Global Criminal Justice: An Idea Whose Time Has Passed

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Introduction

The title for this section of the Symposium is posed as a question: “Global or Local Justice?” To regard this as a genuine or serious question, one must assume that “global justice” is actually a plausible alternative. Not long ago, there seemed to be quite a number of advocates insisting that only global justice—that is, an independent, international tribunal—was appropriate for dealing with monsters like Saddam Hussein.1 The idea certainly had considerable appeal for international law scholars. It also had great appeal for human rights advocates, who are, for their own reasons, much given to thinking like law professors.

The appeal of global justice is that it can avoid improper entanglement in local idiosyncrasies, provincial prejudice, national or political self-interest. What embraces the whole must be impartial, since it embraces everyone. From this perspective, global justice may appear to be the highest justice. If it cannot be available to everyone, at least it must claim priority—when it can be deployed—over every other form of justice. From this perspective, local or national justice will necessarily appear to be a lesser form of justice or a form of justice that has lesser dignity.

There is also, perhaps, another attraction: Global justice is largely unencumbered by established laws and institutions. Global justice might develop on any path which law professors and human rights advocates judge to be the best path. What the specialists on justice would consider to be the proper standards for justice would simply be the proper standards. Agreement among them should not be hard to reach, moreover, since specialists on international justice are agreeable people—and the disagreeable need not be consulted.

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It is a vision that captivated the world of international law scholarship for a brief moment in the 1990s. But that moment has passed. It lives on in the ghostly half-life of its one remaining legacy: the International Criminal Court (ICC). That rather pathetic institution has managed to retain an existence of sorts by determinedly avoiding its original agenda and desperately hiding itself in the underbrush of stateless regions.

The original, brighter dream of global justice may have died when terrorists brought down the twin towers of the World Trade Center in 2001. Or it may have died when the U.N. Security Council refused to enforce its own rulings against Saddam Hussein in 2003 and an American-led coalition proceeded to overthrow that monstrous tyrant without U.N. approval. Or perhaps the dream really died when a new government in Iraq insisted on mounting its own trial of Saddam, to the chagrin of so many international legal analysts. But the happy vision of global justice, which animated so many nice people in the 1990s, was bound to dissolve when reality intruded. It is a matter of taste whether one wants to say the dream is now simply "dead" or only "brain dead"—that is, irretrievably comatose.

Global justice was always a dream. It is only in dreams where things that do not fit together in real life can be brought together without shock or confusion. If global justice were something real, the victims of mass atrocities throughout the world would have powerful claims against it. In the real world, there is no global authority to be held accountable for the world's enduring miseries. The professors and nongovernmental organization (NGO) advocates are the first to disclaim responsibility for the horrors that persist in our world. They are strongly opposed to mass murder, as well as sex discrimination, and other offenses against human rights. Their job is simply to clarify the rules that render such wrongdoing illegal. So they must be allowed to continue their important work, setting down learned expositions of what international law requires or forbids. They are not


3. See Michael Scharf, Is it International Enough?: A Critique of the Iraqi Special Tribunal in Light of the Goals of International Justice, 2 J. Int'l Crim. Just. 330 (2004) (arguing that, unlike previous international criminal tribunals, the Iraqi Special Tribunal is not sufficiently international and "risks being seen by both Iraqis and outsiders as a puppet of the Occupying power, and as a tool for vengeance for Saddam Hussein's enemies, rather than as the cornerstone of a new judicial system, committed to the rule of law").

4. See, e.g. Restatement (Third) of Foreign Relations Law of the United States § 702 cmt. (a) (1990) (stating that "genocide and slavery" have attained the status of universal prohibitions, binding on all states, whether they have ratified particular treaties or not.); see also Richard B. Lillich, The Growing Importance of Contemporary International Human Rights Law, 25 Ga. J. Int'l & Comp. L. 1, 7 n. 43 (1996) (reporting that "[l]ess than a decade later, the chief reporter for the Restatement indicated in a speech that 'if he were drafting Sec. 702 today he would include as customary international law rights . . . freedom from gender discrimination plus the right to personal autonomy [presumably in relation to sexual practices] . . . .'".). The absence of international response to the genocide in Rwanda does not seem to have affected this vision of the forward march of customary international law of human rights.
responsible for seeing that their standards are enforced. It is not their fault that all their legal analyses, filled as they are with massed citations and impeccable reasoning, do not actually constrain terrorists or warlords or murderous tyrannies.

People who suffer the most terrible oppression hope that effective force will come to their rescue. Sometimes that does actually happen. Revolutions sometimes do overthrow terrible tyrannies. Outside powers do sometimes intervene and topple dictators or restore order. Americans secured their liberty with assistance from France in the eighteenth century and repaid that debt—with all the accumulated interest—by saving France and its neighbors from far more terrible tyranny in 1944. Iraqis were saved from a monstrous tyranny by an Anglo-American coalition in 2003. And the same outside powers helped Iraqis to organize effective responses to terrorist barbarism in the aftermath of the war.

The United Nations, however, has never approved an outside intervention on humanitarian grounds, and never helped sponsor a revolution against an existing government, no matter how barbarous its conduct. There are good reasons and bad for the passivity of the organized international community. But the fact remains, for good or for ill, that the world does not agree on when conditions justify either revolution or outside intervention. When it comes to genuinely effective responses, there is very little law to rely upon. There are arguments about justice, but these arguments are seen in different ways, or invoked in different ways, by different observers. So justice remains local in several senses.

There is no serious alternative to this difficulty. The "international community"—whatever that may mean—is not organized to act on behalf of particular suffering peoples. To wait for international agreement is not a way of securing justice, but of paralyzing action, which often means lending protection to existing threats and existing evils. To say that this world is governed ultimately by law is to say that everything in it is a necessary evil. That thought may be more palatable to professors in comfortable offices than for people suffering under terrible tyrannies. To acknowledge that justice is inevitably partial is, at the least, a source of some consolation to the oppressed. They need not accept the childish conceit of law professors that a few more learned articles will help bring relief from their

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6. The point was not lost on the American Founders. They had, after all, launched a revolution with a declaration about the "right of the people to alter or abolish" their existing "form of government"—a right only made good in their case with foreign military assistance. James Madison, in an essay published in 1792, criticized the proposal of Jean-Jacques Rousseau for a peace-keeping federation, guaranteeing all existing governments from military challenge: Madison protested that it would be "the tendency of his plan to perpetuate arbitrary power wherever it existed and by extinguishing the hope of one day seeing an end of oppression, to cut off the only source of consolation remaining to the oppressed." James Madison, Universal Peace, in James Madison: Writings 505 (Jack N. Rakove, ed., 1999).
miseries. And if they manage, somehow, to escape from the strangling coils of tyranny, newly freed people need not, in real life, feel bound to accept the admonitions of international legal scholars on what they must do next.

In what follows, I will try to explain why the dream of global justice deserves to be forgotten, starting with a brief demonstration of the fact that this dream only came upon the world in the soft, warm international environment of the mid-1990s, when governments could see only endless peace and accumulating prosperity on the horizon. As dreams often have only the most tenuous connection to waking experience, the dream of global justice had almost no reliable grounding in past practice or in generally accepted political or legal doctrines.

