouni, *supra* note 104, at 281–82.

112. "Crimes against humanity" is quoted in the Armenian Memorandum presented by the Greek delegation to the 1919 Commission on Mar. 14, 1919. See Schwelb, *supra* note 82, at 181. See generally VAHAKN N. DADRAN, *GERMAN RESPONSIBILITY IN THE ARMENIAN GENOCIDE* (1997); VAHAKN N. DADRAN, *THE HISTORY OF THE ARMENIAN GENOCIDE* (1995). For a Turkish perspective, see CTR. FOR STRATEGIC RESEARCH, *THE ARMENIAN "GENOCIDE": FACTS AND FIGURES* (2007).

inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, *as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.*<sup>113</sup>

In the short time between 1919 and 1945, when the charter of the IMT was adopted, the victorious Allies of World War II, led by the United States, formulated in Article 6(c) of the Charter the international category of crimes called “crimes against humanity.”<sup>114</sup> The failed precedent of World War I became the legal basis for the newly defined crime. What had changed were the times and the facts. Faced with the Holocaust and other atrocities committed by the Nazi regime, the Allies had no choice but to establish “crimes against humanity” as an international crime under positive international criminal law. The same crime was included in the IMTFE Tokyo statute,<sup>115</sup> as well as in Control Council Law No. 10, applicable in Germany by Allied tribunals.<sup>116</sup> Later, in 1993 and 1994, this crime was included by the Security Council in the statutes of the ICTY and ICTR, Articles 3 and 5, respectively; and in 1998, it was also included in the ICC’s Article 7.

Notwithstanding these precedents, there is to date no international convention on crimes against humanity. The explanation is simply that states are unwilling to have such a convention that would place their heads of state and senior state actors in jeopardy. Although the crime is established in customary international law, the normative basis in conventional ICL for crimes against humanity is lacking. Admittedly, however, customary international law has a less than certain basis, as compared to ICL, with respect to the specificity of the crime’s legal elements and its contents. If nothing else, the situation reveals that states have an interest in preserving legal gaps and ambiguities that allow them the flexibility to argue against the duty to prosecute state actors who commit such crimes, notwithstanding the human harm that

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113. Convention Respecting the Laws and Customs of War on Land, *supra* note 100 (emphasis added).

114. Charter of the International Military Tribunal at Nuremberg art. 6(c), Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279.

115. Charter for the International Military Tribunal for the Far East art. 5(c), Jan. 19, 1946, T.I.A.S. No. 1589, 4 Bevans 20.

116. Allied Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, § II(2)(e), Dec. 20, 1945, *reprinted in* TELFORD TAYLOR, FINAL REPORT TO THE SECRETARY OF THE ARMY ON THE NUERNBERG WAR CRIMES TRIALS UNDER CONTROL COUNCIL LAW NO. 10, at 250 (1949).

continues to be committed in violation of customary international law. Once again, *realpolitik* prevails over the values and interests of justice.

The justice record in the aftermath of World War I, while intrinsically weak, nevertheless set the foundation for the IMT, the IMTFE, Control Council Law No. 10 (which applied to the European Allies in their respective zones of occupation in Germany), and the Allies' prosecutions under their respective military laws in the Far East. The latter, however, reveals how few selective national prosecutions were conducted, other than for those who had supported the German occupying forces. Between these post-World War II prosecutions and the establishment of the ICTY, ICTR, ICC, and the mixed-model tribunals for Sierra Leone, Timor-Leste, Kosovo, Cambodia, Bosnia, and Lebanon, there were only a few symbolic national prosecutions in Canada, France, Australia, the United Kingdom, Italy, and Israel. In total, ten persons were prosecuted. Furthermore, while Germany prosecuted an estimated fifty thousand persons for crimes committed during World War II, Japan, Italy, and Austria prosecuted none of their own citizens. As for Japan, after the IMTFE's judgment in 1947, between 1953 and 1954 it released all of those Japanese persons convicted by that tribunal.

Objective assessment of the post-World War II ICJ experiences is a task that has yet to be undertaken. When that occurs, it is likely to debunk many myths that ICJ needs to preserve. However, turning violators of the *jus in bello* and *jus ad bellum* to a justice process was indeed extraordinary. This was a major accomplishment in the history of humankind. To paraphrase the principal architect of Nuremberg, Robert Jackson, in his opening statement before the IMT as the chief U.S. prosecutor: flushed with victory, the Allies stayed the hand of vengeance and brought their enemies to justice. In so doing, they reclaimed the hopes of Themis and *Iustitia*.

Since 1948, much has occurred to correct the deficiencies of the IMT and IMTFE. At the normative levels, genocide and war crimes have been codified, though regrettably crimes against humanity and aggression have not. The latter two, however, have been embodied in customary international law and enforced at the international and national levels. The statutes of the ICTY, ICTR, and ICC satisfy the requirements of the "principles of legality," which were questionable in the IMT Charter and IMTFE Statute. The procedure of norms reflected in the law and practice of the ICTY, ICTR, and ICC are up to the world's best standards of fairness and due process, contrary to the

practices of the IMTFE and, to some extent, the IMT. The principles of criminal responsibility and other aspects of the “general part” of criminal law have been posited in the statute of these post-1994 international tribunals, and expanded by their respective jurisprudence. No matter how much comparative criminal law experts criticize these norms and that jurisprudence, the justice they represent is equal in standing to that of the best national justice systems of the world—and this is substantial progress for ICJ. To point out the legal and procedural weaknesses of ICJ, as well as its political manipulations, is necessary to those who wish to improve the future of ICJ. However, at this point in its history, ICJ cannot risk being undermined by criticism.

