

FROM NUREMBERG TO ROME: TRACING THE LEGACY OF THE NUREMBERG TRIALS

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A. THE QUESTION

The Nuremberg Tribunal, established in 1945, was abolished in 1948 with half its docket unprosecuted, including Kurt Waldheim who later went on to become Secretary General of the United Nations and President of Austria. Moreover, there were many thousands not yet identified, not yet charged that would have been caught by a full blown prosecution effort.

The Genocide Convention, which was approved and proposed for signature by the General Assembly in 1948, assumed an international criminal court would come into being. Article VI says that “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.”¹

The treaty establishing the International Criminal Court was negotiated in Rome in 1998. Between 1948 and 1998, for fifty years, there was no general system of international justice. Why?

B. THE COLD WAR

The United Kingdom was a reluctant participant in the Nuremberg effort from the start. As Michael Bazyler notes in his presentation to this Conference, the initial reaction of Winston Churchill to the suggestion that Nazi war criminals should be brought to justice was that they should just be shot, instead. The British were eventually brought on board, but their reluctance continued.

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1. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, art. 6, 78 U.N.T.S. 277.

The Canadian Commission of Inquiry on War Criminals, headed by the Honourable Jules Deschênes, made public in 1986 for the first time telex traffic in 1948 from the United Kingdom, the decision to end the Nuremberg initiative. A then secret cable of July 13, 1948 from the British government to seven British Commonwealth states asserted “in view of future political developments in Germany envisaged by recent tripartite talks we are now convinced that it is now necessary to dispose of the past as quickly as possible.”² The future political developments to which the cable referred was the pending independence of Germany and its ability to choose its own political course. The Western Allied powers believed that prosecution of Nazi war criminals might make it harder to keep West Germany onside in the Cold War.

From the perspective of hindsight, this reasoning is hollow. It was an insult to the German people, the German nation that, for them to be onside with the West in the Cold War, Nazi mass murderers must go free.

At the time that the Nuremberg trials ended, West Germany was still under Allied rule. When West Germany did become independent and self-governing, it continued the prosecution of Nazi war criminals the Allies had initiated.³ The notion that giving immunity to Nazi mass murderers was necessary to keep West Germany onside quickly dissipated. Yet, global immunity persisted until 1998. Why?

Yesterday, we heard from John Shattuck, a former Assistant Secretary of State for Democracy, Human Rights and Labour in the Government of the United States. He had a very simple explanation for this fifty year gap - the Cold War. So he says, both sides in that War were complicit in massive violations of human rights; the East perpetrating them and the West tolerating them in friendly authoritarian regimes.

At one level, the level of motive, I accept that explanation. But, if you actually pore over the historical record, the speeches, the resolutions, the studies, that is not what we find. We do not find either the West or the East saying that they want to avoid an international justice system so that they can violate human rights with impunity. The reasons on the public record, though they may be hollow, are quite different.

C. UNITED KINGDOM REASONING

The opposition to international justice in the early years before, during, and immediately after Nuremberg was prompted neither by the United

2. DAVID MATAS & SUSAN CHARENDOFF, *JUSTICE DELAYED: NAZI WAR CRIMINALS* 68 (Summerhill Press) (1987).

3. David Cohen, *Transitional Justice in Divided Germany after 1945*, available at <http://ist-socrates.berkeley.edu/~warcrime/D%20Cohen%20-%20DeNazification.DOC> (last visited April 24, 2006).

States nor the Soviet Union, but rather by the United Kingdom. In the early fifties, it was the United Kingdom which led the opposition to the creation of an international criminal court.

The U.K.'s argument was that there was no point in setting up a permanent tribunal for war crimes since war itself is not permanent. *Ad hoc* methods of adjudication used in the past were reasonably adequate. A permanent court might not be set up by victors in a war; but it would be activated by them. The charge of one sidedness, if there were a permanent court, would remain.

For crimes against humanity, the U.K. argued that no government which was complicit in crimes against humanity would surrender its nationals for trial before an international criminal court. The only time, outside of war and defeat, where criminals against humanity would be tried is after a revolutionary change of government. But, so said the U.K., that rarely happened. Few people out of power are international criminals.

It is hard to take these U.K. arguments at face value. In light of what we know now about the U.K. efforts to stop all war crimes prosecutions after 1948, the U.K. interventions in this international criminal court debate have a decidedly disingenuous air about them.

