

XVI

The International Criminal Court

A Skeptical Analysis

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PROFESSOR LESLIE C. GREEN HAS BEEN KNOWN AS AN ACTIVE SKEPTIC since we first met, too many years ago to count. And nobody now living dares question his knowledge of international law. We have disagreed from time to time, and probably disagree about the utility of an International Criminal Court (ICC). But argument in the philosophical sense, constructive debate and discussion, has been our style for too many years to abandon now. So here is my tribute to Leslie's skeptical knowledge.

Very little has excited the international legal and human rights community as much in recent years as the prospect of establishing an international criminal court. After much political and legal labor, a Statute of such a court was adopted in Rome on July 17, 1998, by an overwhelming vote.¹ In my opinion, the ICC, as outlined in the Statute, cannot possibly work as envisaged. This is not because technical problems have been carelessly handled, although there do seem to be some questions, as must be expected in such a work. It is because the ICC is based on assumptions about the relationship of authority to substantive law and a model of the international legal order that seem unrealistic.

First, a few indications that surfaced in the Statute as what appear to be merely technical flaws but in fact seem to reflect assumptions that raise the most serious questions. In the Preamble, paragraph three, there is reference to

“grave crimes”; in paragraph five to “such crimes”; in paragraph six to “international crimes.” While the reference to “the most serious crimes of concern to the international community as a whole” in paragraphs four and nine might relate to municipal law crimes (i.e., “crimes” so designated by a municipal legal order, the suppression of which might be of concern to the entire international community),² paragraph ten speaks of an International Criminal Court to be “complementary to national criminal jurisdiction,” thus implying the existence of “crimes” not defined by municipal law but by international law directly.

Yet the international community has no organ capable of legislating criminal law to its members other than the ICC as newly minted. For example, references in conventional wisdom to “piracy” as an “international crime” simply cannot stand scholarly examination. Despite much dicta referring to piracy “*jure gentium*,”³ there are no actual cases to support the notion that “piracy” is anything other than a municipal law “crime” in many countries.⁴ All attempts internationally to codify the essential elements of the supposed “crime,” including the “piracy” provisions of the 1982 United Nations Convention on the Law of the Sea, turn out to be meaningless when read carefully.⁵

The notion that there is “universal jurisdiction” over the supposed “universal offense” of “piracy” also fails when the concept of “jurisdiction” is examined non-polemically. There might be a universal jurisdiction to prescribe (i.e., States might tailor their municipal legislation to make criminal, by their respective municipal laws, the acts of foreign “pirates” against foreigners in foreign territory or the high seas). But nobody has ever acknowledged a foreign country’s “universal jurisdiction,” without the permission of the territorial or flag State, to enforce its municipal prescriptions in foreign territory or on board vessels properly flying a foreign flag, even in an “enforcing” State’s own port. And even where there has been a permitted arrest of a foreigner on board a foreign vessel, the arresting authorities usually seem to lack the “jurisdiction to adjudicate” necessary for a successful prosecution unless there has been some real link between the offense or the offender and the State attempting to apply its municipal law to him or her.⁶

Similarly, the notion that “war crimes” involve universal jurisdiction not only to prescribe but also to enforce and to adjudicate is far more than the evidence will bear. At best there have been “victors’ tribunals” as at Nuremberg, or tribunals to which the States concerned have been construed, rightly or wrongly, to have agreed, such as the tribunals at The Hague and Arusha applicable to events in the Former Yugoslavia and Rwanda.⁷

The reasons why jurisdiction to adjudicate is limited even in the case of so-called “universal crimes” are deeply rooted in the structure of the

international legal order. It takes time, effort, and somebody's taxpayers' money to prosecute anybody for anything. The difficulties are regarded as minor when a municipal society, a State, is the beneficiary of its own expenses. But whose children are to be sent to die to perform the arrest or evidence-gathering when a foreigner is to be investigated or arraigned for an act against other foreigners outside the territory of the State purporting to be concerned? Whose legislators determine the procedures to be followed and the exceptions to those procedures when circumstances get complicated? Whose legal order governs when it appears that the enforcers have themselves violated the law of the State in whose territory they are acting, or commit atrocities in the course of acting?

Let us look closely at a particular problem: To whom does a person wrongly arrested appeal, and who pays his expenses? Article 85 of the Statute of the ICC actually foresees this last situation and provides that in the case of a "miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law." But it does not say whose law or what law, implying that there is an international legal standard for such compensation (which is probably not the case except in the minds of advocates wishing to raise some precedents, but not others, to the level of customary law) and that the new Court will elaborate on it. That presumably means leaving both determinations to the very tribunal that was involved in the miscarriage to begin with. And out of whose pocket is the compensation to come? Presumably, the tribunal pays it out of the regular budget of the tribunal which draws from the fund established under Article 115 of the ICC Statute and voluntary contributions. Whether the parties will long consent to have their taxpayers amerced for errors committed by a tribunal they do not control, a tribunal that defines and administers its own law and does not itself respond to legislators for its errors, is a question better answered by faith than by experience.

But perhaps these problems are too theoretical. Perhaps the notion is that the tribunal can resolve these problems and that States parties to the Statute of the ICC will have such an interest in the success of the tribunal that they will be content to have their taxpayers pay for it in its formative years. Let us turn instead to some more immediate problems.

