INTERNATIONAL CRIMINAL LAW AND THE AD HOC TRIBUNAL FOR FORMER YUGOSLAVIA

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I. INTRODUCTION

The importance of strengthening humanitarian law, and, for that matter, human rights law, is evident in light of the ubiquity of recourse to violence to resolve international as well as internal conflicts. This use of violence provokes the most grave deviations from even the most minimal level of moral sensibility.\(^1\) Two conflicts that have shocked the conscience of humanity recently have been so egregious, that as painful as those memories are for humanity, images of the Holocaust have been resurrected.\(^2\) In Rwanda, an ongoing civil war rapidly transformed itself into a genocidal program as Hutu militia and functionaries began a systematic slaughter of the Tutsi.\(^3\) In the former Yugoslavia, Serbian military and paramilitary forces continue to implement a policy of ethnic cleansing in which genocide, mass murder, torture, systematic rape and many other atrocities have been directed at non-Serb nationalities.\(^4\) These situations led the United Nations Security Council to create ad hoc tribunals to adjudicate crimes against humanitarian law in the former Yugoslavia and

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1. See HELSINKI WATCH, WAR CRIMES IN BOSNIA-HERCEGOVINA 50-140 (1992) (summarizing war crimes committed in the Balkans War); 2 HELSINKI WATCH, WAR CRIMES IN BOSNIA-HERCEGOVINA, 30-391 (1993) [hereinafter HELSINKI WATCH REPORT].

2. ROY GUTMAN, WITNESS TO GENOCIDE vii-xvi, 36-40 (1993).


4. See generally GUTMAN, supra note 2.
Rwanda.\textsuperscript{5}

These events have also invigorated momentum for a permanent international criminal tribunal.\textsuperscript{6} The statistic given by Professor Rummel that approximately 170,000,000 persons were murdered by their sovereign governments in our age is both sobering and shocking.\textsuperscript{7} This kind of statistic so elevates the scale of the humanitarian and human rights problems that even a permanent international court or tribunal may not be more than a symbolic band-aid. Indeed, this kind of statistical nightmare may mandate a more fundamental rethinking about the basis of human, political, and associational organization as we approach the twenty-first century. We must rethink, so to speak, the conceptual and normative basis of the body politic itself.\textsuperscript{8}

At the 1995 Conference on Strengthening the Enforcement of


\textsuperscript{7} R.J. RUMMEL, DEATH BY GOVERNMENT 9 (1994).

\textsuperscript{8} The great and unrelieved tension built into the United Nations Charter reposes in the effort to accommodate the dangers of the abuse of international power by aggression with the notion of "sovereignty" and the inviolability of the internal domestic affairs of a sovereign state. This precept is in tension with the rights of peoples and individuals encased in the boundaries of sovereign nation-states. The tension is heightened when the facts of human interaction cut across state and group lines creating the socio-economic reality of political and juridical interdependence and interdetermination. The metaphor spaceship earth is sometimes invoked to stress this element of existential realism. The European Union process is a remarkable example of how these forces may be peacefully managed. This in turn affects what we mean by the terms "sovereign" and "state." See ROBERT H. JACKSON, QUASI-STATES: SOVEREIGNTY, INTERNATIONAL RELATIONS, AND THE THIRD WORLD 139-63 (1990); Vincent Cable, The Diminished Nation-State: A Study in the Loss of Economic Power, DAEDALUS, Spring 1995, at 23 (discussing the impact of economic integration on national power); Stephan J. Del Rosso, Jr., The Insecure State, DAEDALUS, Spring 1995, at 175 (discussing challenges posed to the state by economic integration, trade alliances, and changing international regimes); Gerald B. Helman & Steven R. Ratner, Saving Failed States, FOREIGN POL'Y, Winter 1992-1993, at 3 (proposing U.N. conservatorships of failed states); Michael Mann, Nation-States in Europe and Other Continents: Diversifying, Developing, Not Dying, DAEDALUS, Summer 1993, at 115 (discussing how the concept of a nation-state has changed particularly with the creation of the European Union); Kenichi Ohmae, The Rise of The Region State, FOREIGN AFF., Spring 1993, at 78 (arguing that the "nation state" has been replaced by a "region-state" which is defined by the economic forces of the global market); Susan Strange, The Defective State, DAEDALUS, Spring 1995, at 55 (discussing the impact of economic integration on the social science conception of the state); cf. J. Brian Atwood, Suddenly, Chaos, WASH. POST, July 31, 1994, at C9 (arguing that the future of nation-states has become the new challenge to American foreign policy).
Humanitarian Rights, Professor Donald Horowitz, a world authority on ethnic conflict, raised the question about the possibility of avoiding genocide in the context of an ethnic conflict by a more strident defense of the sovereignty idea. He would apparently approve of a world community that is less tolerant of secessionist movements. Essentially, he is skeptical of ethnically conditioned claims to self-determination, or disquieted that the price they exact in devaluing humanitarian values is out of proportion to the claim itself. He is particularly critical of the role of the Badinter Arbitration Commission, which provided a modicum of legal validation to the processes of transformation or reconfiguration of the Yugoslav federal/state system.

The bogus claims to self-determination cleverly invoked by Belgrade and its surrogates subsequently in the Krajina (a majority Serb region in Croatia) and in Serb occupied Bosnia (Republika Srbska) are a stern warning about the ramifications of permitting abuse of claims to self determination. The claim to self-determination

9. Professor Horowitz is a distinguished authority on the impact of ethnicity on political behavior. See generally DONALD L. HOROWITZ, A DEMOCRATIC SOUTH AFRICA: CONSTITUTIONAL ENGINEERING IN A DIVIDED SOCIETY (1991) (discussing the relationship between ethnic tension and the development of democratic institutions).

10. The Badinter Arbitration Commission was assembled by the European Community to decide legal issues related to the Yugoslavian conflict to which its members could not agree. The decisions of the Badinter Arbitration Commission can be found in 31 I.L.M. 1488 (1992).

11. Despite the sophistication and realism of the proposition implicit in Horowitz's view, that the core residuum of ethnic identification inhibits and often destroys efforts at creating political cultures that generate loyalty, solidarity and levels of social integration with symbols of identity other than that of ethnicity, I remain skeptical about the adequacy of ethnic identities, to the exclusion of other important symbols of identity, that might crucially impact upon a community's process of developing effective power. I suspect that the Horowitz thesis is particularly vulnerable in contexts where the evidence is overwhelming that ethnic atrocity and murder are issues of decision-makers manipulating both insecurity and the instruments of propaganda to promote the proposition that ethnic violence is both irrational and inexplicable. Winston P. Nagan, Towards Unpacking the War in Former Yugoslavia: An International Lawyer's Perspective, HUM. PEACE (IOAES Commission on the Study of Peace, University of Florida, Gainesville, Fla.), Winter 1994, at 3.

In the context of ethnicity, self-determination and the defense of territorial sovereignty, I am not as skeptical of the task the Badinter Arbitration Commission set for itself. Indeed, I believe that its juridical determination that the Federal Republic of Yugoslavia was in a state of dissolution fully accords with reality. Opinion No. 1, 31 I.L.M. 1494, 1497 (Conf. for Peace in Yugo. Arb. Com. 1992). The effort to prescribe acceptable standards of conduct for the management of political reconfiguration is also important. The rejection of these standards by the Krajina Serbs (Krajina has been reintegrated into the republic of Croatia as a result of the military action in July of this year) who now control the Krajina and Bosnian Serbs does not make these standards one bit less relevant to a durable solution to the crisis of transition. See Opinion No. 9, 31 I.L.M. 1523, 1525 (Conf. for Peace in Yugo. Arb. Com. 1992).
should in no way be abused by invoking it as a justification, however transparent, for the continuing tragedy in Bosnia and Herzegovina. This claim serves as a continuing threat to the territorial integrity and political independence of the Republic of Croatia itself.

I have a great deal of sympathy for Horowitz’s defense of national sovereignty and for his skepticism of certain claims to secession and self-determination. I also have a great deal of admiration for the effort to provide legal standards for the orderly management of change in nation-state systems when change is mandated by political reality. How and by what criteria we promote, prescribe, apply, appraise, terminate and create new political associations is a difficult and contentious exercise of which the accounting under humanitarian law is simply one dimension of the failure of politics, diplomacy and law. Because these larger issues may take us far afield from the narrower focus of strengthening humanitarian law, it may nonetheless be said that humanitarian law as well as human rights law can provide a viable framework of normative standards to manage transitions in ways that are more congruent with United Nations Charter expectations and basic standards of decency. Strengthening humanitarian values, by deepening our understanding of humanitarian law and how it is to be given operative vitality, will surely aid us in understanding how the international community can intervene in managing transitions in a more realistic and cost-effective manner.

II. KEY THEMES RELATING TO STRENGTHENING INTERNATIONAL HUMANITARIAN LAW

I suspect that there are in effect five interrelated, dominating themes relating to strengthening international humanitarian law. First, we must address the issues of international crimes as a prescriptive or lawmaking dimension of the international legal process. Second, we face the general question of the ability of an international criminal tribunal to provide an applicative and enforcement dimension, or, more specifically, a dimension of international efficacy, to the prescriptive codes and precepts that seek to control and regulate behaviors deemed to be matters of international criminal concern.