The rest of the argument will sketch the enduring relevance of traditional objections to global justice. First, it does not acknowledge the need for force in ensuring justice and therefore invites the reckless conclusion that justice can be accomplished among nations by legal proceedings alone. Second, it fails to reckon with the political difficulties of establishing a new regime, where force can be minimized only if justice is tempered by political calculation. Finally, it greatly underrates the extent to which criminal law gains its noblest end by expressing communal condemnation, which must be the condemnation of a particular community to have any serious effect and any lasting meaning.

I. Innovation in a Dreamy Moment

When the International Criminal Tribunal for the former Yugoslavia (ICTY) was established in 1993, it was widely hailed as the first international criminal tribunal since Nuremberg. But the so-called International Military Tribunal, which placed Nazi leaders on trial at Nuremberg in 1945, was not truly international. That earlier tribunal was organized and staffed by the four powers then occupying Germany: the United States, the United Kingdom, the Soviet Union and France. These powers sought no advice from other powers in organizing the tribunal and sought no assistance in conducting the trials. These powers categorically refused to place their own soldiers or officials under the jurisdiction of the tribunal they had created for the trial of German leaders. No one thought it odd that, when the trial of the first two-dozen Nazi leaders had ended, each of the


participating nations proceeded to organize trials for lesser Nazi criminals entirely on its own, within its own occupation zones.

The tribunal organized at Tokyo for the trial of Japanese war criminals, at the same time, was even less international. 10 Here, too, nations directly involved in the war against Japan organized the tribunal on their own, without involving neutral states or any larger international gathering. At Tokyo, the judges represented a larger group of victor nations (eleven in all). In other respects, the international component of the Tokyo trials was more limited than at Nuremberg. The United States, which organized the occupation of Japan on its own, also established the charter for the war crimes tribunal in Tokyo on its own, then decided on its own which Japanese officers and officials to charge before the tribunal. Thereafter, as a recent history notes, Americans exercised "control of prosecution policy and strategy [which] bordered on the absolute." 11 So, for example, when General MacArthur advised Washington that the Emperor of Japan should not be charged before the tribunal, Hirohito was not charged. Presentations by prosecutors carefully skirted any serious discussion of the Emperor's responsibility for Japanese crimes and policies of aggression.

The Yugoslav tribunal was, by contrast, genuinely international. It was created by the U.N. Security Council. 12 Its prosecutors, if they answered to anyone, answered to the Council as a whole rather than any particular government. And at least in principle, the tribunal could try anyone charged with having committed war crimes in the territory of the former Yugoslavia, even if a citizen of a nation on the Security Council (whose European members already had peace keeping units in the region). 13 Perhaps most notably, the ICTY was supposed to administer justice over a territory that was not, either in principle or in practice, under the overall control of the Security Council nor of any member of the Council. The ICTY was supposed to do justice on behalf of humanity in territories supposed to be otherwise under the control of sovereign states.

So, this was not the first tribunal of its kind in fifty years, as was commonly said. It was the first of its kind—ever. It was a project that could not even have been seriously considered in any earlier period. The League of Nations and the U.N. itself had never given serious thought to imposing an international criminal tribunal on otherwise independent nations. True, the 1948 Convention on the Punishment of Genocide made vague reference to a possible future international tribunal for the trial of this crime. 14


11. Id.


13. See ICTY Statute, supra note 7, art. 1 ("The International Tribunal shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991"—with no restrictions regarding the nationality or status of such "persons.").

But proposals floated by international jurists always assumed that the jurisdiction of such a court would only be triggered by requests from the home state of the accused.\textsuperscript{15} Anything more ambitious seemed out of the question amidst the general atmosphere of suspicion and distrust between the superpowers (and their respective allies) during the Cold War.

By the 1990s, Cold War divisions had vanished. Communist authority had collapsed throughout eastern Europe. The Soviet Union itself had fallen to pieces. Suddenly, international cooperation seemed to have vastly more potential. The World Bank proclaimed a "Washington consensus" on economic development: free markets, and secure protection for private property, were the way forward, and everyone now agreed. Meanwhile, environmentalists imagined that all nations could come to agree on plans for limiting fossil fuel use throughout the world in order to contain climate change. A world where all nations were in fundamental agreement was a world in which longstanding local conflicts could finally be guided to peaceful resolution by international mediation. Peace in the Middle East would follow shortly, after Israel and the Palestine Liberation Organization and leading Arab states had been brought together at the 1991 Madrid conference.

Everything seemed possible. A book published in that era had the resonant title \textit{The End of History and the Last Man}.\textsuperscript{16} Its thesis was that, with no more serious matters to dispute, human life was in danger of becoming so comfortable and secure that human beings would become altogether frivolous. It was a best seller.

To be sure, previous generations also were seized with great visions amidst post-war euphoria. After the Allied victory in the First World War, the victors proposed a League of Nations to ensure a lasting peace for all time. When the League and its peace failed, a new generation dreamed of a United Nations that would assure peace and promote human rights everywhere. But previous visions were, in important ways, more tempered. The United States not only declined to join the League of Nations in 1919. It proceeded, instead, to sponsor a naval treaty that actually achieved the pre-war American goal of establishing a navy "second to none."\textsuperscript{17} The U.N. Charter envisioned a world of peaceful cooperation through international institutions. But the framers of the Charter still thought to equip the Secur-

\begin{footnotesize}
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  \item[15.] For review of previous proposals by the International Law Commission and others, see James Crawford, \textit{Drafting the Rome Statute}, in \textit{FROM NUREMBERG TO THE HAGUE} 143-44 (Phillipe Sands ed., 2003).
  \item[17.] Washington Treaty for the Limitation of Naval Armaments, Feb. 6, 1922, 43 Stat. 1655, \textit{reprinted in} 2 BEVANS 351 (1968); see HAROLD & MARGARET SPROUT, \textit{THE RISE OF AMERICAN NAVAL POWER}, 1776-1918, at 334-46 (Princeton University Press 1946) (discussing the debate over the Navy Act of 1916, and reporting, among other things, that the act committed the United States to a program of naval expenditures increasing seven times more than the increase of British expenditures in the decade before 1914 and sixty times more than German increases before the outbreak of the war—at a time when Britain and Germany were conceived to be in a naval arms race).
\end{itemize}
\end{footnotesize}
ity Council with international military advisors in case the peace needed to be enforced.\(^{18}\) They even thought to equip the Council with an international bomber force, so the military advisors would have something to work with.\(^{19}\)

After the world wars, those who projected new plans for peace did not forget that peace had been won only after victory in war. The Cold War may have ended in victory for western democracies, but it was victory achieved without all-out war. The experience seems to have encouraged the notion that international justice could now be achieved by setting standards. And if those standards proved to be less than self-executing, they could be enforced by new international institutions: by international courts. There was suddenly a great deal of interest—at least among legal scholars—in “the legacy of Nuremberg.” Enthusiasm for war crimes trials seemed to imply that international law had been crippled for decades only because the Nuremberg tribunal had closed its doors prematurely. Of course, by such reasoning, one might think the real mistake was in not convening the Nuremberg tribunal some years earlier—or, since that site would not have been available in 1941, at least a London or Boston tribunal. A great deal of “preparatory work” for Nuremberg, which in the actual circumstances had to be left to division commanders under Eisenhower, Montgomery and Zhukov, could then have been handed straight off to the lawyers.

