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Just Outcomes, Overreaching Rationales: How International Criminal Law's Achievements Augur Flawed Responses to Political Violence

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JUST OUTCOMES, OVERREACHING RATIONALES: HOW INTERNATIONAL CRIMINAL LAW'S ACHIEVEMENTS AUGUR FLAWED RESPONSES TO POLITICAL VIOLENCE

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I. INTRODUCTION

Over the last two decades, international criminal justice has risen to extraordinary prominence as a feature of the international legal order.[1] Beginning with the United Nations (UN) Security Council's establishment of the International Criminal Tribunals for the former Yugoslavia (ICTY) in 1993 and for Rwanda (ICTR) in 1994, criminal processes have moved from international law's periphery to its core, becoming intertwined with the peace and security regime. Not only have the Security Council's extraordinary Chapter VII powers been interpreted to include the discretion to subject categories of individuals to penal jurisdiction without state consent,[2] but the commission of international crimes within states has come to be recognized – under the "Responsibility to Protect" doctrine – as a sufficient ground for Chapter VII measures up to and including the use of force.[3] Beyond this, states increasingly have, by treaty and by participation or acquiescence in collective manifestations of *opinio juris*, renounced their sovereign capacities to shield state officials who commit specified aggravated breaches of human rights and humanitarian law, irrespective of the location of the conduct or nationality of the victims. Not only have a majority of states consented to the jurisdiction of an International Criminal Court (ICC), but many more have left themselves open to cross-border projections of power by foreign-state courts, now individually "deputized" to exercise universal jurisdiction.

All of these developments qualify earlier understandings of state sovereignty, and in many instances transform international law from ally to foe of sovereign prerogative. Whatever may be still said of state sovereignty *within*

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1 For a critical examination of this phenomenon from a perspective different from what follows below, see Kenneth Anderson, *The Rise of International Criminal Law: Intended and Unintended Consequences*, 20 EUR. J. INT'L L. 331 (2009).

2 *See* Prosecutor v. Tadić, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

3 2005 World Summit Outcome, G.A. Res. 60/1, ¶ 139, U.N. Doc. A/RES/60/1 (Oct. 24, 2005); *see also* S.C. Res. 1674, ¶ 4, U.N. Doc. S/RES/1674 (Apr. 28, 2006) (reaffirming paragraphs 138 and 139 of the 2005 World Summit Outcome).

international law,[4] it can no longer be identified directly with official impunity for the most heinous atrocities: leaders who were once quite literally laws unto themselves – bearers of the last word on what counted as the legitimate use of force in their territories – are now palpably subject to extraterritorial penal consequences, and their states potentially subject to legally authorized military intervention.

These developments are, in the main, a good thing. But there can be too much of a good thing.[5] The potential problem lies not in the extraterritorial prosecutions themselves – which so far have entailed relatively little true overreach – but in the exuberant characterizations of their animating principles, whether contained in the dicta of court judgments, in the writings of academic commentators, or in the slogans of human rights activists.

Much of this rhetoric casts international criminal law not as amending, but as transforming the global juridical order. Slogans such as "an end to impunity" and "no safe havens" – and their counterpart doctrinal innovations – tend to elevate these supposed imperatives to the level of categorical priorities, to which other legal considerations must give way. Consequently, the fulfillment of these imperatives comes to be posited, not only as the true test of international legality's efficacy, but as a condition of fidelity to constraints that international law places on righteous self-help. Sovereignty with responsibility is thus prone to being supplanted by sovereignty *as* responsibility—portending a unilateral withholding of respect for the legal inviolabilities of a foreign state deemed to have defaulted on its responsibilities.[6]

International criminal justice processes, from Nuremberg onward, have arisen in contexts of extraordinary crime. The International Military Tribunal at Nuremberg – the international criminal justice prototype – was directed against

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[4] I have given this question book-length treatment. *See* BRAD R. ROTH, SOVEREIGN EQUALITY AND MORAL DISAGREEMENT (2011).

[5] I have made more elaborate arguments to this effect. *See* Brad R. Roth, *Coming to Terms with Ruthlessness: Sovereign Equality, Global Pluralism, and the Limits of International Criminal Justice*, 8 SANTA CLARA J. INT'L L. 23 (2010); *see also* Brad R. Roth, *Just Short of Torture: Abusive Treatment and the Limits of International Criminal Justice*, 6 J. INT'L CRIM. JUST. 215 (2008).

[6] As one official of the George W. Bush Administration put it:

> Sovereignty entails obligations. One is not to massacre your own people. Another is not to support terrorism in any way. If a government fails to meet these obligations, then it forfeits some of the normal advantages of sovereignty, including the right to be left alone inside your own territory. Other governments, including the United States, gain the right to intervene.

Richard Haass, Director of Policy Planning for the George W. Bush State Department, *quoted in* Nicholas Lemann, *The Next World Order*, THE NEW YORKER (Apr. 1, 2002), http://www.newyorker.com/archive/2002/04/01/020401fa_FACT1.

the most outrageous state behavior in recorded history.[7] The ICTY and the ICTR responded to campaigns of "ethnic cleansing" and genocide that were understood broadly to be antithetical to the purposes underlying such state prerogatives as the international order acknowledges and protects.[8] Universal jurisdiction, beginning with the *Eichmann* case,[9] has proved expedient in thwarting escapes by acknowledged perpetrators of notorious atrocities.[10]

Extraordinary circumstances justify extraordinary responses – including relaxation of certain rules that, if applied rigidly to extraordinary circumstances, would frustrate the purposes and principles that compose the substructure of the rules themselves. Even "the principle of legality" itself – *nullum crimen sine lege* – rings hollow in the face of mass extermination. But therein lies a temptation to make a virtue of necessity and to allow the exception to swallow the rule. Innovations designed for exceptional cases are celebrated in ways that augur expansion rather than limitation of their applicability. Expectations become skewed, and the frustration of those expectations leads either to cynicism or to the embrace of unbridled self-help.

Restraints on unilateral pursuits of justice are a feature, not a flaw, of the international legal order. International law's most essential function is to establish a framework for cooperation among bearers, not only of conflicting material interests, but also of conflicting moral dispositions.[11] Universal judgments about justice are often elusive, and those actors capable of unilaterally implementing even genuine universal principles are often both untrusted and untrustworthy. Indeed, a presumptive "impunity," far from being the antithesis of international legality, is implicit in any international order that does not (as did the Nuremberg moment) presuppose victor and vanquished. International law is tasked with providing the foundation of peace among global actors who may regard one another as criminals.

This article seeks to counteract a series of misimpressions associated with exuberance about international criminal justice. These misimpressions

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[7] *See Judicial Decisions Involving Questions of International Law – International Military Tribunal (Nuremberg), Judgment and Sentences*, 41 AM. J. INT'L L. 172 (1947) [hereinafter *IMT Judgment*].

[8] *See, e.g.*, S.C. Res. 827, ¶ 2, U.N. Doc. S/RES/827 (May 25, 1993); *see also* S.C. Res. 955, ¶ 1, U.N. Doc. S/RES/955 (Nov. 8, 1994).

[9] *Attorney-General of the Government of Israel v. Eichmann*, 36 I.L.R. 5 (1961), *aff'd*, 36 I.L.R. 277 (Supreme Ct. of Israel 1962).

[10] Strikingly illustrative is the Belgian prosecution of Rwandan nuns who, before taking up residence in Belgium, had assisted in the murder of Tutsi civilians during the 1994 genocide. Henry J. Steiner, *Three Cheers for Universal Jurisdiction – Or Is It Only Two?*, 5 THEORETICAL INQUIRIES IN L. 199, 214 (2004) (citing Public Prosecutor v. the "Butare Four," Cour d'Assises [Cour. ass.] [Court of Assizes] Brussels, June 8, 2001).

[11] *See* ROBERT JACKSON, THE GLOBAL COVENANT: HUMAN CONDUCT IN A WORLD OF STATES 368 (2000) ("[P]erhaps the most fundamental [concern of modern international society] has been . . . to confine religious and ideological *weltanschauungen* within the territorial cages of national borders . . . .") (alteration in original). *See generally* TERRY NARDIN, LAW, MORALITY, AND THE RELATIONS OF STATES (1983).

concern: (a) the nature of the political violence that ordinarily occasions serious human rights and humanitarian law violations; (b) the juridical relationship of human rights norms to other norms of international law; and (c) international law's uses and limitations in addressing political violence within states. The goal, in correcting these misimpressions, is not to disparage the accomplishments of international criminal justice processes, but instead to appreciate them as accomplishments in their own right, rather than as a down payment on a larger project of justice beyond borders.