If a permanent court of international criminal justice had been established after the War, then it could have and probably would have taken up the unfinished business of prosecuting Nazi war criminals that the British had themselves abandoned and encouraged others to abandon. The U.K. arguments against such a court, now read like camouflage, attempting to forestall the Nazi war crimes prosecutions through this court, if established, that the British had succeeded in blocking off in other ways.

But even if we take the British interventions at face value, we can say that they were tragically mistaken. Regrettably, since World War II, crimes against humanity have been all too common. Revolutions, invasion and even elections dislodging those who committed such crimes are a regular occurrence. Criminals against humanity, who terrorize and murder their own people, have a tenuous hold on power. These crimes alienate what little support these criminals have. And they soon disappear from power.

Idi Amin is no longer in power in Uganda. Pol Pot has been deposed from Cambodia. General Videla no longer controls Argentina. Romania has overthrown Ceausescu. And the list could go on. There is a steady diet of tyrants available for an international criminal court.

The U.K. government assumed a false dichotomy. It assumed either the governments would be complicit in crimes against humanity, in which case they would not turn over these criminals, or that governments would be revolutionary regimes, totally free from criminals against humanity. These revolutionary regimes would be so few that their numbers would not justify the setting up of an international court.

Instead, since the war we have seen a whole sequence of hybrid governments, where some criminals against humanity remain in power, and others are dislodged, where criminals against humanity or their supporters retain control of one or more branches of the government, but lose control of others. In these hybrid situations using an international criminal court makes eminent sense. Turning a criminal over to an international criminal court may be possible in a situation where trying the criminal at home may be impossible.

One obstacle a country in transition to democracy often faces is the judiciary. The judges may have been appointed by the deposed criminal regime. It may be impossible to get satisfactory criminal judgments out of these judges against their former benefactors. Yet, a democratic regime in transition is unlikely to want to fire all its judges. Nor constitutionally will it always have the power to do so. An international criminal court can give independent justice to the accused, while judges who were appointed by the accused could not.

Nonetheless, the old arguments for an international criminal court, while more convincing than those against, now appear at least in part anachronistic. The proponents of a world criminal court writing after World War II thought very much in terms of what they had just seen - massive atrocities committed in the context of war by an enemy power engaged in a struggle for world hegemony. What we have seen, instead, since World War II are atrocities committed either in the context of regional wars, or, even more commonly, in the absence of any war at all. Perpetrators are evicted from power, with regularity. Public knowledge of their crimes becomes a precursor of their downfall. The criminals either flee, to seek refugee elsewhere, or benefit from a local amnesty.

The whole idea of victor's justice, or avoiding the notion of victor's justice, has no place in this situation, nor should it. Crimes against humanity do not involve a battle between combatants, a victor and a vanquished. The concept of crimes against humanity is based on the fact that the victims are innocent, that they are non-combatants. Nazi crimes against humanity were committed during war, but they were not part of the war effort. In the Nazi demonology, Nazis saw themselves in a battle with the Jews for world domination. But it was a one sided battle only the Nazis were fighting.

This pattern of perpetrators and victims exists for all crimes against humanity. When these types of criminals are punished the justice is never victor's justice because victims were never involved in a military struggle with the perpetrators. With crimes against humanity, the issue is immunity or prosecution, not victory or defeat.

Because at Nuremberg, crimes against humanity were prosecuted in conjunction with war crimes, this fundamental aspect of crimes against

humanity was blurred. Indeed, the Nuremberg tribunal jurisdiction was restricted to crimes against humanity committed in conjunction with war crimes or crimes against peace.

The crimes against humanity since the War have been mainly freestanding crimes, not committed in conjunction with war crimes or crimes against peace. With these sorts of crimes, the notion of victor's justice, and the need for an international criminal tribunal to avoid the taint of victor's justice disappears.

D. RECORDED EFFORTS

Immediately after the War there was an attempt made to establish an international criminal court. A General Assembly resolution of 1948 stated "there will be an increasing need of an international judicial organ for the trial of certain crimes under international law."⁴ The General Assembly asked the International Law Commission to study the desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide or other crimes over which jurisdiction could be referred by international convention.