12. Opinion No. 9, supra note 11.
13. By cost-effective, I refer not only to the expenditure of international capital (for peace keeping, materials, humanitarian aid, and so on), but also to the cost of human suffering itself.
Third, there is the specific form and function of the ad hoc Tribunals for dealing with certain kinds of internationally prohibited, criminalized acts or omissions in the context of both the former Yugoslavia—now a state system comprised of several independent sovereign Republics—and Rwanda. Fourth, there are the technical problems of giving effect to both the prescription and application of international criminal law, a challenge that tests many assumptions about the objective reality of criminal law competence, independent of individual sovereign states. Fifth, even more critically, there is the uncomfortable issue of the survival of a viable international rule of law should this experiment with the ad hoc Tribunals in the prescription and application of international criminal law fail.

The best way to approach these themes is to place them in an appropriate politico-juridical context. Accordingly, in the language now fashionable in literature of the psychological and social sciences, we should “contextualize” the problem of the prescription and application of the international criminal justice process.

III. THE RELEVANT CONTEXTUAL BACKGROUND OF THE INTERNATIONAL CRIMINAL JUSTICE PROCESS

What I have called the international criminal justice process is in reality an outcome of what Professor McDougal has called the global community process, or more specifically, it is an outcome of the global power and constitutive process. The organization or the group in international relations most specialized to power, and to the use and often abuse of power (with actions such as coercion, violence, and


war) is undoubtedly the nation-state. According to McDougal and Lasswell, "[t]he nation-state, a territorially based entity organized for power purposes, is still the most conspicuous institution through which individuals seek to make and influence decisions in the global arena." These authors then note, "[t]here are, of course a vast number of other important, power-conditioned actors on the world stage including intergovernmental organizations, national liberation movements, political and civic associations, business organizations." However, "the individual human being remains the creator of, and ultimate actor in, all the organized participants."

There are, it seems to me, three salient dimensions to international criminal law. First, states prescribe criminal law standards and seek to give these standards extraterritorial reach if certain jurisdictional facts make it reasonable for a domestic forum or agency to extend the reach of its law. Second, there are the international criminal law prescriptions unaided by treaty making processes that a state may seek to prescribe and apply in particular instances. Finally, there are the treaty based expectations that carry the obligation to prosecute or extradite an offender.

Whether expectations are generated by practice, custom or codification, even "universal" crimes will often be dependent on state action for their specific prescription and enforcement. If there is to be a viable international criminal law regime, its coherence and efficacy rest to a large degree on the reality of sovereign state power. If the sovereign or its agents are mass murderers, the blunt juxtaposition of criminal responsibility and sovereign power would have to be reconciled to some degree, or sovereignty trumps international criminal law.

The central problem for international criminal justice becomes more apparent when we emphasize the point that criminal law is to an extraordinary degree a state monopoly, and states are still the most concrete expression of organized community power in the internation-

19. Id.
20. Id.
21. A perusal of a number of leading criminal law casebooks will quickly disclose that there are scant references to international criminal law. The implied assumption for this omission may be that criminal law professors believe the subject is a municipal law phenomenon falling under the sovereignty of the state.
al system. If there is to be a viable international criminal law system, this constraint must be accommodated. Indeed, securing an organized collective international criminal law prospect would seem to require intergovernmental organizations (the United Nations, or within that organization, the Security Council) to co-opt or preempt a significant portion of the power presently allocated to the states themselves.

Finally, enforcement of international criminal law is especially complex because the tradition of international law, despite important deviations, still limits the role of the individual as a subject (either as defendant or plaintiff) of international law itself, notwithstanding the social reality that at the back of all instances of organizational behavior are the finite, concrete human agents of decision. Indeed, making individuals directly accountable under international law has been a painful and sporadic exercise in the experience of international criminal law.

The central duality of the international criminal justice system is that the prescription of its most fundamental precepts has been a matter of international agreement and strong rhetorical consensus. Its application is almost the antithesis of this consensus. As one commentator has indicated:

Modern international criminal law can be said to have commenced in 1815 at the Congress of Vienna with efforts to abolish slavery. Since then 317 international instruments on substantive criminal law have been agreed to covering international crimes such as aggression, war crimes, crimes against humanity, apartheid, torture, piracy

22. According to Professor Bert V. A. Roling:

International law is a body of law characteristic of an under-developed community, lacking a central legislative body and a central power which is able to enforce the law. This lack of enforcement power is one of the characteristics of the law of nations, showing clearly its underdeveloped [sic] character. Another feature of its underdevelopment [sic] is the absence of a central court which can decide upon conflicts concerning the interpretation of the law. Because such a court with compulsory powers does not exist, international law is compelled to recognize the right of each party to interpret the law as it chooses. States and other subjects of international law are bound by international law, but their right of autointerpretation of that law is also recognized.

Bert V. A. Roling, Aspects of the Criminal Responsibility for Violations of the Laws of War, in THE NEW HUMANITARIAN LAW OF ARMED CONFLICT, 199, 199 (Antonio Cassese ed., 1979). I am skeptical that decentralized law, be it national or international, is necessarily underdeveloped. Perhaps the underdevelopment lies in our jurisprudential assumptions used to describe and inquire into diverse systems of public order.

23. The classic early study of this anti-formalist theme is HAROLD L. LASSWELL, WORLD POLITICS AND PERSONAL SECURITY (1965).

on board commercial vessels, aircraft hijacking, kidnapping of diplomats and other internationally protected persons, taking of civilian hostages and environmental damages to name a few.\textsuperscript{25}

Affective international criminal procedure is a rare legal commodity outside the reality of sovereign state power. The process of prescribing these codes has occurred in most part, though not exclusively, through international agreement. This reality implies at least the existence of some internationally sanctioned, validating authority.

On the other hand, these codes are largely given effect unevenly in a decentralized state system.\textsuperscript{26} There is of course a continuing effort in both official and unofficial circles to create an international criminal tribunal.\textsuperscript{27} These efforts have been limited by the political-juridical reality just described. Hence, the dominant method of enforcing international criminal law is through the jurisdictional competence allocated to the territorially organized bodies politic that we refer to as sovereign nation-states.\textsuperscript{28}

The model of the sovereign state operates under severe pressures for change as the global community seeks to accommodate the social realities of interdependence and interdetermination.\textsuperscript{29} Notwithstanding this weakening of the Westphalian edifice of international organization centered on the sovereign state, the state dominated system is still a powerful factor in international relations and international law.

It is perhaps in the area of international criminal law where states have been most resistant to relinquish their jurisdictional competence. Increasing levels of coercion at intra- and international levels, as well as gross forms of human rights and humanitarian abuse, have generated escalating beliefs that certain forms of international criminal behavior are matters beyond the sovereignty precept of Article 2.7 of the U.N. Charter.\textsuperscript{30} It is apparent that these violations are indeed


\textsuperscript{29} See RICHARD FALK, \textit{Revitalizing International Law} 3-57 (1989).

\textsuperscript{30} U.N. CHARTER art. 2, § 7.
matters of *inclusive* international jurisdictional concern, not only in prescription, but also in application and enforcement. The time may have come to look more carefully at the idea of state sovereignty and the conceptual basis of international criminal law.

**IV. SOVEREIGNTY AND INTERNATIONAL CRIMINAL LAW**

The term "sovereignty" has both political and juridical implications in international law and international relations. These implications are important for understanding the scope and efficacy of international criminal law. Criminal law in general involves the prohibition of conduct that is more than simply delictual. Crimes are one of the techniques that organized bodies politic use to respond to patterns of conduct deemed incompatible with community life. These techniques could be as innocuous as rules of etiquette or social and political conventions, or they could range to conduct labelled criminal by the community or body politic.

In general, criminal behavior should be reserved for conduct that involves a serious challenge to social life. The characterization "crime" implies a public power to deal with the behavior. Since World War II, there has been an increasing tendency to characterize certain types of international behavior, especially egregious behaviors having international impacts, as criminal. The Charter of the International Military Tribunal included international crimes against the peace, defined as "planning, preparation, initiation, or waging of a war of aggression or a war in violation of international treaties," as well as crimes against humanity such as "[m]urder, extermination, enslavement, deportation, and other inhumane acts committed against the civilian population before or during the war or persecutions on political, racial, or religious grounds . . . ."

Leading criminal law scholars indicate "[t]he whole field of substantive criminal law constitutes a rather stern moral code. It is not exhaustive in this respect but represents the points at which conduct is deemed so offensive to the moral judgment of the

33. CHARTER OF THE INTERNATIONAL MILITARY TRIBUNAL, art. 6, *reprinted in* 13 DEP'T ST. BULL. 223, 224 (1945).
community as to call for punishment." The community these scholars have in mind is usually the body politic of the sovereign nation state.

Indeed, several defendants convicted in Nuremberg received the death sentence. Criminal law in general often carries the prospect of severe sanctions, which are of course penal in character. Hence, sanctions that are meant to accompany the law of crimes, whether national or international, are meant to punish, and their application is coercive. Punishment is in the name of the collective national or international community. In practice, penal law is very decentralized and thus is mainly an explicit invocation of sovereign authority.