II. THE NATURE OF POLITICAL VIOLENCE

International crimes are a product of political conflict, whether within or across national boundaries. Sometimes the criminal conduct is an end in itself: a systematic campaign to destroy or displace a discrete civilian population, or the opportunistic indulgence of sadism, venality, or private vendetta behind the smokescreen of the prevalent chaos and violence.[12] But much of the transgression is undertaken as a means to a cognizable political end, one that often garners substantial loyalty—including among informed persons of good faith and sound reason.[13]

Whereas criminal tribunals apply generally applicable standards to discrete acts, to the exclusion of broader considerations, historical judgments apply more holistic criteria. Ruthlessness in a noble cause, far from being universally reprehended, is often well appreciated or even celebrated. (U.S. President Harry S. Truman has been widely admired for his moral courage, not despite his decisions to obliterate Hiroshima and Nagasaki, but because of them.) The maxim that "the end can never justify the means," however persuasive in a courtroom or in a philosophy seminar room, does not reflect broadly shared attitudes where morally imperative ends are perceived to be at stake.[14]

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[12] *See, e.g.*, STATHIS N. KALYVAS, THE LOGIC OF VIOLENCE IN CIVIL WAR (2006); Stathis N. Kalyvas, *"New" and "Old" Civil Wars: A Valid Distinction?*, 54 WORLD POL. 99 (2001).

[13] That this was the case on the Allied side of World War II is well known, if not often highlighted. *See, e.g.*, Hans Blix, *Area Bombardment: Rules and Reasons*, 49 BRIT. Y.B. INT'L L. 31, 37 (1978) (quoting Telford Taylor: "Aerial bombardment had been used so extensively and ruthlessly on the Allied as well as the Axis side that neither at Nuremberg nor Tokyo was the issue made a part of the trials"). Even today, support for torture (in the interrogation of certain high-value terrorist suspects) is not unknown among highly placed and deeply thoughtful members of the legal academy. *See* Eric A. Posner & Adrian Vermeule, *Should Coercive Interrogation Be Legal?*, 104 MICH. L. REV. 671 (2006).

[14] A survey by the Pew Research Center for the People and the Press, conducted in the United States in October 2005, asked 2,006 adults whether they thought "the use of torture against suspected terrorists in order to gain important information can often be justified, sometimes be justified, rarely be justified, or never be justified." Sixty-three percent responded that, at least on rare occasions, torture for that purpose could be justified.

The renewal of the long-dormant project of international criminal justice coincided with technological developments that permitted the major liberal war-fighting powers (i.e., the United States and its most prominent Western allies) to avoid reliance on the crude methods of the recent past.[15] It also coincided with the end of Cold War, which obviated a previously felt need for liberal-democratic governments to supply extensive weaponry, training, and logistical support to local forces around the globe – often participants in "hot" civil wars – who were considered to be doing the great powers' "dirty work."[16]

Even if a genuine moral advance – spurred by the international human rights movement – can be said to have occurred in that moment, the timing rendered the advance conveniently inexpensive; there was, by then, little call among liberal internationalist elites for recourse to the ruthlessness of prior eras.[17]

Tom Carney, *Americans, Especially Catholics, Approve of Torture*, NAT'L CATH. REP. (Mar. 24, 2006), http://www.natcath.org/NCR_Online/archives2/2006a/032406/032406h.htm.

[15] The Allied Powers in World War II firebombed cities in Germany and Japan, producing hundreds of thousands of civilian casualties even before the fateful decision to drop nuclear bombs on Hiroshima and Nagasaki. A similar pattern marked the conduct of the Korean War (a fact that seems to have been largely forgotten everywhere, but in North Korea). *See* BRUCE CUMINGS, THE ORIGINS OF THE KOREAN WAR 753 (1990) (attributing hundreds of thousands of North Korean civilian deaths to U.S. strategic bombing). As recently as the Vietnam War, attacks from the air, at times notoriously, took the form of "carpet-bombing." These tactics could hardly be distinguished from terrorism, except for the fact that they were undertaken by the regular armed forces of recognized states; their goals were not only to cripple the enemy war effort's productive infrastructure, but also "to bring home the cost" of the enemy government's policies to that government's civilian constituents. *See, e.g.*, Marilyn Young, *Bombing Civilians: From the Twentieth to the Twenty-First Centuries*, *in* BOMBING CIVILIANS: A TWENTIETH-CENTURY HISTORY 154, 164 (Yuki Tanaka & Marilyn B. Young eds., 2009).

[16] *See, e.g.*, CHRISTOPHER HITCHENS, THE TRIAL OF HENRY KISSINGER (2002); RAYMOND BONNER, WEAKNESS AND DECEIT: U.S. POLICY AND EL SALVADOR (1984).

[17] The usefulness of violence remains a touchstone of its permissibility. Whereas blatantly indiscriminate attacks are now condemned, criminal liability for collateral infliction of civilian losses is limited to cases in which such losses figure to be "clearly excessive in relation to the concrete and direct overall military advantage anticipated . . . ." Rome Statute of the International Criminal Court art. 8, § (2)(b)(iv), July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002) [hereinafter Rome Statute]. This is hardly a peripheral matter since the number of civilians killed as a direct result of United States and Allied operations in Iraq is estimated at ten thousand to fifteen thousand. *See, e.g.*, Madelyn Hsiao-Rei Hicks et al., *Violent Deaths of Iraqi Civilians, 2003-2008: Analysis by Perpetrator, Weapon, Time, and Location*, PLOS MEDICINE (Feb. 15, 2011), http://www.plosmedicine.org/article/info:doi/0.1371/ journal.pmed.1000415.

Moreover, many gruesome, but useful military tactics remain not prohibited. Such tactics may include, shockingly, the use of white phosphorus in combat against enemy troops. *See US Forces Used "Chemical Weapon" in Iraq*, THE INDEP. (Nov. 16, 2005), http://www.independent.co.uk/news/world/americas/us-forces-used-chemical-weapon-in-iraq-515551.html; Scott Shane, *Defense of Phosphorus Use Turns Into Damage Control*, N.Y. TIMES, Nov. 21 2005, at A1. Furthermore, Article 35(2) of Protocol I Additional to

Moreover, that historical moment, far from being marked by soul-searching about past misdeeds and recrimination toward previous revered figures, was suffused with moralistic Western triumphalism about victory over the Communist "evil empire."[18] Over two decades later, no significant effort has been made to revise favorable historical judgments of Western officials who perpetrated or abetted ruthless policies – let alone to impose penal accountability – even though some no-longer-useful erstwhile clients (e.g., Augusto Pinochet, Hissène Habré) have been subjected to transnational justice processes.[19]

The point here is not to make accusations of hypocrisy, but simply to notice that support for ruthless forms of political violence is not as foreign to the liberal-democratic sensibility as the currently prevalent rhetoric would seem to suggest. However often serious violations of human rights and humanitarian law may correctly be ascribed to fanaticism or to cynical calculations of self-interest, experience suggests that sober and principled persons can sign on as well where they perceive the moral stakes of the conflict to be sufficiently high.[20] For

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the Geneva Conventions – to which the United States is not a party, but which the United States acknowledges as including many provisions that embody customary international law – prohibits employing "weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering," but this provision arguably does not preclude use of incendiary chemicals against fortified structures occupied by combatants. *See* 1977 Protocol Additional to the General Conventions of 12 August 1949, and Relating to the Protections of Victims of International Armed Conflicts (Protocol I) art. 35(a), June 8, 1977, 1125 U.N.T.S. 3.

[18] Most of such rhetoric was less audacious than that of Francis Fukuyama's famous essay, *The End of History?*, *in* THE NATIONAL INTEREST (1989). But even the less optimistic forecasts about the post-Cold War world were hardly introspective. *See, e.g.*, Douglas Brinkley, *Democratic Enlargement: The Clinton Doctrine*, FOREIGN POL'Y, Spring 1997, at 112 ("Although America's bedrock values of democracy and open markets were in ascendance worldwide – as citizens everywhere busily cast votes, bought stock, and wrote laws – the collapse of the Soviet empire lifted the lid from a cauldron of ethnic animosities and regional conflict.").

[19] *See* Regina v. Bow St. Metro. Stipendiary Magistrate (Pinochet III), [2000] 1 A.C. 147 (H.L.) [hereinafter *Pinochet*] (approving the extradition to Spain of former Chilean leader Augusto Pinochet Ugarte); Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment, 2012 I.C.J. (2012), *available at* http://www.icj-cij.org/docket/files/144/17064.pdf (affirming the obligation of Senegal to try or extradite former Chadian leader Hissène Habré).

[20] As I have argued elsewhere:

> Under sufficiently adverse conditions, such as extreme ethno-national or socioeconomic polarization, the interaction of these two problems – the inability to agree on a fair basic structure of public order, and the inability to exclude recourse to extraordinary means in the struggle to install or maintain a basic structure of public order that comports with one's own conception of fairness – leads informed persons of good faith and sound reason to support ruthless measures against one another. Where the gap between competing conceptions of fairness is

participants in real-life conflicts, the conflict's outcome has a moral significance that rivals that of constraints on the conduct of hostilities.[21] Especially where one has become convinced that the other side respects no limits, it can be morally plausible to embrace all measures necessary to neutralize the threat. Such rationalizations of ruthlessness may be wrong and censurable in any one given case or in all cases, but adoption of such rationales does not separate an iniquitous "them" from a righteous "us"; they are a part of the human condition.