The International Law Commission, in 1950, came back with a report that it was both desirable and possible to establish an international criminal court.⁵ The Commission distinguished between what was possible, and what was practicable. The Report offered no conclusion on the practicability of such a court. A.E.F. Sandstrom, one of the two special rapporteurs asked to present working papers to the Commission, himself concluded that a world criminal court was bound to be ineffective. Because it would be ineffective, it was undesirable.⁶

The General Assembly, on receipt of the report of the International Law Commission, in 1950, passed a resolution stating that a final decision regarding the setting up of an international penal tribunal could not be taken except on the basis of concrete proposals. The Assembly decided to set up a committee composed of representatives of seventeen member states to prepare a draft convention relating to the establishment of an international criminal court.⁷

This Committee on International Criminal Jurisdiction, called the Geneva Committee, produced a report which formulated proposals regarding some of the questions to which the creation of an international

4. G.A. Res. 260 B, U.N. Doc. A/810 (1948).

5. Report of the International Law Commission to the General Assembly, U.N. Doc. A/1316 (1950).

6. Report of the International Law Commission, U.N. GAOR, 5th Sess., U.N. A/CN.4/20. (1950).

7. G.A. Res. 488, U.N. GAOR, 5th Sess., U.N. Doc. A/1775 (1950).

criminal court gives rise. The report contained a draft statute for an international criminal court.⁸ It was circulated to member states for comment.

In 1952, the General Assembly decided there was need for further study of the problems relating to international criminal jurisdiction. It set up a new 17 member committee, consisting of state representatives. The 17 member committee had 7 new members and 10 states carried over from the previous committee.⁹

The General Assembly, in 1954, received the report of the second committee, called the New York Committee,¹⁰ and did nothing with it. The Assembly decided to postpone consideration of the establishment of an international criminal court until it had adopted a code of offenses against the peace and security of mankind.¹¹ It also decided not to adopt a code of offenses against the peace and security of mankind, until the crime of aggression had been defined.¹²

The International Law Commission, at its inception in 1947, was asked to prepare a draft code of offenses against the peace and security of mankind.¹³ The Commission presented a draft to the General Assembly in 1950.¹⁴ The General Assembly asked member states to comment on the draft, and the Commission to prepare another draft based on these comments.¹⁵ The Commission came back to the General Assembly with a revised draft in 1954.¹⁶

The first draft code made aggression a crime, but did not attempt to enumerate exhaustively what acts constituted acts of aggression. The General Assembly in 1952 decided to set up a special committee of fifteen member states to define aggression.¹⁷

The Committee on Aggression reported in 1954, but without agreeing on a definition of aggression.¹⁸ The General Assembly, in 1954, set up a

8. Report of the Committee on International Criminal Jurisdiction, U.N. GAOR, 7th Sess., Supp. No. 11, U.N. Doc. A/2136 (1952).

9. G.A. Res. 687, U.N. GAOR, 7th Sess., U.N. Doc. A/7/687 (1952).

10. Revised Draft Statute for an International Criminal Court, U.N. GAOR, 9th Sess., U.N. Doc. A/2645 (1954).

11. G.A. Res. 898, U.N. GAOR, 9th Sess., U.N. Doc. A/2890 (1954).

12. G.A. Res. 897, U.N. GAOR, 9th Sess., U.N. Doc. A/2890 (1954).

13. G.A. Res. 177, U.N. Doc. A/519 (1947).

14. Report of the International Law Commission to the General Assembly, U.N. Doc. A/1316 (1950).

15. G.A. Res. 488, U.N. GAOR, 5th Sess., U.N. Doc. A/1775 (1950).

16. 1954 Draft Code of Offenses Against the Peace and Security of mankind, U.N. GAOR, 9th Sess., U.N. Doc. A/2693 (1954).

17. G.A. Res. 688, U.N. GAOR, 7th Sess., U.N. Doc. A/2361 (1952).

18. Report of the 1953 Committee on International Criminal Jurisdiction, U.N. GAOR, 9th Sess., U.N. Doc. A/2638 (1954).

second, nineteen-member committee on defining aggression, and decided to postpone consideration of the International Law Commission draft code until this special committee reported.¹⁹

The General Assembly considered the report of the second committee on aggression in 1957.²⁰ But the second committee had made little progress beyond the work of the first committee. The Assembly decided to appoint a third committee of 21 members on the issue.²¹ This third committee, too, got nowhere.