As it turned out, there were still serious problems for the world, even in the 1990s, even in Europe. Some of these challenges were finally tackled in the old-fashioned way that architects of the U.N. had envisioned—by bombing. But that recourse came later. And, as might have been expected, it came outside the confines of existing international law. Neither American bombing in Bosnia in 1995 nor NATO bombing in Serbia in 1999, to force a settlement over Kosovo, were authorized by the Security Council.

Before that, however, there was an experiment in security through lawyering. It provided an object lesson on the limitations of international law, especially international criminal law. In the special, dreamy atmosphere of the 1990s, the world needed to learn the lesson over again. If it had remembered that lesson, it would not have created the first truly international criminal tribunal and dreamed that it could move straight from moral indignation to morally satisfying war crimes trials—skipping the unpleasant military operations that had preceded the Nuremberg and Tokyo trials. This short-cut was immensely convenient at the time. The world still couldn’t agree on the when and where and how of military interventions. It found it much easier to agree on interventions by international lawyers. The charm of this approach was such that, when faced with mass slaughter in Rwanda in 1994, the U.N. actually withdrew its peace-keeping

\(^{18}\) U.N. Charter art. 47.

\(^{19}\) Id. art. 45.
forces on the ground in that bleeding nation, and eventually replaced these potential lifesavers with teams of unarmed layers.

II. Moral Hazards

The most obvious problem with international criminal justice is that it focuses on the very last and most formal part of the "criminal justice system." Most of the force of criminal law comes from police. Even indicted criminals in the United States usually do not receive a trial, because evidence gathered by police convinces defendants that prosecutors would likely prevail in a trial. Even so, most police officers spend most of their time in activities unrelated to gathering evidence of past crimes. They spend most of their time simply demonstrating their presence, as, notably, by walking a beat or patrolling in marked cars. The presence of police is thought to deter crime.

The world does not have a standing police force to deter international crimes. That is one major reason why justice—in the sense of criminal justice—was historically regarded as the exclusive responsibility of sovereign states. Only sovereign states are equipped to provide reliable enforcement to criminal prohibitions. Providing international forums for criminal trials is providing only the very last and, in some ways, the least controversial part of a criminal justice system. The idea that the U.N. would send blue-helmet patrols to all countries to enforce international criminal law would provoke outrage—or gales of laughter. It is, to say the least, highly optimistic to think that judges and prosecutors, operating without reliable policing in the background, can secure criminal justice on their own.

The obvious danger posed by this fanciful notion is that, in focusing on the easy part, attention is directed away from the far more important elements of enforcement. In the eighteenth century, when piracy on the high seas was acknowledged by all states as an "international crime," no one imagined that such crimes could be suppressed simply by establishing an international tribunal for pirates. Everyone understood that only naval power, wielded by actual states, could have any success in battling pirates. National navies were quite effective at suppressing piracy, because national navies were available to do so.

Contemporary aims are more ambitious. Mass murder, on the scale perpetrated by Europeans during the Second World War, was such a departure from anything imagined in the modern world, that a new name had to be coined to describe this crime: "genocide." To prevent such horrors in the future was seen as one of the urgent missions of the new international organization founded by the Allied victors at the end of the war. Unlike the Covenant of the League of Nations, the U.N. Charter gave the new organization responsibility for promoting "human rights." The very first human rights instrument prepared by the U.N. was the Convention on the Punishment of the Crime of Genocide. It is telling, however, that the geno-

cide convention does not commit any nation to do more than extradite perpetrators to a jurisdiction where they can be tried. It makes no provision for intervention to stop a program of mass murder while it is still going forward.\(^{21}\)

In the Second World War, the program of mass murder conducted by Germany and its various client states, such as Hungary and France, was only stopped by the victory of Soviet and Anglo-American arms. Indictments in London would not have made any difference and were not attempted while the war was in progress. But the Allied powers were, at least, straining all their resources to defeat Germany and its clients.

If they are not already at war for their own reasons, however, few nations are prepared to take great risks to save citizens of other nations. Outsiders are prepared to send food and medical supplies to assist in humanitarian crises. They are rarely prepared to send troops, especially when those troops are likely to face hostile fire. There are better and worse reasons for outside powers to hesitate over committing their own soldiers to humanitarian interventions. But there are always reasons. Since it is always easier to send lawyers to an international tribunal than to send troops to the site of the killing, there is an obvious risk that organizing an international tribunal will become a substitute for organizing an effective military response. But lawyers are not an adequate substitute.

In the insurance industry, it is called "moral hazard"—the danger that people behave less cautiously when they think they are insured against the consequences of reckless conduct. Establishing international tribunals can easily encourage a diplomatic version of this syndrome: a quite unjustified confidence that the international community has provided an effective response to humanitarian crisis, when it has not.

The danger is not speculative. The Yugoslav tribunal itself is a perfect example. The United States was the first to call for this special tribunal in 1993. At the time, the Clinton administration was extremely averse to committing troops to the Balkans. American troops sent to Somalia the year before (to protect food shipments from attacks by warlords) had become entangled in firefights with guerrilla forces. The troops had to be hastily withdrawn after the bodies of the dead American soldiers were dragged through the streets of Mogadishu. Establishing a tribunal became a substitute for a more considered and effective military intervention in Yugoslavia.

It turned out to be a quite ineffectual substitute. One of the most terrible episodes in the ongoing Balkan conflict was the massacre of Bosnian Muslim civilians in the town of Srebrenica by Serb militia forces.\(^ {22}\) The massacre took place after the establishment of the tribunal. Even more tell-

21. Article 8 of the Convention on the Punishment of Genocide authorizes as party to the treaty to "call upon the competent organs of the United Nations to take such action under the [U.N.] Charter as they consider appropriate for the prevention and suppression of acts of genocide"—but does not commit the U.N. to take any particular action or any response of any kind. Genocide Convention, supra note 14, art. 8.

ingly, it took place in a town that had been proclaimed by the U.N. as a safe haven for Bosnian Muslims.\textsuperscript{23} People were invited to take refuge in that town, with assurances that U.N. peacekeeping forces, which could not stem the general tide of violence, would at least assure the safety of people who sought haven in Srebrenica. Yet the Dutch peace-keepers, who had not been prepared for actual fighting, stood by while nearly ten thousand people were slaughtered.\textsuperscript{24} The Dutch troops did not even communicate with U.N. authorities to seek guidance or assistance while the killing was underway. The Dutch government had made no serious effort to prepare its troops to provide effective protection to anyone. Perhaps the Dutch government imagined that it had already made its main contribution by offering to host a war crimes tribunal at The Hague.

Low-level warfare, aiming at holding or ethnically cleansing disputed territory, continued in the Balkans throughout the first half of the 1990s. What stopped Serb militias in Bosnia was the intervention of countering force—most decisively, counterforce from American air power. In 1999, Serb troops in Kosovo were stopped from retaliating on Albanians in the province by the intervention of NATO (mostly American) bombing. How much of the carnage might have been averted by earlier and more focused interventions is still debated. Scarcely anyone argues that a higher profile role for the Hague tribunal would have done anything to reduce the bloodshed. To the extent that establishing the tribunal gave outside powers the sense that they were responding to the crisis in the Balkans, it only prolonged and aggravated the crisis—by giving an excuse for failing to take more serious action.