Perhaps more importantly, the ICTY and ICTR have demonstrated how well international judicial institutions can function, what high level of integrity can be attained, how impartiality can be consistently respected, and how judges, prosecutors, and registrar staff can work together to bring about working institutions. Despite the initial mistakes or costs, the ICTY and ICTR have made an indelible mark on ICJ. The same can be said of the Sierra Leone Tribunal, which deserves to be placed in that same category of honor, followed by the lesser-known, under-funded, and unsupported Bosnia and Herzegovina Court. Not so, however, for what is really a mere pretense of justice, the Cambodia Court. The Timor-Leste and Kosovo Courts stand in between these two models. As to the Lebanon Tribunal, it was and still remains a political instrument of U.S. foreign policy; as such, it is a blot on the history of ICJ, no matter how professional and politically neutral its judges, prosecutors, and staff may be. What the legacy of these institutions is likely to be after 2012, particularly with respect to the ICC, can only be speculative.

There are, however, some legacies of the IMT and IMTFE that must be corrected, if for no other reason than to expunge certain dark blots from their record. The IMT’s record needs to be corrected by including a *corrigendum addendum* to the effect that the wholesale slaughter of some twelve thousand Polish officers in the Katyn Forest was not carried out by the German Wehrmacht, but by the Red Army,<sup>117</sup> and by disclosing that the USSR conspired with Nazi Germany in its invasion of Poland through the Molotov-Ribbentrop secret agreement on

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117. See J.K. ZAWODNY, DEATH IN THE FOREST: THE STORY OF THE KATYN FOREST MASSACRE 16–25 (1962).

dismembering Poland and splitting it between the two states.<sup>118</sup> For the IMTFE, the *corrigendum addendum* should include reference to the failure to address the Emperor Hirohito's responsibility for the war, the failure to prosecute the Emperor's uncle for the Nanking atrocities,<sup>119</sup> and the failure to properly address those who are still shamefully addressed as the Korean "Comfort Women."<sup>120</sup> In connection with both the IMT and IMTFE, an admission should be made about the one-sided application of justice by excluding Allied crimes, including the firebombing of Dresden, Germany in 1945, which killed an estimated 35,000 civilians, and the American nuclear bombing of the Japanese cities of Hiroshima and Nagasaki in 1945, which killed an estimated 200,000 civilians and later many others as a result of radiation.<sup>121</sup> None of these cities were military targets and their populations were protected under the 1907 Hague Convention; however, no one was prosecuted on the victorious Allies' side.

These and other flaws in the foundations of ICJ must be corrected, or at least admitted, in order to lend it credibility and integrity. Otherwise, the flaws will remain, giving validity to the claims of ICJ detractors that double standards and exceptionalism exist. These claims are implicit in the current support by African and Arab states for Sudan's President Omar al-Bashir, who was indicted by the ICC prosecutor for crimes in Darfur.<sup>122</sup> More explicit arguments contend that George W. Bush, as Commander in Chief of U.S. forces, caused more Iraqi civilian deaths than the deaths allegedly caused by al-Bashir in Darfur. Spurious as that argument may be, it captures the claim of double-standards. This situation was never referred to the ICC by the Security Council, nor will it ever be. *Ergo sum*, say those who raise the question of double standards and exceptionalism.

In 1948, just a few years after the IMT and IMTFE were established, the Cold War brought ICJ to a halt. ICJ did not recommence until 1992,

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118. See generally IZIDORS VIZULIS: THE MOLOTOV-RIBBENTROP PACT OF 1939: THE BALTIC CASE (1990).

119. See IRIS CHANG, THE RAPE OF NANKING: THE FORGOTTEN HOLOCAUST OF WORLD WAR II 172–80 (1997).

120. See generally GEORGE L. HICKS, THE COMFORT WOMEN: JAPAN'S BRUTAL REGIME OF ENFORCED PROSTITUTION IN THE SECOND WORLD WAR (1997); YOSHIKI YOSHIMI, COMFORT WOMEN (Suzanne O'Brien trans., 2002).

121. See GENBAKU SAIGAISHI HENSHU IINKAI, HIROSHIMA AND NAGASAKI: THE PHYSICAL, MEDICAL, AND SOCIAL EFFECTS OF THE ATOMIC BOMBINGS 113–14 (1981). See generally MALLOY, *supra* note 32.

122. See Prosecutor v. Al Bashir, Case No. ICC-02/05-01/09, Warrant of Arrest for Omar Hassan Ahmad Al Bashir (Mar. 4, 2009).

when the Security Council established, pursuant to Resolution 780, the Commission of Experts to Investigate Violations of International Humanitarian Law in the Former Yugoslavia Between 1991 and 1994.<sup>123</sup> Since then, ICJ has progressed farther than it had during the period of 1919 to 1994; however, this progress is largely owed to events occurring between 1945 and 1948.

### C. *The Third Stage*

The third stage will likely begin in 2012. By then, the two *ad hoc* tribunals established by the Security Council, the ICTY and ICTR, will have finished their work because the Security Council cuts off their funding that year.<sup>124</sup> There will be some residual functions that one or more judges will carry on with a few staffers, but there will be no new cases. By 2012, all of the mixed-model tribunals will also have been shut down. The states that brought about these institutions will have concluded that they have given ICJ enough, and that the beneficial effects of their proceedings are not enough from a cost-benefit standpoint to continue their existence.

Admittedly, the costs of contemporary ICJ are high, particularly those of the ICTY, followed by the ICTR and the ICC. That is not the case, however, with respect to the mixed-model tribunals. A quantitative analysis is always fraught with dangers of oversimplification and trivialization. Conducting a cost-benefit analysis of the “price” of justice risks devaluing the importance of ICJ. Perhaps that is one of the relevant ways to approach the quantitative analysis of ICJ. For example, between 1994 and 2009, the ICTY, ICTR, and ICC indicted 252 persons (respectively 161, 79, and 12). Of these, 105 have been brought to trial (respectively 120, 41, and 4). There are at all times twenty-seven judges for the ICTY (fifteen permanent and twelve *ad litem*), twenty-four judges for the ICTR (thirteen permanent and eleven *ad litem*), and eighteen for the ICC. In 2008 and 2009, the three tribunals employed over 3,200 prosecutors, investigators, registrars, and administrative and security personnel. The cumulative costs are as follows: for the ICTY, \$1.4 billion; for the ICTR, \$1.2 billion; and for the ICC, \$700 million.