Graham Hughes has indicated that the several conceptual bases behind the idea of a crime overlap to a certain extent. Hughes expresses that position as follows:

[T]wo concepts of crime overlap, and it is important to elucidate the relations between them. First, there is an idea of crime that might be called natural and that is intuitively understood by most people. It embodies a sense of an act that is deeply wrong, that evokes strong communal disapproval, and that is thought to deserve, indeed to call for a punitive sanction . . . . [T]his idea of crime is connected with a particular set of procedures and with special officials, special courts, and perhaps special rules of evidence and special avenues of appeal. This body of law is usually called criminal, or penal, law . . . and it always has as a possible outcome the imposition on the defendant of some disadvantage—such as imprisonment, a fine, or probation—for engaging in prohibited conduct.

This latter base is of course related to the efficacy of enforcement and assumes that crime is the business of the sovereign nation-state. The most practical questions about international criminal law and state sovereignty revolve around the fact that international criminal law is still significantly a matter of "sovereign" competence.

In this way, under the doctrine of the Lotus decision, the idea that restrictions on the sovereignty of states ought not to be presumed has continuing vitality, especially in the criminal law context. In the

34. See Perkins and Boyce, supra note 32, at 243.
context of international war crimes, the principle derived from the *Lotus* case is well stated by Koessler as follows:

[n]othing in the present international law limits the discretion of a belligerent State in its decision as to whether the war crimes trials of captured enemy nationals should take place before its ordinary civil or military courts or before tribunals established *ad hoc* . . . .

From an operational perspective, the practical question generally has been how far a state may go in establishing the external reach of its criminal jurisdiction under international law. The phrase “under international law” suggests some accommodating prudential limit of the reach of a state’s competence from the perspective of other states whose interest may be compromised when a state allocates for itself the right to try the nationals of other states under its own criminal justice standards.

If the sovereignty idea has to be unpacked for our time, the unpacker will have to confront several basic difficulties—some of a conceptual and some of an empirical nature. For example, from a conceptual point of view, the term has at once had the contradictory characteristics of being both *reified* and *porous*. At times the sovereignty doctrine can be an impenetrably rigid juridical artifact as states incant the ritual of brooking no interference with their internal affairs. If Rummel is only partially correct about the number of murders by government in this century, we should have concerns, even if we are completely insensitive to politics, about the estimated figure of some 170,000,000 murders by sovereigns. Indeed, we ought to be skeptical about just how much the veil of sovereignty obscures. States that have made the most exaggerated claims to a reified form of sovereignty seem to be at the top of the list of the worst offenders when it comes to state sanctioned killing.

Even the respected U.S. Senate acted as an unwitting accomplice to the insulation of governmental mass murder from an appropriate

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40. Operational constitutions often exhibit the characteristics of being reified and porous at the same time.

measure of international concern and timely condemnation. It is tragic to recall the fate of the Genocide Convention before the United States Senate. After 37 years, a mildly embarrassing version of the Convention made it through the Senate's "advice and consent" process, generating concerns about the numerous reservations, declarations and understandings that accompanied it. It was the notorious or heroic (depending on one's politics) Senator John Bricker who said that he would seek to keep human rights covenants buried so deep that no one would dare to secure their resurrection. As those who were actively engaged in lobby strategies following the Senate vote on the Genocide Convention have noted, the attitude articulated by Senator Bricker also hindered the ratification of other main human rights covenants, such as torture, civil and political rights, and racial discrimination.

As pointed out by Senator Jesse Helms, the core sticking point of contemporary ratification that ultimately has to be overcome is the sovereignty issue. For Helms and his colleagues, it is a frightening thought that if torture were made an international crime or delict, the United States itself would be subject to the sovereignty of a foreign entity, thereby compromising the sovereignty of the United States.

V. SOVEREIGNTY IN PRACTICE: REIFICATION AND POROUSNESS

In the United States the ambiguity surrounding the sovereignty doctrine permeates many areas of international legal concern in


45. Id. (discussing how most human rights treaties and other human rights legislation have not received Senate approval).

46. For example, Representative Lee H. Hamilton, discussing the relationship between the role of the United Nations and United States policy, stated that notions of threats to American independence of action are important issues to Americans: "In some groups of Americans, there is a distinct fear of loss of U.S. sovereignty to the U.N." Barbara Crossette, U.N. Finds Skepticism Is Eroding the Hope That Is Its Foundation, N.Y. TIMES, June 25, 1995, § 1, at 1 (quoting Indiana Representative Lee H. Hamilton); see also Nagan, supra note 38, at 317-18, n. 13.
addition to the human rights and international criminal law context. The evolution of our doctrines of sovereign immunity and act of state are good indicators of both the porous character of the sovereignty doctrine and its capacity for reification.

Two recent cases illustrate this point. Recently the U.S. Supreme Court upheld the jurisdiction of a U.S. court over a Mexican physician abducted from Mexico by federal law enforcement agents. The physician had been implicated in the torture murder of Enrique Camerena, a federal law enforcement agent. The existence of an extradition treaty could not insulate porous Mexican sovereignty from the long arm of the U.S. Drug Enforcement Agency and the U.S. Supreme Court.

On the other hand, the Court of Appeals for the District of Columbia provided a blunt illustration of how far a court is prepared to go to affirm the reified version of the sovereignty precept in a claim against the Federal Republic of Germany (Germany). In Princz v. Federal Republic of Germany, the D.C. Court of Appeals held that Princz, the plaintiff, could not sue Germany for legal claims growing out of his experience in the notorious concentration death camp and slave labor process of the Holocaust. Among the grounds for refusing


48. The literature is enormous on the evolution or devolution of the act of state Doctrine. The modern high point of the doctrine is reflected in Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964). Apart from legislative efforts to undo Sabbatino, the Court found an ingenious way to change the result of the case through juridical action in First National City Bank v. Banco Nacional de Cuba, 406 U.S. 759 (1972). In this case Justice Rehnquist simply collapsed the conceptual basis of the act of state doctrine into that of the sovereign immunity doctrine on the basis that both doctrines have their "common basis" in Schooner Exchange v. McFadden, 7 Cranch 116, 146 (1812). Of course, in 1972 the sovereign immunity doctrine came with a restrictive gloss for commercial exceptions. Subsequent cases have made the act of state doctrine exceedingly porous. See, e.g., Alfred Dunhill of London v. Republic of Cuba, 425 U.S. 682 (1976); W.S. Kirkpatrick & Co., Inc. v. Environmental Tectonics Corp., International, 493 U.S. 400 (1990).


to breach the veil of sovereignty was the surprising idea that Princz's injury, or his forced role as a slave laborer to sustain the German war effort, had no "direct effect" on the United States.\textsuperscript{51} In blunt but accurate terms, the court held that an effort to dispose of a U.S. citizen by genocide had no direct effect on the United States sufficient to implead a foreign sovereign.\textsuperscript{52}

Apart from the court's suspect analysis of the direct effects test and its ignorance of any plausible theory of international jurisdiction, at issue in this case are precepts of universal jurisdiction. These precepts are those of \textit{jus cogens}, international juridical precepts which are meant to limit the sovereign imperative in international law. Put into the context of the United States' role in the Nuremberg process, the D.C. Court of Appeals simply construed the Foreign Sovereign Immunities Act in a way that is a legal embarrassment, surpassed only by the German reluctance to settle with Princz out of court.

These illustrations of both reification and porousness inherent in the operation of the sovereignty doctrine are an indication of the difficulties that attend and have constrained efforts to create, \textit{inter alia}, a permanent international criminal court. It remains to be seen whether the action taken by the Sixth Committee in its consideration of the Draft Statute\textsuperscript{53} will be another multigenerational exercise in international idealism and operational constipation. That is to say, everyone agrees on the theory of a permanent international criminal court so long as it does not come at the expense of their sovereignty. The present level of political and diplomatic motion is doubtless owed to the magnitude of the crimes committed in the former Yugoslavia and Rwanda.\textsuperscript{54}

While sovereign states have often reified their sovereign status in international law as it relates to the regime of international criminal

\textsuperscript{51} This appears to radically undermine a traditional principle of international jurisdiction, namely the venerable protective principle.

\textsuperscript{52} It should be noted that Judge Wald of the D.C. Circuit filed a trenchant dissent: "Congress did not intend to thwart the opportunity of an American victim of the Holocaust to have his claims heard by the United States judicial system. Because I cannot agree that the FSIA requires us to slam the door in the face of Hugo Princz, I dissent." \textit{Princz}, 26 F.3d at 1185.

\textsuperscript{53} \textit{Draft Statute, supra} note 6.

\textsuperscript{54} On the issue of humanitarian and gross violations of human rights in Bosnia-Herzegovina see Amnesty International Report, Bosnia-Herzegovina: Living For The Day - Forcible Expulsions from Bijelina and Janja (AI Index: Eur 63/22/94); AMNESTY INTERNATIONAL U.S.A., \textit{supra} note 3, at 75-78, 108-09, 315-19; see also HELSINKI WATCH REPORT, \textit{supra} note 1; UNITED STATES INSTITUTE OF PEACE, RWANDA: ACCOUNTABILITY FOR WAR CRIMES AND GENOCIDE—A REPORT ON A UNITED STATES INSTITUTE OF PEACE CONFERENCE (1994).
law, they have been porous about the prescription, if not the application, of crimes of universal or near universal import. There has been no obvious reluctance to prescribe international crimes of universal reach.\(^{55}\) In this sense, the allocation of a lawmaking competence over criminal law concerns of inclusive importance is effectually a divestiture of a sovereign lawmaking competence from the state to the general international community.

