Policy Perspectives Favoring the Establishment of the International Criminal Court
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Full Text:
The First World War was called "the war to end all wars." However, a short time later, the world again found itself in conflict. After the horrors of the Second World War were revealed, a new promise emerged: "never again." Since then, some 250 international and regional armed conflicts have occurred. These conflicts, along with human rights violations perpetrated by tyrannical regimes, have produced an estimated 170 million casualties as well as other incalculable losses.(1)

Governments in a position to prevent or mitigate these tragic events, or to pursue restorative and retributive justice, remain largely and regrettably passive, though some have voiced opprobrium. This passivity has had devastating consequences and the "never again" proves to be of little comfort to the people who continue to suffer as a result of these conflicts. This is due, in part, to the nature of contemporary democratic forms of government, which make it difficult to obtain prompt and effective institutional responses,(2) and the fact that the humanitarian values that most people share do not easily transcend public apathy to conflicts around the world. But the vast tragedies of the 20th century are also due to the absence of a permanent system of international criminal justice. In the context of such a world system, where national and international action are problematic and human nature can be its own worst enemy, we need an effective system to deter or lessen the scope of international violence and crime, and provide needed accountability and redress. To avoid repeating the enormous tragedies of this century, we need to have a permanent system of international criminal justice.

The overall situation is particularly shocking not only because of the high level of victimization, but also because so many violations fall under the proscriptive norms of genocide, crimes against humanity and war crimes--the three major jus cogens international crimes.(3) Yet, notwithstanding the types of crimes committed and the enormously harmful results, the worst perpetrators, including high-level government decisionmakers, have seldom been held accountable.(4) These individuals have therefore benefited from de facto and sometimes even de jure impunity.(5)

Impunity is due in large to the pursuit of political settlements at the expense of justice, which is often bartered away in exchange for political goals--a process that confuses ends with means.(6) But while that approach may temporarily satisfy the demands of realpolitik, it sacrifices the most basic human need for elementary justice. Recognizing this moral challenge, international civil society has reached the point where it no longer accepts the dissembling argument that to achieve peace, meaning political settlement, impunity is the justifiable quid pro quo that leaders exchange for cessation of conflict.(7) That is not to say, however, that international criminal prosecutions are appropriate in all cases and for all perpetrators.(8) Accountability mechanisms vary, and what may be appropriate in one context may not be in another.(9)

Sympathy for victims of international crimes, no matter how sincere or widespread, is meaningless. Indignation by itself is never enough. Retributive and restorative justice is what makes sympathy meaningful and indignation credible.

CHARACTERISTICS OF THE INTERNATIONAL CRIMINAL COURT(10)

The International Criminal Court (ICC) is an international, treaty-created body whose powers are derived from the will of the state-parties, as opposed to a supranational entity imposed upon states. The treaty, which contains the statute of the court, will be binding only on its state-parties and will enter into effect only after 60 ratifications. The ICC's jurisdiction complements that of national criminal justice systems and applies only to criminal conduct that occurs subsequent to the statute's ratification. The ICC will depend on the cooperation of the state-parties as well as non-state-parties for its investigatory, prosecutorial and enforcement needs. This includes apprehension and surrender of offenders, securing evidence, enforcement of judgements and execution of sentences. Following is a list of the ICC's ten basic characteristics:

1. The ICC's jurisdiction is "complementary" (Article 17) to national legal systems. It must be clearly understood that the ICC is created by a treaty that, upon its ratification, becomes part of the national law of the ratifying state. Consequently, the ICC is not a supranational institution, but an international institution. The ICC does not, therefore, infringe upon national sovereignty. Furthermore, the ICC exercises a function that member states individually and collectively confer upon it by treaty and by national legislation. Lastly, the ICC does not promulgate laws that override those of national legal systems. The statute further specifies the basis upon which jurisdiction can shift from a state-party's national jurisdiction to the ICC. The ICC is thus an extension of national jurisdiction, as established by a treaty whose ratification under national parliamentary authority makes it part of national law. The court may exercise jurisdiction when the member state who has primary jurisdiction is either unwilling or unable to exercise its national criminal jurisdiction. The determination of inability or unwillingness is made by a three-judge panel subject to a review on appeal before the appellate chamber, consisting of five judges.

2. The ICC will only exercise jurisdiction prospectively in cases where indictments have been returned after confirmation by a three-judge chamber of the court when the alleged crime was committed on a member state's territory by one of its nationals. In addition, the ICC may exercise its jurisdiction when a non-member state consents to the court's jurisdiction and the crime has been committed

on that state's territory or the accused is one of its nationals.