Ten years later, in 1967, the General Assembly created yet a further committee to define aggression, consisting of thirty-five members.²² Finally in 1974, after seven years, that Committee produced a definition of aggression²³ which the General Assembly accepted by consensus.²⁴

After aggression was finally defined, the efforts of the International Law Commission to draft a code of offenses was resuscitated. But this resuscitation occurred at the glacial pace characteristic of the U.N.

In 1978, the General Assembly asked member states to comment on the draft code the International Law Commission had presented to the General Assembly in 1954.²⁵ After the comments had been received in 1981, the Assembly invited the International Law Commission to recommence its work on the draft code, taking into account the developments in international law since 1954.²⁶

Work on the revised draft code lumbered along. The International Law Commission broke off into two working groups, one dealing with the criminal responsibility of states, and another with non-state criminal responsibility. It was asked to reconsider the 1954 draft code in light of subsequent developments. The Special Rapporteur of the International Law Commission on non-state responsibility, Doudou Thiam, came up with reports that seemed destined to postpone the conclusion on a draft code indefinitely.

In his fourth report,²⁷ in 1986, he drafted as an offence the possible establishment or maintenance of colonial domination. Another draft offence was the recruitment, organization equipment and training of mercenaries.

19. G.A. Res. 895, U.N. GAOR, 9th Sess., U.N. Doc. A/2890. (1954).

20. Report of the 1956 Special Committee on the Question of Defining Aggression, U.N. GAOR, 12th Sess., U.N.Doc. A/3574 (1956)..

21. G.A. Res. 1181, U.N. GAOR, 12th Sess., U.N. Doc. A/3805 (1957).

22. G.A. Res. 2330, U.N. GAOR, 22d Sess., U.N. Doc. A/6988. (1967).

23. Report of the Special Committee on the Question of Defining Aggression, U.N. GAOR, 29th Sess., U.N. Doc. A/9619 (1974)..

24. G.A. Res. 3314, U.N. GAOR, 29th Sess., U.N. Doc. A/RES/3314 (1974).

25. U.N. GAOR 33/97, 34th Sess., U.N. Doc. A/33/45 (1979).

26. U.N. GAOR 36/106, 36th Sess., U.N. Doc. A/36/51 (1981).

27. Report of Special Rapportuer, U.N. GAOR, 41st Sess. U.N. Doc. A/CN.4/400 (1986).

These two offenses were considered crimes against peace. Within the scope of crimes against humanity he included any serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment. None of these draft offenses had any foundation in international law. The rapporteur omitted such crimes as slavery and narcotics trafficking which are generally recognized as part of international criminal law.

Professor Bassiouni called the 1986 draft code the product of a very high degree of technical nonchalance. He said that the efforts to draft a code have been eroded by ideological and political concerns. Robert Friedlander said that the possibility of U.S. acceptance of the draft code in its 1986 form was not merely bleak, it simply did not exist.²⁸

There was an attempt in 1957 to break the linkage between an international criminal court and the draft code of offenses, but it failed. In the sixth committee of the U.N. General Assembly in 1957, only the Dutch and Belgian delegates supported breaking the linkage. Their position was voted down 54 to 2 with 2 abstentions.²⁹

Finally, on July 12, 1991, the International Law Commission adopted a draft Code of Crimes against the Peace and Security of Mankind, and forwarded it to the United Nations General Assembly for consideration. The draft Code contained the offenses of colonial domination and other forms of alien domination; of recruitment, use, financing and training of mercenaries; and of wilful and severe damage to the environment. In other words, it was drafted in a manner that ensured it would not receive universal acceptance. The draft Code was circulated to member states of the U.N. for their comment.

The representative of the Government of Canada said, diplomatically, in a statement to the General Assembly in 1991 that the draft Code should be based on existing law. "It should not attempt, at this stage, to embark upon a program of development in respect of this important, sensitive and controversial field of law." To attempt to go beyond the accepted offenses already in the international instruments "would involve many more years of work and could not be expected to produce a code that would receive broad acceptance and adhesion in the near term."³⁰

In 1989, the General Assembly asked the International Law Commission to analyze the question of establishing an international criminal court. The International Law Commission completed its analysis in 1992 and recommended in favour of the establishment of such a court.