However, criminal law prescriptions, as indicated, have an attribute of sovereignty in the old-fashioned Austinian sense. They are more overtly imperative than other species of law. By imperative we mean prescriptions are accompanied by a higher expectation of coercion, including public violence. The sovereign state has been described by international relations realists as the repository of legitimate violence. The coercive dimension of an effective criminal justice process lends weight to this insight.

Because organized coercion is a characteristic that accompanies the criminal law, it may indeed be more easily identified with the exercise of the prerogative on national sovereignty. It is all the more remarkable that the pressures of international life, and the perception of self-interest, have conspired to generate a porous conception of the doctrine of sovereignty in many areas of criminal law and procedure. The imperative facts of interdependence and interdetermination have revealed a credible corpus of substantive international criminal law, and even more an impressive code of human rights precepts vested with a criminal law character. On the other hand, the experience with genocide, human rights and sovereignty tells us a good deal about the limitations the concept of sovereignty imposes on giving efficacy to precepts of both humanitarian and human rights law.\(^{56}\)

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56. See LEO KUPER, *GENOCIDE* (1981). "There was the horror that considerations of sovereignty and of military strategy should take precedence over humanitarian concern for the almost countless innocent victims of this deadly struggle. And there was incredulity that as many as 1,000,000 people might have to die so as to safeguard the unity of an artificially created colonial conglomerate of peoples." *Id.* at 75. Kuper refers to the Biafran/Nigerian genocide.
VI. DECONSTRUCTING AND REINVENTING SOVEREIGNTY AS A SYMBOL OF A COMPREHENSIVE CONSTITUTIVE PROCESS

Distinguished international law publicists recognize what they regard as the "inescapability of the concept of sovereignty as a quality of the State under present-day international law." They also recognize it as a "fundamental principle of the law of nations." However, even the strongest proponents of the positivist view of international law conditioned by sovereign states assert that international law strongly rejects the admissibility of absolute sovereignty as the basic principle of international law. Surveys of the writings of diverse authors such as Korowicz, Larsen and Jenks indicate a clear repudiation of any absolutist notion of sovereignty implicit in the command theory of law and its progeny. It will doubtless be recalled that Austin's theory of law relegated international law to the domain of positive morality, a dubious status it shared with constitutional law.

Theory and practice concede a certain flexibility about what aspects of international and constitutional law are to be designated sovereign. However, the criteria by which such practical designations are made often reflect levels of reification and porousness about what is and is not sovereign, and what effect and deference are in practice to be accorded such characterizations. As earlier indicated, the law of sovereign immunity is a good example of this proposition. The reification of state behaviors labelled jure imperii gave ground in practice to state behaviors that could be juridically classified as jure gestionis, or the competence of a domestic court or tribunal to treat a foreign sovereign state just like any other litigant. The act of state doctrine in U.S. practice has been similarly eroded, including the implicit sovereignty assumptions that served to insulate acts of sovereign states done within their own territories from adjudication in

59. Id. at 17.
60. Larson et al., supra note 57.
61. See John Austin, The Province of Jurisprudence Determined and the Uses of the Study of Jurisprudence 12, 140 (1964); contra J.W. Harris, Legal Philosophies 226-30 (1980).
the courts of other sovereign states.

The roots of reification and porousness in modern international law practice and custom, I would suggest, are tied to the processes of decolonization and the expansion of the state sovereign system. The post World War II processes of decolonization penetrated, and later eroded, the claims of colonial powers that their colonies fell within their sovereignty and were thus beyond the reach of international law concern.

The key doctrine that eroded the colonial sovereignty idea was the claim of indigenous political movements to self-determination, which in post cold war practice became a *jus cogens* principle of international law. In this context, the claim to self-determination simultaneously denied colonial sovereignty and affirmed sovereignty sustained by self-determination. Latent in claims to self-determination was the idea of sovereign independence.

The outcome of the decolonization self-determination process was a radical increase in internationally recognized claims to national state sovereignty. However, vast numbers of these newly independent sovereign states were weak in terms of national integration and foreign relations. Moreover, many new states were both products and victims of cold war politics. This led to widespread reification of sovereignty in vast numbers of newly independent states, justified under the internal affairs domestic jurisdiction clause of the U.N. Charter. At the same time that states were claiming widespread immunity from international duties and obligations (especially in the human rights sphere), these same states were claiming expanded sovereign rights as a form of compensation for the wrongs of colonial-imperialist exploitation and hegemony.

As is now apparent from this discussion, the term sovereignty is one of the most used and abused terms in the language of law, social science, history and international relations. The term means different things in different historic periods. It also means different things to different scientific and intellectual disciplines. It means different things to practical politicians, international civil servants, diplomats, and both domestic and transnational jurists; it may mean radically different things to practical politicians in a diverse, pluralistic, cross-cultural world.

For example, a Western European politician may accept the mutations of state sovereignty as a necessary incident of European

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political and economic integration. A Chinese politician may see in some Pacific Rim practices an infringement on the internal affairs of a sovereign state, rejecting natural or incidental mutations of sovereignty by the alleged facts of interdependence and interdetermination, either economic or political. I shall try to show that there are multiple political-juridical meanings embedded in the sovereignty idea that in both historical and cross-cultural terms may give a stable, designative, empirical reference to the term “sovereignty”.

Let us begin our deconstruction with a simple ordinary language sensitive phrase: “The Queen is Sovereign”. A child familiar with folk tales will doubtless associate the term “Queen” or “King” with the term “sovereign” and then equate the term “sovereign” with the terms “ruler” or “rule-maker”. What, over time, is the difference in usage between “Queen Elizabeth I” and “Queen Elizabeth II”? To answer this question meaningfully we would have to look at what might be usefully described as the constitutional position of the monarch. In other words, we need still other words to unpack the sovereign status of Elizabeths I and II.

As a factual matter, it may be accurate to describe the regime of Elizabeth I as a system of relatively personalized competence in which the institution of the monarchy and the relevant persona are largely undifferentiated. The ordinary user of language will also doubtless appreciate that the constitutional position of Elizabeth II is substantially different. The meaning of sovereignty in the 16th century is obviously different from its meaning in the 20th century.

Sovereignty often means different things to different people, even to different cultural paradigms. Yet in international law, the law of a multicultural, diverse, pluralistic world order, the term has incredible currency as an organizing symbol of international legal and political order while simultaneously inviting controversy.

The diverse and often partial meanings attributed to the term sovereignty mean that its invocation is unclear and fraught with ambiguity. Indeed, from the practice of decision-makers and the writings of eminent scholars, there are certain identifiable core references which the term sovereignty evokes. For example, the term includes a reference to the notion of a body politic (a complex idea of which the nation-state is simply one example); it includes a reference to control or efficacy in political and legal processes; and it includes an ambiguous reference to the idea of governance with either an implicit legitimacy or an authority component. These core designa-
tions have been implicit in the many partial and incomplete references the term has come to symbolize, such as:

1. Sovereignty as a personalized monarch (real or ritualized);
2. Sovereignty as a symbol for absolute, unlimited control or power;
3. Sovereignty as a symbol of political legitimacy;
4. Sovereignty as a symbol of political authority;
5. Sovereignty as a symbol of self-determined, national independence;
6. Sovereignty as a symbol of governance and constitutional order;
7. Sovereignty as a criterion of jurisprudential validation of all law (grundnorm, rule of recognition, sovereign);
8. Sovereignty as a symbol of the juridical personality of Sovereign Equality;
9. Sovereignty as a symbol of “recognition”;
10. Sovereignty as a formal unit of a legal system;
11. Sovereignty as a symbol of powers, immunities, or privileges;
12. Sovereignty as a symbol of jurisdictional competence to make and/or apply law; and
13. Sovereignty as a symbol of basic governance competencies (constitutive process).

The discourse of international criminal law would be greatly improved if the reification and porousness of the term sovereignty, in this context, is put into a more disciplined theoretical focus that stresses the issue of constitutive competencies and interests, permitting analysis to clarify which interests are sovereignty exclusive and which are sovereignty inclusive. Such a focus would do a great deal to clarify the reach, purpose and competence to apply, prescribe and enforce what is called “international criminal law”.

One of the major vices of the term “sovereignty” is the designative reference given to the analytically distinct concepts of authority and control. The sovereignty idea in reified garb continues to perpetuate the Austinian fallacy of collapsing authority and control, making it extremely difficult to properly appreciate how international criminal law is rationally prescribed and applied. Indeed, a proper appreciation of these processes is crucial to developing a more rational approach to the international, constitutional allocation of competence in controlling and regulating criminal behaviors that require effective community interventions. The destructive impact of criminal behaviors on important world order values are serious enough that effective policing is required from local to global levels in the name of
the world community as a whole.

Stated simply, a complete denial of the principles of humanitarian law, especially when grave breaches of that law are involved, also represents a rejection of fundamental human rights precepts and may point to an alternative normative order that essentially disparages the precept of human dignity. To strengthen the conceptual and doctrinal basis of humanitarian law we must purge the sovereignty precept of the conceptual and normative confusion it generates. We need more precision about the nature of the specific problems in which sovereignty is invoked as a sword or a shield, a clearer perception of the common and special interest it sometimes seeks to promote, protect or compromise, and a clearer delineation of its precise role in the constitutional order and promise of the U.N. Charter. We must map and locate sovereignty more precisely within the context of global power and constitutive processes.