3. Every state has the right, in accordance with its constitutional norms, to transfer jurisdiction over an accused individual to another state(11) or to an international judiciary with which it has signed a treaty Such jurisdictional transfer is an entirely valid exercise of national sovereignty. It must, however, be done in accordance with international human rights norms.(12) Since the ICC is complementary to national criminal jurisdiction, a member state's surrender of an individual to the ICC's jurisdiction pursuant to the treaty, does not infringe upon national sovereignty, nor does it violate the rights of the individual whose prosecution is transferred to a complementary criminal jurisdiction provided that international human rights law norms are observed as discussed further below.

4. Its ratione materia jurisdiction extends, at this time, to three well-defined international crimes: genocide, war crimes and crimes against humanity. Genocide is defined in the 1948 United Nations Treaty Series Convention on the Prevention and Punishment of the Crime of Genocide,(13) ratified by 123 states(14) and consistently confirmed by customary international law. The ICC's definition of genocide (Article 6) is almost verbatim Articles II and III of the convention. The ICC's war crimes provision (Article 8) includes the "grave breaches"(15) and Common Article 3 of the 1949 Geneva Conventions that have been ratified by 186 states.(16) That provision also includes those aspects of the two 1977 Geneva Protocols(17) deemed part of the customary law of armed conflict.(18) The 1977 Geneva Protocols have been ratified respectively by 147 and 139 states.(19)

The ICC provision on crimes against humanity (Article 7) embodies Article 6(c) of the Nuremberg Charter,(20) Article 5 of the International Criminal Tribunal for the former Yugoslavia (ICTY)(21) and Article 3 of the International Criminal Tribunal for Rwanda (ICTR).(22) The provision also includes more specifics which could be included under the terms "other inhumane acts" which are included in all these prior formulations. However, owing to the ICC drafters' concern with the "principle of legality,"(23) they preferred to list such specifics as:

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... imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
torture; rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of
sexual violence of comparable gravity; persecution against any identifiable group or collectivity on political, racial,
national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized
as impermissible under international law, in connection with any act referred to in this paragraph or any crime within
the jurisdiction of the Court.(24)
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Other crimes that are within the interpretative scope of "other inhumane acts" are also included. Because of that very concern, the drafters also elected not to include "aggression," until it can be clearly defined by the Assembly of State-Parties (Article 5).(25)

Since all three crimes within the ICC's jurisdiction are already well-defined, the ICC does not establish new international criminal law, but rather, embodies it. Even if that were not the case, the ICC is a product of treaty, and thus the state-parties can surely establish what should constitute an international crime provided its application is prospective.(26) The substantive law of the ICC will, therefore, not be applied retroactively It is well-established, positive law that the ICC has codified in order to avoid the potential quandaries of law created not by elected legislatures but by judges. Any claim that the ICC statute invokes a body of international criminal law not previously legislated is spurious: the ICC does not have the power to legislate.

5. The statute provides for substantive and procedural due process rights that satisfy internationally established norms and standards.(27) The statute contains a definition of the crimes (Articles 6, 7 and 8) and their elements (Article 9), elements of individual criminal responsibility (Article 25), conditions of exoneration from criminal responsibility (Articles 31, 32 and 33) and penalties (Article 77) that satisfy the substantive due process requirements of the world's major criminal justice systems.(28) Furthermore, the Rules of Procedure and Evidence contained in the statute provide for fundamental fairness to the accused in a manner that satisfies international legal standards of procedural due process. The rules also provide for certainty of the process before the ICC (Articles 55 and 67).

6. Actions brought before the ICC will be initiated by a "referral" of a "situation" from the Security Council or a member state (Articles 13 and 14), which means that no individual can be targeted. A non-member state may also consent to the jurisdiction of the court in a particular situation and refer a situation to the ICC (Article 12). For these referrals, there is no mandatory duty to prosecute, but a duty does exist for the prosecutor to investigate. At the conclusion of the investigation, the prosecutor may present an indictment to a special chamber of the court for its confirmation (Articles 56 and 57). That chamber, consisting of three judges, will review the proposed indictment and upon a finding of probable cause, confirm it, thus ensuring judicial safeguards against prosecutorial abuse (Article 58). Lastly, the prosecutor may initiate propio motu an investigation (Article 53), subject, however, to a three-judge chamber of the court's approval. The investigation would be for a set time period. Upon completion, the prosecutor may present an indictment for confirmation to that chamber of the court in the same manner as in instances of a "referral" from the Security Council, member states or non-member states as indicated above.

7. Enforcement modalities and cooperation between states will be channeled through the national legal systems of the member states, as well as cooperating non-member states, and will therefore not infringe upon national sovereignty nor have a supranational character. The ICC may, however, be capable of accelerating procedures and processes not necessarily available to an individual state within the context of bilateral relations (Articles 86 to 99).