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123. See U.N. Sec. Council, Comm’n of Experts, *Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780*, U.N. Doc. S/1994/674 (May 27, 1994).

124. As early as 2003, the UN Security Council began calling for the closure of the ICTY and ICTR by 2010. It has now extended the deadline to 2012. See Press Release, Security Council, With 2010 Completion Target for Yugoslavia War Crimes Tribunal Unlikely to be Met, Security Council Calls for ‘Quick and Efficient’ Conduct of Trials, U.N. Doc. SC/9549 (Dec. 19, 2008).



The average cost per case for the ICTY is \$12 million; for the ICTR, \$11 million; and for the ICC, over \$160 million.

How to qualitatively measure the justice impact of the ICTY, ICTR, and ICC is far from easy. The ICC is much too new to accurately assess its impact. The two others have a longer and better-established record, but still, there are no agreed-upon criteria by which to make qualitative assessments of ICJ. How do we assess outcomes, and by what criteria do we compare them with similar international institutions or, for that matter, with the world's 198 national judicial systems? Few empirical studies have been undertaken and few sociological or socio-psychological studies have been done to measure impacts and perceptions. We are, therefore, left with general impressions derived from limited facts and selective observations.

The costs of prosecutions in national criminal justice systems are usually a small proportion of what is contained in national budgets, usually not more than five percent. Even for states like the United States, the costs of individual trials are relatively limited. On occasion, there are exceptional cases such as the Oklahoma bombing case, which cost an estimated \$82 million; and the special prosecutor's costs to bring impeachment charges against President Clinton, which cost \$45 million. But across the fifty states, as well as within the federal criminal justice system, complex violent crimes cases do not average \$10 million per case, as is the average cost per case before the ICTY, ICTR, and ICC. Governments and legislative bodies in most countries are not likely to see the merits of having an ICJ system that costs so much, particularly in relation to what they are likely to perceive are the positive outcomes of these trials on peace and security. In other words, a cost-benefit analysis is inevitable, as is a comparison between national and international costs, and that would not be favorable to ICJ.

Most people evaluate ICJ institutions on the basis of common sense. The first question they ask is why the ICTY and ICTR do not have their respective seats in the conflicts' territories, where they would have had a much greater impact on the interested population. Moreover, their presence in these territories would have enhanced national capacity-building where it would have been most needed. If the ICTY and ICTR had been located in Sarajevo and Kigali instead of The Hague and Arusha, their impact would have been more significant to the victim populations, and they would have helped promote a greater sense of justice and closure for victims. Locating these tribunals where the conflicts occurred would have employed locals, whose training and

work in these international institutions could have transferred much needed expertise to their national legal systems, and also would have lessened costs.

The ICTY, ICTR, and ICC employed in 2008–2009 fifty-six judges and some 3,200 other personnel.<sup>125</sup> Cumulatively, an estimated five thousand staff persons and 130 judges have been involved in these institutions. They constitute a pool of individuals who possess some knowledge of ICL and of the functioning of ICJ institutions. If nothing else, these institutions provide for an admittedly expensive international training program. Their benefits include the fact that there is now, more than ever, a constituency for ICJ. This will make a difference in the future because there is a new professional category offering career opportunities. More importantly, let no one underestimate the survival powers of bureaucracies once institutions are established.

Yet there is surely more to it. How can we objectively assess the real and symbolic meaning and impact of seeing the twenty-two major Nazi criminals stand in the dock at Nuremberg,<sup>126</sup> and the twenty-eight major Class A criminals stand in the dock at Tokyo?<sup>127</sup> How can we assess the impact of what is probably one of the most direct manifestations of ICJ, when the helicopter carrying Charles Taylor on March 29, 2006 flew from Freetown, Sierra Leone, over the city, heading to the site of the Sierra Leone Special Chambers, with throngs of people who had suffered from Taylor's war walking along the road and chanting beneath his helicopter? When the helicopter landed at the Tribunal's site, there was a brief moment of silence, followed by an explosion of applause. For the people of Sierra Leone, that was a palpable sign of ICJ.

How can we measure the impact on a victim population of trials of heads of states, such as Jean Kambanda, the Rwandan head of state; Slobodan Milošević, the Serb head of state, and Taylor, the Liberian head of state? If in 1950, one asked how much it would cost to establish

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125. Statistics about these tribunals can be found on their respective websites: International Criminal Tribunal for the former Yugoslavia, <http://www.icty.org/> (last visited Dec. 17, 2009); International Criminal Tribunal for Rwanda, <http://www.icttr.org/> (last visited Dec. 17, 2009); International Criminal Court, <http://www.icc-cpi.int/> (last visited Dec. 17, 2009).

126. *See generally* EUGENE DAVIDSON, *THE TRIAL OF THE GERMANS: AN ACCOUNT OF THE TWENTY-TWO DEFENDANTS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL AT NUREMBERG* (Univ. of Missouri Press 1997) (1966); *PERSPECTIVES ON THE NUREMBERG TRIAL* (Guénaél Mettraux ed., 2008).

127. *See generally* NEIL BOISTER & ROBERT CRYER, *THE TOKYO INTERNATIONAL MILITARY TRIBUNAL: A REAPPRAISAL* (2008); TIM MAGA, *JUDGMENT AT TOKYO: THE JAPANESE WAR CRIMES TRIALS* (2001); YUMA TOTANI, *THE TOKYO WAR CRIMES TRIAL: THE PURSUIT OF JUSTICE IN THE WAKE OF WORLD WAR II* (2008).

head-of-state international criminal responsibility and bring three brutal ones to trial, what would the answer be? It would be difficult to put a price on it.