As applied to the constitutional position of the ad hoc Tribunals, the practical question is whether the common interest of sovereign entities is better protected by this constitutional innovation, or whether exclusive parochial interests of a reified sovereignty precept undermine this effort at grounding international justice in its practical application. Additionally, some states may view the ad hoc nature of the Tribunals as just that—ad hoc and an exception to the overriding imperium of state sovereign competence over international criminal law. Other state parties may, however, see the constitutional innovation of an ad hoc tribunal as the first tentative step in creating an independent, international criminal justice process of long duration.

VII. SOVEREIGNTY, THE UNITED NATIONS AND INTERNATIONAL CRIMINAL JUSTICE

The term "sovereignty" in the U.N. Charter is most visible in the context of sovereign equality. Outside this context, the term is rarely used in the text of the Charter. Indeed, Charter Article 2.7 uses the term "domestic jurisdiction" as a precept that seems intentionally less inclusive than the term "sovereign" suggests. The U.N. Charter is part of a world constitutional instrument. As a constitution, the Charter is the formal basis of an international rule of law. One of its primary purposes is to constrain sovereign behaviors inconsistent with its key precepts.

It was in fact the United Nations Security Council, operating under the authority of Chapter VII, that gave its backing to an international constitutional innovation, the Tribunals for the former Yugoslavia and Rwanda, even if that innovation is only an ad hoc one. On the other hand, it is well known that the United Nations is going through a crisis of redefinition in the post-cold war era, and its credibility in the security and peace-protecting arena has been severely tarnished. United Nations officials have been quick to project blame onto the sovereignty aspect of international power. They hold that stripped of all the trimmings, the United Nations serves as a directorate of states. If this is the reality, then two of the most important premises built into the Charter may be severely compromised. I refer to use of the “people” and the “individual” as important constraints and components of international legal order.

The weaknesses of the United Nations generally in the context of peace and security are nowhere more vividly underlined than in the recent withdrawal from Somalia, the failures in Rwanda, and the continuing ineffectiveness of its peacemaking efforts in the former Yugoslavia. In defense of the United Nations one may quote Ambassador Herbert Okun, who recently said “diplomacy without at least the threat of force is like baseball without a bat.” Apart from the limitations in the United Nations’ mandate, there have been widespread concerns voiced verbally or in the media about the United Nations’ role in the former Yugoslavia. A random selection of the events which prompted these concerns includes:

(1) United Nations commanders declining to investigate charges that peace monitors were having sexual relations with Muslim women captured by the Serbs;

67. Id.
69. See Anthony Lewis, Lessons of Disaster in Bosnia, GAINESVILLE SUN, July 18, 1995; see also Roger Cohen, Honor, Too, is Put to Flight in Bosnia, N.Y. TIMES, July 16, 1995, § 4, at 1; Chuck Sudetic, Asserting Croatia Invaded, Bosnia Appeals to U.N., N.Y. TIMES, Jan. 29, 1994, § 1, at 3 (discussing generally United Nations involvement in Bosnia).
70. GUTMAN, supra note 2.
(2) the murder of the Bosnian vice-president;
(3) the vulnerability of the safe havens in Bosnia;
(4) the disquiet about the level of fraternization between General Mladic and U.N. Commander Rose, because the former has been named as a potential war criminal;
(5) the disquiet about the even-handed approach which requires collaboration with aggressors;
(6) the evenhanded policy leading cynics to suggest that Mr. Akashi has a "pro Serb" bias because of the difference in relative power positions of the aggressor and victims of aggression; and
(7) that the United Nations peacekeeping mission in the former Yugoslavia has suffered from public misunderstanding of its limited mandate and that its peacekeepers have even been called the "capos" of the concentration camps.\footnote{71}

Perhaps the effort to project a neutral good offices role in a context of aggression and the grotesque violation of human rights precepts denigrates the United Nations because it is an impossible goal.

The crisis the United Nations faces is not simply focused on the legal and policy dimensions of its constitutional architecture in the post-cold war era. Rather, the situation the United Nations finds itself in raises the important issue of international public opinion regarding the organization. That opinion is an authority base crucial to maintaining the effective role and function of the organization.\footnote{72}

The disasters of the United Nations in Somalia, Burundi, Rwanda and the former Yugoslavia have tended to overshadow many other important areas in which the United Nations remains an essential institution of world order. Probably the policy most damaging to the United Nations has been the imposition of an arms embargo on the poorly armed Bosnians—an act of dubious international validity and a genuine restriction of Bosnian sovereignty.\footnote{73} The United Nations' corresponding inability to prevent a continuation of the policies of ethnic cleansing and genocide only compounds the problem.

The failure to allow the victims of aggression to invoke an inherent Charter right of self-defense, and the incapacity to provide effective protection from atrocity and murder, are especially damaging to an institution whose power resonates from its credibility and its sense of high rectitude. Because United Nations officials talk

\footnote{72}{See Crossette, supra note 46.}
\footnote{73}{Winston P. Nagan, Rethinking Bosnia and Herzegovina's Right of Self-Defense: A Comment, 52 INT'L COMMISSION JURISTS 35 (1994).}
somewhat despairingly of taking orders from a "directorate of sovereigns," it seems that the role of the "people" and the "individual" subjects of general international law are defined away from the core juridical and political cognizance they achieved under earlier Charter practice. On the other hand, the ad hoc Tribunals provide a juridical framework that seeks to vindicate the rights of individual victims and simultaneously provide human rights protection for individual potential defendants. Perhaps this requires us to again examine the core precept behind the Nuremberg process.

VIII. NUREMBERG, SOVEREIGNTY AND INDIVIDUAL RESPONSIBILITY

The war crimes trials in Nuremberg and Tokyo represent the most remarkable exception to the decentralized character of international criminal law. The great historic question about Nuremberg is whether it was an aberration, or whether it represents a sufficiently strong institutional expression of the international rule of law in action so that the process of criminal justice it created will become central to an improved world order. Indeed, I would suggest that a central policy feature of Nuremberg was the ancient function of the law of preventive politics. In this sense, the law serves as a restraint on unlimited decisional competence because it requires some minimal responsibility and accountability for decisions.

74. In practice, international tribunals for prosecuting war crimes are not without precedent (for example, the tribunals in Nuremberg and Tokyo following World War II), but they are exceptional. The dominant expectation is that war criminals should be tried in national fora, often the fora of the victor. Cf. Roling, supra note 22, at 201:

International law relies heavily on national law. It uses different means for assuring that international rules are sanctioned by national courts. One of the means is to grant national legislators the liberty (or impose upon the duty) to apply universally their national penal provisions: the principle of universality, that is the universal appeal of national law.


75. One of the most fundamental principles of Nuremberg was the notion of individual responsibility. HERBERT WECHSLER, PRINCIPLES, POLITICS AND FUNDAMENTAL LAW: SELECTED ESSAYS 138-57 (1961).

The Nuremberg Tribunal held the agents of state decision making personally responsible for crimes against peace, war crimes and crimes against humanity. These transgressions were not only international legal wrongs, but wrongs punishable through the ascription of personal responsibility by criminal law sanctions. The message of Nuremberg is clear. Those who authorized and committed crimes against the peace, war crimes and humanitarian crimes would be personally responsible for those crimes and would be made to suffer the consequences of their conduct. To hold the perpetrators of these proscribed forms of conduct accountable signifies that terrible things cannot be done to people without a resulting meaningful international sense of responsibility.

Nuremberg's detractors have attacked it on two grounds: it was seen to represent the victors' justice, and it was thought to compromise the *nulla poena* principle. I have not viewed these as the strongest objections to the Nuremberg process.\(^7\) I believe that the real objections to Nuremberg are tied to sovereignty issues. First, Nuremberg made the sovereign state and its officials subject to the international rule of law. This was precisely the point that U.S. Secretary of War Henry Stimson had in mind when he lent his weight to the idea of trying the Nazi war criminals.\(^8\) At the core of his thinking was the idea of a crime against the peace as part of the indictment.\(^9\) Second, Nuremberg permitted penetration of the veil of sovereignty in order to identify the concrete agents of decision who were responsible for criminal behavior. From an international law perspective, the idea that individuals could be directly responsible under international law subverted a cardinal tenet of the positivist conception of international law—that it is a law of sovereign states for sovereign states.

If individuals are directly subject to international legal obligations,

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78. A detailed account of his role (and that of others) is found in Bradley F. Smith, *The Road to Nuremberg* (1981).

79. *Id.* at 92-94, 108.
they are also directly entitled to international legal rights. This principle was implied in Nuremberg in two ways: First, the victim had rights that international law could honor collectively through the criminal law. Second, the defendants had rights to fair judicial proceedings. Nuremberg was also a revolutionary event in another sense. It was meant to tie deterrence directly to criminal responsibility of elites, who make war acting under color of sovereign authority. This is not meant to underplay the importance of the humanitarian aspect of the Nuremberg process. War, however, is often a core condition of immense humanitarian and human rights abuse.

It may also be worth mentioning what potential alternatives to the Nuremburg trials were considered. The British Lord Chancellor, Lord Simon, believed that the summary execution of certain Nazi leaders would solve the problem of justice and retribution. Stalin, on the other hand, thought that the summary execution of 50,000 S.S. officers and soldiers would satisfy the demand for retribution. Given this kind of political reality, it is surprising that Nuremberg's process has been so juridically suspect based on the charge of victors' justice and the alleged violation of the *nulla poena* principle.