8. The court will have 18 judges, elected by the Assembly of State Parties, with carefully articulated qualifications and who meet the highest standards of the world's major legal systems. The 18 judges will represent the world's major legal systems and represent an equitable geographic distribution (Article 36). One chamber consisting of three judges will deal exclusively with indictments and pre-trial matters; three trial chambers consisting of three judges each; an appellate chamber consisting of five judges; and one presiding judge. To maintain a distinction between trial and appellate chambers, neither the five appellate judges nor their colleagues in the trial chambers can rotate between two chambers (Article 39). The statute provides guarantees for the impartiality and independence of ICC judges (Article 40).

9. An Assembly of State Parties shall be constituted (Article 112) with certain specific prerogatives including the electing judges, the prosecutor and the registrar, who is responsible for the ICC's administrative and financial matters. Moreover, it reviews and approves the budget, and provides support for the institution, including the ability to deal with member states who fail to carry out their treaty obligations. The assembly also has the power to enunciate rules for the internal functioning of the court, and to adopt rules of procedure and evidence in conformity with the statute.

10. The relationship between the ICC and the Security Council is a consequence of the Security Council's power as established in the U.N. Charter. Consequently, the Security Council has the right to refer a situation to the ICC for investigation and eventual prosecution. In addition, the Security Council may ask for a suspension of proceedings before the ICC for 12 months if the Security Council deems that the situation under which the prosecution arises constitutes a threat to "peace and security" as provided for in the U.N. Charter. Under its charter powers, the Security Council can, by resolution, take measures that are binding upon all U.N. member states. Thus, the Security Council's suspension prerogatives in the statute are within its charter powers.

These characteristics demonstrate, as the drafters envisioned, that the ICC statute does not legislate new crimes, set itself up as a supranational body, supplant national criminal justice systems, interfere with other lawful international processes or arbitrarily impose new values upon the international community. The ICC does no more than what each and every state in the international community can do presently. Accordingly, what states can do individually, they can also do collectively.

POLICY CONSIDERATIONS

The purpose of a permanent International Criminal Court is to combine humanitarian values and policy considerations, which are essential for justice, redress and prevention, with the need for the restoration and preservation of peace.(29) Given the present world order, no institution can achieve all of these goals. However, as this article argues, the ICC can significantly contribute to their attainment.

Inherent in the concept of polity is the establishment of judicial institutions whose purposes are to mediate, resolve and impose settlements upon conflicts that disrupt a state's social order.(30) In isolation, such institutions, no matter how effectively constituted and operated, cannot maintain social order indefinitely nor instill the sense of lawfulness(31) unless linked to broader social, political and economic institutions. Moreover, as the Nuremburg Tribunals, among other examples demonstrate, what works at the national level can, with sufficient resolve, work in international society.

This century's ad hoc enforcement legacy of the proscriptive norms against genocide, crimes against humanity and war crimes, now codified in the ICC statute,(32) have been characterized by randomness and selectivity.(33) This approach, or more accurately the lack thereof, has weakened the controlling impact of these international norms and thus their effectiveness as a means of prevention. At issue is not the epistemological, ontological or ethical content of substantive norms prohibiting genocide, crimes against humanity and war crimes, but rather their effective instrumental function as a means of international social control. At this stage in history, no one seriously doubts their legal enforceability, even though they are only occasionally enforced at the international and national levels. Even the relatively few instantiations are adequate proof of the reality and potential of these norms. That is why the ICC can better serve as an international social control mechanism in enforcing sanctions against these crimes as opposed to ad hoc processes in which norms apply only selectively. An international criminal justice system, as embodied in the ICC, will carry out its functions on a regular and permanent basis. These are necessary ingredients in the pursuit of justice. Thus, the ICC offers the global community, for the first time, a method for addressing some international crimes on a regular, continuous and consistent basis. What is further needed is universality of application throughout the world, a goal that can be attained eventually, but which must be nurtured in the ICC's initial stages.

The ICC is the most appropriate international mechanism through which the proscriptive norms against genocide, crimes against humanity and war crimes can become more effective instrumental norms, as opposed to being essentially the embodiment of intrinsic values reflecting international social expectations. An instrumental norm, in contrast to an intrinsic one, is characterized by repeated and consistent application, channeled through a process that brings to bear on social conduct a concentration of what, in physics, is called faisceaux lumineaux (or "beams of light"). The consistent interpretation and successive application of such norms intensifies social expectations and thereby reinforces compliance. Greater compliance translates into fewer harmful consequences, which is, obviously, one of the ICC's goals. Furthermore, the ICC's legal processes through which these proscriptive norms are to be interpreted, applied and proclaimed in a consistent manner will further strengthen the instrumental nature of these norms, and enhance the effectiveness of their preventive goals. What will emerge from the ICC legal processes is a societal picture of the norms, and through it, a more humane image of international society itself, and, perhaps more importantly, a higher expectation for standards of behavior. Initially these expectations may be somewhat vague and undefined, but as the ICC develops, the court will command increased social attention and thus compel a higher degree of individual conformity to its observance.