First, consider an apparently obscure problem with large implications: Article 90 of the ICC Statute deals with extradition of an accused to a requesting State under an extradition treaty, or surrender to the Court under the ICC Statute. I could find no mention in the Statute of the "hand over" obligation of the 1949 Geneva Conventions on the laws of war.⁸ The phrase "hand over" was deliberately chosen in that context to avoid the complications of municipal

“extradition” law and procedures, while “surrender” was apparently chosen as a word of art in the ICC Statute for the same reason by people who were certainly familiar with the 1949 Geneva Conventions and their use of that different phrase, “hand over.” Since Article 8(2)(a) of the ICC Statute, defining “war crimes,” and Article 8(2)(c), defining various acts as criminal if performed in an armed conflict not of international character, both specifically refer to the 1949 Geneva Conventions, and the first provision mentions “grave breaches” of the Conventions to which the “hand over” provisions apply, this omission is incomprehensible. It appears as if the parties to the ICC Statute are not obliged to arrest and transfer to the custody of the ICC persons accused of the very “grave breaches” to which this article says it applies, leaving their trials and punishment to the never-used procedures already set out in the 1949 Conventions. But if that is so, it is hard to understand just what the scope of the ICC’s authority is intended to be. Perhaps there were intended to be two inconsistent obligations—to “hand over” the accused to another Party to the 1949 Geneva Convention and to “surrender” the same person to the ICC—and disputes were to be resolved by the lawyers after the event actually arose. Since the 1949 Geneva Conventions lie at the root of international obligations on each State party to search out those who are suspected of having committed a “grave breach” and to try them or hand them over for trial to another party concerned, it is difficult to understand what the legal obligation of States now is with regard to persons accused of the most abominable breaches of the supposed international laws of war. It cannot have been to supplement the provisions of the 1949 Geneva Conventions because it creates a clash of obligations, not alternatives; or, if construed to create alternative obligations, does not specify how or by whom the inconsistencies should be resolved. It seems as if the function of these provisions of the ICC Statute is to supersede the 1949 Conventions, but not to provide for the cooperation of States parties that are intended to give real effect to those provisions. I cannot believe that that is what was intended, but the actual intent then seems hidden in inconsistent provisions now accepted as binding by parties to the 1949 Geneva Conventions who are also to be parties to the ICC Statute.

There are many questions of similar technical character in the new draft. But the intelligence and competence of those involved in the drafting is so far beyond dispute that one is left merely to wonder at their intentions and suppose that serious disagreements will surface as real problems begin to arise in practice. Apparently, the tribunal itself and its associated organs are expected to resolve those disputes.

This raises problems of an even deeper and more serious type: Exactly what is the scope of authority given to the institutions created by the ICC Statute? Is the world really willing to give that authority to those bodies?

First is the Prosecutor. His authority is to initiate investigations when there is "a reasonable basis to believe that a crime [sic] within the jurisdiction of the Court has been or is being committed; . . . [unless] (c) there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice."⁹ The word "justice" is used in other provisions of the Statute. But nowhere does it appear that the word "justice" is conceived in its normal sense as essentially a word in the moral order, in which it has many different meanings. Aristotle addresses the concept of "justice" in his *Nicomachean Ethics*¹⁰ and isolates several different meanings, such as "commutative justice," "distributive justice" and "rectificatory justice." Each overlaps the others in part but not completely. To Aristotle, "law" was not necessarily related to "justice." "Natural law" was not related to morality and was self-enforcing, like the law of gravity.¹¹ As to the positive legal order, it seemed obvious to Aristotle and seems obvious today that various tribunals have different conceptions of "justice" and apply them differently with no clear uniformity.¹² And each party before any of these tribunals seeks "justice" defined in ways different from the "justice" sought by other parties under their own definitions. For example, if a child is killed by some "national liberation" group, there will be parents who insist that "justice" is not done unless all those involved in the group are, to do "distributive justice," condemned to death; others will be satisfied that "commutative" justice has been done if only the direct perpetrator(s) be condemned. Still others will argue that "commutative justice" can be done only if a child of the perpetrator is killed by the State; others that "death" is a commutative remedy that is "unjust" because it cannot serve to rectify the injury, which is not rectifiable but perhaps compensable, which is as close as reality can come to "rectificatory justice" in the circumstances. Aristotle himself proposes mathematical ratios to measure rectificatory and commutative "justice" (which at least one of his translators calls "reciprocity justice"). The examples can be multiplied *ad infinitum*. What this all means is that the Prosecutor is given the authority to determine very important things, like "justice," that are not capable of determination to universal satisfaction. It explains in part why Thomas Jefferson once commented, "I tremble for my country when I reflect that God is just."¹³

The argument that lawyers are trained to grapple with such dilemmas and are more trustworthy than politicians to come to generally acceptable answers has many flaws. First, lawyers are people like everybody else and disagree over

major moral issues like everybody else. They are not trained in morals as much as they are trained in rhetoric, and it is not clear that even appeals to morality will resolve problems that have baffled thinkers of the power of Aristotle for over 2,000 years.