International prosecutions have been sporadic, limited in number, high in cost, and selective. More significantly, no one from the five states that are permanent members of the Security Council has ever had to face an international criminal trial. The inference, if not presumption, of exceptionalism is self-evident. However, exceptionalism goes even further. It includes, on occasion, heeding the wishes of these major powers regarding whom to prosecute, on what charges, and when. Thus, it becomes an exercise in political hegemony. For sure, no evidence allowing such exceptionalism or hegemonic influence appears anywhere. There are no fingerprints, but those working in the vineyards of ICJ get the message. If not, they unexpectedly find their work slowed down by bureaucratic entanglements, dried-up funding, and negative media publicity, followed by personal attacks on those who fail to get the message, and the threat of removal from office one way or another.

To those who have never been in the system, it is difficult to see why and how certain things happen. They happen in ICJ because there is no transparency or accountability. There are no institutional checks and balances likely to prevent political influence, let alone to correct or redress its excesses. In the area of ICJ, states abuse their power internally and externally, and with much higher expectations of getting away with it. The only factor that can be countervailing is the mass media and the reactions it can engender in world public opinion. However, that is a temporary solution. Those who abuse power in the arena of ICJ only have to wait for any media storm to blow over. Unless the facts disclosed are outrageous, these abuses usually quickly recede from public attention, or someone else is held accountable as a scapegoat. The bottom line is that those who comply with the political wishes of the powerful are more often than not rewarded, and those who do not are surreptitiously punished. There are no rewards for virtue. Those who follow their duty may, at best, be briefly remembered or lauded on their way down and out, after which they are soon forgotten.

#### IX. TOKENISM, SYMBOLISM, AND HEAD OF STATE PROSECUTION

To prosecute a few for the crimes of many is tokenism and intended only to convey the appearance of justice. It is, however, symbolic and thus meaningful when the selection of the few is representative of the

many. At Nuremberg, twenty-two major criminals were tried. They were the leaders of the political, military, economic, and social institutions whose powers were marshaled to bring about the institutionalized capability of Nazi Germany. Millions were in one way or another involved in producing this outcome, but only a few were prosecuted. The representative and leadership roles of these individuals in producing these outcomes made them the appropriate symbols to prosecute. The same occurred at the Tokyo Trials with twenty-eight persons brought to trial. Unlike Nuremberg's twenty-two defendants, the Tokyo twenty-eight were not all major criminals. Moreover, some who belonged in the symbolic category at Tokyo, such as the Emperor and his uncle, were excluded from prosecution.

Where to draw the line between tokenism and symbolism is in large part judgmental, and includes political considerations. However, there is seldom a stronger symbol than the prosecution of a head of state. Equally true is the proposition that there is nothing more politically judgmental than prosecuting a head of state. Experience shows that these prosecutions occur only when the state in question has been defeated and the victorious power decides to prosecute. Even so, that decision depends on how politically useful the head of state may prove to be for post-conflict peace purposes.

For example, when World War I came to an end in 1919, Europe's leaders, who were mostly monarchs, were not about to prosecute one of their own any more than the European monarchs were willing to prosecute Napoleon in 1814 and 1815. The difference one hundred years made was that it became impossible to rule out the possibility of head-of-state prosecution. A mere twenty-six years after the end of World War I, the principle was established in the Nuremberg Charter and Tokyo Statute. The German head of state, Adolf Hitler could not be prosecuted, having committed suicide before the fall of Berlin, but his designated successor Hermann Goering was prosecuted and convicted.<sup>128</sup> In Japan, Emperor Hirohito was spared trial by General Douglas MacArthur, the Supreme Allied Commander in the Far East. The reason was political, but it was couched in terms that for all practical purposes exonerated Hirohito of active criminal responsibility in the initiation of an aggressive war, even though the war could not have been initiated without his tacit consent. The argument was that, since Hirohito was not involved in conducting the war, he could not be

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128. Goering committed suicide in his cell the night before he was to be executed. See DAVIDSON, *supra* note 126, at 96.

deemed responsible for the crimes committed by Japanese forces under the theory of command responsibility.<sup>129</sup> This was a far more restrictive interpretation of command responsibility than the United States applied to General Yamashita, the Japanese military commander of the Philippines in the last few weeks before the end of the war.<sup>130</sup> Thus, the United States, acting through MacArthur for purely political and personal reasons, shielded the Japanese head of state and distorted the law of command responsibility in the prosecution of one of Japan's senior generals.

Conversely, the Emperor's uncle, Prince Yasuhiko, who directed the Japanese military invasion of Chinese Manchuria, and who gave the order for the "Rape of Nanjing," was spared prosecution.<sup>131</sup> In that attack, an estimated 250,000 Chinese civilians were killed, thousands of women were raped, and the city was pillaged and destroyed. These were unquestionably war crimes, but MacArthur deemed that protecting the Emperor and his uncle would be more beneficial to the U.S. occupation and pacification of Japan than to prosecute these two symbols of popular reverence, even though they were also symbols of "crimes against peace," "crimes against humanity," and "war crimes," as specified in the Tokyo Statute.

Things did not change much over the ensuing years, as the Cold War brought a halt to ICJ and the prosecution of heads of state. However, a breakthrough occurred in the statutes of the ICTY (1994) and the ICTR (1995). Even so, many suspect that in the 1995 Dayton Accords that brought an end to the conflict in the former Yugoslavia, Richard Holbrooke, the U.S. peace negotiator, offered the heads of state of

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129. See generally L.C. GREEN, *SUPERIOR ORDERS IN NATIONAL AND INTERNATIONAL LAW* (1976); William H. Parks, *Command Responsibility for War Crimes*, 62 MIL. L. REV. 1, 5 (1973).