Peace with the perpetrators of ruthlessness is often attainable and desirable. This typically requires an agreement to disagree about who were the heroes and who were the villains. The 1993 handshake between Yitzhak Rabin and Yasir Arafat was an iconic moment that peacemakers aspire to renew. Ian Paisley and Gerry Adams now cooperate in the governance of Northern Ireland, while in El Salvador, there is cohabitation of the party of the left-wing former guerrillas (which holds the Presidency) and that of right-wing former death squads (which dominates the legislature).[22] Meanwhile, the cliché that "yesterday's terrorist is tomorrow's statesman" finds vindication in the democratic presidencies of one-time urban guerrillas Dilma Rousseff and Jose Mujica of Brazil and Uruguay, respectively.

To notice this is not to say that retrospective justice, including retributive justice, has no place in the transitions from civil war to peace and from dictatorship to constitutionalism. The often ill-posed "peace *versus* justice" question draws the response from hardline foes of immunity and amnesty that there is no contradiction: that true peace requires a "settling of accounts" in order to end the "culture of impunity."[23] That assertion may be true in any given case.

> sufficiently great, and the perceived moral stakes of political conflict sufficiently high, efforts to forge a mutually acceptable institutional solution will fail, prompting recourse to an unmediated clash of social forces. The result is a principled recourse to measures, such as dictatorship, repression, and terrorism, that would be rejected in the abstract.

Roth, *supra* note 4, at 105.

[21] For a provocative recent articulation of this point, see Dwight Garner, *Son of Israel, Caught in the Middle*, N.Y. TIMES, Nov. 19, 2013, at C1 (quoting ARI SHAVIT, MY PROMISED LAND: THE TRIUMPH AND TRAGEDY OF ISRAEL 131 (2013) ("If need be, I'll stand by the damned. Because I know that if it wasn't for them, the State of Israel would not have been born. If it wasn't for them, I would not have been born. They did the dirty, filthy work that enables my people, myself, my daughter and my sons to live.")), *available at* http://www.nytimes.com/2013/11/20/books/ari-shavits-my-promised-land.html?.

[22] *See, e.g.*, *After Decades of Hatred, Paisley and Adams Finally Sit Side by Side and Agree to Share Power*, MAIL ONLINE (Mar. 27, 2007), http://www.dailymail.co.uk/news/article-444523/After-decades-hatred-Paisley-Adams-finally-sit-side-agree-share-power.html; Tim Padgett, *El Salvador's Left Wins with the Ballot, Not the Bullet*, TIME WORLD (Mar. 16, 2009), http://content.time.com/time/world/article/0,8599,1885573,00.html#ixzz2m6M26o8n.

[23] *See, e.g.*, Leila Nadya Sadat, *Universal Jurisdiction, National Amnesties, & Truth*

But that assertion is not an *a priori* truth, to be insisted upon across the diversity of historical circumstances; it is matter for local settlement (as least presumptively). "No peace without justice" – especially where it refers to retrospective penal accountability – is a terrible slogan, since the opposing sides, along with their often-ample respective social bases, disagree about what justice entails. Outside forces may, in the name of universal human rights, play a productive role in insisting on processes to establish a credible historical record of violent acts, to recognize the victims as bearers of rights that were violated, and to provide reparation to victims and their families. Vilification of perpetrators, however, is a matter best left to be resolved according to local circumstances rather than one-size-fits-all standards, except where special international interests (such as against genocide, ethnic cleansing, and widespread attacks on civilian populations) are implicated.

Concededly, this separation of the wrong suffered from the wrong committed contradicts an intuition that animates enthusiasm for international criminal justice. As the Nuremberg tribunal famously noted, unlawful state acts are "committed by men, not by abstract entities."[24] It is supposed to be one of the lessons of the Nazi era (perhaps most famously explored in the *Eichmann* case) that impersonal governmental mechanisms (or, for that matter, insurgent command structures) cannot be allowed to obfuscate personal responsibility for atrocities.

But one should not extrapolate too far from the extraordinary case. Much political violence is attributable to structural conditions rather than to willfulness, a fact that continues to be reflected in law long after Nuremberg.[25] The criminal justice mentality presupposes a baseline of harmony, disturbed by aberrant acts; in this conception, criminal prosecution "settles accounts," while redressing the "culture of impunity" by punishing those who "did it because they could."[26]

Where the baseline is not harmony, but chaos and violent conflict, conflict participants' responsibilities to one set of human beings, on whose behalf they see themselves as acting, can seem plausibly to contradict their responsibility

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Commissions: Reconciling the Irreconcilable, *in* UNIVERSAL JURISDICTION: NATIONAL COURTS AND THE PROSECUTION OF SERIOUS CRIMES UNDER INTERNATIONAL LAW (Stephen Macedo ed., 2003); Payam Akhavan, *Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?*, 95 AM. J. INT'L L. 7 (2001); Juan E. Mendez, *National Reconciliation, Transnational Justice, and the International Criminal Court*, 15 ETHICS & INT'L AFF. 25 (2001); Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537 (1991).

[24] *IMT Judgment*, *supra* note 7, at 221.

[25] Combatant privilege to this day continues to govern soldiers' participation in their nations' unlawful wars. One theory, proposed prior to Nuremberg by Col. William C. Chanler, but rejected by the Allied powers, would have held that Wehrmacht soldiers participating in their state's unlawful offensive uses of force lacked combatant privilege and could thus be susceptible to prosecution for their combat violence as domestic crime. *See* TELFORD TAYLOR, THE ANATOMY OF THE NUREMBERG TRIALS 37 (1992).

[26] *See, e.g.*, Sadat, *supra* note 23; Akhavan, *supra* note 23; Mendez, *supra* note 23; Orentlicher, *supra* note 23.

to another set of human beings, upon whom they are acting. In a morally ordered universe, a wrong suffered logically entails a wrong committed; the real world of violent conflict, to the contrary, contains contradictions and incommensurables. Such conflicts are not, as a rule, contested cleanly (especially where "smart" weaponry is not available or deployable), even if some conflict participants are markedly worse than others; vulnerability to retributive justice processes is widespread in principle, albeit highly selective in practice.

The much-maligned 2013 ICTY *Perišić* judgment represents a concession to the complexities of violent conflict.[27] In ordinary circumstances, it seems reasonable to ascribe criminal complicity to those who provide assistance to persons whom they know will use it in the perpetration of crimes. But in the context of armed conflict, one's allies, whose war efforts one may have a cognizable duty to assist, may be known to be engaged in a combination of legitimate and illegitimate war-fighting measures. The policy of assisting such forces may or may not be reprehensible, depending on a totality of the circumstances. To render it an international crime, however, is to vilify sweepingly a wide range of actors who have engaged in such assistance for morally plausible reasons.[28] (Moreover, in a system where customary practice is a touchstone of legal obligation, the "everybody does it" defense is not inherently invalid.)[29] The ICTY Appeals Chamber thus, in a judgment seemingly at odds with the dicta of past decisions, held that the assistance, to constitute an act of criminal complicity, must be "specifically directed" to the criminal component of the perpetrators' activities.[30]

Even though it has worked to shield Serbian officials who engaged in authentically reprehensible conduct, the *Perišić* judgment represents a welcome recognition that international crimes, to be credible, must pertain to conduct that the international community of states has genuinely renounced. This renunciation has occurred mostly with respect to those measures that do not appear useful to cognizable governmental ends, and rather entail or suggest, by their very nature, either rogue activity or ends that the international community has authoritatively

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[27] Prosecutor v. Perišić, Case No. IT-04-81-A, Judgment (Feb. 28, 2013). *But see* Prosecutor v. Šainović, Case No. IT-05-87-A, Judgment (Jan. 23, 2014) (contrary holding by a different Appeals Chamber panel).

[28] It has been alleged that United States and Israeli military officials influenced the Chief Judge to change the ICTY's course in this regard. *See* Marko Milanovic, *Danish Judge Blasts ICTY President*, EJIL:TALK! (Jan. 7, 2014, 4:43 PM), http://www.ejiltalk.org/danish-judge-blasts-icty-president/.

[29] The much-maligned *tu quoque* defense has considerable force where a standard's legal validity ultimately rests on its manifestation in patterns of actual practice. Even at Nuremberg, German Admiral Karl Doenitz was successfully defended on the count of engaging in unrestricted submarine warfare on the basis of an affidavit from U.S. Admiral Chester Nimitz, who averred that he had done the same against the Japanese. *See* Gerry J. Simpson, *Didactic and Dissident Histories in War Crimes Trials*, 60 ALBANY L. REV. 801, 806 n.26 (1997); *IMT Judgment*, *supra* note 7, at 305.