As indicated, the Nuremberg process established the principle that the veil of sovereignty could be judicially pierced, and that individuals responsible for substantive criminal acts of a grave nature could be personally responsible. In a single stroke, Nuremberg established a precept of limitation on the sovereignty doctrine, while

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80. Robert H. Jackson, Chief Counsel for the Prosecution in the Nuremberg Trials, declared in his opening statement of November 21, 1945:

Before I discuss particulars of evidence, some general considerations which may affect the credit of this trial in the eyes of the world should be candidly faced. There is a dramatic disparity between the circumstances of the accusers and the accused that might discredit our work if we should falter, in even minor matters, in being fair and temperate . . . . We must never forget that the record on which we judge these defendants is the record on which history will judge us tomorrow. To pass these defendants a poisoned chalice is to put it to our own lips as well. We must summon such detachment and intellectual integrity to our task that this trial will commend itself to posterity as fulfilling humanity’s aspirations to do justice.


81. SMITH, supra note 78, at 46-47. Smith notes that Lord Simon prepared a draft of a paper advocating summary execution of high-ranking Nazis:

On 4 September [Lord] Simon completed the draft, which advanced a number of legal and political arguments to show the trials were inappropriate. It contended that the *Moscow Declaration*, stating that “the joint decision of the Governments of the Allies,” would determine the fate of the Nazi leaders, implied that the problem would be dealt with politically, not judicially. Simon concluded, therefore, that the best thing to do was simply to shoot a handful of the top Nazi leaders like Hitler and Himmler.

*Id.*

82. *Id.* at 63.
also establishing precepts of transparency, accountability, legal personality and international efficacy for the idea of criminal responsibility. More than that, the precept of universal personal jurisdiction, as well as preemptory principles of international law such as substantive legal precepts unconstrained by state sovereignty, are suggestive of how important a legal innovation the Nuremberg process was and is. The addition of crimes against the peace is, in effect, the explicit outlawing of aggression conjoined with the principle of personal responsibility. This addition is a further indication of how far the Nuremberg idea cut into the statist, sovereignty-dominated paradigm of international law.

If we view the operational state of international criminal law as constitutionally allocated to sovereign states by custom, practice and treaty law, then Nuremberg was an important constitutional allocation of competence to the international community and away from the sovereign nation state. This, in my view, is the accurate juridical position which Nuremberg (and Tokyo) occupied in the global constitutive process. The Nuremburg tribunal confronted the dualism between sovereign versus personal responsibility directly: "He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the state if the state in authorizing action moves outside its competence under International Law."8

Shortly after the Nuremberg decision, the United Nations General Assembly, in a unanimous resolution, affirmed the Nuremberg principles as accepted principles of international criminal law.84 Perhaps the most concise statement of the essential juridical meaning of the Nuremberg process came from Justice Jackson:

An agreement between the major powers for the first time made explicit and unambiguous what was theretofore, as the Tribunal has declared, implicit in International Law namely, that to prepare, incite, or wage a war of aggression ... is a crime against international society, and that to persecute, oppress, or do violence to individuals or minorities on political, racial or religious grounds in connection with such a war, or to exterminate, enslave, or deport civilian populations, is an international crime .... 85

IX. THE AD HOC TRIBUNAL FOR THE FORMER YUGOSLAVIA

The excursion into the core community policies behind the Nuremberg judgment is an important backdrop to evaluate some important themes and issues that accompany the creation of the ad hoc Tribunal for the former Yugoslavia. In this part of the article, I focus on some of the dominant themes that have attended the creation, organization and functions of the ad hoc Tribunal. Permit me to start with an expression of skepticism. For this kind of tribunal to be a success, it must (1) successfully prosecute a sufficiently large number of international criminal defendants; (2) prosecute high level governmental officials — those who planned and ordered the implementation of policies deemed criminal at the international level; and (3) produce a historical record comparable to Nuremberg and record the atrocities uncovered by the United Nations, states and credible non-governmental organizations (NGOs) in the former Yugoslavia. These are, in my view, the minima for international credibility.

My skepticism lies in the murky process by which this initiative was launched. While reading various reports and United Nations documents, one does not have a feel for the underlying hesitation that vast numbers of governmental officials, as well as international civil servants, may feel for such a process. Given that this hesitation did in fact exist, why did the process go forward?

If we can pick a date that actually starts the war in the former Yugoslavia, it would be June 27, 1991, when the Jugoslavenska Narodna Armija (JNA—the Yugoslav People’s Army) attacked the provisional Slovenian militia. The war in Croatia dates to about the middle of July, when hostilities broke out in areas of Croatia with large Serb populations. The war began in Bosnia-Herzegovina in early April of 1992.

88. HELSINKI WATCH REPORT, supra note 1, at 8.
The nature of the war has generated grave breaches of the main precepts of humanitarian law. Concentration camps doubling as death camps, torture camps, and rape camps have been exposed. As well, evidence of genocide, mass killings, disappearances and the like has come to light. By mid-1992, the Security Council was compelled to draw attention to these violations of international humanitarian law and basic human rights standards. Security Council Resolution 764 drew particular attention to obligations under international humanitarian law, suggesting the possibility of individual responsibility for grave violations. Resolution 771 called on states to collect and present to the Security Council data on the violations of humanitarian law in the former Yugoslavia. Resolution 780 required the United Nations Secretary-General to establish an impartial commission of experts to collect and evaluate evidence of violations of international humanitarian law.

Resolution 808 entailed an agreement in principle to establish an international tribunal to prosecute persons for serious violations of humanitarian law in the former Yugoslavia. The Report of the Secretary-General, May 3, 1993, contains a statute for an international criminal tribunal as well as the justification for its establishment. Resolution 827 established the “international tribunal for the sole purpose of prosecuting persons responsible for serious violations of international humanitarian law committed in the territory of former Yugoslavia . . . .”

The events leading to the creation of the ad hoc Tribunal may suggest a logical, rational progression from the initiation of war to atrocity, to an ineluctable form of international intervention in the form of the Tribunal. This conclusion is misleading and may hamper rather than facilitate the process of the Tribunal in the long run. The true story emerges from an appreciation of what concerned decision-makers knew, when they knew it, and what they did or did not do.

94. Secretary General’s Report, supra note 74.
95. S.C. Res. 827, supra note 5.
not do about it. This narrative still has to be written and warrants an entire article on its own. Because the narrative in effect would be an essay on the conditions that gave birth to the Tribunal, it may be useful to highlight key features of them.

Although there had been scattered and occasional reporting on the war and its human consequences, Resolution 764 triggered international concern at the highest levels of international decision-making. It was almost a month later that Resolution 771 called on members to supply the Security Council with data. A great deal was known long before these resolutions were adopted. Certainly states that make human rights reporting a normal part of the apparatus of diplomacy, like the United States, might have expected to be leading rather than following in this matter. Two key U.S. non-governmental sources were particularly prominent in generating a mountain of disquieting facts about the situation on the ground, especially in Bosnia-Herzegovina. One such source was the reports of Roy Gutman of Newsday,97 but even more influential was the key report of the Helsinki Watch Committee which came out in August of 1992.98 These two sources had a substantial influence on public opinion. Indeed, the Watch Committee report carried the credibility of systematic reporting and strong scholarly craft skills.99

The Watch Committee report was given added impact and credibility by an August 15 report by the U.S. Senate’s Foreign Relations Committee titled “The Ethnic Cleansing of Bosnia-Herzegovina.”100 On September 23, the U.S. Government, pursuant to Resolution 771, submitted a modest eleven page initial report to the Security Council.101 On October 22, a second, more substantial sixteen page report citing such sources as the New York Times, the Washington Post, USA Today and an extended quotation from a report of Gutman to Newsday was given to the Council.102 I believe a case can be made that the Bush administration’s approach to the problem was belated.

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97. GUTMAN, supra note 2.
98. HELSINKI WATCH REPORT, supra note 1.
99. Id.
100. STAFF OF SENATE COMM. ON FOREIGN RELATIONS, 102D CONG., 2D SESS., REPORT ON THE ETHNIC CLEANSING OF BOSNIA-Hercegovina (1992).
The problem was certainly a difficult one in an election year. The policy process became even more murky when Lawrence Eagleburger became acting Secretary of State. Eagleburger had served as U.S. ambassador to Yugoslavia, and it has been alleged he was a former "drinking buddy of Milosevic." Moreover, "as a private citizen he was a co-director with Milosevic of the Yugoslav Bank, and was also president of the company importing Yugo cars to the United States. He was the director of Kissinger and Associates, the principal lobbying group for Yugoslavia, and was paid more than $1.5 million." It is interesting to note that three distinguished foreign service officers in charge of the Yugoslav desk, namely George Kennedy from the Bush administration and Marshall Harris and Ian Weston from the Clinton administration, resigned from the Department of State to protest the inaction endorsed by the U.S. policy on Yugoslavia.