The articulation and application of the ICC's proscriptive norms to specific cases, coupled with its sanctions capabilities, constitute the structural conditions of the international collectivity's ordered use of power. This structure is derived from what may be called its "value-standards."(34) The dynamic, interactive and formal process of the proscriptive norms' interpretation and sanctions, applied by the ICC in a formal process, separates the clear expectations of social conduct from the episodic and random characterization which has, until this time, defined both the norm and individual deviant conduct.(35) Thus, the continual flow of judicial decisions that the ICC is expected to generate will give greater coherence, clarity and consistency to social expectations. ICC decisions will also reduce the socially influenced diminishing of standards that results from both the lack of and selective nature of enforcement. These lowered standards in turn contribute to the nebulous nature of international proscriptive norms and reduce their preventive effect.

Accordingly, the public processes of the ICC will reinforce social values and expectations concerning international conduct that will then contribute to the individual internalization of these values. This dual reinforcement of such objective and subjective effects of the norm is one of the ways by which the ICC can increase individual observance of its parent statute within the international polity and thus prevent future harm. To paraphrase Aristotle: when law guided by "right reason" becomes "universal and everywhere the same," its transgression will become in and of itself a deterrent factor.(36)

The ICC's power to impose sanctions is the essential element of the proscriptive norms contained in its statute. That power manifests the means by which an ordered society under law provides social guidance to individual conduct.(37) The mutual interlocking relationship between the normative expectations and the sanction's application with respect to transgressors is a necessary step toward overcoming the paralyzing habits of thought and practice that have countenanced injustice and establishing a more just and secure normative order.(38) As Pascal, the 17th century mathematician and philosopher, said: "Justice without force is impotent. Force without justice is tyrannical.... One must, therefore, combine justice and force, and, therefore, make strong what is right, and make right what is wrong."(39)

Even in the absence of the ICC's socialization and compliance inducement process, sanctions can also serve as a deterrent. Despite the historical difficulties that criminologists have encountered in measuring the effect that deterrence--understood as the certain enforcement of swift and severe punishment--has on criminal conduct, this factor can be expected to weigh heavily upon the minds of national leaders and their agents. Such individuals often occupy positions of prominence that place them conspicuously in the public eye, an eye vastly more probing with today's powerful electronic and print media. Thus, the criminal under international law cannot hide as readily as the so-called "common criminal." The assumption that enforcement, which includes apprehension, prosecution and, upon conviction, punishment, is indeed well-established even though its impact cannot be precisely measured. Some 2,500 years ago, Plato, in Protagoras stated that:

No one punishes those who have been guilty of injustice solely because they have committed injustice, unless indeed he punishes in a brutal and unreasonable manner. When anyone makes use of his reason in inflicting punishment, he punishes not on account of the fault that is past, for no one can bring it about that what has been done may not have been done, but on account of a fault to come in order that the person punished may not commit the fault, that his punishment may restrain from similar acts those persons who witness the punishment.(40)

Similarly, with respect to deterrence, the Roman stoic philosopher Seneca stated that "either [a sanction] may correct him who it punishes, or that the punishment may render other men better, or that, by bad men being put out of the way, the rest may live without fear."(41) It is, therefore, a valid postulate to assume that the enforcement of the ICC's international sanctions, and complementary national ones, will contribute to the reduction of social harm and to the preservation, restoration and maintenance of peace.(42)

The ICC must be an effective and credible theater on which the private drama of a given case, or series of cases, can evolve publicly and project internationally. As one commentator has noted, like its counterpart in classical drama, the ICC must at times appear in the role of the theos ek mechanes or, in Latin, the deus ex machina, which providentially arrives at the scene of a crisis to provide a solution.(43) The transfer of the conflict's venue from the battlefield to the courtroom not only changes the scenery, but helps alleviate the harmful consequences of a given conflict while setting in motion a new cycle of events that can help bring about the end to the conflict's violent interaction. In that respect, the ICC is a necessary and even an indispensable mechanism for ending conflicts, restoring order and creating and preserving peace.

The ICC will surely not be the answer to all the world's ills, nor will it prevent all deviant behavior that produces genocide, crimes against humanity and war crimes. Prosecution is also not the exclusive means for international accountability and redress. International prosecution will, however, contribute to the attainment of these ends, and to that extent, it will advance the goals of justice and the prevention of social harm.