[30] *Perišić*, Case No. IT-04-81-A, ¶ 73 (quoting *Tadić* Appeal Judgement [sic], ¶ 220).

repudiated (such as "ethnic cleansing"). Only the most extreme discrete acts have been renounced irrespective of context, and where the renounced tactic of torture has been employed in circumstances that have led some to rationalize its use, retrospective justice has unsurprisingly given way to a determination to "look forward, not backward."[31]

Criminal justice approaches to political violence seek, in effect, to depoliticize the violence. This can be done only either where the political dispute is authoritatively settled or where the violence was opportunistic and its political component essentially pretextual. Genocide and crimes against humanity are not cognizably political acts because the international system has succeeded in excluding from sovereign prerogative the pursuit of the ends that these crimes, by their nature, embody. The great contribution of the ICTY has been to make clear that what was once understood as a cognizably political objective – "population transfer" – is so thoroughly bound up with crimes against humanity that it can no longer be viewed in these terms.

Other forms of violence, however, remain ineluctably political. An Argentinian commentator, Federico Finchelstein, recently lamented the Kirchner Administration's political characterizations of the 1970s "dirty war" as follows:

> The country has moved beyond Videla's efforts at "reconciliation"; it is clear from the reactions to his death that in Argentina almost nobody buys Videla's idea that the military were saviors of the nation . . . . Equally problematic from a historical standpoint are the efforts by the Kirchner administrations to present the victims as heroes.
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> In effect, this marks a shift from a legal perception of perpetrators and victims under the junta, to a moral one of a "war" between heroes and villains. This is exactly how Videla wanted to be remembered – as a warrior in a violent political contest.
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> . . . .
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> Such efforts to emphasize the political identities of the victims as the main reason for their victimization retroactively places the crimes of the state within the political sphere. Yet these crimes were outside politics – the "dirty war" was state-sponsored terrorism, not a struggle between different political visions.[32]

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[31] David Johnson & Charlie Savage, *Obama Reluctant to Look Into Bush Programs*, N.Y. TIMES (Jan. 11, 2009), http://www.nytimes.com/2009/01/12/us/politics/12inquire.html?pagewanted=all.

[32] Federico Finchelstein, *An Argentinian Dictator's Legacy*, N.Y. TIMES (May 28, 2013), http://www.nytimes.com/2013/05/28/opinion/global/an-argentine-dictators-legacy.html?ref=global&_r=0.

This analysis seems highly problematic. First, Finchelstein's account self-consciously depoliticizes the historical role of the *junta*, reducing it to an isolated criminal conspiracy. Apparently, the actions of the *junta* were not a product of deep divisions in Argentinian society, undertaken with the tacit support and collaboration of large sectors of the society that either knew what was being done or knew that they did not want to know. And therefore, no one, but the members of the criminal conspiracy was responsible; in Finchelstein's telling, even members of the regime's ostensible social base were victims of a sort, and any suggestion of complicity on the part of current members of the conservative elite is mere calumny. The dictatorship is confined to the past; accounts have now been settled; the case is closed. Indeed, part of the point of transitional penal justice is to demonstrate the exceptional nature of political violence and to purge grudges by exonerating those not identified as part of the criminal conspiracy. (That is manifestly part of the ideological project of the ICTY.)

Second, Finchelstein's account self-consciously strips all political identity from those who were killed. They were victims, not martyrs or fallen participants in a struggle (however flawed) for social transformation; their inherent humanity is to be respected, perhaps in spite of their politics, but certainly in isolation from any role as conscious actors. To consider their politics is to contaminate the apolitical purity of their victimhood, thereby simultaneously to validate the political agendas of both Videla and Kirchner. (One might consider that the words "innocent" and "innocuous" are connected.) Yet while many of those subjected to the regime's ruthlessness were undoubtedly mere bystanders, many were not—and would, one might imagine, have been appalled (and perhaps humiliated) to think that they would be remembered in this way.

Underlying Finchelstein's account is a refusal to acknowledge the political character of the violence for fear that the violence might then be attributed – at least in part – to the human condition, emerging where the stakes of political contestation take it beyond the capacity of institutions to contain. To contextualize criminal acts within political conflict appears to let Videla and his ilk "off the hook."

It need not. Moral and legal judgments can each be grounded in something less than a universal, acontextual ascription of criminality to discrete acts. Nonetheless, the role of the acts' political character in the moral assessment will depend on the competing moral frameworks used to evaluate conduct (e.g., deontological, consequentialist, and virtue-ethics approaches, each in competing versions). Whether or not there is a universal truth about such matters, there is not – and there will not be, any time soon – any universal accord about this truth. One can lament or condemn this lack of accord, but there is no legitimate reason to pretend that it is not so.

As to legal judgments of a punitive nature, these must be grounded in social fact rather than in moral truth—not because of any imperative to observe the precepts of legal positivism, but because *nullum crimen sine lege* is a natural law principle that adverts to positive law. Where an authoritative social decision, applicable to the conduct's time and place, has manifestly (even if not in *lex*

scripta) and unambiguously condemned the act in question, the act is legally a crime, irrespective of extenuating political circumstances. What cannot legitimately be done is to fill gaps in the law, at the expense of the defendant, on the basis of "universal" judgments that, however righteous, were not, in fact, broadly accepted when the conduct occurred. Thus, it is to the dangers of mistaken legal judgments that we now turn.

III. THE LEGAL LIMITS OF INTERNATIONAL CRIMINALIZATION

International criminal law (ICL) serves to implement a limited part of the corpus of the international human rights law (IHRL) and international humanitarian law (IHL). Because the former is therefore closely connected to the latter, confusion often arises as to the scope of the former and as to methodologies appropriate to establishing norms of the former.

International legal norms presumptively bind states as corporative entities; most breaches give rise only to state responsibility. Ordinary international legal norms may include state obligations to provide internal legal remedies, including penal remedies, in support of the norms; these international norms nonetheless remain non-self-executing, becoming applicable to individuals only insofar as states enact applicable provisions of internal law.

International criminal law differs in piercing the veil of state sovereignty for specified aggravated breaches of international human rights and humanitarian law norms; ICL norms thus reach individuals directly, exposing even current and former state officials to extraterritorial prosecution in either international tribunals or the domestic courts of foreign states. But whereas IHRL and IHL represent brakes on the exercise of state power, ICL licenses transboundary exercises of power against individuals,[33] as well as intrusions upon the domestic jurisdiction of

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[33] Ironically, the conflation of state and individual responsibility can work against the implementation of IHL and IHRL norms, given the prevalent reluctance to impugn respected figures as criminals for their implementation of popularly supported policies. Illustrative is the effort by the well-known U.S. national security commentator, Benjamin Wittes, to dismiss IHL scholar, Mary Ellen O'Connell, in these terms:

> There you have it. The ACLU's and CCR's expert witness, in response to the direct question of whether Obama is different from Ted Bundy and whether Harold Koh is a conspirator to commit murders declines to use the words "serial killing" or "murder," because they haven't been convicted yet, but she freely accuses them of being "willing to engage in unlawful killing." While she declines to call for their prosecution now, she declines only because she doesn't think it's realistic, and she's happy, in any event, to "talk about accountability later."

Benjamin Wittes, *Is Barack Obama a Serial Killer?*, LAWFARE BLOG (Oct. 25, 2010, 3:00 PM), http://www.lawfareblog.com/2010/10/is-barack-obama-a-serial-killer/#at_pco=smlwn-1.0& at_tot=1&at_ab=per-1&at_pos=0.

states, in ways that derogate from still-effective ordinary norms of international law.

This fact has two major implications. First, overlapping norms of jurisdictional limitation, functional immunity (immunity *ratione materiae*), and *nullum crimen sine lege* limit the scope of international criminal liability to what ICL has specially established. Second, unlike IHRL and IHL norms, which should be read broadly (against state interests) to effectuate their object and purpose, ICL norms need to be read narrowly, as carve-outs to otherwise prevalent norms (limitations on legislative jurisdiction and functional immunity) and in keeping with the strict-construction corollary to *nullum crimen sine lege*.[34]

Cases involving the prosecution of Nazi perpetrators are sometimes invoked for contrary propositions.[35] The Nuremberg Tribunal, for example, stated broadly, "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."[36] However, as Michael Akehurst pointed out, these words were aimed at acts that "were crimes against international law, so it is doubtful whether they apply to breaches of international law which are not crimes against international law."[37] Ordinary breaches of international law, though they incur state responsibility, are not understood to vitiate functional immunity, and even IHL violations (which peculiarly lend themselves to criminal prosecution) require some additional element to be transformed into international crimes.[38]

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[34] "[W]here there is a plausible difference of interpretation or application, the position which most favors the accused should be adopted." Prosecutor v. Krstić, Case No. IT-98-33-T, Judgment, ¶ 502 (Aug. 2, 2001); *see also* Rome Statute art. 22 ("The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted."). For an expression of concern about IHRL methodology's penetration of ICL, see Darryl Robinson, *The Identity Crisis of International Criminal Law*, 21 LEIDEN J. INT'L L. 925 (2008).