In the meantime, the U.N. Security Council established a second tribunal to deal with the far more massive horrors unleashed in Rwanda.\textsuperscript{25} A government controlled by Hutus had organized a systematic slaughter of the country’s Tutsi population in the spring of 1994. Over 800,000 people, ranging from toddlers to grandmothers, were killed in the space of a few weeks. It was one of the few episodes of mass killing in the post-war era that could rightly be described as genocide. Far from acting to halt the slaughter, the Security Council ordered the withdrawal of international peacekeeping forces that were already in Rwanda, even when the commander of those forces expressed willingness to intervene.\textsuperscript{26} Home governments of these forces (Canada and Belgium) did not want to risk their

\begin{itemize}
\item \textsuperscript{23} \textit{Id.}
\item \textsuperscript{24} \textit{See} David Rhode, \textit{Endgame: The Betrayal and Fall of Srebrenica, Europe’s Worst Massacre Since World War II}, 164 (Farrar, Straus and Giroux 1997). \textit{But see Honig & Both, supra note} \textsuperscript{22}, \textit{at xviii, xx}.
\item \textsuperscript{25} \textit{S.C. Res. 955, U.N. Doc S/Res/955} (Nov. 6, 1994) (establishing the International Criminal Tribunal for Rwanda).
\item \textsuperscript{26} \textit{See} Michael Barnett, \textit{Eyewitness To Genocide: The United Nations and Rwanda} 78-229 (2002) (noting that the U.N. refused to take actions to avert mass slaughter, even actions recommended by peacekeepers on the ground. When violence began, U.N. officials ordered peacekeepers to concentrate on evacuating Europeans—that is, whites—who were not themselves targets of the violence.).
\end{itemize}
troops in active fighting. The Clinton administration supported the impulse to disengage.

The genocide campaign was halted only when a Tutsi army, organized in neighboring countries, ousted the Hutu government and established a new government in Rwanda. Having done nothing at all to halt the horror, the U.N. contented itself with sending lawyers after the fact. It established a second tribunal in 1994 to assure that leading perpetrators of genocide would not be left to the standards of justice that might be arranged by the new Tutsi government.\(^27\) Another crisis, another tribunal—confirming, as a prominent human rights advocate put it, that diplomats were offering tribunals “as substitutes for effective action.”\(^28\)

By intervening when and where it did, the Security Council’s response to the Rwanda catastrophe risked giving the impression that the international community was more concerned to protect the perpetrators of genocide than its victims. Or, to put the point somewhat differently, the Security Council’s intervention seemed to imply that the international community was more concerned to assure perfect justice for mass murderers than to assure that mass murder would not take place. By taking the perpetrators into international custody, the U.N. did assure them better treatment—not only in access to lawyers and protections of due process, but in food, medical care and daily amenities—than was available to those with less blood on their hands. Perpetrators received better care than ordinary Rwandans, suffering amidst the chaos and squalor of post-war conditions. The U.N. may not have set out to protect perpetrators of mass murder. But the result was implicit in the U.N.’s limited arsenal of responses: when the most ready response is to send lawyers, the U.N. is better equipped to protect criminals than their victims.

It is true, of course, that arranging for international intervention is very much more difficult than arranging for tribunals. Still, the telling fact is that, in the aftermath of the Rwandan catastrophe, the U.N. made only the most desultory, half-hearted efforts to think about how international responses might be organized to stave off mass murder in the next crisis. Instead it went forward with more ambitious plans for international tribunals. Four years after the Rwandan catastrophe, the U.N. had made no progress in organizing a new structure to mobilize international military interventions. Instead, the U.N. helped to launch an international criminal tribunal—so that, for the next crisis, the U.N. would be equipped to respond by . . . again threatening to send lawyers!

Indeed, the Statute of the ICC rather perversely denied the court jurisdiction—even for genocide—if the perpetrating government had refused to sign, while subjecting soldiers and officials of intervening states to liability for very broadly defined “war crimes” if their home government had signed


on to the Statute. So, in the next conflict, a country that agreed to send troops in a humanitarian intervention would be subject to scrutiny and monitoring by the ICC. That fact, after all, provides another reason to refrain from committing troops. In 2004, when the United States proposed that the U.N. exempt authorized international forces from ICC jurisdiction, the Security Council refused. Upholding the authority of lawyers was more important than preserving the capacity for effective military responses. There were, of course, other considerations, at a time when the Council was much divided over the American and British action in Iraq, which had not received Council authorization. Still, the Council was clear in its priorities: it wanted to preserve the authority of lawyers over the capacity for military action.

Faced with a new humanitarian crisis in the Darfur region of Sudan, the Council hesitated. Some members used the word “genocide,” which after all requires “punishment” under international law. U.N. authorities determined that the word “genocide” was improper, and the situation was one of mass murder, but not quite “genocide.” No serious discussion was given to organizing an international intervention force. Council members instead devoted their energies to arguing about the preferred response, ultimately authorizing special jurisdiction for the ICC. When the United States finally agreed to abstain from the vote authorizing ICC investigations, the Council had a policy: it would do nothing effective regarding Darfur. It would leave the protection of people facing massed slaughter to the protection of a counter force of ... lawyers in the Netherlands.

The most charitable interpretation of this pattern is that the international community prefers to emphasize those responses which it is best able to administer and it is easier to get agreement on the reasoned, deliberative, procedurally bound work of lawyers than on military action, which is so much more difficult to control from a distance. Better to emphasize matters on which it is easier to get agreement.

But what can be agreed upon may not be sufficient or at all seriously responsive to the challenge. Diplomats may find it easier to agree on a lunch menu than on provisions of a peace deal. That doesn’t make menu planning a sensible focus for diplomacy. The comparison may seem frivolous. The international criminal tribunals for Yugoslavia and Rwanda were not just offering a banquet table for international lawyers. If they were supposed to be doing more serious things, however, there was not all that much agreement on what those things should be.

III. Blind Justice, Bitter Politics

International justice may do little to stop butchery while it is occurring. It may even offer a salve to tender consciences which delays or

deflects efforts to organize effective intervention. ("We have recruited the best minds from the law schools, so we don't need to bother the military academies or the war colleges.") Advocates of international criminal justice still can argue that international tribunals can provide decisive help, after the slaughter has ended, when attention shifts to finding ways to heal a torn and wounded society. At that stage, advocates argue, the international community can provide specialists in justice, just as it often provides specialists in epidemiology and food distribution.

Probably the best known academic study of the tribunals, a book by the Canadian political scientist Gary Bass, sums up this argument in its title: "Stay the Hand of Vengeance." Bass makes the seemingly plausible argument that international justice can provide a more stable post-conflict environment by assuring that justice is free from vengeful passions. By fostering domestic stability in strife-torn lands, international tribunals can contribute to international peace—at least as this argument would have it.