Accountability and redress are among the goals of contemporary international civil society, just as they have been constituents of cultures throughout the world from time immemorial.(44) Today, these values have also become increasingly universalized. Through the ICC, these intrinsic values will be elevated into worldwide instrumental norms whose effective, consistent and fair enforcement will clearly reflect the aspirations of international society. The ICC both embodies these expectations and is intended to lead to their actualization.

The ICC will therefore serve to dispense exemplary and retributive justice, provide victim redress, record history, reinforce social values, strengthen individual rectitude, educate present and future generations and, most importantly, deter future human depredations.(45) To achieve these ends, the ICC must act with predictability and consistency, be cognizant of publicly perceived fairness and, when appropriate, temper the harshness of the law with understanding and compassion. The essential interrelated premises for obtaining these results are political independence, judicial fairness and effectiveness.

Furthermore, the ICC needs the enforcement power of the U.N. Security Council and the effective cooperation of states, whether parties or non parties--but that of course is inherently aleatory. There will be instances where states--especially powerful states--will give the ICC the political backing that will make it effective in some instances, and withhold support in other instances depending on their immediate interests. Thus, the record of the ICC may be questionable initially. In time, however, the precedential value of its decisions will acquire its own independent weight. Like other judicial institutions, the ICC will have to grow, evolve and acquire a strength of its own making.(46)

CONCLUSION

To speculate about the future resolution of unknown tensions between the political interests of states and the judicial independence of the ICC is a futile exercise. In the words of old Chinese and Arabic proverbs, "the longest journey starts with the first step." No one can forecast where that step will lead, but certainly, in light of the collective experiences of this century, no one can argue that a step toward justice is a step in the wrong direction. Our best guidance is the historical analogy to national judicial institutions and how useful they have been in advancing justice and democracy in national contexts. If national judicial institutions played such an important role in the humanization of national societies, so too can the ICC in international society.

In the final analysis, however, the need for international criminal justice will shape the ICC's future and it may only be a matter of time until that institution fulfills the expectations of those who created it. In the interim, the institution will evolve to meet these expectations. Though we may not always achieve them, wisdom requires that we should simply pursue higher ideals.(47)

(1) This estimate relates, by some accounts, to all conflicts since the First World War, and by others to all victimization since the Second World War. See M. Cherif Bassiouni, "Searching for Peace and Achieving Justice: The Need for Accountability," Law and Contemporary Problems, 59 (1996) p. 9; Jennifer L. Balint, "An Empirical Study of Conflict, Conflict Victimization and Legal Redress," in Nouvelles Etudes Penales, ed. Christopher C. Joyner and M. Cherif Bassiouni, 14 (1998) p. 101; Sollenberg and P. Wallesteen, "Major Armed Conflicts," Sipri Yearbook 1996 (Oxford: Oxford University Press, 1996); and R.J. Rummel, Statistics of Democide, Genocide and Mass Murder Since 1900 (Charlottesville: University of Virginia, 1997).

(2) See Inter-Parliamentary Union, Democracy: Its Principles and Achievement (Geneva: Inter-Parliamentary Union, 1998) especially M. Cherif Bassiouni, "Toward a Universal Declaration on the Basic Principles of Democracy: From Principles to Realization."

(3) See M. Cherif Bassiouni, "International Crimes: Jus Cogens and Obligatio Erga Omnes," Law and Contemporary Problems, 59 (1996) p. 63:

"Consequently, these obligations are non-derogable in times of war as well as peace. Thus, recognizing certain international crimes as jus cogens carries with it the duty to prosecute or extradite, the non-applicability of statutes of limitation for such crimes, and universality of jurisdiction over such crimes irrespective of where they were committed, by whom (including Heads of State), against what category of victims, and irrespective of the context of their occurrence (peace or war). Above all, the characterization of certain crimes as jus cogens places upon states the obligatio erga omnes not to grant impunity to the violators of such crimes,"; and ibid., pp. 65-66.

(4) See Diane F. Orentlicher, "Selling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime," Yale Law Journal, 100 (1991) p. 2537; and Steven R. Ratner and Jason S. Abrams, Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy (New York: Oxford University Press, 1997).

(5) See Christopher C. Joyner and M. Cherif Bassiouni, eds., "Reining in Impunity for International Crimes and Serious Violations of Fundamental Human Rights: Proceedings of the Siracusa Conference 17-21 September 1997," Nouvelles Etudes Penales, 14 (1998).

(6) Niccolo Machiavelli, The Prince (New York: Oxford University Press, 1998) chap. VIII.

(7) Aside from the moral issues, the shaky intellectual foundation of this proposition is no different from the rationalization of rewarding common criminals for stopping the further commission of crimes.

(8) See M. Cherif Bassiouni, "Searching for Peace and Achieving Justice: The Need for Accountability" Law and Contemporary Problems, 59 (1996) p. 9; and Madeline H. Morris, "International Guidelines Against Impunity: Facilitating Accountability," ibid., p. 29.