[35] For a sympathetic view of this trend, see Beth Van Schaack, *Crimen Sine Lege: Judicial Lawmaking at the Intersection of Law and Morals*, 97 GEO. L. J. 119, 191–92 (2008). For a less sympathetic view, see Robinson, *supra* note 34, at 958.

[36] *IMT Judgment*, *supra* note 7, at 221.

[37] Michael Akehurst, *Jurisdiction in International Law*, 46 BRIT. Y.B. INT'L L. 145, 243 (1973).

[38] The ICTY has indicated that in order to constitute an international crime, an IHL violation that does not fall within the "grave breaches" (i.e., expressly ICL) provisions of the Geneva Conventions "must constitute a breach of a rule protecting important values," "must involve grave consequences for the victim," and "must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule." *Tadić*, Case No. IT-94-1-I, ¶ 94. The Tadić court's criteria, drawn from Nuremberg, emphasized that "[s]tate practice indicating an intention to criminalize the prohibition, including statements by government officials and international organizations, as well as punishment of violations by national courts and military tribunals." *Id.* ¶ 128.

The Nuremberg judgment also contains the troublesome statement that "the maxim *nullum crimen sine lege* is not a limitation of sovereignty, but is in general a principle of justice."[39] Unmoored from its context, this language can become transmogrified into a rationale to ignore *nullum crimen* whenever conduct is asserted to be "*malum in se*," as opposed to merely "*malum prohibitum*," which would imply nothing less than the principle's inapplicability to ICL. If *nullum crimen* is principally a norm of fair notice, and if all human beings possessed of reason are deemed to be "on notice" that *malum in* se acts authorized by their states are inherently criminal, it might be said that no "principle of justice" interferes with what are, in essence, prosecutions for natural-law crimes.[40]

The sleight-of-hand here is to confuse the impugned's act's moral gravity with consensus among "the community of nations" as to its wrongfulness in all circumstances. The principle's codification in current human rights law, Article 15 of the International Covenant on Civil and Political Rights, quite properly allows that *nullum crimen sine lege* is not the same as *nullum crimen sine lege scripta*; Article 15(2) permits prosecution of conduct that, "at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations."[41] Thus, legal authority exists to establish the criminality of universally reprehended conduct that, for whatever reason, was not the subject of a positive legal prohibition formally applicable at the time and place committed. But to be applicable, Article 15(2) requires a genuine, not an illusory, consensus of the international community at the time of the act's commission. Many acts that are condemned sweepingly in the abstract are subject to justificatory defenses in some, but not other, legal orders that enjoy good standing in the international community.[42]

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[39] *IMT Judgment*, *supra* note 7, at 217.

[40] For a domestic-law analogue to this mode of reasoning, see Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 SUP. CT. REV. 345, 400–01 (1994) ("[W]hen the underlying conduct is located not on the border, but deep within the interior of what is socially undesirable . . . , a person who consciously seeks to come up to the statutory 'line' without crossing it is not attempting to conform her behavior to the law, but rather to evade punishment for admittedly wrongful or illegal acts.").

[41] International Covenant on Civil and Political Rights art. 15, Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976).

[42] I have addressed this issue at length in regard to the law of the former East Germany. *See* Brad R. Roth, *Retrospective Justice or Retroactive Standards? Human Rights as a Sword in the East German Leaders Case*, 50 WAYNE L. REV. 37 (2004). One need look no farther than U.S. law. Although the United States is bound by Common Article 3 of the Geneva Conventions to refrain from cruel, humiliating, or degrading treatment of detainees in non-international armed conflict, the 2006 amendment to the War Crimes Acts abolished criminal liability for humiliating or degrading treatment and limited criminal liability for cruel treatment to extreme instances, such as "bodily injury that involves . . . significant loss or impairment of the function of a bodily member, organ, or mental faculty." Military Commissions Act of 2006 § 6(b)(1)(B), Pub. L. No. 109–366, 120 Stat. 2600, 2634 (2006). The amendment further establishes that "[n]o foreign or international source of law shall supply a basis for a rule of decision" in such a criminal

The Third Reich, which committed multiple genocides and pan-continental aggression, and sought to revise the entirety of the existing global security order by force, was not worthy of such respect. Individuals participating in its attack on the very foundations of the international legal order could not be heard to interpose that order's norms as a defense. One can easily accommodate the Nuremberg judgment without embracing natural justice as a basis for criminal prosecution (ironically, a principle that, in a perverse form, marked Nazi law).[43]

If Nuremberg language can be taken out of context to weaken constraints on international prosecutions, language in the Israeli High Court's *Eichmann* judgment can be so invoked without such distortion. Seeking to justify its result by every possible rationale, the court went so far as to deny altogether that *nullum crimen sine lege* was a principle of international law.[44] It is hardly clear that such a repudiation was necessary to the outcome of that case. Even if some maneuver was required, the combination of the underdevelopment of pre-World War II international penal norms and the extraordinary circumstances of Nazi atrocities – repudiation of which underlay the post-World War II re-creation of the international legal order – could easily have grounded a narrow exception rather than the trashing of the very "principle of legality." The lesson seems clear: hard cases do not necessarily make bad law, but extreme cases can generate bad dicta.

By contrast, the Special Court for Sierra Leone case of *Sam Hinga Norman* understood that it had to determine whether, in regard to the international norm prohibiting enlistment of children in armed forces, "by 1996 it was intended by the international community to be a criminal law prohibition for the breach of which individuals should be arrested and punished."[45] In a 2-1 decision, the panel majority found adequate "[s]tate practice indicating an intention to criminalize the prohibition."[46] Judge Geoffrey Robertson, finding otherwise, elaborated in his dissenting opinion the standard that must be met to elevate the human rights standard to an international penal standard:

> There must be evidence (or at least inference) of general agreement by the international community that breach of the

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matter. *Id.* § 6(a)(2); *see also* Rasul v. Myers, 563 F.3d 527 (D.C. Cir. 2009) (holding that U.S. officials entitled to civil immunity for Constitutional claims where the alleged acts of cruel, inhuman, or degrading treatment occurred outside what had at that time been "clearly established" to count as U.S. territory); Rasul v. Myers, 512 F.3d 644 (D.C. Cir. 2008), *vacated*, 555 U.S. 1083 (2008), *reinstated in relevant part*, 563 F.3d 527 (D.C. Cir. 2009).

[43] *See* INGO MÜLLER, HITLER'S JUSTICE: THE COURTS OF THE THIRD REICH 68–81 (1991).

[44] *Eichmann*, 36 I.L.R. at 282 ("[I]f it is the contention of counsel for the appellant that we must apply international law as it is, and not as it ought to be from a moral point of view, then we must reply precisely from a *legal* point of view, no such rule of international law is to be found." (alteration in original)).

[45] Prosecutor v. Sam Hinga Norman, Case No. SCSL-2004-14-AR72(E), Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment), ¶ 20 (Special Ct. for Sierra Leone May 31, 2004) (Robertson, J., dissenting).

[46] *Id.* ¶ 37 (majority opinion).

> customary law rule would or would now [1996], entail international criminal liability for individual perpetrators, in addition to the normative obligation on States to prohibit the conduct in question under their domestic law . . . . [I]t must be clear that the overwhelming preponderance of states, courts, conventions, jurists and so forth relied upon to crystallize the international law "norm" intended – or now [1996] intend – this rule to have penal consequences for individuals brought before international courts, whether or not such a court presently exists with jurisdiction over them.[47]

Judge Robertson, a well-known ICL expert, characterized the stakes as follows:

> Here, the Prosecution asserts with some insouciance that "the principle of *nullem crimen sine lege* is not in any case applied rigidly, particularly where the acts in question are universally regarded as abhorrent and deeply shock the conscience of humanity." On the contrary, it is precisely when the acts are abhorrent and deeply shocking that the principle of legality must be most stringently applied, to ensure that a defendant is not convicted out of disgust rather than evidence, or of a non-existent crime. *Nullem crimen* may not be a household phrase, but it serves as some protection against the lynch mob.[48]

As *nullum crimen sine lege* is, indeed, an ICL principle, it must be overcome by the demonstrable emergence of an international norm that establishes individual penal responsibility. Where a domestic court prosecutes conduct perpetrated outside its territory by a foreign national in the absence of a traditionally recognized domestic interest (e.g., territorial effects of conduct committed abroad or, at least in some circumstances, protection of nationals abroad), the court must find that international lawmaking processes have expressly or tacitly conferred universal legislative and adjudicative jurisdiction over the personal conduct in question.[49]

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[47] *Id.* ¶¶ 17, 21 (Robertson, J., dissenting).