The Watch Committee's report named names. The names of potential defendants rapidly became familiar in households in the West. They included Blogoje Adzic (JNA), Drago Dan Bokan (paramilitary), Mirko Jovic (paramilitary), Radovan Karadzic (President, SDP of B/A), Slobodan Milosevic (President, Serbia), Ratko Mladic (JNA), Zivota Panic (JNA), Zeljko Raznjatovic (Arkan-Paramilitary), and Vojslav Seslj (paramilitary). The report states that Helsinki Watch "believes that sufficient evidence is available to warrant the investigation of the [above] persons to determine whether they have committed the war crimes described in this report." The impact of early reporting and the impact of a powerful report from the Helsinki Watch Committee was responsible for, among other initiatives, what appeared on the surface to be a strong diplomatic initiative by the Bush administration. In August 1992, the administration called for a special session of the United Nations Human Rights Commission and demanded the appointment of a Special Rapporteur. Whether this demand represented an attempt to pass the

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104. Id.
105. Id.
106. HELSINKI WATCH REPORT, supra note 1, at 6.
107. On August 13, 1992, the United States requested an unprecedented session of the United Nations Human Rights Commission. See John R. Bolton, *Unspeakable Savagery in Former Yugoslavia*, U.S. DEPT. OF STATE DISPATCH, Aug. 17, 1992, Vol. 3, No. 33 at 647. The United States maintained that it was "appalled at the unspeakable, immoral savagery being unleashed on the civilians of what used to be Yugoslavia." Id. The United States called for a number of charges to be issued and for an accounting from those responsible. It demanded the
buck or a serious effort to make the Commission a player, is unclear. The Bush administration then invoked its other "ace in the hole," the Resolution 771 data collection procedure. Once this procedure was used, the Security Council had the responsibility to do something. After the Bush administration's electoral loss, Secretary Eagleburger presented a further report to the Council naming potential defendants, a matter widely discussed in congressional and public opinion-forming circles in the United States, because of earlier NGO and news reports.

As suggested, the Watch Committee's report came at an awkward time for United States electoral politics. Administration inaction on credible evidence of genocide and worse would have fueled the campaign of the opposition. It may be that the electoral position of the parties had a good deal to do with the administration putting the Bosnian crisis away from domestic politics and squarely on the agenda of first the Human Rights Commission and later the Security Council.

As for the other permanent members of the Council and their position on this matter, the reluctance of the United Kingdom, Russia and China to take action could be eminently predicted. For the latter two powers in particular, opposition to international intrusion into the internal affairs of a state, especially regarding human rights standards, has a long-standing history.

It is therefore a tribute to the power of the modern media and persistent NGO work that the Council was shamed into taking action. The creation of a commission to investigate the tragedy was naturally the next battleground. The initial work of the Commission of Experts for Yugoslavia, starved as it was for resources, provoked derogatory newspaper headlines. Furthermore, Professor Fritz Kalshoven, the first head of the Commission of Experts for Yugoslavia, indicated that appointment of a special rapporteur to investigate the matter. President Bush stated in a radio address from this time:

[T]he war in Bosnia-Herzegovina and Croatia is a complex, convoluted conflict that grows out [of] age-old animosities. The blood of innocents is being spilled over century-old feuds. The lines between enemies and even friends are jumbled and fragmented . . . Blood feuds are very different to resolve.

President Bush, Containing the Crisis in Bosnia and the Former Yugoslavia (Aug. 6, 1992), in U.S. DEPT. OF STATE DISPATCH, Aug. 10, 1992, Vol. 3, No. 32 at 617. In another speech, Bush noted:

[Even in our new world, as old threats recede, new ones emerge. With the end of the East-West standoff, ideology has given way to ethnicity as a key factor for conflict. Ancient hatreds, ethnic rivalries frozen in time, threaten to revive themselves and reignite. We see it now in the war-ravaged Balkans . . . .

Facing New Challenges of Diplomacy Remark, Naval Academy Comment and Annapolis, MD (May 27, 1992), in U.S. DEPT. OF STATE DISPATCH, June 1, 1992, Vol. 3, No. 22 at 424.

108. See, eg., Roy Gutman, War Crimes Unit Hasn't a Clue, NEWSDAY, Mar. 4, 1993, at 8.
the scope of the agenda was so overwhelming that questions were raised about whether the Commission could at the end of the day serve any useful purpose. In an article published in March 1993, Professor Kalshoven indicated that "[t]here is no way a tribunal could work in the present atmosphere of anti-Serb propaganda, which is rampant all over the world... a tribunal can take place only at the end of the conflict," and agreed that the end of the conflict might be ten years or more. Professor Kalshoven also stated that the formation of a Tribunal would be "quite some while off," adding that he was "not overly optimistic" one would ever come about. It is a tribute to Professor Cherif Bassiouni, the second chairman of the Commission, that a sufficiently credible body of evidence was created to effectually compel the creation of an ad hoc tribunal.

On February 22, 1993, the Security Council voted on the French proposal that the Secretary-General prepare a report detailing the specific structure and procedures of the ad hoc Tribunal. There was and is little public opposition to the Tribunal; the concern appears to be its potential effectiveness. If the Tribunal and its Rwandan counterpart do credible work in detecting, apprehending, prosecuting, convicting and punishing the war crimes defendants, the specific and more general stakes for world order under law will be strengthened. Specifically, it will give political weight to the present impetus to put life into the idea of a permanent court. This in itself would be a radical and highly progressive addendum to an improved world order. The successful international prosecution of high level state officials and their underlings has broad implications for the world constitutive process. It reinvents and applies as an international legal expectation the concepts of responsibility, transparency and accountability as issues central to the idea of limiting government, and correspondingly limits the excesses that are justified under the label of "sovereignty." However, the Tribunal got off to a rocky start when political considerations and pressures led to the appointment of a prosecutor, Ramon Escovar Salon, whose ability to organize the massive task of implementing the Security Council Resolution from scratch inspired little international confidence. Salon later resigned the position

109. Id.
110. Id.
111. The Security Council approved the French proposal in Resolution 808. S.C. Res. 808, supra note 94.
112. Marquand, supra note 64.
and Justice Goldstone, who had headed the "Goldstone Commission" investigating the causes of violence and political intimidation in South Africa, became the new War Crimes Prosecutor.\textsuperscript{113} Goldstone's reputation for professionalism, integrity and the ability to get things done was a major boon to the process envisioned for the ad hoc Tribunal.

The Tribunal's apparent practical problems remain immense. Not only is the budget of the Tribunal inadequate, the infra-structural cost of the operation, including salaries of judges and high level administrators, will doubtless leave few resources for the practical work of investigations.\textsuperscript{114} Rhetorical commitment in this context does not mean much if it is not matched by numbers.

The resources issue regarding the ongoing work of the Tribunal is absolutely critical if the process is not to be severely undermined. There is also no question that the United States will have to lead the way on the resources issue. Within the United States, it is Congress that holds the effective control over the budget, and it is the Republican party, which now controls Congress, which has taken some of the toughest, most visible stands against international lawlessness and criminality in Yugoslavia. It is the Republicans who will have a great deal to do with the extent of the United States' commitment to the work of the Tribunal.

Although there exists some skepticism about the political will that attended the creation and functioning of the ad hoc Tribunal, the most difficult task it will confront is apprehending defendants and bringing them to trial. The veil of sovereignty may well serve as a shield for many defendants whose prima facie situation indicates probable cause for a war crimes indictment. Here, it seems to me that rules relating to the handling of absent defendants may have interesting and important potential for advancing the work of the Tribunal.

X. HANDLING THE ABSENT DEFENDANT

Under Article 21(4)(d) of the Statute of the Tribunal, a defendant has the right to be "tried in his presence . . . ."\textsuperscript{115} This limitation

\begin{itemize}
  \item \textsuperscript{113} \textit{Id.}
  \item \textsuperscript{114} The proposed budget for 1994 was some $32.5 million. The cost to the U.S. for prosecuting John Gotti, the mafia king-pin, was $75 million. The Iran-Contra investigation, a much smaller scale investigation, cost the American taxpayers some $40 million. Robert Marquard quotes a Washington law firm as follows: "[T]he budget they put together last year was $20 million short of what they need for a minimally credible prosecution." \textit{Id.}
  \item \textsuperscript{115} Tribunal Statute, \textit{supra} note 15, art. 21(4)(d).
\end{itemize}
reflects prescriptive protections accorded prospective defendants in, *inter alia*, the International Covenant on Civil and Political Rights. The practical problem which this provision presents is that the Tribunal may not be able to practically acquire physical control over the person of a defendant, and thus may not be able to proceed with the prosecution of the case against that defendant. The legal advice that a potential defendant inside the former Yugoslavia might receive is essentially not to submit to the jurisdiction of the Tribunal by showing up in the Hague. Rule 61(A), as well as paragraphs (B), (C), (D) and (E), provide a procedure whereby a judge of the Tribunal "shall order the indictment to be submitted to the Trial Chamber, together with all the evidence that was presented to the judge who confirmed the indictment." The prosecutor may supply additional evidence such that there are "reasonable grounds for believing that the accused has committed all or any of the crimes charged in the indictment..." The question is whether this procedure is enough to guarantee a more effective response to the case of the reluctant war crimes defendant. I am uncertain. However, I think the formulation must be strengthened if it is to have a chance of giving the Tribunal the credibility it needs. I would first suggest that the "additional evidence" provision be strengthened beyond the reasonableness test to something like a "clear and convincing" standard. I think that this will strengthen the international arrest warrant (super arrest warrant) in terms of legitimacy and credibility. It will also permit the court to construct the public record with a limited juridical imprimatur. The principle is already codified in Rule 61; the issue is whether it can be strengthened.