(9) See Law and Contemporary Problems, 59 (1996) especially Neil J. Kritz, "Coming to Terms with Atrocities: A Review of Accountability Mechanisms for Mass Violations of Human Rights," p. 127, Stephan Landsman, "Alternative Responses to Serious Human Rights Abuses: Of Prosecution and Truth Commissions," p. 81, Priscilla B. Hayner, "International Guidelines for the Creation and Operation of Truth Commissions: A Preliminary Proposal," p. 173, Mark S. Ellis, "Purging the Past: The Current State of Lustration Laws in the Former Communist Bloc," p. 181; Nouvelles Etudes Penales, 14 (1998) especially Nigel Rodley, "Impunity and Human Rights," p. 71, Luc Huyse, "To Punish or To Pardon: A Devil's Choice," p. 79; and Ved P. Nanda, "Civil and Political Sanctions as an Accountability Mechanim for Massive Violations of Human Rights," Denver Journal of International Law and Policy, 26 (1998) p. 389. See also Neil J. Kritz, Transitional Justice (Washington, DC: United States Institute of Peace, 1995).

(10) Rome Statue of the International Criminal Court [hereinafter ICC Statute], U.N. Doc. A/CONF.1 83/9 (Rome: 17 July 1998) reissued 25 September 1998 for technical reasons as Rome Statue of the International Criminal Court, U.N. Doc. A/CONF.1 83/ 9, corr. (Rome: 17 July 1998).

(11) For a comparison see European Convention on the Transfer of Proceedings in Criminal Matters, ETS. no. 73, 30 (March 1978); and E.M. Rappard and M. Cherif Bassiouni eds., European Inter-State Co-operation in Criminal Matters (Dordrecht, The Netherlands: Martinus Nijhoff Publishers, 1991) p. 831. Surrender of individuals by one state to another is commonly done by means of extradition. See M. Cherif Bassiouni, International Extradition in U.S. Law and Practice (Dobbs Ferry, NY: Oceana Publications, 1996).

(12) International human rights law norms provide for certain substantive and procedural guarantees. These norms also arise under regional conventions such as the European Convention on Human Rights and Fundamental Freedoms. See M. Cherif Bassiouni, ed., The Protection of Human Rights in the Administration of Justice: A Compendium of United Nations Norms and Standards (Ardsley-on-Hudson, NY: Transnational Publishers, 1994); and M. Cherif Bassiouni, "Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent in National Constitutions," Duke Journal of Comparative & International Law, 3 (1993) pp. 235-297.

(13) Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 277 (New York, United Nations: 9 December 1948) in M. Cherif Bassiouni, International Criminal Law Conventions and Their Penal Provisions (Ardlsey-on-Hudson, NY: Transnational Publishers, 1997) pp. 247-250.

(14) As of December 1997.

(15) Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 6 U.S.T. 3114, 75 U.N.T.S. 31, Article 50 (New York, United Nations: 12 August 1949); Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 6 U.S.T. 3217, 75 U.N.T.S. 85, 6 U.S.T. 3316, 75 U.N.T.S. 135, Article 51 (New York, United Nations: 12 August 1949); Geneva Convention Relative to the Treatment of Prisoners of War, art. 130 (Geneva, United Nations: 12 August 1949); and Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 6 U.S.T. 3516, 75 U.N.T.S. 287, art. 147 (New York: United Nations, 12 August 1949). For a historical overview of the evolution of formal and informal limitations on the conduct of war among Western states, see generally M. Howard, G. Andreopoulos and M. Shulman, The Laws of War: Constraints on Warfare in the Western World (New Haven: Yale University Press, 1994).

(16) See Bassiouni, "Searching for Peace and Achieving Justice: The Need for Accountability" (1996) p. 9. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Geneva: United Nations, 12 August 1949) pp. 416-425; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, pp. 426-433; Geneva Convention Relative to the Treatment of Prisoners of War (Geneva: United Nations, 12 August 1949) pp. 434-439; Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Geneva: United Nations, 12 August 1949) pp. 440-445.

(17) For ratifications of the two protocols to the four Geneva Conventions, see Bassiouni (1997), pp. 457-494; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts of 8 June 1977 (1977 Protocol I), Annex I U.N. Doc.A/32/144 (1977), reprinted in 16 I.L.M. 1391; and Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (1977 Protocol II) Annex II, U.N. Doc.A/32/144 (1977), reprinted in 16 I.L.M. 1391.

(18) See also Convention Respecting the Laws and Customs of War on Land (Second Hague IV), 36 Stat. 2277 (The Hague: 18 October 1907).

(19) Bassiouni (1997) pp. 457-494.