[48] *Id.* ¶ 12 (citing Prosecution Response, ¶ 17) (emphasis added).

[49] The Lotus affirmation that "restrictions on the independence of states cannot be presumed" is sometimes interpreted to mean that states may presumptively exercise jurisdiction to prescribe however they choose, subject to a specific showing of state practice and *opinio juris* that demonstrates a restrictive norm. S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 18 (Sept. 7). A close reading of *Lotus* indicates that the court "majority" (really, six out of twelve judges, with the President voting a second time to break the tie) said no such thing. The *Lotus* decision began by asserting a presumptive universal jurisdiction to adjudicate civil cases with respect to persons found in the territory, on what we would now call a "transitory tort" logic. Then, the court considered whether the presumption of universal jurisdiction that it found in civil cases applied also to criminal

This establishment of universal jurisdiction is now additionally taken (at least in criminal cases) to overcome the functional immunity that otherwise applies to state agents' conduct inside their national territory and within the scope of their official capacity. Thus, in the *Pinochet* case, the British House of Lords ultimately determined that while torture had long been prohibited by a human rights norm rising to the level of *jus cogens* ("accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted"),[50] it was only the coming into force of the Torture Convention in 1987 that, solely on a prospective basis, established the international crime and licensed the trumping of immunity.[51] As the lead opinion of Lord Browne-Wilkinson stated:

> I have doubts whether, before the coming into force of the Torture Convention, the existence of the international crime of torture as *jus cogens* was enough to justify the conclusion that the organisation of state torture could not rank for immunity purposes as an official function. At that stage there was no international tribunal to punish torture and no general jurisdiction to permit or require its punishment in domestic courts. Not until there was some form of universal jurisdiction for the punishment of the crime of torture could it really be talked about as a fully constituted international crime. But in my judgment the Torture Convention did provide what was missing: a worldwide universal jurisdiction.[52]

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cases—that is to say, whether there is also a presumptive extraterritorial jurisdiction to prescribe. On this, the court "majority" decided not to decide (dissenting opinions are clear in the negative), on the ground that the facts of this case did not require examination of a ground of extraterritorial jurisdiction that had been neither clearly licensed nor clearly disallowed. Although state practice and *opinio juris* were equivocal on the validity of the principle permitting domestic prosecution of extraterritorial conduct based solely on the nationality of the victims, they were unequivocal in permitting prosecutions based on territorial effects.

In any event, even if a presumptive universality of legislative jurisdiction were plausible in 1927, authorities are fairly clear that it is not plausible now. *See* Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 1, ¶¶ 14–15 (Feb. 14) (separate opinion of Judge Guillaume); *see also* CHRISTIAN TOMUSCHAT & JEAN-MARC THOUVENIN, THE FUNDAMENTAL RULES OF THE INTERNATIONAL LEGAL ORDER: JUS COGENS AND OBLIGATIONS ERGA OMNES 439 (Christian Tomuschat & Jean-Marc Thouvenin eds., 2006) (stating to the extent that it was ever valid, this "doctrine has fallen into obsolescence as a consequence of the development of the doctrine of jurisdiction according to which any State activity *iure imperii* requires a reasonable link").

[50] Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 331(entered into force Jan. 27, 1980) [hereinafter Vienna Convention].

[51] *See generally Pinochet.*

[52] *Pinochet*, [2000] 1 A.C. at 204–05 (opinion of Lord Browne-Wilkinson) (emphasis added). Somewhat surprisingly, the House of Lords went on a few years later to

Notwithstanding this holding, it is commonplace for *jus cogens* alone to be cited as a basis for nullifying immunity. The argument typically given is that because immunity (including both the immunity *ratione personae* of sitting heads of state, heads of government, foreign ministers, and accredited diplomats and the immunity *ratione materiae* of anyone executing official acts within national territory) is an ordinary norm of the international order, it must give way to a peremptory norm as a matter of "normative hierarchy."[53]

Putting aside the question of the methodological basis for determining what counts as a peremptory norm – identified authoritatively with recognition as such "by the international community of States as a whole,"[54] but associated in much of the literature with natural justice – *jus cogens* does not operate in this way.[55] An obligation to prosecute a *jus cogens* violation, where it exists at all, is

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hold unanimously that current and former state officials retained their immunity *ratione materiae* in civil suits based on their internationally criminal conduct. Jones v. Ministry of the Interior of the Kingdom of Saudi Arabia, 2006 U.K.H.L. 26. For a persuasive criticism of this holding, see E. Steinerte & R.M.M. Wallace, *Case Report: Jones v. Ministry of the Interior of the Kingdom of Saudi Arabia*, 100 AM. J. INT'L L. 901, 905 (2006).

[53] *See, e.g.*, Curtis A. Bradley & Laurence R. Helfer, *International Law and the U.S. Common Law of Foreign Official Immunity*, 2010 SUP. CT. REV. 213, 236–37 (2010). *But see* John Bellinger, *Why the Solicitor General Should Ask the Supreme Court to Reverse the Fourth Circuit's Decision in Samantar*, LAWFARE BLOG (July 16, 2013), http://www.lawfareblog.com/2013/07/why-the-solicitor-general-should-ask-the-supreme-court-to-reverse-the-fourth-circuits-decision-in-samantar/ (contending that such an override of immunity reflects an erroneous understanding of international law).

[54] *See* Vienna Convention, *supra* note 50, art. 53 (defining *jus cogens*, or "peremptory" norms).

[55] As the International Court of Justice has recently noted:

> [T]his argument about the effect of *jus cogens* displacing the law of State immunity has been rejected by the national courts of the United Kingdom (*Jones* v. *Saudi Arabia*, House of Lords, [2007] 1 *AC* 270; *ILR*, Vol. 129, p. 629), Canada (*Bouzari* v. *Islamic Republic of Iran*, Court of Appeal of Ontario, *DLR*, 4th Series, Vol. 243, p. 406; *ILR*, Vol. 128, p. 586), Poland (*Natoniewski*, Supreme Court, *Polish Yearbook of International Law*, Vol. XXX, 2010, p. 299), Slovenia (*case No. Up-13/99*, Constitutional Court of Slovenia), New Zealand (*Fang* v. *Jiang*, High Court, [2007] *NZAR* p. 420; *ILR*, Vol. 141, p. 702), and Greece (*Margellos*, Special Supreme Court, *ILR*, Vol. 129, p. 525), as well as by the European Court of Human Rights in *Al-Adsani* v. *United Kingdom* and *Kalogeropoulou and others* v. *Greece and Germany* . . . , in each case after careful consideration.

Jurisdictional Immunities of the State (Ger. v. It.), Judgment, 2012 I.C.J. 99, ¶ 96 (Feb. 3) (alteration in original).

not *ipso facto* a *jus cogens* obligation, and so does not override norms that limit prosecutorial authority.[56]

The failure of the *jus cogens* trump is seen most clearly in regard to the immunity *ratione personae* – a defense to jurisdiction over the person – that attaches to current holders of specific positions relevant to international diplomacy. Immunity *ratione personae* is a purely procedural defense, with no substantive implications: the immunity temporarily blocks the exercise of jurisdiction over the person, but it has no bearing on the criminality of the underlying conduct. As soon as the immunity is withdrawn, either because the person ceases to hold the immune post or because his or her state waives the immunity, all special defenses to liability are removed. But for as long as the immunity remains in place, it operates rigidly. Courts time and again have held that whereas international tribunals may be created under statutes that expressly override personal immunities, domestic courts have no license, from *jus cogens* or elsewhere, to disregard personal immunities (which, however, persist only as long as the person holds the immune post).[57]

The *jus cogens* trump equally fails in regard to immunity *ratione materiae* – a defense to jurisdiction, both legislative and adjudicative, over the subject matter – that otherwise attaches to official conduct. This failure is masked, however, by the fact that many *jus cogens* violations have also become established as international crimes. Absent that development, though, and with respect to any conduct prior thereto, immunity *ratione materiae* remains effective, shielding even *jus cogens*-violating state agents from a foreign state's extraterritorial legislation that would purport to reach official conduct.[58]

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[56] *See, e.g.*, WARD N. FERDINANDUSSE, DIRECT APPLICATION OF INTERNATIONAL CRIMINAL LAW IN NATIONAL COURTS 182 (2006).

[57] *See, e.g.*, Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. Rep. 3 (Feb. 14). *See generally* Sean D. Murphy, *Immunity Ratione Personae of Foreign Government Officials and Other Topics: The Sixty-Fifth Session of the International Law Commission,* 108 AM. J. INT'L L (forthcoming 2014), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2350495 (citing cases at 9 nn.31–36).