130. Token prosecutions also served political interests after World War II. The case in point occurred in 1946 when General MacArthur had Japanese General Yamashita tried before a U.S. Military Commission in the Philippines. *Yamashita v. Styer*, 327 U.S. 1 (1946). Yamashita was charged for war crimes under the doctrine of command responsibility. Troops under his command had committed atrocities against Philippine civilians. However, Yamashita neither ordered these atrocities, nor was he aware of their commission. Even if he was aware of their occurrences, he had no effective control over the troops that committed them. He was found guilty by the U.S. Commission, whose members were acting under the command influence of MacArthur. The novel theory, never used since, was that "he should have known." Yamashita was executed. His appeal to the U.S. Supreme Court was rejected over the strong principled dissents of Justices Murphy and Rutledge. The punishment of Yamashita was simply retribution by MacArthur for his 1942 defeat by the Japanese in the Philippines. Like Peter von Hagenbach in 1474, Yamashita was a political scapegoat. See generally A. FRANK REEL, *THE CASE OF GENERAL YAMASHITA* (2d ed. Octagon Books 1971) (1949).

131. See CHANG, *supra* note 119.

Serbia (Milošević), Croatia (Franjo Tuđman), and Bosnia (Alija Izetbegović), de facto immunity. Most assuredly Milošević should have been prosecuted by the ICTY, but there was not even an active investigatory file opened until May 1999, when he started an ethnic cleansing campaign in Kosovo.<sup>132</sup> That is when the presumed Dayton deal was off, and Milosevic was surrendered to the ICTY for trial. He later died during the proceedings.

Another case was the disgraceful Lomé Agreement, which ended the war in Liberia and Sierra Leone. The war was initiated in Liberia by Charles Taylor, who plunged two countries into devastating human destruction for his personal enrichment.<sup>133</sup> Since the major Western powers did not want to send their military forces to stop the war and remove Taylor's criminal organization from power, the only inducement was to offer Taylor immunity. Part of the deal was for him to receive asylum in Nigeria and for the proceeds of his blood diamonds to be spent on the "development of the people of Sierra Leone."<sup>134</sup> It was only in September 2003, when the international community's opposition to this blatantly illegal and immoral deal increased and Taylor could no longer have a negative impact on peace in Liberia and Sierra Leone, that he was surrendered by Nigeria and brought to trial before the Special Court of Sierra Leone in March 2006.

Another example, which is rarely addressed by scholars or experts, is the case of General Raoul Cédras, the de facto head of state of Haiti from 1991 to 1994. The United States sent in troops to restore the legitimately-elected president, Jean-Bertrand Aristide, who was deposed by Cédras. To avoid American casualties, then President Clinton sent former President Jimmy Carter and General Colin Powell, the Chairman of the Joint Chiefs of Staff, to negotiate the voluntary departure of

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132. Even though this author, as Chairman of Security Council Commission 780, concluded in his report that there was enough material to indict or at least further investigate Milošević for his command responsibility in military activities in Bosnia and Croatia between 1991 and 1994, the first two ICTY prosecutors did not follow up on that material. It was only after Serbia's ethnic cleansing attack on Kosovo that the third prosecutor first indicted Milošević for the Kosovo attack and subsequently expanded the indictment to include previous conduct between 1991 and 1994. *See generally* Prosecutor v. Milosevic, Case No. IT-99-37, Indictment (May 22, 1999); CARLA DEL PONTE WITH CHUCK SUDETIC, MADAME PROSECUTOR: CONFRONTATIONS WITH HUMANITY'S WORST CRIMINALS AND THE CULTURE OF IMPUNITY (2008).

133. *See* GREG CAMPBELL, BLOOD DIAMONDS: TRACING THE DEADLY PATH OF THE WORLD'S MOST PRECIOUS STONES 89-94 (2002).

134. Peace Agreement Between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone art. VII, July 7, 1999, annex to Letter Dated 12 July 1999 from the Chargé D'Affaires Ad Interim of the Permanent Mission of Togo to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/1999/777 (July 12, 1999).

Cédras to Panama, where he received asylum. Cédras still lives there, with an undisclosed financial settlement. In this case, as in others, criminal responsibility was sacrificed for political expediency.

Political punishment has historically been preferred over prosecutions of heads of state, and this phenomenon remains extant, notwithstanding some token prosecutions of former heads of state. Contemporary post-conflict justice practices attest to the present viability of this approach for senior leaders of regimes who have committed international crimes. Lustration is one of these mechanisms. Traditionally meaning a ceremonial offering or purification, modern lustration consists of widespread disqualification from governmental positions of those individuals associated with the previous regime. It was used after 1989 in several Eastern and Central European states instead of prosecutions.<sup>135</sup> The few token prosecutions that did occur after 1989 in these countries were intended to provide de facto impunity for the perpetrators of many atrocities that had been committed in these communist regimes under the USSR's hegemony from 1945 to 1989. Such was the case in Germany after its reunification, with the token prosecutions of three East German border guards who killed a few civilians trying to escape East Germany and of some leading politicians of the Democratic Republic of Germany.<sup>136</sup> That was the extent of prosecutions for years of violent repression and torture in the Communist East German regime. Another example is Romania after the fall of the Ceaușescu Communist regime. That tyrannical ruler was tried and executed, but no one else in this repressive regime was ever tried for the many crimes committed between 1945 and 1989.<sup>137</sup>

This tokenism is no stranger to the practice of ICJ since the end of World War II. It is the fig leaf cover that conveys to the public the perception of justice, while in fact allowing the many who should have been prosecuted to benefit from impunity. Above all, the token prosecutions serve as a way of cleansing societies from their collective responsibility. The French collaborationist government of Vichy during

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135. See Roman Boed, *An Evaluation of the Legality and Efficacy of Lustration as a Tool of Transitional Justice*, in POST-CONFLICT JUSTICE, *supra* note 77, at 345; Monika Nalepa, *Lustration*, in THE PURSUIT OF INTERNATIONAL CRIMINAL JUSTICE: A WORLD STUDY ON CONFLICTS, VICTIMIZATION, AND POST-CONFLICT JUSTICE, *supra* note 35.