28. Kerry W. Kircher, *Draft Code of Offenses Against the Peace and Security of Mankind*, 80 American Society of International Law Proceedings, 120, (1986).

29. U.N. GAOR, 6th Comm., 12th Sess., U.N. Doc. A/3771 (1957).

30. Statement of Richard Tetu, November 8, 1991.

The General Assembly Sixth Committee, on November 12, 1992, passed a resolution mandating the Commission to draft a statute for such a court.³¹

The representative of Canada strategically suggested to the Sixth Committee that the base jurisdiction for the new judicial body “might not be expected to include the range of offenses currently included” in the draft Code of Crimes, but rather a more narrow band of universally acceptable offenses. The Hon. Barbara McDougall, Secretary of State for External Affairs, announced, in her statement at the 1992 U.N. General Assembly that Canada would convene an international meeting of experts to mobilize legal expertise on an international criminal court. The 1992 Canadian Sixth Committee statement concluded with this observation: “There is much work to be done before an International Criminal Court comes into existence.”

E. THE CONSEQUENCES

Between the Nuremberg Court and the Rome treaty of 1998 establishing the international criminal court, crimes were being committed and cried out for justice. Take genocide, the one crime specifically mentioned in the original resolution of 1950 that attempted to get an international court established. If we define genocide broadly to cover the state sponsored mass murder of innocent civilians for whatever reason, whether political, religious or racial, there have been forty-four such episodes tabulated from World War II, up until 1988.³²

Some of these mass murders are only on the margin of public consciousness, such as the killing of up to 14,000 Tutsi in Rwanda in 1963-4, or the mass killing of up to 205,000 Hutu in Burundi from 1965 onward. Others are well known indeed - the killing fields of Kampuchea or the death squads of El Salvador. But all of them are in violation of international criminal standards.

After the Gulf war there were calls for an *ad hoc* international criminal court to prosecute and punish Saddam Hussein. But nothing happened. The ethnic cleansing of Bosnia by Serbian forces generated new calls for war crimes trials. Tadeusz Mazowiecki, as special envoy for the United Nations Human Rights Commission, issued a sequence of reports detailing war crimes in Bosnia. The U.N. Security Council, in October 1992, voted to create an international commission which would collect evidence on criminal violations of international humanitarian law and make recommendations.³³ That Commission led to the International Criminal

31. U.N. GAOR, 6th Comm., 47th Sess., U.N. Doc. A/C.6/47/L.14 (1992).

32. Barbara Harff & Ted Robert Gurr *Toward Empirical Theory of Genocides and Politicides* 32 International Studies Quarterly 359 (1988).

33. S.C. Res. 780, U.N. SCOR, 47th Sess., 3119th mtg. at 36, U.N. Doc. S/RES/780 (1992).

Tribunal for Yugoslavia. The International Criminal Tribunal for Rwanda followed shortly thereafter.

F. THE ALTERNATIVE OF UNIVERSAL JURISDICTION

An international criminal court is not necessary for bringing international criminals to justice. Legally, there is universal jurisdiction and a general duty to prosecute. The principles of international cooperation in the detection, arrest, extradition, and punishment of persons guilty of war crimes and crimes against humanity passed by the General Assembly in 1973. These principles provide that individuals who commit war crimes and crimes against humanity shall be subject to tracing, arrest, trial and punishment regardless where they committed their crimes.³⁴

The principles on the effective prevention and investigation of extra legal, arbitrary and summary executions, passed by the Economic and Social Council in 1989, state that governments shall ensure that persons participating in extra legal, summary or arbitrary executions are brought to justice. The principle applies no matter who and where the perpetrators and the victims are, their nationalities or where the offence was committed.³⁵

To answer why there was no general system of international justice between 1948 and 1998, one has to address not just why there was no international criminal court. One has to address why there was no functioning domestic universal jurisdiction system for war crimes or crimes against humanity or genocide anywhere. What happened in Canada provides as good an answer to that question as any.

Canada legislated its own code of offenses against the peace and security of mankind. Substantially before 1998 there was a whole list of international criminal offenses that were punishable by the Canadian legal system no matter where the crime was committed, no matter what the nationality of the criminal, no matter what the nationality of the victim, provided only the criminal was found in Canada.