(20) Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Charter of the International Military Tribunal, 59 Stat. 1544, 82 U.N.T.S. 279 (New York: United Nations, 8 August 1945).

(21) Statute of the International Tribunal for the Former Yugoslavia, Security Council Resolution 827 (1993), 48th Sess., U.N. Doc. S/RES/827, (New York: United Nations, 25 May 1993).

(22) Statute of the International Tribunal for Rwanda, Security Council Resolution 955 (1994) 49th Sess., U.N. Doc. S/RES/955, (New York: United Nations, 8 November 1994).

(23) Nullum crimen sine legge, nulla poena sine legge, and no ex post facto. See M. Cherif Bassiouni, Crimes Against Humanity in International Criminal Law (Dordrect, The Netherlands: Martinus Nijhoff Publishers, 1992) pp. 87-146.

(24) ICC Statute, art. 7.

(25) For a discussion of the uncertain agreement surrounding the meaning of "aggression" under international law, see A. Rifaat, International Aggression: A Study of the Legal Concept, Its Development and Definition in International Law (Atlantic Highlands: Humanities Press, 1979); Yoram Dinstein, War, Aggression and Self Defense (Cambridge, England: Grotius, 1994); and M. Cherif Bassiouni and Benjamin B. Ferencz, "The Crime Against Peace," in International Criminal Law, 1 ed. M. Cherif Bassiouni (Dobbs Ferry, NY: Transnational Publishers, 1986).

(26) Articles 11 and 24 expressly state that ICC jurisdiction is prospective.

(27) See ICC Statute, pts. 4, 5, 6 and 7. Also see M. Cherif Bassiouni, ed., The Protection of Human Rights in the Administration of Justice: A Compendium of United Nations Norms and Standards (Ardsley-on-Hudson, NY: Transnational Publishers, 1994).

(28) Bassiouni (1996), p. 9.

(29) For contrasting perspectives, see M. Cherif Bassiouni, "Searching for Peace and Achieving Justice: The Need for Accountability, " Law and Contemporary Problems, 59 (1996) p. 9 and W. Michael Reisman, "Institutions and Practices for Restoring and Maintaining Public Order," Duke Journal of International Law, 6 (1995) p. 175.

(30) Jean Imbert, Gerard Sautel and Marguerite Boulet-Sautel, Histoire des Institutions et des Faits Sociaux, 2 vols. (Paris: Presses Universitaires de France, 1957); John Henry Wigmore, A Panorama of the World's Legal Systems, 3 vol. xxxi (Holmes Beach, FL: Wm. W. Gaunt and Sons, 1928) p. 1206; See also Carl Joachim Friedrich, The Philosophy of Law in Historical Perspective, 2nd ed. (Chicago, IL: University of Chicago Press, 1963).

(31) W. Michael Reisman, "Stopping Wars and Making Peace: Reflections on the Ideology of Conflict Termination in Contemporary World Politics," Tulane Journal of International and Comparative Law, 6 (1998) pp. 5, 46-52; and W. Michael Reisman, "Legal Responses to Genocide and Other Massive Violations of Human Rights," Law and Contemporary Problems, 59 (1996) p. 75.

(32) Kritz (1997), p. 127.

(33) M. Cherif Bassiouni, "From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court," Harvard Human Rights Journal, 10 (1997) p. 11.

(34) Anthony Giddens, Central Problems in Social Theory (Berkeley, CA: University of California Press, 1990) p. 103; and Emile Durkheim, Ethics and the Sociology of Morals, trans. Robert T. Hall (Buffalo, NY: Prometheus Books, 1993).

(35) The ICC, through the language of the law that it will use and reiterate in the context of specific cases, will remove the ambiguity in the language of the proscriptive norm, and thereby strengthen the normative order.

(36) Artistole, Nicomachaen Ethics, ed. Richard McKeon, trans. W.D. Ross (New York: The Modern Library, 1947) p. 413. Aristotle stated: "When separated from law and justice, man is the world of all animals." (Politics: The Athenian Constitution, trans. Benjamin Jowett and Thomas Twining [London: Heron Books, 1959] bk. 1, chaps. 2, 6).