136. See Peter E. Quint, *The Border Guard Trials and the East German Past—Seven Arguments*, 48 AM. J. COMP. L. 541, 542 (2000).

137. See GIULIANO VASSALLI, FORMULA DI RADBRUCH E DIRITTO PENALE [THE RADBRUCH FORMULA AND CRIMINAL LAW] 224–75 (2001) (describing post-World War II prosecutions in Germany and in East Germany).

World War II was cleansed after only three post-World War II prosecutions of Barbie and Papon. In contrast, many European countries occupied by Nazi Germany conducted prosecutions for collaboration with the occupier. These prosecutions seldom extended to international crimes, as did the prosecutions at Nuremberg and before the Allied tribunals pursuant to Control Council Law No. 10, which allowed each of the four major Allies to prosecute Germans in their respective zones of occupation. Germany, to its credit, prosecuted many of its citizens who committed international crimes during World War II.

Even though the substantive immunity of heads of state was overturned by the IMT's Charter, temporal immunity survives today and has been confirmed by the International Court of Justice's 2002 decision in *Congo v. Belgium*.<sup>138</sup> There, the Court noted that the ICC's Article 27 removes this immunity, but the lingering effects of head-of-state immunity still exist, as evidenced by the al-Bashir case.<sup>139</sup> Al-Bashir was the Sudanese head of state, whom the ICC Prosecutor, in 2008, charged with "crimes against humanity" and "war crimes" in Darfur. He received support from most African and Arab heads of state on the basis of their interpretation of head-of-state immunity. Understandably, most of these heads of state obtained their positions through undemocratic processes, and most of them engage in serious and consistent human rights violations. Thus, they have every interest in protecting a notion that also inures to their mutual benefit. To their credit, South Africa and Botswana, who are state parties to the ICC, announced that they would arrest al-Bashir and surrender him to the ICC if he entered their respective territories. Paradoxically, the pro-al-Bashir campaign by African and Arab states make the ICC better known in these countries, and this may lead in the future to the domestication of international crimes and to national prosecutions, as is the case in some Latin American countries like Argentina and Chile.

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138. See Case Concerning the Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3 (Feb. 14); see also M. Cherif Bassiouni, *Universal Jurisdiction Unrevisited: The International Court of Justice Decision, in Case Concerning the Arrest Warrant of 11 April 2000* (Democratic Republic of the Congo v. Belgium), 12 PALESTINE Y.B. INT'L L. 27, 27-48 (2002-03).

139. The position of Sudanese President Omar al-Bashir and his government is that temporal head of state immunity applies to him, even though Article 27 of the ICC statute removes it because the Sudan is not a state party to the statute. Since the situation of the Sudan was referred to the ICC by the UN Security Council, that referral should have been made on the basis of the applicability of customary international law, which recognizes the temporal immunity of sitting heads of state.



It is not only African and Arab heads of state who are concerned about being prosecuted internationally. One has only to recall the great lengths that the United Kingdom and Chile went to in order to save Augusto Pinochet from extradition to Spain in 2000.<sup>140</sup> The opposition of the United States, Russia, China, and India to the ICC is in no small measure due to these countries' concerns for their heads of state—present and past—and for their senior military and civilian leaders.

### CONCLUSION

From both an ethical and moral perspective, there is no price tag for doing what is right; there is no utilitarian test that can measure the objective outcomes of doing the right thing. To curtail impunity for core international crimes and to have enhanced accountability, no matter by what margins, is an accomplishment that the international community should herald.

Sometimes even what appears to be a failure can still have some successful outcomes. Pinochet was not extradited to Spain and he was not tried in Chile, but the hue and cry produced ultimately resulted in the September 2009 arrest by the Chilean Prosecutor General of 129 officers who carried out that country's dirty war. The rejection by African and Arab states of the ICC's arrest warrant of Sudanese President al-Bashir caused all of those states and their populations to become more aware of the ICC and the crimes it prosecutes. In September 2009, the Sudanese Parliament adopted a revision to Chapter 18 of its Criminal Code, adding the three crimes within the ICC's jurisdiction in order to use that law for eventual national prosecutions. It is unlikely that the Sudanese regime's goal is to carry out prosecutorial responsibilities under the ICC's complementarity regime, but rather to use it as a shield to avoid surrendering its senior officials. No matter

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140. See *R v. Bow St. Metro. Stipendiary Magistrate & Others, Ex parte Pinochet Ugarte* (No. 1), [2000] 1 A.C. 61 (H.L. 1998); Christine M. Chinkin, *United Kingdom House of Lords, (Spanish Request for Extradition): Regina v. Bow Street Stipendiary Magistrate, Ex parte Pinochet Ugarte* (No. 3), 93 AM. J. INT'L L. 703, 704 (1999); see also *R v. Bow St. Metro. Stipendiary Magistrate & Others, Ex parte Pinochet Ugarte* (No. 3), [2000] 1 A.C. 147, 225–29 (H.L. 1999). What is more telling about the crimes committed under the Pinochet regime is the relatively low number of victims—three thousand. Yet in Chile, there is a political will expressed by the people to pursue justice. In comparison, this will does not exist in the Sudan, where in Darfur some 250,000 persons are estimated to have been killed, two million or more have become refugees, and many women have been raped. ICJ is always best served when the demand for it comes from the bottom up. When the people in a given society demand justice, it is more likely to happen. What constitutes the difference among societies is the value they place on justice and their levels of indignation toward injustice.

what today's manipulative purpose may be, however, this law may one day become effectively and fairly applied. After all, the failures of ICJ in the aftermath of World War I ripened into what developed after World War II. These are the ways in which ICJ progresses.