Although the Canadian war crimes and crimes against humanity legislation had much to be said in its favour from the point of view of principle, its creation was very much the result of Canadian political realities. Many of the alleged war criminals in Canada were from Eastern Europe. Canada did not have operative extradition treaties with several of these countries, including most notably Poland and the Soviet Union. Once an extradition treaty is signed, an accused cannot question in Canada the fairness of the legal system in the country to which the person would be

34. G.A. Res. 3074, U.N. GAOR, 28th Sess., U.N. Doc. A/9326 (1973).

35. Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions, E.S.C. Res. 1989/65, U.N. Doc. E/1989/89 (1989).

extradited. The extradition treaty itself imports a legal presumption of fairness.³⁶

During the Cold War, Canada was not prepared to accept the legal systems of Eastern Europe as fair. Even for those countries in Eastern Europe for which there were operative extradition treaties, Czechoslovakia, Hungary, Romania and Yugoslavia, extradition for trial of accused Nazi war criminals was an unacceptable political option.

Before the Iron Curtain collapsed, there was a commonly held view in emigré communities in Canada that efforts initiated in Eastern Europe to prosecute Nazi war criminals was aimed not just at Nazis, but, as well, at anti-Communists. Whatever the validity of that view, its existence was a political reality. Extradition to Eastern Europe, or even denaturalization and deportation to Eastern Europe, met with widespread opposition amongst Eastern European emigrés in Canada.

Prosecution was more palatable than any other remedy. And prosecution of all war criminals, all criminals against humanity, was more palatable than prosecution of Nazi war criminals or Nazi criminals against humanity alone. The Ukrainian Canadian Committee (UCC), in particular, was active in reminding the Canadian political community of Stalinist crimes of which Ukrainians had been the victim. The UCC lobbied actively for any remedy that was legislated to encompass the possibility of prosecution for Stalinist crimes.

The legislation which resulted, though the fruit of political tactics, stands up well to the scrutiny of principle. Legally it is an easier law to defend than a more narrowly constructed statute aimed only at Nazi war criminals would be.

The Canadian Charter of Rights and Freedoms guarantees to all equality before and under the law and the equal benefit and protection of the law without discrimination. Doug Christie, counsel for accused Nazi war criminal Imre Finta, was quick to rely on the equality guarantee to argue that the Canadian war crimes provision then in the Criminal Code was unconstitutional. But the inequalities he pointed out were farfetched and fanciful.

Finta, who came to Canada after World War II, was accused in 1988 of being a key official in the rounding up of the Jews of Szeged, Hungary in 1944 and sending them off to Auschwitz, a Nazi death camp, and to Strasshof, a Nazi concentration camp. Christie argued that Finta was being treated unequally because Finta's deportation of Jews to Auschwitz was similar to what Canada did to its Japanese citizens during World War II in dispossessing, relocating and deporting them. The trial judge found the analogy unacceptable. While the judge did not condone the Canadian

36. *Schtraks v. Government of Israel*, 1964 A.C. 556 (H.L.).

treatment of its Japanese citizens, the situation was drastically different from the Nazi treatment of Hungarian Jews.³⁷

However, if the Canadian law were not to have covered all war crimes, but only Nazi war crimes, Christie would have had a more plausible argument to make. While the horrors, the dimensions, the techniques of the Holocaust were a unique tragedy, there have been all too many crimes of mass murder committed both before and since which bear a good deal closer resemblance to the Holocaust than the Canadian internment of its Japanese citizens. The legislation, in the general form, prevented arguments of unequal treatment based on the inability to prosecute other mass murderers not involved in the Holocaust from being raised.

In 1990, the French convicted, *in absentia*, an Argentinean naval captain, Alfredo Astiz, for kidnapping and torture of two French nuns in Argentina in 1977. Astiz had been previously amnestied for this crime by the Argentinean government. The lawyer for the nuns remarked that never before had a person been convicted in a foreign country for a crime he had committed in his own country, for which he had been amnestied.

That conviction was indeed remarkable and despite the fact it took place only on March 16, 1990, it was, to my knowledge, the first of its kind. But, Canadian law went even beyond the French. The victims in the French case were French nationals. According to Canadian law, a person could be convicted in Canada of such a crime, even where the victims were Argentinean nationals. And, if the crime was a crime against humanity, as arguably it was, the person could be convicted even if the crime was committed before the Canadian law was legislated. What Canadian legislation allowed Canada to do in relation to international crimes, and, in particular, in relation to war crimes and crimes against humanity is very much what an international criminal court would do.