Second, the notion that lawyers or judges form an elite to which we can refer the most complex social dilemmas is deeply inconsistent with fundamental rules of democratic governance. It is a throwback to Plato's notion of rule by "guardians" who are by nature superior to those of us who must live by their rules. The inconsistency of this approach with the notion of an "Open Society"¹⁴ does not necessarily mean it is a foolish notion, but it is not a framework for governance that should be adopted without much thought. For example, it is frequently forgotten that to Plato nobody was fit to be a guardian who would want the role.¹⁵ But I know of no supporter of the ICC who does not think that s/he would do well as the Prosecutor or a judge in it. The point is too deep for mockery; we are dealing with a real statute setting up what its supporters expect to be a real tribunal with real authority.¹⁶ This is not to say that Plato was right, but neither was he clearly wrong. He raised an argument based on insight and character worth considering deeply. In a sense, he was posing a "natural law" argument based on the inborn "nature" of people—a "natural law" like the law of gravity or the laws of economics that has nothing to do with the "moral law" frequently referred to as if "natural" in disregard of several thousand years of unmistakable evidence.

Third, there seems to be a fundamental notion that armed conflict, whether international or not, is governed by rules that can be overseen by an umpire or referee. But when people are willing to die for a cause, or see their own children killed, the matter is too serious for a games approach.

Fourth, the idea that judges or lawyers can "fill in the gaps" of an incompletely expressed bit of legislation might serve well in areas, such as economic regulation, where a mistake can be digested within the system as long as the rules are made clear—or even during an interim period when the rules are not yet clear and some bankruptcies occur which a later appreciation of the rules within the system grappling with the problem would have avoided. But where life or death is involved, or personal freedom, the return to "common law crimes," i.e., "crimes" defined by judges after the event, is deeply disturbing. In the United States, "common law crimes" dropped out of consideration in 1816 when the Executive Branch of the American government refused to bring a prosecution against an individual whom some judges (particularly Joseph Story) thought might be convicted on the basis of non-legislated rules adopted by judges, with knowledge of those rules attributed by judges to all members of

society.¹⁷ It is very distressing to many Americans to see the “common law crimes” approach resurrected under other names and rationales by those who fancy themselves the governors, or at least the political beneficiaries, of the “new” system.

There is a much deeper problem that seems to have received only polemical attention: Is the object of the ICC to do “justice” or to help attain and preserve “peace”? To many, “justice” as they perceive it is a prerequisite to “peace.” To others, “peace” as they conceive it is a prerequisite to “justice.” I would suggest that assertions on both sides are simplistic and distort the complex relationships they hint at.

“Peace” is not the result of “justice,” it is the result of implied consent to a social structure (possibly, in some cases, analogizeable to a “social contract”) under which the alternatives to peace are believed worse than the “injustice” that might be unavoidable under any current conception of a human social order. No doubt, in both municipal and international legal orders “peace” can be attained by a draconian criminal law system, “just” or “unjust,” depending on the value judgment of each evaluator, under which dissent is immediately punished. Such a peace is unacceptable politically to Americans and many others whose value systems include a great weight to be given open political speech, true or not, disruptive of stability or not.

The international legal order, as currently conceived, considers attempts to alter municipal legal orders by force to be beyond the legal control of international society as long as international peace and security are not threatened;¹⁸ civil wars are not illegal as a matter of international law; they are always, possibly by definition, illegal under the municipal law of the society whose authority-structure is under attack.¹⁹ While the variations in reality might be limitless, it is clear that such “revolutions” as have recently occurred in the former Soviet Union are now occurring in many States²⁰ and are considered to lie beyond the authority of the international community.

The Statute of the ICC would seek to make criminal, as a matter of international law, violations of the limits of a soldier’s privilege in armed conflicts not of an international character agreed by Common Article 3 of the 1949 Geneva Conventions. Under the Geneva Conventions, no State had the “standing” necessary to support diplomatic correspondence or intervention in any such cases; the provisions were acceptable to existing States’ authority-holders because they could not, as a matter of law, be applied except polemically by outsiders or as “moral” imperatives now agreed by the apparently defaulting States and brought to their attention by non-governmental organizations, like Amnesty International or the International Committee of the Red Cross and their

agents. But the polemics and moral arguments have always been available to outsiders. And bolstering those arguments by embodying the moral rules in positive documents in the form of “legal” commitments was accomplished in 1949. The great change now has been the creation of an organ empowered to oversee the internal affairs of States parties and limit the application of force used either in revolution or to suppress that revolution.

The ideal commends itself. But it is very difficult to see how this arrangement can work in the current legal and political order. Who should arrest the generals in command of the forces defending an authority structure, whether established or revolutionary, already in place—Ariel Sharon, Saddam Hussein, Yasser Arafat, a Russian general involved in the Chechnya campaign, the Chechen leaders? And surely the evidence of recent experience in Somalia and elsewhere makes it clear that even foreign troops sent in as world-police occasionally commit acts which amount to indictable war crimes. In most cases, these last can be governed well by their own municipal military organizations. But not in the former cases and not in all of the latter. Can a Prosecutor under Article 53 of the Statute be placed in position as the referee of revolutions? It seems to me that even if the positive law placed him or her in that position, the States agreeing to the Statute would refuse to carry out the obligations that a diligent and objective Prosecutor would need carried out if s/he were to perform his or her statutory functions. Indeed, in Article 54 of the Statute, the authority of the Prosecutor seems to be restricted. S/He is authorized to “request the presence” of witnesses but not compel it; to “seek the cooperation of any State” but not to demand it and not to act within a State’s territory without its permission. I doubt that these provisions can be strengthened to give the Prosecutor the necessary authority at the expense of States parties to the Statute. It is even more doubtful that s/he could assert the necessary authority over revolutionary groups that are not even parties to the Statute, and thus not subject to its obligations, unless there is a serious move to world governance and to abolish the legal and political effects of even a successful revolution.