The practical reason for invoking the Rule 61 procedure for a super arrest warrant is not only the laudable objective of creating international outlaw status for a war crimes defendant. It may also serve the purpose of providing a juridical determination, albeit for a limited purpose, that there are reasonable grounds (I prefer clear and convincing grounds) for believing that an identifiable individual defendant is responsible under this standard of probative evidence for specific crimes against specific people in specific places at specific times. The construction of such a public record would also serve the

116. *Id.* at Rule 61(A).
117. *Id.* at Rule 61(C).
118. *Id.* at Rule 61(D) (stating "[t]he Trial Chamber shall also issue an international arrest warrant in respect of the accused which shall be transmitted to all States.").
function of an international "truth and justice" commission. The creation of a public record is not as desirable as a conviction over a present defendant, but serves the important purpose of shaming and delegitimizing war criminal "thugs" who control the organs of state sovereignty in order to shield themselves from international criminal responsibility. Moreover, this procedure may hold important value for the record of the abuse of women in the war context.

XI. WAR CRIMES THAT SPECIFICALLY VICTIMIZE WOMEN

The Bosnian war raised, in a very explicit way, the general problems of the situation of women in war, the problem of women and humanitarian values in situations of armed conflict, and the more general question of women and gross human rights violations in contexts of war and peace. The victimization of women in war contexts has often come in the form of sexual aggression—rape or sexual battery and various other sex-related forms of abuse. The focus on the distinctive ways in which women are made primary victims of rape and sexual abuse is not meant to understate the other ways in which women are made victims of mass murder, genocide, disappearances, extrajudicial executions, torture and other forms of cruel, unusual and degrading treatment. The fact is that women experience rape, sexual battery and allied abuses, invariably in a way that men do not.

Without an elaborate canvass of the history of rape and sexual battery in the conduct of war, it may be recognized that in war, a sharp distinction is made between the "we" and the "other"—the enemy. Since the "other" includes women who are often neither armed nor trained in the use of arms, they are among the most vulnerable sectors of the "enemy" that may constitute an object of destruction—an object of war.

The specter of armed men confronting unarmed women has been an understated aspect of war from antiquity to Bosnia. In World War I, the German aggression included a tactical and strategic objective of atrocity against conquered civilian populations to ensure rapid submission to German occupation. Rape of Belgian and French women was an essential part of the strategy of aggression and conquest. In this sense the Belgian and French women were made an object of war.

During the 1930s, the Sino-Japanese war produced the notorious "Rape of Nanking," as the Japanese conquering armies attempted to
prove the superiority of the Japanese race over the inferior Chinese people by making the Chinese women of Nanking an object of Japanese conquest and aggression. Consider how an American missionary described Nanking under the Japanese occupation: "[n]ever have I heard or read of such brutality. Rape! Rape! Rape! We estimate at least 1,000 cases a night, and many by day. In the case of resistance . . . there is a bayonet stab or a bullet. We could write up hundreds of cases a day." It was estimated after the war by the International Military Tribunal for the Far East that approximately 20,000 cases of rape occurred in Nanking in the first month of the Japanese occupation. The Tribunal also stated: "[t]he barbarous behavior of the Japanese army cannot be excused as the acts of a soldiery which had temporarily gotten out of hand . . . ." This statement implies the obvious: women were an object of Japanese war aims, an object of aggressive war.

Europe, especially Eastern Europe in World War II, provides evidence of massive rape practices by the German army and the special security forces. Since rape practices followed a particular pattern, and especially targeted women, women became an object of aggressive, racial war.

In the post-war period in Bangladesh, the Pakistan army sought to suppress a drive for independence by a policy of mass rape and torture. Statistics indicate that some 200,000 to 400,000 rapes occurred during a nine month period. It may be noted that during the Vietnam war the incidence of rape by the enemy, or the Vietcong, was marginal. One explanation for this outcome was that Vietcong men and women fought side-by-side and thus established lines of mutual respect that extended to enemy women.

Although crimes against the peace are omitted from the competence of the Tribunal, the question that insistently confronts international lawyers concerned about the legal regulation of armed conflict is this: as wars of aggression are unlawful and constitute crimes against the peace, may it not be a plausible construction of the concept of

119. SUSAN BROWNMILLER, AGAINST OUR WILL 58 (1975).
120. Id. at 60-61.
121. Id. at 61.
122. Id. at 48-56.
123. Id. at 80.
124. Id.
125. Id. at 90.
126. Id. at 91.
aggression that when aggression makes rape and allied depredations against women an object of aggressive war, such abuses are part of the definition of aggressive war and hence constitute a universally proscribed crime against the peace? If we are alert to the social reality of aggressive war, as, for example, in Bosnia, these crimes against women are distinctive crimes against the peace and should make those responsible subject to universal criminal jurisdiction. It is therefore regrettable that the Tribunal's jurisdiction is limited so as to exclude these crimes.

Although the scale of atrocities in Bosnia-Herzegovina and Croatia has shocked the conscience of humankind, two particular kinds of atrocities have permeated public opinion circles and the mass media in general. These are (1) the systematic rape of women and girls as a stratagem of the war making process; and (2) the use of killing, torture, rape, mutilation, bombing of civilians, and other such terror tactics as a stratagem to displace people from their homes in order to "ethnically cleanse" cities, towns and villages. Recently, Time magazine opined that "Bosnia opens a terrible new perspective. It shows rape as policy to scorch the enemy's emotional earth."

The policy of systematic rape of Muslim and Croatian women and girls in Bosnia-Herzegovina is a policy that seeks to ravage the core sense of personal identity and dignity of women. Rape is an aspect of humanitarian law codified in the Geneva Conventions since rape is a form of "mutilation"—both physical and psychological; it is "cruel treatment," and it is a form of "torture" experienced exclusively by women. It is also an outrage "upon personal dignity" and is a particular form of "humiliating and degrading treatment."


is a crime against humanity when it is a part of the official war policy of a party and when it is done in a systematic and continuous manner. Because this kind of war policy is also designed to further the policies behind ethnic cleansing, and because rape and ethnic cleansing are aspects of genocide in the context of this crisis, it is important to outline the general problem of genocide in the context of this war.

The systematic and continuous implementation of the policies of mass rape against women are part of the framework of acts committed with the "intent to destroy, in whole or in part, a national, ethnical... or religious group... [by] causing serious bodily or mental harm to members of the group..." In addition, the systematic aspect of the mass rape policy may be seen as "deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part..." in the sense that the rape policy is designed to destroy the psychological bonds of marriage and other family ties that secure the cultural basis for community cohesion and existence. The rape policy is meant to destroy interpersonal respect, family ties and relations, the cultural status of women, and the family mores of group or national life.

The evidence seems to be substantial that women have been one of the primary targets of "ethnic cleansing". Rape and other forms of sexual aggression have been a key tactic to implement the policy of ethnic cleansing. Since ethnic cleansing is also a war aim of the aggressor, rape and sexual aggression against women, girls and even men have been a tactical instrument to realize this strategic objective. The phrase "ethnic cleansing," translates into a euphemism for the crime of genocide. These words carry some implicit nationalist justification for brutal and inhuman acts against mankind which are being done in Bosnia-Herzegovina. What the Tribunal is confronted with here is the crime of genocide.

The definition of genocide is thus broad enough to encompass many of the behaviors that have constituted crimes against humanity, war crimes and crimes against the peace. These crimes have the purpose of destroying in whole or in part the existence of nations within the state of Bosnia-Herzegovina and have employed the tools of "killing" as well as doing "serious bodily or mental harm" to the

131. Id.
victims of genocide and allied crimes.\textsuperscript{132}

The statute of the Tribunal omits crimes against the peace from the scope of the subject matter jurisdiction of the Tribunal. However, the juridical basis of the entire statute is founded upon the Security Council's power to be seized of and enforce matters of international peace and security under Chapter VII of the United Nations Charter. I would respectfully suggest, notwithstanding the omission of crimes against the peace from the competence of the Tribunal, that it may be entirely appropriate to use the Rule 61 procedure to broaden the basis of juridical "fact finding" in order to put explicitly on the record the proposition that defendants subject to the super arrest warrant procedure were part of the mass rape policy which made women an object of war, since the ethnic cleansing issue remains to this day an object of the war-making process of the aggressor. Ethnic cleansing may be fairly interpreted, as earlier indicated, to meet the criteria that constitutes the crime of genocide, over which the tribunal does have jurisdiction.\textsuperscript{133} I suspect that the position of women in war is an under-appreciated issue, probably from the beginning of recorded history to Yugoslavia and Rwanda. A properly developed prosecutorial record under Rule 61 may do much to give this issue appropriate juridical recognition.

\section*{XII. CONCLUSION}

It may be said that legal theory, or more specifically, a jurisprudence whose core foundations are rooted in the sovereignty precept, may in reality be the undertaker of international law. International criminal law may not be a player in the last rites of international law, but it severely tests the validity and efficacy of an international law that has to trump or limit sovereignty. The creation and functioning of the ad hoc Tribunal to bring an internationally sanctioned criminal justice standard to those who may have committed serious international law crimes in the former Yugoslavia, as well as in Rwanda, is a welcome surprise, an astonishing challenge, and, indeed, a reason for a serious commitment to the viability of the international rule of law in our time. The alternative prospect may be a dismal new age.

\textsuperscript{132} Id.
\textsuperscript{133} Tribunal Statute, supra note 15, art. 4.