[58] Immunity *ratione materiae*, albeit a procedural defense, has substantive implications that are sometimes missed. Since it is a defense to legislative jurisdiction, another state's extraterritorial jurisdiction over any conduct other than a universal-jurisdiction crime is blocked, meaning that the act – even if validly reached by foreign legislation on territorial effects, protective, or passive personality grounds, and even if a *jus cogens* violation – does not count as criminal for the state agent at the time and place committed. This framework has an important implication for retroactive waiver. Foreign state officials are often being hung out to dry by successor governments, and generally speaking, immunities – existing for the sake of state rather than individual interest – are waivable. States can clearly waive their former officials' defenses to adjudicative jurisdiction over past acts, but while states can waive immunity to legislative jurisdiction as well, what they cannot do is to waive retroactively *the effects of* a previously existing barrier to a foreign state's extraterritorial legislative jurisdiction. If the act was not a criminal act for the state official at the time and place that he committed it, it cannot become a criminal act retroactively as a result of a subsequent waiver.

Jurisdictional limitations, immunities, and *nullum crimen sine lege* combine to constrain what domestic courts can do in the name of redressing IHRL and IHL violations abroad. The limitations can be significant, as in the case of the Torture Convention's distinction between torture, which is established as a universal-jurisdiction crime, and cruel, inhuman, or degrading treatment short of torture, which is not.[59] Yet natural justice itself, properly understood, demands that penal standards be rooted in discernment of social fact rather than in bare assertion of moral truth. The international community has come so far, and no farther, in licensing transnational prosecutions. Excesses of rhetorical exuberance, if ever implemented, would actually undermine the normative foundations of international criminal justice.

IV. "RESPONSIBILITY TO PROTECT" AND THE LIMITS OF ADMISSIBLE INTERVENTION

Even the most scrupulous observance of legal limitations on the scope of extraterritorial prosecutions leaves much low-hanging fruit. Violent political conflict (whether or not rising to the threshold for the applicability of the law of armed conflict) is everywhere associated with conduct that plausibly breaches international penal norms. With the increased prospect of domestic court invocations of universal jurisdiction, there is a dispersal of prosecutorial discretion to as many as one hundred ninety-odd justice systems. Whereas the ICC is designed with checks to maximize the likelihood of a judicious use of this discretion,[60] there is nothing to prevent naked political agendas from dominating the exercise of this authority in domestic systems. Rather than selecting plausible candidates for "the worst of the worst," extraterritorial prosecutions in domestic courts will predictably be brought against targets of opportunity, selected for reasons ranging from benign to random to blatantly partisan.

There are, of course, powerful practical disincentives for domestic legal systems to get into this game. States generally do not wish to get embroiled in the diplomatic controversies that such cases engender, nor to incur retaliatory prosecutions of their own officials in the domestic systems of aggrieved states. One of the most active early sites of universal jurisdiction prosecutions, the Belgian system, revised its universal jurisdiction statute in an effort to constrict its openness to ideologically motivated applications (which had included criminal

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[59] Convention Against Torture and Other Cruel, Inhuman, and Degrading Treatment or Punishment art. 16, Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter *Torture Convention*]; *see also* Brad R. Roth, *Just Short of Torture: Abusive Treatment and the Limits of International Criminal Justice*, 6 J. INT'L CRIM. JUSTICE 215 (2008).

[60] *See* Rome Statute arts. 61 (charges must be confirmed by a Pre-Trial Chamber composed of judges elected by the Assembly of States Parties), 17 (charges cannot be brought unless the Court finds the state in question to be "unwilling or unable genuinely to carry out the investigation or prosecution").

complaints against both Ariel Sharon and Yasir Arafat).[61] A nightmare scenario of 190 justice systems targeting current and former officials of disfavored states is a long way off.

In principle, states have not only a license, but an obligation, to exercise universal jurisdiction against alleged perpetrators of international crimes found in their territories.[62] In practice, "prosecute or extradite" obligations lie dormant in the absence of a live request for extradition, something that, in the universal jurisdiction context, comes along quite rarely (e.g., in the *Pinochet* and *Habré* cases).

Nonetheless, the loaded weapon lies on the table.[63] The question is whether one should be urging more widespread use or whether the prevailing reluctance should be seen as salutary. One danger is that in all, but the most morally and politically unambiguous cases, outcomes on the merits would tend to depend on the political predilections prevalent in the forum state, thereby breeding cynicism about "universal" justice.[64] Another danger is that considerations of international legality will be manipulatively enlisted, not on the side of interstate peace, but on the side of agitation for aggressive unilateral action against wrongdoing regimes.[65]

Contrary to what is frequently imagined, the international order's non-intervention norms were designed to withstand wrongdoing on the part of those norms' beneficiaries.[66] There is no innovation in the claim that sovereignty entails responsibility for the protection of states' territorial populations; this responsibility is implicit in the UN Charter and explicit in human rights treaties and declarations.[67] But the inviolability of territorial sovereignty, *vis-à-vis*

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[61] Steiner, *supra* note 10, at 225–26. At the time of this writing, Spain is considering a similar curtailment of its courts' authority to exercise universal jurisdiction. *See* Jim Yardley, *Spain Seeks to Curb Law Allowing Judges to Pursue Cases Globally*, N.Y. TIMES, Feb. 11, 2014, at A7.

[62] *See* Questions Relating to the Obligation to Prosecute or Extradite (Belg. v. Sen.), 2012 I.C.J., Judgment (July 20).

[63] The allusion here is to Justice Jackson's rhetoric in Korematsu v. United States, 323 U.S. 214, 244 (1944) (Jackson, J., dissenting).

[64] *See* Steiner, *supra* note 10, at 230 ("Far from representing a common effort of judiciaries everywhere to vindicate common goals, universal jurisdiction could be understood as a partisan enterprise in which states seeing the villain would reach out to prosecute, while those holding the image of hero would not.").

[65] The U.S. indictment, prior to the 1989 invasion of Panama, of Panamanian army chief Manuel Noriega – albeit for drug trafficking rather than human rights-related offenses – illustrates the political utility of this means of vilification. *See, e.g.*, Jeff Cohen & Mark Cook, *How Television Sold the Panama Invasion*, FAIRNESS & ACCURACY IN REPORTING (Jan. 1, 1990), http://www.fair.org/index.php?page=1546.

[66] *See, e.g.*, Military and Paramilitary Activities (Nic. v. U.S.), 1986 I.C.J. 14, 134–35, ¶ 267–68 (June 27).

[67] *See, e.g.*, U.N. Charter preamble, arts. 1(2)–(3), 55–56; International Covenant on Civil and Political Rights (1966) (ICCPR), 999 U.N.T.S. 171 (entered into force Mar. 23,

individual foreign states or *ad hoc* groups of states, is nowhere made contingent on those foreign states' judgments about the target state's compliance. International law permits the use against wrongdoers of the unilateral political and economic measures that fall within states' discretion (as a matter of their external sovereignty) and also may permit recourse to non-forcible, but presumptively unlawful measures ("countermeasures") that are necessary and proportionate to the task of impelling the target state's compliance.[68] But forcible recourse is neither explicitly nor implicitly licensed by human rights and humanitarian law instruments or by customary international law. Clearly, this leaves a gap, as the legally permissible responses of individual states and coalitions may be inadequate to secure compliance with norms of imperative significance.

In such cases, it is only the Security Council, in the exercise of its Chapter VII powers, that has the capacity to override the legal limitations on the coercion of wrongdoing states. Contrary to the popular misconception, however, the Security Council is not a law enforcement body. It is charged with making political judgments about threats to the peace, whether in the presence or absence of a violation of international law, and it authorizes measures at its discretion, irrespective of and overriding existing international legal obligations.[69] The Security Council is best understood not as an executive branch of global government that faithfully executes the law, but as the guardian of a suspension clause – not unlike the notorious "state of exception" provision contained in Article 48 of the Weimar Constitution[70] – that authorizes such supra-legal measures as the Council deems necessary and appropriate.

This is a system designed for a moderately distrustful international system in which weak states that lack all capacity for self-help need to be reassured against powerful states' abuses of self-help—past instances of which representatives of weak states can copiously cite. The system is thus designed to guard against a suspension of non-intervention norms in all cases where the broadest international consensus – cutting across differences of geostrategic interest, ideology, and culture – cannot be secured. A propensity to deadlock is built into the system by design,[71] and while deadlock may in some circumstances

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1976); International Covenant on Economic, Social, and Cultural Rights (1966) (ICESCR), 999 U.N.T.S. 3 (entered into force Jan. 3, 1976).

[68] *See* Rep. of the Int'l Law Comm'n, 53d sess, Apr. 23–June 1, July 2–Aug. 10, 2001, art. 49, U.N. Doc. A/56/10; GAOR, 56th Sess., Supp. No. 10 (2001) ("An injured State may only take countermeasures . . . in order to induce [the wrongdoing] State to comply with its obligations . . . ."); *id.* art. 51 ("Countermeasures must be commensurate with the injury suffered . . . ."); *id.* art. 54 (allowing for responses by "[a]ny State other than an injured State" to breaches of those obligations recognized in Article 48 as being "owed to the international community as a whole," but mentioning only "lawful measures," rather than countermeasures).