With regard to international armed conflicts, the situation is also untenable. Suppose, in an international armed conflict like the Gulf War of 1991, a military leader in the position of General Norman Schwarzkopf were to be arraigned for ordering the bombing of what later turned out to be a civilian bomb shelter. Would a State in the position of the United States not argue that its own legal order was operating and capable of handling the situation? But would that assertion be believed by the relatives of those civilians who had been killed? Or anybody else? And if somebody in the position of General Schwarzkopf were to be surrendered to the ICC for trial, how could s/he defend

him/herself without revealing information that the United States would feel should not be revealed on the ground of national security,²¹ such as information received through covert sources or radio intercepts that the civilian bomb shelter overlay a military installation.

And if the Prosecutor waits until the battle or war is finished, the situation would be just as bad. Could a victorious general be surrendered for international judgment when s/he is a national hero? It is frequently forgotten that Admiral Karl Dönitz, the Nazi successor to Hitler, was convicted of declaring unrestricted submarine warfare in the teeth of a submission by America's own Admiral Chester Nimitz that he had done the same thing in the Pacific war on December 7th, 1941.²² The point is not that Dönitz should have been acquitted of the charge or that Nimitz should have been tried; it is that without a world government it would have been politically impossible to arraign Nimitz, a national hero of the victor State, before any tribunal for the very act for which Dönitz was convicted. It is not difficult to see the equivalent political impossibility of an international trial in analogous situations to arise in the future.

On a more theoretical level, the impossibility of producing "legal" results when States ignore their apparent obligations under the ICC Statute, and the demonstrable lack of State action under the 1949 Geneva Conventions' "grave breaches" provisions, with a lack of "legal" results flowing from that inaction, implicates Occam's Razor, the "law of parsimony." Under that principle of philosophic and legal construction, the simplest rule with the fewest exceptions must always be taken as the primary rule to account for reality.²³ Under that rule, a commitment without results in the legal order but with results in the moral or political orders is better categorized as a moral or political rule than a legal rule. The supposed and much ignored obligation to search out foreigners committing a "grave breach" of the 1949 Geneva Conventions and to "hand such persons over for trial to another High Contracting Party concerned" seems to be obviously a rule of morality and politics, not a rule of law. Failure to carry out the obligation may result in political tensions and opprobrium on the part of those concerned with the morality of giving asylum to persons who have committed atrocities in armed conflict. It has not produced results in the international legal order.

While this skims the surface of why the ICC Statute is unlikely to help achieve the results that its advocates expect from it, it ignores alternatives that have also been ignored by the legal and human rights communities that have pushed so hard to have their value systems institutionalized in the international legal order by means of the positive law. While the ICC does not foreclose parallel possibilities that might be more successful in actually enforcing

that value system, it undercuts those parallel possibilities by making them seem poor alternatives that withhold “justice” from the aggrieved by making “justice” a legal instead of a moral term.

Every normative order has its own enforcement techniques. If the default be regarded as a matter of positive law, then the enforcement techniques of the positive law must be used to “right the wrong.” But if the default is viewed as a moral default, then a “Truth and Reconciliation” Commission might be the best way to achieve the closure that peace requires, with moral opprobrium and social ostracism the “sanction.” And if the requisite level of opprobrium does not flow, if the wicked find haven among their like-thinking fellows, then it is hard to see how peace and security would flow from the application of positive law sanctions to the wicked. There are two obvious problems. First, the wicked constituents might want to defend “their” wicked leader, and military activity with its attendant atrocities on all sides is the most likely result of attempts to “arrest” him or her. Second, if “legal justice” in the normal municipal criminal law sense is to be done in some cases, only chaos would be the likely result. For example, to do what some demand as “justice” in Rwanda, surely every Hutu who killed an innocent Tutsi, and every Tutsi who killed an innocent Hutu should face trial and punishment. Failing that, the hordes of unhappy survivors would threaten to make peace and reconciliation impossible. How many hundred thousand trials and how many prisons should there be? Or will the “world” apply its sanctions only to a select few? Who selects the “few”? A prosecutor applying objective standards? What standards? What is “objective” in these circumstances that would permit the murderer of a child to go free while the inciter or political leader who killed nobody goes to prison? And who is the “world”? Slightly more than one fifth of the population of the world is Chinese and seems more or less content to live under a government whose conception of “human rights” seems very different from that of the framers of the ICC Statute. The same may be said of the slightly less than one-fifth of the world’s population that is Hindu; and the same may also be said of about one-fifth of the world’s population who participate in revealed religious traditions, organizations, or sects—whose “divine law” perceptions forgive or even encourage the killing of non-members of their clan or society. Three-fifths is a majority. And while it might be argued that not all Chinese, Hindus, and adherents to absolutist religions would agree with their elected, born, or appointed spokespeople in matters relating to “human rights,” it can equally well be argued that not all Americans and other participants in the European enlightenment agree with their political leaders about such questions.²⁴ So let us abandon majority rule

and move to rule by the enlightened few—us. But that was Plato's answer, and it is inconsistent with open society ideals we also purport to have.