The argument has a superficial plausibility insofar as international lawyers, recruited from outside the scene of the conflict and operating in the calm atmosphere of The Hague, are far less likely to share in the passions of the partisans. Yet if the argument were actually compelling, we would expect to see this solution adopted very widely. The general pattern, however, is quite the opposite. It was not only the World War II victors who disdained to concede control of post-war prosecutions to the international community. Some two-dozen states made transitions to democracy in the 1990s, after the collapse of communism in Europe, after the collapse of apartheid in South Africa, after the collapse of military dictatorships in South America and the ending of bitter insurgences in Central America. In almost every case, atrocities committed by the previous government had generated demands for justice—or retribution. So far from inviting international authorities to supervise the implementation of justice, new regimes in almost every case proclaimed some form of general amnesty for crimes committed under the old government (or acted as if there had to be some practical equivalent to general amnesty).

In a number of cases—most notably in Chile and South Africa—a prior promise of amnesty was the price paid by opponents of the old regime to secure a peaceful transition. Those who held power agreed to give it up, in return for promises not to seek retribution. Even where no formal agreement of this kind was made, new governments had obvious incentives to "stay the hand of vengeance" in order to conciliate previous supporters of the old governments.

One can argue that some new governments failed in their duty to implement adequate justice for past horrors. One can argue that short-

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32. Id.
term stability was bought at the price of lingering resentments or delusions. One can argue that crimes too quickly buried will return to haunt political life in these countries down the road. Arguments about historical reckonings are worth pursuing but rarely yield any clear conclusions. After the Second World War, revived democracies in Western Europe faced the challenge of apportioning responsibility for those who collaborated with German crimes, which in every country included senior civil servants and often very high level politicians. Not many were punished. Officials connected with the most terrible crimes were allowed to pursue postwar careers in the civil service and sometimes were found, decades later, to have enjoyed considerable success in these careers, protected from legal challenge by mysterious political forces in the background.\footnote{For succinct review of postwar protection provided to French civil servants who helped administer mass murder during the Vichy years, see Anthony Beevor & Artemis Cooper, Paris After the Liberation 384-87 (Penguin 2004). For more general treatment, comparing experience in several countries, see The Politics of Retribution in Europe, World War II and Its Aftermath 300 (Istvan Deak et al. eds., 2002), which sums up the pattern of “justice” offered in the first years after the war as “so partial and aborted” but notes that justice in France was particularly “partial and aborted.” In the French approach, the “emphasis was clearly placed upon the need to reduce to the minimum the number of convicted persons” and “reserve for this select few a sort of symbolic and representative function” while “leaving] the rest of the social fabric untouched . . . through a process of benign collective neglect.” Id. at 302.} Still, it is not at all obvious that postwar Germany, where outsiders initially organized punitive justice, ended up with a more honest accounting of its own past and a more reliably tolerant or democratic political culture in subsequent decades.\footnote{A poll conducted in 2004, for example, found that a majority of Germans believe policies of the Israeli government, in resisting terror attacks, were comparable to the genocide perpetrated by Germany in the Second World War. Whatever else this finding indicates, it does not speak well for the educational value of Nuremberg and other postwar trials. See E. Lefkovits, German poll equating Israeli, Nazi tactics, Jerusalem Post, Dec. 9, 2004; Robin Shepherd, In Europe, An Unhealthy Fixation on Israel, Wash. Post, Jan. 30, 2005, at B03.}

For new governments, at any rate, future political consequences must often give way to immediate needs. To reach a future in which a stable democracy has come to terms with a terrible past, transition governments must get through the stresses of the present. The compromises that governments make—with justice, with truth, with security and with public feeling—are often controversial. That is the stuff of politics. But there is no general consensus on what compromises should be made in what circumstances.

To suppose that international tribunals can do a better job with these challenges, one must suppose that it is possible to provide justice without compromise, without regard for circumstances. That is the implication of the structures established for the Yugoslav and Rwanda tribunals. There is no provision for pardon or amnesty. Such exceptions from the law are granted, in national systems, at the discretion of executive or legislative authorities on broadly political grounds. Neither the charters of the special tribunals nor the Rome Statute acknowledge any need for such exceptions.
Perhaps that is because acknowledging the need for exceptions would raise awkward questions about who is empowered to make such political judgments and on what grounds. It is safer to pretend that the tribunals answer entirely to the law and to nothing but the law.

But this is, of course, a pretense. Tens of thousands of individuals might have been liable to prosecution under the jurisdictions accorded to the Hague tribunals. The tribunals, however, were not equipped to handle more than a few dozen prosecutions. The choice of which cases to pursue and which to disregard inevitably raised questions about priorities, if not consequences. Even judges, in established national courts, have been known to cast one eye at least on policy considerations. Certainly prosecutors must give some thought to the political implications of the way they exercise their discretion. That is why, in common law countries, prosecutors have always been regarded as properly accountable to political authorities (or to voters). In recent political memory, Americans rejected the notion that an "independent prosecutor" could be trusted to make non-partisan decisions when investigating a sitting president—even when the prosecutor was the respected former judge, Kenneth Starr.

Once one acknowledges that prosecutors of international tribunals are exercising discretion, one might still defend their judgments as guided by conscientious concern for doing the best possible job with limited resources. But it is not saying much to claim that international prosecutors must disregard partisan or personal agendas. What is an improper distraction and what is a proper consideration of policy? If one drops the pretense that international prosecutors are simply guided by the law, one must assume that international prosecutors are likely to be more honest, or more informed, or more astute, in grappling with policy considerations, than their domestic counterparts in the affected countries. Yet it is hard to see why we should credit such assumptions.

International prosecutors are accountable to the international community, whatever that may mean. The international community is likely to be paying much less attention to the consequences of prosecutions in a particular country than the people who live in that country. A domestic prosecutor must live with the people affected by his decisions, while the international prosecutor can move on to new assignments, without ever returning to that country. Apart from motivation, the domestic prosecutor will generally be familiar with the language and culture of the offenders as well as the victims. The domestic prosecutor will likely have a much more informed understanding of the challenges facing the new government for which he acts. The international prosecutor may know almost nothing about the country to which he has been assigned to deliver justice. Why suppose that the international prosecutor will do a better job?

After more than ten years of experience with the Yugoslav and Rwanda tribunals, these are no longer abstract or speculative questions. Judged from the perspective of those most affected, these tribunals have not performed well at all. Even judged from the perspective of the international
community (or its representatives in the Security Council) they have not performed well.

The most obvious problem is that the tribunals have proceeded at an agonizingly slow pace. "Justice delayed is justice denied." That is an American adage, not always honored in American courts. But the personnel of the international tribunals seem never to have heard of this adage. In the first five years after the International Criminal Tribunal for Rwanda (ICTR) was established, it had not achieved a single conviction. In its first ten years, it had convicted twenty perpetrators, while promising to reach verdicts on another twenty-five individuals over the next four years. The Rwandan government, with one-tenth of the funding available to the ICTR, had imposed verdicts on 5,000 cases in the first five years after the Tutsis came to power. It was not that the Rwandan government simply pursued lesser offenders. In over a hundred cases, Rwandan courts imposed death sentences for the crimes involved. The ICTR was precluded, by its organizing statutes, from imposing any sentence beyond life imprisonment, so excessive haste might not have been quite so much of a danger. But the international prosecutors did not even focus on the worst offenders—at least not exclusively.