[69] U.N. Charter arts. 39, 41–42, 103.

[70] *See, e.g.*, GEORGE SCHWAB, THE CHALLENGE OF THE EXCEPTION 29–60 (1989).

[71] For a historical examination of the Security Council's structure and functioning, see Frederic L. Kirgis, Jr., *The Security Council's First Fifty Years*, 89 AM. J. INT'L L. 506

expose flaws, deadlock itself is not evidence of flawed design, unless one wishes to dismiss (as do many commentators—typically from the strongest states) the system's foundational considerations.

The Security Council's extraordinary powers currently extend to circumstances where "national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity."[72] Armed humanitarian intervention thus has both substantive and procedural requisites. However, the substantive requisite – tied to ICL standards – is essentially indeterminate, since a country beset by civil war is almost invariably one in which "national authorities are manifestly failing to protect their populations from . . . war crimes."[73] The result is that the procedural requisite – nine affirmative votes out of fifteen Security Council members and no veto from any of the Permanent Five (P5) – is the only true barrier to intervention. The combination of a too-weak substantive constraint and a potentially too-strong procedural constraint creates the perfect condition for discontent, as the currently accepted "R2P" formula promises action that it is institutionally incapable of delivering. This leads potentially to a fork in the road: a retreat into cynicism, or an alliance with powerful but untrusted unilateralists.

Those who favor licensing unilateral humanitarian intervention invoke the Rwanda example continuously.[74] Yet on close examination, the logic of that invocation is elusive. The underlying notion, of course, is that Rwanda evidences the need for more of the right interventions in the right places. This notion is unexceptionable (even if there is some reason to be relatively pessimistic about the humanitarian prospects of even "good" interventions). But international law is incapable of calling forth such beneficence on the part of those who have the capacity to do good; its only real role is either to constrain or to license such behavior as powerful states are disposed to engage in.

When one looks at Rwanda and asks what powerful states were disposed to do, there turn out to have been two answers: (1) nothing (e.g., the United States) and (2) worse than nothing (i.e., France). Legal regard for Rwandan sovereignty played no role whatsoever in obstructing the rescue of Tutsis from the Hutu extremists; there was nothing to obstruct because no one was willing to invest blood and treasure in that project.[75] France was later willing to invest blood

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(1995). The veto was established as a substitute for the more debilitating "safeguard" of Council unanimity contained in the League of Nations Covenant. *Id.* at 506–07.

[72] 2005 World Summit Outcome, *supra* note 3, ¶ 139; *see also* S.C. Res. 1674, *supra* note 3, ¶ 4 (reaffirming paragraphs 138 and 139 of the 2005 World Summit Outcome, *supra* note 3).

[73] 2005 World Summit Outcome, *supra* note 3, ¶ 139.

[74] *See, e.g.*, SAMANTHA POWER, A PROBLEM FROM HELL: AMERICA AND THE AGE OF GENOCIDE (2002); Int'l Comm'n on Intervention & State Sovereignty, *The Responsibility to Protect* (2001), http://responsibilitytoprotect.org/ICISS%20Report.pdf.

[75] *See, e.g.*, Michael N. Barnett, *The UN Security Council, Indifference, and Genocide in Rwanda*, 12 CULTURAL ANTHROPOLOGY 551, 560 (1997) ("[T]here were no volunteers for such a force.").

and treasure in protecting Hutus (their former clients) from revenge killings by the insurgent Tutsi-led Rwandan Patriotic Front – a motive that may not have been malign (the evidence is mixed)[76] – but the effect of this was to preserve the Hutu extremist militias and to metastasize the conflict.[77]

So, indeed, the Rwandan experience says something damning about the international community, but sovereignty considerations actually played no role in the debacle. The argument for a more broadly permissive norm, then, actually proceeds not from the Rwandan example itself, but from a confabulated "Rwanda Prime" example in which a ready, willing, and able intervener was blocked by, say, the Russians and Chinese (who, in the actual event, did not block anything). Viewed this way, the argument looks far less compelling.

Legal rules are crafted to constrain untrusted and untrustworthy implementers of universal principles. Potential intervening powers need to be viewed, not as a humanitarian "we," but as a "they" who occasionally act in the name of humanitarianism. The "they" may not always look like Dick Cheney, but one needs to craft legal norms based, among other things, on a sober calculation of the odds that interveners will look like Dick Cheney and based on the understanding that many of the participants in the scheme of cooperation expect would-be interveners to look like Dick Cheney. The international order requires, not only substantive norms, but procedural norms for adjudicating disagreements as to the substance, and these procedural norms need to be agreeable to the (at least moderately) distrustful.

Moreover, intervention is usually not about stopping wars, but about participating in them; where (as in Syria) adverse powers are willing to supply the opposing side, intervening may simply further escalate the conflict. Part of the justification of the requirement of a Security Council P5 consensus is that any conflict that has P5 powers on opposite sides is going to be far worse.

This is not to say that the rules of the international system are perfect as they are, nor that they should command unconditional fidelity. Pitted against the moral obligation to comply with centrally important international legal norms, a substantive judgment of moral emergency may nonetheless occasionally prevail. The veto is best justified as an exercise of genuine, albeit minoritarian, judgment and as a guarantee that extraordinary measures are backed by a cross-cutting consensus. The mere fact of a veto, no matter how substantively arbitrary and no

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[76] According to one source, "General Jean-Claude Lafourcade, commander of Operation Turquoise, admitted that the safe zone was intended to keep alive the Hutu government in the hope that it would deny the RPF total victory and international recognition as the rulers of Rwanda." Chris McGreal, *France's Shame?*, THE GUARDIAN (Jan. 11, 2007), http://www.guardian.co.uk/world/2007/jan/11/rwanda.insideafrica. Whether this is true, the French intervention had the effect of facilitating the passage of genocidal Hutu militias into neighboring Congo, where their presence precipitated a series of devastating armed conflicts.

[77] For a critical account of the intervention's effects on the ground, see PHILIP GOUREVITCH, WE WISH TO INFORM YOU THAT TOMORROW WE WILL BE KILLED WITH OUR FAMILIES: STORIES FROM RWANDA 157–61 (1998).

matter how isolated the vetoing state is in its obstructionism, is not a persuasive reason to condemn unapproved action, the human benefits of which manifestly figure massively to outweigh the human costs. In such cases, the harm of such an unapproved action might be mitigated by an accompanying proposal of a narrowly specified exception to the procedural requisite, perhaps under the rubric of "forcible countermeasures." (It is interesting that the NATO powers were quite deliberately unwilling to craft such a legal rationale in connection with the Kosovo action—some out of concern to avert proliferation of such actions,[78] some evidently out of concern to keep a free hand.) But if the precedent of unauthorized intervention comes to stand for the principle that established procedures should be ignored whenever they fail to yield the "right" decision, the result will be to undermine the foundations of international peace and security.

In sum, the existing procedural norms governing forcible intervention are considerably better than their reputation. They fairly well fit the world in which we actually live, even if they would be dysfunctional in the world in which we wish we could live.

V. CONCLUSION

The post-Cold War revival of international criminal justice has important successes to its credit. Foremost among these, perhaps, has been to make "ethnic cleansing" a term of global opprobrium. International criminal justice draws the line between the sad realities of endemic conflict and the handiwork of enemies of humanity, identifying what can be perceived across geostrategic, ideological, and cultural divides as abjectly criminal rather than as cognizably political. But it can do so fairly and persuasively only when it does so modestly. And because it identifies those whom international law casts beyond the realm of peaceful coexistence, it is inevitably in tension with legal constraints on the righteous pursuit of self-help.

Although hard cases do not necessarily make bad law, extreme cases generate bad dicta. The rhetoric of international criminal law tends to be addressed to morally unambiguous conflicts, where one side used atrocious means in the service of a manifestly evil end. Yet political violence is a far more complex phenomenon than such rhetoric suggests and calls for a broad range of nuanced responses. As slogans such as "an end to impunity" and "no safe havens" become prevalent in the rhetoric of international law advocates, accommodation and restraint become cast as vices rather than virtues, to the detriment of the international legal order's most practicable mission: peaceful cooperation among actors who cannot be expected to agree about justice. Paradoxically, instead of contributing to its presumed mission of furthering

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[78] *See* Thomas M. Franck, *Lessons of Kosovo*, 93 AM J. INT'L L. 857, 859 (1999); Bruno Simma, *NATO, the UN, and the Use of Force: Legal Aspects*, 10 EURO. J. INT'L L. 1, 14 (1999).

accountability in the exercise of power, international criminal law may end up furnishing a rationale to disparage and to flout norms designed to hold powerful states accountable.

An insistence on the thoroughgoing eradication of impunity presupposes victors and vanquished and is inconsistent with peace in the world that we know. Wisdom lies in the recognition that constraint on the righteous exercise of power, far from frustrating legality's ends, is often law's highest and best use.