I conclude that openness leading to moral examination of value systems is probably the closest we can come to "justice" if "peace" is really our aim in this imperfect world.

Until now, the accommodation of the international legal order to the quest for enforceable moral standards has been to encourage States in the international legal order to agree to general rules, usually masquerading as legal principles but actually moral principles, and enforce them through their own interpretation of them in their own municipal legal orders. That is why the 1949 Geneva Conventions contain their uniformly incomplete "hand over" provisions quoted above. It is also why, in the Genocide Convention of 1948, the enforcement provision provides that: "The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated. . ."²⁵ And "Persons charged with genocide . . . shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction."²⁶ Until now, i.e., for about 50 years, no State has accepted the jurisdiction of any international tribunal for such acts although, under severe political pressure, the Serbian part of the Bosnian State is argued to have authorized the spokesperson of the Republic of Yugoslavia (Slobodan Milosevic) to accept such an obligation for it. How the other parties to the pertinent international accords construe themselves into making definitive interpretations of a document of delegation to which they are not parties is a bit mysterious as a matter of law, however simple it might seem as a matter of politics.²⁷ Whether any State accepting the ICC Statute conceives it applying to its own leaders acting in its own territory remains to be seen. Whether other States parties will send their young people to be killed and spend their own taxpayers' money to enforce the mandate of an international tribunal applied in the territory of a second State and affecting only the people of that State, also remains to be seen.

The overarching problem confronting the statesmen and lawyers of the world is probably not that of creating a tribunal to reduce "war" or political violence to the point that atrocities can be punished by some outside umpire. War itself is atrocious; it kills innocent people, hurts others, destroys property, and in many cases is temporary in its political results. The "civilized" world

celebrated with joy the Kellogg-Briand Pact that was supposed to end recourse to war as an instrument of national policy in 1928. It was followed by two decades of bloodshed and misery. The current United Nations Charter requires international disputes to be settled by peaceful means and forbids the threat or use of force in international relations.²⁸ It is only when these provisions of the positive law are violated or evaded²⁹ that atrocities can occur that cross international boundaries. But today, the greater number and extent of atrocities, like genocide, occur wholly within the boundaries of a single State, like Bosnia or Rwanda. The real question is whether international law as such is capable of addressing these situations.

The traditional answer would be “No.” The situation of internal atrocities is analogous to the situation of child abuse within a municipal legal order—everybody condemns it and would like to do something about it, but the conflicting social values involved in some institutional oversight over family life, and the difficulties of finding people whom society could trust to make decisions in the best interest of society, make the resolution of child abuse issues too difficult to be satisfactorily resolved in Western society. Now, it appears as if the magic solution would be to have the international equivalent of child abuse, genocide, policed by the very system that has failed so obviously in municipal societies: the Courts.

Let me make a radical suggestion. Some problems are not capable of being resolved by the application of positive law. Some social problems are moral problems and better resolved through the application of remedies provided in the moral order, not the legal order. The obvious remedy in the moral order for genocide is exposure and opening borders to grant at least temporary haven to the victims. In some cases, the moral remedy might indeed involve revolution or even an international armed conflict. That appears to have been the case when Idi Amin was accused of presiding over the butchering of a significant part of the population of Uganda. In that case, the moral imperatives appear to have overcome the legal imperatives forbidding recourse to force in international affairs. And nobody but Idi Amin and his supporters would complain. Similarly, the complaints about North Viet Nam’s occupation of Cambodia to end the unspeakable regime of Pol Pot were muted by the thought that nothing and nobody else would do the job. Morality turns out to be a counter-weight to the positive law, and the dominant system in some cases. Perhaps it is what Cicero had in mind when he wrote of the “true law [*vera lex*]” that should be obeyed even if inconsistent with the positive law, the decrees of the Roman Senate.³⁰

How can the enforcement tools of morality be brought into play in cases of military atrocity? Exposure is the obvious first step. Criminal trials might be a State's response in its own interest; not trials of foreigners for committing atrocities on other foreigners abroad, but trials of people subject to its own jurisdiction for committing atrocities against anybody whom that jurisdiction, allowing reciprocal authority to other municipal orders under current conceptions of the equality of all sovereigns before the law, considers within the range of its protection. That solution does not involve international tribunals; it involves the same national tribunals that the normal laws of war prescribe—national tribunals, possibly military courts-martial but not necessarily so. The application of municipal law in those circumstances is undertaken not because international law compels it, but because national interest makes it the best solution. An example is the United States Civil War of 1861–1865, during which the Union never declared or acknowledged the legal capacity of the Confederacy to engage in “war,” but nonetheless issued the first great modern codification of the laws of war, the Lieber Code.³¹ The United States Supreme Court in 1877 gave its opinion that those laws were applied as a “concession . . . made in the interests of humanity, to prevent the cruelties which would inevitably follow mutual reprisals and retaliations.”³² There are many other reasons that could be added to those, but this is not the place for further elaboration.