The Yugoslav tribunal proceeded at an equally glacial pace. After ten years, it had reached thirty-six "judgments"—some of which were only settling procedural questions—while actual trials continued. An additional forty-two indictments, accumulated by 2003, had not yet proceeded to trial. In half of these cases, the accused were not yet in custody; of the remainder, half were already five years old. The Security Council finally became so impatient with the pace of the tribunals that, in 2003, it demanded that the tribunals finish their trials within the next five years.

The ICTR, looking to cut down on its case load to comply with these deadlines, then announced that it was relinquishing custody of forty-one perpetrators (nearly forty percent of those who were then being held for trial

35. See Bass, supra note 31, at 307-08 (noting that Rwandan national courts had handed down over one hundred death sentences and a comparable number of sentences of life imprisonment in a period in which the international tribunal had not managed to conclude a single trial. "No one," he concludes, "should have expected the Rwandans to be as unconcerned about the punishment of the genocide as the UN was.").


37. See Richard Sezibera, The Only Way to Bring Justice to Rwanda, WASH. POST, April 7, 2002, at B1 (noting that national courts in Rwanda, with one tenth of the funding supplied to the international tribunal, had rendered judgments in more than 5,000 cases, while the international tribunal was still struggling through its first dozen cases); see also Mark A. Drubl, Lecture, Law and Atrocity: Settling Accounts in Rwanda, 31 OHIO N.U. L. REV. 41, 46 (2005).


before the ICTR) on the grounds that these individuals were on the grounds that they were only “low-level participants” rather than among those who “bear the gravest responsibility for the crimes committed.”

The ICTR has not explained why its prosecutors claimed jurisdiction over non-major perpetrators in the first place. One can draw some inferences from previous prosecutions, however. Among those held accountable in the first twenty trials were officials charged with sexual humiliation of Tutsi women (though not with actual rape, let alone murder). The point, it seems, was to set a precedent for future tribunals. Doing justice for Rwanda was a lesser priority than building up case law for a global law of criminal justice. The Tutsi government became so furious with the tribunal’s priorities that at one point it simply refused to issue visas to the international prosecutor and her staff to enter Rwanda—though this was somewhat less disabling to international prosecutors than it might seem, since the trials took place in neighboring Tanzania.

In the Yugoslav tribunal, meanwhile, prosecutors initially withheld any indictment of Slobodon Milošević, president of Serbia, while handing down a number of indictments against Serb-backed militia commanders in Bosnia. It is likely that the prosecutors had at least one eye on the preference of NATO governments in the mid-1990s. NATO was negotiating with Milošević in the mid-1990s to achieve a settlement to the fighting in Bosnia and NATO countries provided almost all the peace-keeping forces on the ground in Bosnia, on which the tribunal was dependent to execute its arrest warrants. It might also have been somewhat relevant that NATO members constituted a majority of the permanent members of the Security Council, which established the ICTY and had to approve its continued funding.

In 1999, NATO demanded the withdrawal of Serb forces from Kosovo—and then commenced a bombing campaign against Serbia, when the Milošević government rejected this ultimatum. In the midst of the bombing campaign, the ICTY announced that it would prosecute Milošević for war crimes in Bosnia—crimes that had occurred years earlier. In the


41. If such precedent-setting efforts were a bid for mention in casebooks, they achieved their goal. See HENRY J. STEINER & PHILIP ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS 1887-88 (2d ed. 2000) (discussing cases establishing that “sexual violence” may “include acts which do not involve . . . physical contact” and that “coercive circumstances need not be evidenced by a show of physical force.” While these are entirely plausible claims for a domestic legal system, they are not, one might think, of highest priority for prosecutors faced with an actual pattern of mass murder that had consumed 800,000 lives.

42. For an extended survey of complaints about the operations of the ICTR, see Hans Nichols, U.N. Court Makes Legal Mischief, INSIGHT ON THE NEWS, January 20, 2003 (concluding, “[i]t’s clear the lawyers and judges of the ICTR like the idea of working on behalf of humanity rather than something as trifling or temporal as a country such as Rwanda and its 800,000 dead”)

meantime, prosecutors arranged for light treatment of an official of the Serb enclave in Bosnia, who had been directly connected with atrocities there but could provide valuable testimony against Milošević.

Almost two years after his indictment by the tribunal, Milošević was actually delivered to The Hague for trial. He had already been forced out of power after street protests prevented him from declaring himself the winner in a popular election. The new government was a coalition of democratic reformers and disillusioned supporters of Milošević (whose wars had ended in failure and whose domestic policies had brought economic chaos). The new government's bid to organize its own trial of Milošević was rejected by the ICTY, however. Western governments (including the United States) insisted that aid to the new democratic government would not be forthcoming unless Milošević were extradited to The Hague.

What followed was not a good example for international justice. After Milošević's extradition, the ICTY insisted that it would also seek indictments of others in his immediate entourage. This announcement exacerbated strains in the new coalition in Belgrade and ultimately led to the assassination of the prime minister who had arranged the extradition of Milošević. Meanwhile, at The Hague, after many delays, Milošević turned his trial into an occasion for endless demagogic speeches—hours and hours of which were broadcast into Serbia and helped turn Serb opinion in his favor. Milošević's party gained seats at the next election, even with Milošević on the list of candidates for parliament. And the trial ground on and on and on, still far from ending after four years of proceedings.

Questioned about the extreme sluggishness of these proceedings, Judge Patricia Wald, a U.S. federal appeals court judge serving on the ICTY appeals panel at The Hague, explained to a congressional hearing that delays were the price paid to achieve the tribunal's highest priority: "We have to assure that justice is seen to be done." It is, perhaps, a laudable aim. But if that is the standard, it is clear that it was not achieved—if the seeing that matters is in Yugoslavia or Rwanda. Perhaps what Judge Wald had in mind was the way these trials were "seen" by the world at large.

That remains a strange perspective, however. In Germany, the Nuremberg tribunal took eleven months, from the opening gavel at the bench to the last swing of the gallows for the condemned. Only a few months into the trials, Allied governments were pressing the prosecutors to speed things up. Perhaps the requisites of international consultation slowed things down. In France, the trial of the chief wartime collaborator, Pierre Laval,
took four days. Laval's execution followed in less than a week. Perhaps these earlier trials were far from perfect. But there was a political need to achieve some rapid sense of closure to facilitate postwar reconstruction. For Serbs, the international community is in no hurry; even less so for Rwandans. Not until every procedural refinement has been considered can the trials move forward. But of course, they won't be regarded as perfect justice in any case. Nor should they be, given the improvised procedures, a mish-mash of civil law and common law procedures.

The International Covenant on Civil and Political Rights (ICCPR) prohibits ad hoc tribunals, presumably on the ground that they will cause suspicion of injustice. But ad hoc is precisely the term to describe these unique international tribunals. It is revealing that apologists for these tribunals ignore this awkward fact. The ICCPR reflects a concern that tribunals established for special purposes will deliver a level of justice that is distorted by these special purposes. Advocates for international justice seem to have imagined that ad hoc international tribunals could somehow transcend the special political contexts that produced these special tribunals and so provide a quality of justice that would be above reproach. What these ad hoc tribunals actually succeeded in doing was confirming that lawyers in distant forums aren't good political calculators for the countries they purport to be serving. Serving humanity is something different than serving a particular political community. What serving humanity means, it turns out, is serving no particular set of human beings.