This recent phase in ICJ's history saw the establishment of new institutions and the development of norms and jurisprudence. Above all, this phase witnessed normalization (in the French sense of *normalité*) of ICJ. It is no longer exceptional, and it is increasingly seen as simply another dimension of ordinary criminal justice practiced at the international level.

Another significant result of recent experiences with ICJ is the fact that there is now an experienced constituency of judges, prosecutors, investigators, and administrators of ICJ who can staff new institutions and also their own national justice institutions. This experienced pool of ICJ operators is likely to make "complementarity" between national and international justice institutions a reality. Another important constituency is the generation of young jurists who study ICL, a subject taught in law schools all over the world. Generations of jurists in all countries have not only become knowledgeable of ICJ, but supportive of it. Academics and their writings have given the subject greater recognition and acceptance. ICJ is no longer the utopian topic of only forty years ago, when the author began teaching ICL in 1971. At that time, the author was the third U.S. law professor to do so, after Gerhard O.W. Mueller at New York University and Edward M. Wise at Wayne State. Today, there are courses on ICL in at least fifty U.S. law schools, and all international law courses include a component of ICJ. Legal education and publications on ICJ have expanded exponentially in the past decade, and these developments are not likely to be reversed.

New constituencies have also developed, such as the more than 1,200 nongovernmental organizations (NGOs) that are part of the Coalition for the ICC, and the more than 5,000 NGOs registered with the UN Economic and Social Council who represent human rights groups. It will be through these constituencies that ICJ will continue to grow. Its effectiveness, however, will depend on how fast domestic criminal justice systems will assume prosecutions of international crimes. The future of ICJ will not be with the ICC, but with national criminal justice systems.

The struggle for ICJ is still a work in progress, and how it develops and evolves is something history will record. But, as stated above, the biggest inroads made by ICJ is that domestic criminal justice systems

are undertaking prosecutions under national laws embodying international criminal law. Today, few recall that national laws on slavery and drug trafficking derive from international treaties. Those who are prosecuted daily in almost every country for drug trafficking are prosecuted because international treaty obligations defining various aspects of drug trafficking have been embodied in national law. When genocide, crimes against humanity, and war crimes are embodied in the national laws of most states, and domestic prosecutions for these crimes take their ordinary course in national tribunals, ICJ will have met one of its primary goals.

It is somewhat deceiving to advance ICJ as the international counterpart of domestic criminal justice. The assumptions about deterrence and enforcement are substantially different, as are other factors regarding capacity. International prosecutions and their numbers will always be more restricted than their counterparts in national contexts. ICJ can only aim for symbolic prosecutions of heads of state. Yet, as stated above,<sup>141</sup> these prosecutions are the ones most fraught with political considerations, and thus are difficult to pursue. Reliance on national criminal justice systems is indispensable but, in that context, political considerations also have their own weight. ICJ is more likely to develop through national legal systems than through international institutions. The latter's most effective role is to enhance the prospects of domestication of ICJ by acting as a catalyst and by providing technical assistance and support. Only through sustainable national capacity-building can ICJ truly progress. ICJ will always have a tortuous and painstaking path, consisting of the mutually reinforcing and complementary processes of justice at the international and national levels. How effective that process will be is yet to be ascertained.

If war prevention failed, though admittedly some wars were prevented through the collective security system of the UN, and if the humanization of war failed, even though progress was made under the international humanitarian law regime, what would be left? For many, the answer is ICJ, the basic assumption being that the effective threat of criminal prosecution and punishment will engender a deterrence effect. And, if that does not work, then punishment *tout court* is deserved. After all, retributive punishment has its own merit as evidenced by the Torah, the Old Testament, and the Qur'an prescription of "an eye for an eye and a tooth for a tooth."<sup>142</sup> Moreover, Talion Law punishment is

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141. See *supra* Part IX.

142. *Exodus* 21:23–25 ("[I]f there is serious injury, you are to take . . . eye for eye, tooth for

also presumed to assuage the revenge impulses of individuals and groups who were victimized, though one can hardly point to any evidence that revenge prevents future conflicts—the contrary is more often the case.

A glimpse at the state of world conflicts, and the post-conflict justice mechanisms that have been used, reveals the selectivity of ICJ and its insufficient capability of responding to the contemporary needs of justice. The blame for the weaknesses of ICJ rests on states, inter-governmental organizations, and operators of ICJ institutions, for the excessive costs and low efficiency of these institutions. In large part, this blame falls on the United Nations, which administers these institutions in accordance with its own inefficient bureaucratic rules and costly financial standards. If ICJ is to have a hope for success, it will need to free itself from the UN bureaucratic and financial system.

ICJ is a part of post-conflict justice, applying to conflicts of an international and non-international character alike. Conflicts of a non-international character typically bring about the highest levels of victimization, but the lowest levels of justice modalities, because ICJ does not adequately address the problem of non-state actors. The significance of this is that these types of conflicts, with such a high volume of victimization and perpetrators, are increasing, while conflicts of an international character are decreasing. Because of this, it is unlikely that ICJ as we know it will be able to address these issues. The era of Nuremberg and Tokyo is over. What, then, is the future of ICJ?

When we look at the ICTY and the ICTR over the past fifteen years, handling approximately 170 cases, and the ICC over twelve years handling four cases, how can ICJ cope with a potential thirty to forty conflicts in the world at one time with thousands of victims? The ICJ system is simply unable to deal with such a volume. Consequently, the international community needs to focus more on strategies of conflict prevention and to address the issues that give rise to conflict—extreme poverty, poor governance, corruption, and climate change, just to name a few. If more states fall prey to these problems, we will witness more conflicts, and thus more victims and human suffering. The greater the volume of conflicts, the less likely it will be that the ICJ system can adequately address them.