Yet another response, although hardly a “solution,” might be the most difficult of all: do nothing. That is the Waldheim response. Kurt Waldheim was Secretary-General of the United Nations for two full terms and then President of Austria. He is now believed to have known about atrocities committed by the Nazi army in the Balkans during the Second World War and to have denied involvement or even knowledge of them. He has never been brought to trial and it is now highly unlikely that he ever will be. But he cannot easily leave Austria. Nor is he likely to get the prizes and adulation that his record at the United Nations and in Austria would otherwise seem to have earned him. “Successful” leaders who cannot explain the inconsistencies that political leaders always have thrown at them by their political opponents and journalists risk ostracism. Those who lead their countries into positions that outsiders find morally abhorrent, like the apartheid leaders of South Africa before Nelson Mandela's rise to power, find the foreigners reacting to them in ways they did not expect. Nobody in the current world wants to deal with a bigot, so the United States enforced its “Sullivan Rules”; it limited American investment in South Africa to that which could stand moral scrutiny.

Steps like these, isolation of morally dubious individuals and adjustment of legal relations with morally dubious legal orders, do not “fix” the perceived

injustices or apply foreign “law” to them. They indicate the abhorrence of other States and ordered trading partners, thus putting political as well as moral pressure on the persons and legal orders whose actions seem questionable. The persons or legal orders that feel victimized by those steps of ostracism or restrictive trade rules can respond, if they like. It might be that the outsiders are wrong, or fail to understand the complexities of the actions or system they condemn. In that case, explanation and openness might result in a relaxation of the condemnations. But it might not; politics frequently acts on the basis of misperceptions more than facts. And it is also possible that the Waldheims or masters of a racist South Africa feel themselves morally justifiable even though the facts seem to others to indicate morally dubious behavior or outright bigotry. But what is the alternative? Invasion that kills people and destroys property? Criminal charges in a tribunal that has no positive law to rely on but finds “law” in the moral indignation of a Prosecutor and a majority of judges who, as human beings, are also fallible?

I should conclude by wishing that objective “justice” were clear and available via a tribunal of scholars of the integrity and perception of Leslie Green. But until cloning becomes the norm, or society in general is prepared to accept the infallibility of its lawyers, such solutions seem beyond our reach. The conclusion is not pessimistic, but realistic. Much can be done, but it is better to do nothing in the legal order than to confuse it with the moral order and attempt to enforce our view of morality as if binding on others in a universal criminal law.

Notes

A partial version of this analysis has been published as *Challenging the Conventional Wisdom: Another View of the International Criminal Court*, in 52(2)COLUMBIA JOURNAL OF INTERNATIONAL AFFAIRS 7837–94 (1999), and another partial version as *A Critical View of the Proposed International Criminal Court*, 23(2)THE FLETCHER FORUM OF WORLD AFFAIRS 139–150 (1999).

1. A/CONF.183/9, July 17, 1998; <http://www.un.org/icc>. The vote is reported in www.un.org/icc as 120 in favor, 7 opposed, with 21 abstentions. Apparently the vote of each participant was not directly recorded, so the identities of the voting participants must be derived from their statements in explanation of vote or other sources. For present purposes the totals are enough.

2. An example might be drug trafficking or aerial hijacking; there are treaties dealing with them and many other municipally defined “crimes” of international concern.

3. The phrase “*jure gentium*” itself historically relates to a conception of the international legal order under which States are bound by “comity” or “right reason” or some such to enact criminal and other laws in their municipal legal orders that duplicate the equivalent laws of other States. It rests on a notion of universal human morality that seems self-evident to some but has

been disputed by others at least since the days of Aristotle. This entire topic is the subject of ALFRED RUBIN, *ETHICS AND AUTHORITY IN INTERNATIONAL LAW* (1997).

4. Aside from the American struggle to construe a statute of 1819 that made criminal by United States municipal law “the crime of piracy, as defined by the law of nations” (the statute was originally upheld, then dropped out of use), the closest to a case in point is probably *In re Tivnan and Others*, 5 BEST & SMITH’S Q.B. REP. 645 (1864), in which a British tribunal refused to extradite to the Federal Union a Confederate raider during the Civil War on the ground that Article X of the Webster-Ashburton Treaty of 1842 requiring the mutual extradition of “pirates” did not apply to “piracy *jure gentium*” but only to “piracy” as determined by the municipal law of the requesting State. There is much that is difficult to follow in the three opinions for the majority, and the British tribunal was itself split, with Chief Justice Cockburn dissenting. It is likely that the judges involved, the two States parties to the Webster-Ashburton Treaty, and the legal community in general were deeply split in their conceptions of the structure of the legal order and the role of extradition in it. It seems likely that the British court believed the defendants to be “pirates” only under an American polemical definition popular in the Union during the Civil War of 1861–1865 and in some cases applied to Confederate raiders, but did not want to insult the United States federal authorities by saying so. See ALFRED RUBIN, *THE LAW OF PIRACY* pp. 158–171, 206–208 (2d rev’d ed. 1998).

5. An examination of the uses of the term from earliest records to the present is RUBIN, *THE LAW OF PIRACY*, *supra* note 4. The dissection of the current purported codification is at pages 348–372. All of the normally cited cases and scholarly writings are discussed in the text.

6. There have been several cases of this sort, but to disentangle them seems more than is necessary in this place. See AMERICAN LAW INSTITUTE, *RESTATEMENT 3d OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES*, secs. 421–423 (1987). The interested reader is referred to RUBIN, *ETHICS & AUTHORITY IN INTERNATIONAL LAW*, *supra* note 3, and RUBIN, *THE LAW OF PIRACY*, *supra* note 4, at 388–389.