(37) The role of the norm in society is articulated from a sociological perspective in Emile Durkheim, The Division of Labor in Society (New York: Free Press, 1997). For discussions concerning the relationship between the sociology of law and social morality, see Emile Durkheim, On Morality and Society: Selected Writings (Chicago, IL: University of Chicago Press, 1973). For a criminal justice policy perspective, see Jeremy Bentham, Principles of Penal Law (Edinburgh: W. Tait, 1843); Morris RaphaelCohen, "The Moral Aspects of Criminal Law" Yale Law Journal, 49 (1940) p. 987; Cesare Beccaria, On Crime and Punishment (Indianapolis, IN: Hackett Publishing Co., 1986); Jeremy Bentham, Principles of Morals and Legislation (Oxford: Clarendon Press, 1879), p. 179; A.C. Ewing, The Morality of Punishment (London: K. Paul, Trench, Trubner & Co., 1929); and Ray McConnell, Criminal Responsibility and Social Constraint (New York: C. Scribner's Sons, 1912). For philosophical perspectives, see Immanuel Kant, The Philosophy of Law: An Exposition of the Fundamental Principles of Jurisprudence as the Science of Right, Part II, trans. Hastie (Edinburgh: T. & T. Clark, 1887); Georg Wilhelm Friedrich Hegel, The Philosophy of Right (London: G. Bell, 1896); Thomas Hobbes, Leviathan, Part II (New York: Macmillan, 1958).

(38) See Talcott Parsons, The Social System (New York: Free Press, 1968) p. 11. The "normative orientation" of the law is a "symbolic system of meanings ... imposed ... on the realistic situation ... the mutuality of expectations [that] is oriented to the shared order of symbolic meaning." ibid., pp. 11-12. See also Morris Raphael Cohen, Law and the Social Order (Holmes Beach, FL: Wm. W.

Gaunt, 1994).

(39) Blaise Pascal, Pensees: The Provincial Letters, trans. W.F. Trotter (New York: The Modern Library, 1941). Pascal did not use the word "justice" in the metaphysical or philosophical sense, but as a shorthand statement for legal processes applying substantive norms.

(40) Plato, Protagoras (New York: Macmillan, 1956). The dialogue between Protagoras and Socrates was on the theme of virtue. The former believed that it could be taught to the masses, particularly through the Sophists' technique of storytelling. Plato felt that virtue could only be taught to the elite and that through their wise rule they would ensure that the masses would follow a virtuous path. In both cases, however, virtue would ultimately be the guiding norm in society.

(41) Monrad Paulsen and Sanford Kadish, Criminal Law and Its Process: Cases and Materials (Boston: Little Brown, 1962) p. 57.

(42) As Oliver Wendell Holmes said: "The life of the law has not been logic; it has been experience." (Oliver Wendell Holmes, The Common Law, ed. Sheldon M. Novick 1 [New York, Dover Publications, 1991]). Thus, we need institutions for law to be experienced.

(43) W. Michael Reisman, "Stopping Wars and Making Peace: Reflections on the Ideology of Conflict Termination in Contemporary World Politics," Tulane Journal of International and Comparative Law, 6 (1998) p. 29. Professor Reisman may not have intended his poetic analogy to convey the same message that I hope my adaptation communicates. In Greek drama the stage has an opening in its center and the theos ek mechanes emerges from it at the critical moment to resolve the crisis.

(44) See Arnold Toynbee, A Study of History, revised edition with Jane Caplan (London: Oxford University Press, 1972). This abridged version summarizes the author's 12 volume series.

(45) See Mark Osiel, "Ever Again, Legal Remembrance of Administrative Massacre," University of Pennsylvania Law Review, 144 (1995) p. 463. See also articles contained in Law and Contemporary Problems, 59 (1996). Conflicts are replete with opportunities for predatory crimes which, in these contexts, are rationalized as patriotic deeds that no public authority opposes, which are committed against defenseless victims and with the perpetrator's ultimate expectation of impunity. On crime and opportunity, see Edwin H. Sutherland et. al., Principles of Criminology, 11th ed. (Dix Hills, NY: General Hall, 1992) pp. 244-245. See also Marshall B. Clinard, "Criminological Research in Society Today: Problems and Prospects", ed. Robert K. Merton et. al. (1959) pp. 509-512.

(46) A good example in the history of the United States Supreme Court is reflected in Marbury v. Madison, 5 U.S. 137 (1803) of which President Thomas Jefferson said that Chief Justice Marshall had made his decision- now let him enforce it. One is far less inclined today to question the enforcement of Supreme Court decisions; they have acquired a self-executing nature. No one can of course guarantee that the ICC's path will be the same, but that is the expectation.

(47) No one is more mindful of that than the author, who as chairman of the United Nations Commission of Experts Established Pursuant to Security Council Resolution 780 (1992) to Investigate Violations of International Humanitarian Law in the former Yugoslavia, witnessed first hand how politically motivated bureaucrats at the United Nations made the commission's investigations needlessly difficult. See M. Cherif Bassiouni, "The Commission of Experts Established Pursuant to Security Council Resolution 780: Investigating Violations of International Humanitarian Law in the Former Yugoslavia," Criminal Law Forum, 5 (1994) p. 279; M. Cherif Bassiouni, "Former Yugoslavia: Investigating Violations of International Humanitarian Law and Establishing an International Criminal Tribunal," Security Dialogue, 25 (1994) p. 409.

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