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tooth, hand for hand, foot for foot, burn for burn, wound for wound, bruise for bruise.”). In the Qur’an, “We ordained for them, a life for a life, and an eye for an eye, and a nose for a nose, and an ear for an ear, and a tooth for a tooth, and a [similar] retribution for wounds; but he who shall forgo it out of charity will atone thereby for some of his past sins.” *Surah* 5:45, THE MESSAGE OF THE QUR’AN 177 (Muhammad Asad trans., 2003).

The increased willingness of the international community, acting in one form or another, to intervene to stop conflicts is another encouraging sign. This includes collective military action that had never occurred before in history. These are encouraging signs for the reduction of collective violence. A current manifestation of the positive development is the emerging concept of the “Responsibility to Protect” enunciated by the World Summit of Heads of State that took place at the United Nations in 2005.<sup>143</sup> However, the current debates of 2009 at the General Assembly reveal a deep cleavage between the Western developed states and Latin America, and states from Africa, Asia, and the Middle East, who claim that this emerging concept is a potential excuse for foreign intervention in their domestic affairs. Moreover, these states claim that double standards and exceptionalism belie claims of universalism and universality.<sup>144</sup> They point to the ICC’s exclusive prosecution of Africans and to the Security Council’s only referral to the ICC—the Sudan. The UN Human Rights Council’s referral of the Goldstone report on the winter 2009 war in Gaza notwithstanding, there is no sign that the Security Council will refer that situation to the ICC.<sup>145</sup> There is also no indication that the United States or other states will address the institutionalization of torture under the George W. Bush administration.<sup>146</sup>

The ICC should prioritize this function in order to make complementarity a reality. In the future, the ICC should address exceptional situations, and certainly should not become a substitute for national justice systems. Above all, the international community must embrace ICJ as an indispensable component of world order.

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143. See RICHARD W. WILLIAMSON, STANLEY FOUND., POLICY ANALYSIS BRIEF: SUDAN AND THE IMPLICATIONS FOR RESPONSIBILITY TO PROTECT (2009), available at <http://www.stanleyfoundation.org/publications/pab/WilliamsonPAB1009.pdf>. See generally GARETH EVANS, THE RESPONSIBILITY TO PROTECT: ENDING MASS ATROCITY CRIMES ONCE AND FOR ALL (2008); RESPONSIBILITY TO PROTECT: THE GLOBAL MORAL COMPACT FOR THE 21ST CENTURY (Richard H. Cooper & Juliette Voinov Kohler eds., 2009).

144. See M. Cherif Bassiouni, *Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice*, 42 VA. J. INT’L L. 81, 137 (2001). See generally PRINCETON UNIV. PROGRAM IN LAW AND PUB. AFFAIRS, THE PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION (2001).

145. See generally Neil MacFarquhar, *U.N. Council Endorses Gaza Report*, N.Y. TIMES, Oct. 17, 2009, at A4.

146. See M. Cherif Bassiouni, *The Institutionalization of Torture Under the Bush Administration*, 37 CASE W. RES. J. INT’L L. 389 (2006); see also M. CHERIF BASSIOUNI, TORTURE IN THE U.S.: ANYONE RESPONSIBLE? (forthcoming 2010).

A new world order<sup>147</sup> in the era of globalization must be based on the following: (1) respect for, and observance of, international and regional human rights, which reflect the international community's commonly shared values on the dignity of humankind as a whole, and of each and every person in particular; (2) the elimination of conflicts by collective security action based on the "Responsibility to Protect"; (3) economic development to prevent the failure of states; and (4) international measure to enhance the Rule of Law and support democracy.

As expressed in ancient Chinese and Arabic proverbs, "the longest journey begins with the first step." That first step has been taken by ICJ, and other steps will surely follow. The exigency of justice is part of humankind's social values, and its course is inexorable. How far and how fast we progress on this journey will depend on individual and collective commitments to attain this laudable goal in which we all have a stake, and in which we all have a role to play. Every one of us can bring a grain of sand to the hill and can thus contribute to the overall result. The following statements aptly conclude these reflections:

"If you see a wrong you must right it:  
with your hand if you can (meaning action),  
or, with your words (meaning to speak out),  
or in your heart, but that is the weakest of faith."  
(Prophet Mohammed)

"If you want Peace, work for Justice."  
(Pope Paul VI)

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147. See Giuliana Ziccardi Capaldo, *Global Law and Politics: A Legal Approach to Political Changes*, in 1 THE GLOBAL COMMUNITY: YEARBOOK OF INTERNATIONAL LAW AND JURISPRUDENCE 2007, at 5 (Giuliana Ziccardi Capaldo ed., 2008); Richard W. Mansbach, *The Great Globalization Debate*, in THE GLOBAL COMMUNITY: YEARBOOK OF INTERNATIONAL LAW AND JURISPRUDENCE 2007, *supra*, at 21. Both of these analyses examine the present state of globalization noting its impact on collective decision-making. These and other writings on globalization accept the assumption that human rights and ICJ are foundational to the processes and values of globalization, yet the studies in the field present no empirical data to that effect. It is this writer's assumption, based on a forthcoming publication containing the results of a two-year study on post-conflict justice, that there is no tangible commitment by governments and IGOs to the effective advancement of ICJ. See M. Cherif Bassiouni, *Assessing Conflict Outcomes: Accountability and Impunity*, in THE PURSUIT OF INTERNATIONAL CRIMINAL JUSTICE: A WORLD STUDY ON CONFLICTS, VICTIMIZATION, AND POST-CONFLICT JUSTICE, *supra* note 35; see also M. Cherif Bassiouni, *International Criminal Justice in the Era of Globalization: Rising Expectations*, in 6 THE GLOBAL COMMUNITY: YEARBOOK OF INTERNATIONAL LAW AND JURISPRUDENCE 2005, at 3–14 (Giuliana Ziccardi Capaldo ed., 2006).

“The world rests on three pillars: on Truth, on Justice, and on  
Peace.”

(Rabban Simeon Ben Gamaleil)

“If Justice is realized, Truth is vindicated and Peace results.”

(Talmudic Commentary)

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