7. These have involved many legal and practical problems and cannot be used as precedents for anything more than *ad hoc* tribunals of doubtful effectiveness. See Alfred Rubin, *An International Criminal Tribunal for Former Yugoslavia?* 6 PACE INTERNATIONAL LAW REVIEW 7 (1994), and Alfred Rubin, *Dayton and the Limits of Law*, 46 THE NATIONAL INTEREST 41 (1997), for a sampling of the problems that seem not to be considered by advocates of the tribunals and their use as “precedents.”

8. The “hand over” provision is identical in all four of the 1949 Geneva Conventions. The texts of those Conventions are usefully collected in *THE LAWS OF ARMED CONFLICTS* (Dietrich Schindler & Jifi Toman eds., 3d rev’d and completed ed., 1988) 373 sq. (Sick and Wounded in the Field), 401 sq. (Wounded, Sick and Shipwrecked), 423 sq. (Prisoners of War), and 495 sq. (Civilians). The parties to those conventions are obliged:

to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, *hand such persons over* [emphasis added] for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a *prima facie* case.

This language appears in Article 49 of the Wounded and Sick Convention, Article 50 of the Wounded, Sick and Shipwrecked Convention, Article 129 of the Prisoners of War Convention, and Article 146 of the Civilians Convention.

There is no provision in any of the Conventions for dealing with persons accused of a grave breach with regard to whom the detaining State has no way of holding a fair trial (subpoenaing foreign witnesses or documents, for example) and no High Contracting Party concerned has bothered to make out a *prima facie* case. There have been no known actions under these provisions for about fifty years now and it is not clear that they bear any relationship to reality. The apparent failure of the ICC to step into the gap, if there is a gap, seems unaccountable and I hope I misread the Statute.

9. ICC Statute, art. 53(1)(a) and (c). See also art. 53(2)(c).

10. ARISTOTLE, *NICOMACHEAN ETHICS*, in *INTRODUCTION TO ARISTOTLE* pp. 402–411 (1131–1134a) (Richard McKeon ed., Modern Library, 1947). There are, of course, other definitions of parts of what some analysts consider “justice.”

11. ARISTOTLE, *NICOMACHEAN ETHICS* 295(H. Rackham trans., Loeb Classical Library, 1939). The point is rather obscurely made and it is necessary to read much more of Aristotle's *ETHICS* and *POLITICS* to understand it. See RUBIN, *ETHICS AND AUTHORITY IN INTERNATIONAL LAW*, *supra* note 3, at 6–8, for a start, with footnotes.

12. “Some hold that the whole of justice is of this [natural] character. What exists by nature (they feel) is immutable, and has everywhere the same force: fire burns both in Greece and in Persia; but conceptions of justice shift and change.” ARISTOTLE, *NICOMACHEAN ETHICS*, *supra* note 11, at 294 (Greek)/295 (English). Aristotle goes on to imply that perhaps to the gods there is an identity between natural law and justice, but human conceptions of justice, being mutable, and human (positive) law being uttered at the will of the legislator, who is human and therefore fallible, is not capable of such precision. The subject is worth deeper study than this essay will allow.

13. THOMAS JEFFERSON, *NOTES ON THE STATE OF VIRGINIA (1781–1785)*, Query 18, as quoted in *BARTLETT'S FAMILIAR QUOTATIONS* (14th ed. 1968), at 471a.

14. See KARL POPPER, *THE OPEN SOCIETY AND ITS ENEMIES* (1950). The major theme of this magisterial work is that Plato's ideal “Republic” rests on a fixed social and political hierarchy run by guardians, while the non-fascist ideals of our time dictate a “republic” responsive to its ever-changing constituencies and their value systems. Stability is not the highest value in our time. Plato's ideal notion was obviously inconsistent with the legal orders of the “States” of his own time, where legal power was, as it is today, frequently the result of the interplay of many other normative orders than positive law and morality. In *PLUTARCH, LIFE OF DION*, and *PLATO, LETTER VII*, it is possible to see the clash between Plato's notion of a government based on the “natural law” of inborn talent and education on the one side, and the realities of government based on “divine law” theories of inheritance and the “positive law” of amoral constitutions and “comity”-based divisions of authority. Dionysius II purported to apply Plato's theories of governance to his own realm in Sicily, and failed as the realities of court intrigue (“comity?”), divine law, his very human yearning for absolute control (“natural law?”), and other normative orders imposed themselves on his decisions.

15. *PLATO, THE REPUBLIC*, Book I, 346e–347, in *PLATO, THE REPUBLIC* 88–89 (Desmond Lee trans., 2nd rev'd ed., Penguin, 1974).

16. I say this harshly because of the notable application of political polemics to the discussions by some advocates of the ICC. See, for example, the comments by Jerome Shestack and David Stoelting, respectively President of the American Bar Association and Chairman of its Coordinating Committee on the ICC, dismissing as “myth” the bases for various objections to the ICC. 1 *ON THE RECORD* 21, July 16, 1998. In my opinion, Shestack and Stoelting misrepresent for polemical purposes the objections they mention and dismiss even those few as if they were all and without serious examination.