IV. Justice for Humanity is not Justice

Advocates for global justice may concede that international justice is, other things being equal, not preferable to local or national justice. That seems to be the premise of the Statute for the ICC, which provides for international jurisdiction only when national justice systems have not taken adequate measures to prosecute the offenses enumerated in the Statute. International justice might still have appeal as a back-stop to national justice.

47. For a vivid account of the political pressures driving the trial toward its rapid and predetermined conclusion, see Anthony Beevor & Artemis Cooper, Paris After the Liberation, 1944-1949, at 165-69 (1994).

48. International Covenant on Civil and Political Rights art. 14, opened for signature Dec. 19, 1966, 999 U.N.T.S. 171, 6 I.L.M, 368 (entered into force Mar. 23, 1976) [hereinafter ICCPR] ("In the determination of any criminal charge ... everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."). When a defendant before the ad hoc tribunal for Yugoslavia protested that the ICTY had been established by special resolution of the U.N. Security Council, rather than "by law," the appeals chamber of the tribunal rejected this provision of the ICCPR as inapplicable: "[T]he principle that a tribunal must be established by law ... is a general principle of law imposing an international obligation which only applies to the administration of criminal justice in a municipal setting" (rather than to international tribunals established, on whatever basis, by international authorities). Prosecutor v. Tadic, Case No. IT-94-1-I, 106 I.L.R. 453, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction (Oct. 2, 1995).
But the premise remains that international justice is, in some sense, more reliably available than national justice. And there is no good reason to believe this premise. Why believe that the international community is more committed to seeing justice done—in any particular nation—than the people who live in that nation? Experience suggests the opposite.

If one judges by aggregate death tolls, the communist regimes in Soviet Russia and China were the most murderous of the twentieth century. When the Soviet regime collapsed in 1991, there was an opportunity for calling to account the surviving perpetrators of mass murder under that regime. The international community did not demand any accounting. The new government in Russia sought financial assistance from western nations. It sought new treaty relationships. It even sought admission to the Council of Europe and participation in the treaty system established under the European Convention on Human Rights. The United States and the European democracies did press for liberalizing and democratizing reforms in post-communist Russia. But they did not press for prosecution of communist crimes. And there were none. There was not even an official accounting for past crimes by a truth commission, as in Chile or South Africa.

So with China. China was encouraged to continue reforms that established a greater measure of freedom. It was admitted to the World Trade Organization at the end of the 1990s. So far from pressing China to account for mass atrocities of the Mao era, European delegates to the U.N. Human Rights Commission refused even to support U.S. proposals to investigate existing standards of human rights protection in the liberalizing Chinese regime of the 1990s.49 So in China, as in Russia, the government made little effort to provide an official accounting, let alone actual prosecutions, for monstrous crimes committed in the past.

One can argue that forbearance in these circumstances was a sound policy, because liberalizing reforms in post-communist Russia and China might have been jeopardized by international demands for raking over past horrors. One can argue that the international community had no strong reason to demand prosecutions and accountings, when people in these countries did not demand them—or at least, did not mobilize on behalf of such claims in visible ways. Perhaps people in these countries had their own reasons not to press claims that might have jeopardized reformist trends under the post-communist governments.

In effect, the international community preferred peace to justice and perhaps that was also the preference of the populations most affected. Still, it is wrong to think that local acquiescence leaves international justice looking roughly comparable, when international and local opinion are comparably indifferent to demands for accountability. At the end of the day, citizens of an affected nation have to live there. Governments, even

49. For a survey of European refusal to seek investigation of Chinese human rights abuses by the U.N. Human Rights Commission, see STEINER & ALSTON, supra note 41, at 634-40.
undemocratic governments, have the responsibility for coping with local situations. International authorities do not acknowledge the same sort of responsibility. Even when the international community sends peace-keeping forces to a troubled region, they do not exert the full responsibility of governing. Among other things, they do not assert the full claims to control that sovereign states are expected to maintain (and indeed, under traditional notions of international law, are actually obligated to maintain).

The situation in Bosnia in the 1990s is revealing of the problem. International peace-keepers sometimes failed even to protect civilians from murderous assault by opposing ethnic militias. International forces were certainly not willing to take risks to apprehend perpetrators of atrocities sought by the distant tribunal in The Hague. Even the perpetrators of the terrible massacre at Srebrenica were never apprehended. Soldiers of NATO nations did not make any great effort to hunt them down. International forces in Bosnia did not place a high priority on executing arrest warrants from the tribunal in The Hague, since they had not been fielded by the lawyers in The Hague and did not report to a common command structure encompassing prosecutors in The Hague. There was a considerable gulf between the priorities of The Hague and the priorities of the home governments of the outside military forces in Yugoslavia. And that should have been expected. The soldiers were not part of the same state structure as the Hague tribunal. They had no very strong reason to vindicate the abstract authority of the international tribunal. Criminals may elude capture even in national justice systems in well-ordered states. But sovereign states have strong incentives to demonstrate their control of their territory. That means, among other things, these states have strong incentives to enforce obedience to their own court systems.

The international community does not have strong incentives to seek justice in any particular case precisely because it does not have sufficient control over any particular territory. The world at large—if one can attribute any sort of motivation or priority to an amorphous collection of so many different states and peoples—necessarily sets a higher priority on dampening conflict between states than on assuring justice among individuals. The international community is not organized to govern specific peoples or territories. That is precisely the purpose of sovereign states.

In these circumstances, it is fair to ask whether the international community really has any moral claim to impose justice on individuals. It may be true that in many cases, if international tribunals cannot act, no action will be taken. That is not, in itself, a particularly compelling argument for international justice. The question remains whether international justice really contributes very much of what criminal justice is supposed to provide.

To see the point, one has only to consider the objections to unauthorized justice. For victims or their relatives to take the law into their own hands is usually condemned on the ground that lynch law is likely to be excessive or reckless. But suppose that perpetrators of mass murder have escaped punishment. Suppose that relatives of the victims have tracked
and cornered the perpetrators. Suppose they are even prepared to offer some form of proceeding before imposing just punishment. Probably most people can sympathize with the moral claim of the avengers in the circumstances. Still, it seems to be the common intuition that private justice of this kind is not at all an adequate substitute for criminal justice delivered by proper authorities. Private justice, in these circumstances, is not really the kind of justice that criminal justice systems aim to provide.

The case, as it happens, is not hypothetical. A considerable amount of effort has been devoted, over the past sixty years, to identifying Nazi war criminals. Most of the participants in one of history's greatest crimes managed to escape without punishment. But there have been few recorded acts of private justice to compensate for the inadequacies of official justice. In the immediate aftermath of the war, there were, in fact, schemes hatched by survivors to do justice by inflicting mass death on captured Nazis. Zionist officials in Palestine seem to have intervened to prevent such plans from being carried out—apparently on the assumption that retaliation in kind by private avengers would not be widely recognized as justice and so would not achieve a central aim of justice. It would not give moral authority to the condemnation of these crimes, because it would not demonstrate a systematic determination to judge and punish such crimes in the future.