17. See *United States v. Coolidge*, 14 U.S. (1 Wheaton) 415 (1816); in the United Kingdom, common law crimes still exist in theory, but scholarly lawyers normally cite MATTHEW HALE, *PLEAS OF THE CROWN* (1678), for the definitions of crimes not defined by Parliament in legislation. In civil law countries, the issue does not exist any longer. In the ICC Statute, Articles 22 and 23, the well-known aphorisms are cited as if beyond dispute and without attribution: *Nullum crimen sine lege* and *nulla poena sine lege*. There is no discussion as to precisely what is meant by “*lege*”—whether it includes common law or is confined to statutory law. If it is intended to reduce the “crimes” to those already defined by judges, these articles seem inconsistent with the authority given to the tribunal elsewhere, notably Article 21(1)(b) of the Statute, which authorizes the tribunal to find its law in otherwise undefined “principles and rules of international law,” among other sources.

18. See U.N. CHARTER arts. 2(1) (“The Organization is based on the principle of the sovereign equality of all its Members”) and 2(7) (“Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter. . .”). Many, if not most, if not all, the Members of the United Nations owe their current authority-structure to a violent revolutionary change somewhere in their history.

19. I suppose it is possible to conceive of a society that includes revolutionary struggle against its authority-structure as a lawful part of its authority-structure, but I know of no such society in reality.

20. For example, in Russia, where the status of Chechnya has been the subject of horrible fighting, and in the Democratic Republic of the Congo, where a civil war seems to have broken out in the Eastern areas and has reached the point at which it is acknowledged by the central government. There are, distressingly, many such situations.

21. See ICC Statute, art. 72(6): “Once all reasonable steps have been taken to resolve the matter through cooperative means, and if the State considers that there are no means or conditions under which the information or documents could be provided or disclosed without prejudice to its national security interests, it shall notify the Prosecutor or the Court of the specific reasons for its decision, unless a specific description of the reasons would itself result in such prejudice to the State’s national security interests.” There are several other pertinent provisions of the ICC Statute, none of which would help the Court significantly in the situation posed. And if the ICC could legally demand the information, it would nonetheless be refused because its exposure would be at the expense of the national security of the State involved as that State sees matters. It is difficult to imagine any State submitting itself to an outside evaluation of its own national security interests, certainly not exposing the information to outsiders before an internally binding internal evaluation.

22. W.T. MALLISON, *SUBMARINES IN GENERAL AND LIMITED WARS*, esp. app. B at 192–195 (Interrogation of Fleet Admiral Chester W. Nimitz on May 11, 1946, taken from 40 *INTERNATIONAL MILITARY TRIBUNAL* 109–111). Mallison’s book is Volume 58 (1966) of the Naval War College “Blue Book” series of *International Law Studies*.

23. The rule, reputedly first formulated by William of Occam in the first half of the fourteenth century, says, “*Essentia non sunt multiplicanda praeter necessitatem* [assumptions should not be made unless necessary].” The language involves the neo-Platonic notion of “essences,” which is now usually considered unnecessary by application of the rule itself. See the article by T.M. Lindsay at 19 *ENCYCLOPEDIA BRITANNICA* 965 (11th ed. 1911).

24. The morality and political utility of abortion and the death penalty are only two of many examples of such disagreement in “enlightened” countries concerning matters that many would regard as aspects of “human rights.”

25. Convention on the Prevention and Punishment of the Crime of Genocide, art. V, 78 U.N.T.S. 277.

26. *Id.*, art. VI.

27. For a fuller analysis of this and many other oddities of the arrangements under which a tribunal was established at The Hague to try people involved in atrocities in the former Yugoslavia, see Rubin, *Dayton and the Limits of Law*, *supra* note 7. The weaknesses of the tribunal’s system were apparent from the moment of its creation. See Rubin, *An International Criminal Tribunal for Former Yugoslavia*, *supra* note 7.

28. U.N. CHARTER arts. 2(3) and 2(4). The Charter is a treaty, and these provisions are normally considered binding as a matter of international customary law. See *Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.)*, Jurisdiction and Admissibility, Judgment, 1984 I.C.J. 392, 425, (para. 76); *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, 1986 I.C.J. 14.38; and decisions 3, 4, 5, 6, and 8 in the latter case, holding American violations of “customary international law” to exist in various acts which also violated Articles 2(3) and 2(4) of the U.N. Charter.

29. A common evasion is when authority over territory is involved and both sides regard the dispute as internal to themselves. An example is the Falklands/Malvinas war between Argentina and the United Kingdom. See Rubin, *Historical and Legal Background of the Falkland/Malvinas Dispute*, in *THE FALKLANDS WAR 9-12* (Alberto Coll & Anthony Arend eds., 1985). That is probably the reason why Iraq categorized Kuwait as legally part of Iraq before the invasion of 1990 that led to the Gulf War of 1991.

30. CICERO, *DE RE PUBLICA AND DE LEGIBUS* (C.W. Keyes, trans., Loeb Classical Library, 1928, 1977), at 210 (Latin)/211 (English).

31. General Orders No. 100 promulgating the Instructions for the Government of Armies of the United States in the Field, in Schindler & Toman, *supra* note 8, at 3.

32. *Williams v. Bruffy*, 96 U.S. 176, 186, 24 L.Ed. 716, 718 (1877). To those reasons can be added the importance of maintaining a sense of moral superiority among the fighters’ constituents and the constituents of allies, maintaining discipline among the troops themselves, together with many other advantages.