The most obvious objection to private justice is that clandestine avengers may make mistakes, misidentifying their targets, punishing those who are innocent or not nearly so guilty as others. At the best, this justice will be "irregular." But that is not simply an objection on behalf of "defendants." Private justice does not convey what official justice is supposed to convey: the formal judgment of an entire community. Jewish officials in Palestine condemned private vengeance against Nazi war criminals in the aftermath of the Second World War. A dozen years later, the same political leaders organized a major trial in Jerusalem for Adolf Eichmann, the man who had organized a major part of the Nazi genocide during the war. That trial had a very different meaning, because it was undertaken by an organized state. It was a state with plausible claims to punish the mass murder of Jews, because it had devoted much energy to organizing the necessary means to repel murderous attacks on Jews.

There were jurisdictional difficulties with the Eichmann trial, as there had been jurisdictional disputes about the original trials at Nuremberg. There was some point in the protest that the trial of German criminals by outside powers was an exercise in "victor's justice." Trials organized by outsiders did not have the same moral force as trials organized by German authorities might have had. But for some time after the war, it was not certain that Germans, on their own, could sustain a government capable of expressing the condemnations that a decent community would be expected to express. Germany had no government of its own at the time of the

50. Rich Cohen, The Avengers 197-203 (Knopf 2000) (describing a plan to poison vast numbers of Germans, which was averted when the organizer was arrested by British authorities, reportedly on a tip from Jewish leaders in Palestine, "perhaps by Ben-Gurion himself").
Allied trials. When self-government was restored to West Germany, politicians clamored for amnesty and pardon of war criminals, rather than seeing through the efforts at punitive justice initiated by the Allies.\textsuperscript{51}

But whatever objections might be raised against trials of German war criminals by outsiders, the most confused objection to such ventures in "victor's justice" is that the victors were not neutral. The proposal to involve jurists from neutral powers was actually advanced by German defense counsel at the original Nuremberg trials. Allied judges dismissed it out of hand, and very reasonably so. The Allied powers were responsible for Germany at that time. Their authority derived, as the International Military Tribunal judges ruled, from Germany's surrender to these powers.\textsuperscript{52}

Justice from bystanders is not an improvement over victor's justice. The victors in a just war have at least devoted their own efforts to fighting wrongdoers. The moral claim of bystanders has very little weight. If they are less self-interested than accusing victors, they are more remote from the crimes. Bystanders may offer sympathy. What victims of crime seek is something more than sympathy.

The most compelling claim of victims is for official acknowledgment that what they suffered was indeed criminal. That acknowledgement does not carry much weight when offered by bystanders who made no effort to stop the crimes when they were occurring and make no commitment to stop their recurrence in the future. Victors in a just war have better claims to judge than mere bystanders. But even victors, if they are outsiders who will not remain to govern the defeated nation, cannot speak with the full moral weight of a normal criminal justice system. The most compelling justice comes from a court system which can claim to speak in the name of the society where the victims suffered. In the proper setting, criminal punishment says, "The community acknowledges that a terrible wrong was done and state organs, in the name of this society, are committed to punishing this wrong, to prevent, as much as possible, such wrongs from recurring."

Bystanders cannot make this claim. Not concerned enough to intervene when the crimes occurred, they make no commitment to act against such crimes in the future. Condemnations from bystanders merely represent opinions—opinions backed by no organized, systematic or meaningful commitment. Condemnation from bystanders has all the moral weight of a sympathy card, purchased for a dollar at a convenience store and sent on by ordinary mail. Gestures of sympathy are no substitute for justice.

\textsuperscript{51} See Norbert Frei, Adenauer's Germany and the Nazi Past, The Politics of Amnesty and Integration 2-20 (Columbia University Press 2002) (reporting that demands for amnesty of previously prosecuted Nazis were among the first and most widely discussed items on the agenda at the opening sessions of the new West German parliament in 1949). More than a third of Germans polled the following year endorsed the view that Nuremberg prosecutions had been "unjust." \textit{id.} at 98.

\textsuperscript{52} International Military Tribunal, 1 Nazi Conspiracy and Aggression 171 (U.S. Gov't Printing Office 1947).
No one should be surprised, therefore, that Iraqis did not embrace the prospect of an international trial for Saddam Hussein. Certainly the U.N. had done nothing to earn the trust of ordinary Iraqis. It had treated a monstrous tyranny as a legitimate government. It had imposed economic sanctions over more than decade, causing great suffering to ordinary Iraqis while allow the tyranny to enrich itself through side deals with corrupt international bureaucrats and corrupt officials of foreign governments. It refused to endorse the military intervention of the Anglo-American coalition that finally ended the Ba'athist tyranny. And in the ensuing terrorist insurgency, the U.N. withdrew its own official assistance mission after one terror attack on their headquarters in Baghdad.

Iraqis had more reason to trust an American organized trial of Saddam and his criminal subordinates. The United States at least had been prepared to commit its own troops to remove Saddam and had demonstrated its willingness to maintain a sizable military presence in the country to restore some degree of peace and stability when terrorists threatened to reduce Iraq to chaos—or to reimpose a new tyranny. Still, Iraqis had reason enough not to place great trust in American justice, either. The Americans lacked the capacity—whether through lack of understanding or lack of troop strength—to prevent a murderous terror insurgency from gaining momentum in the first years after Saddam's removal. American troops were not likely to remain for very long in significant numbers. If Iraq could achieve peace and stability under a decent administration, it would have to do so, in the end, with its own newly organized army and police, answering to its own new government. Why shouldn't the government which sought to rally the hopes of Iraqis for the future also claim the right to do justice for terrible crimes in the past? Why wouldn't an Iraqi government be the most proper authority to impose justice on Saddam and his fellow criminals? Why wouldn't Iraqi justice be most reassuring to ordinary Iraqis? Why wouldn't Iraqi justice have the greatest moral resonance—as justice by a government that takes responsibility for preventing such horrors in the future, as justice by a government that can claim to speak for the priorities of the Iraqi people?

It is, perhaps, the extreme difficulty of answering these questions in the negative that allowed the world to acquiesce to the Iraqi refusal of international involvement in the trial of Saddam and other Ba'athist criminals.


In this case, an international tribunal was not required to console the international community for failing to take more effective action against Saddam. Results that required military intervention had already been achieved—by the military action of the American-led coalition. In this case, the question was simply whether justice would be better served by an international tribunal or a national trial. And there turned out not to be many voices insisting that remote, irresponsible international civil servants in The Hague were the best people to put in charge of something so sensitive—and so crucial to Iraqis—as the trial of the deposed tyrant.

Or perhaps it was simply that, an international community which could not muster the will to deal with Saddam while he was in power, naturally lacked the will to impose its preferences regarding the trial of a deposed and captured Saddam. But that is enough to make the point.

Justice is a serious and often difficult responsibility. It is far too serious to be left to an entity so distracted, so divided, so diffuse as “the international community.” What hope there is for justice in this world must be a hope that resides, where justice has always been sought in the past: in the governments of sovereign nations. It was possible to forget this fact in the giddy, frivolous atmosphere of the 1990s. What previous generations took for granted, the world of the early 21st Century has now relearned. In a more serious world, the lesson is not likely to be forgotten. It is certainly not likely to be effaced by an international criminal court, promising to do justice for humanity, but equipped only to divert a specialized coterie of legal scholars. Justice is too serious to be left to international bureaucrats.