Yet, the Canadian law did not function effectively. While each case has its own particular problems, overall, the difficulties the Canadian law faced were two - delay and insularity. Any prosecution launched forty years after the crime will be difficult. That difficulty will exist whether the crime is prosecuted before a domestic or an international court.

Insularity is a problem unique to a domestic court. The crimes were committed by a non-Canadian against non-Canadians outside of Canada. The accused had stronger ties with Canada than the victims. They had lived decades in Canada. There was a tendency of Canadian judges and Canadian juries to sympathize with the accused, guilty or innocent, because of those ties more than with the victims. An international criminal court avoids this problem of insularity.

37. R. v. Finta, [1989] 50 C.C.C. (3d) 236.

Asking a universal jurisdiction system to provide international justice in the absence of an international criminal court was putting more weight on the shoulders of the universal jurisdiction system than it could bear. Despite the legislation, the actors in the Canadian legal system were either not able or not willing to make Canada a free standing fully operational international justice system. Canada wanted and needed company, the partnership of an international institution. For the domestic system to work, the international system had to be in existence. Now that the International Criminal Court exists and is on the verge of becoming operational, the prospects for a functioning universal jurisdiction system in Canada are finally solid.

When there was no international criminal court, universal jurisdiction exercised by domestic courts was a theoretical alternative, but not a real one. Now that the International Criminal Court is in existence, that alternative is real. But does it matter? Is there any point in trying to develop domestic universal jurisdiction justice systems, or are we better off just working for ratification and implementation of the statute of the International Criminal Court?

My answer to that question is that we have to try for both. The development of universal jurisdiction and the solidification of the International Criminal Court work in tandem. The full realization of international justice will mean developing both remedies. Though justice dispensed by an international criminal court carries internationally the message of justice in a way no domestic court can, in other respects a functioning domestic universal jurisdiction justice system is an improvement over what the International Criminal Court would do.

The statute of the International Criminal Court provides that no person could be tried before the Court unless jurisdiction had been conferred on the Court by the state of which the person is a national or by the state in which the crime is alleged to have been committed or by the Security Council. One reason this jurisdiction was inserted was to encourage states to sign and ratify the Court treaty.

The international law of universal jurisdiction has no such requirement. Neither the consent of the state of nationality nor the consent of the state in which the crime is committed is necessary for Canadian law to operate.

It has been argued that the consent of the state where the crime was committed is necessary from the practical standpoint of the trial of an accused by an international criminal court. This argument, however, both assumes too little and too much.

It assumes too little, because the evidence of an international crime may not just be located in the territory of the state where the crime is committed. For example, witnesses may have moved; documents and other physical evidence may have been transferred; and cooperation of many states may be necessary.

It assumes too much because it is not necessary to accept jurisdiction in order to be involved in cooperation. A state can provide evidence to an international court without accepting its criminal jurisdiction over persons found on its territory.

Canada has resolved this practical problem with evidence gathering agreements. The Government of Canada has entered into agreements with a number of different countries to allow the gathering of evidence for the purposes of its war crimes and crimes against humanity trials. These agreements do not require, as you can well imagine, that foreign governments accept the criminal jurisdiction of Canadian courts over persons found on the territory of the foreign state. And Canada does not claim to assert such jurisdiction.

The statute of the International Criminal Court provides that the Security Council may stop prosecutions of certain cases. Rome treaty discussions showed that there were those who believe that there should be a mechanism for political screening of prosecutions, that a trial might jeopardize international peace and security, and, if it did, it should be stopped.

Canada again, has no such possibility in its law. As long as enough evidence has been accumulated to justify the bringing of a charge, a charge will be laid. The law requires that the Attorney-General of Canada both consent to and conduct the prosecution of war crimes and crimes against humanity. However, that requirement is there to stop politicized private prosecutions, not to allow the Attorney-General to refrain from prosecuting sound cases for political reasons.

The International Criminal Court is a court without jury trials. Trials will be by judge alone. In Canada, an accused charged with international crimes has a right to a jury trial. That right cannot be taken away by any government, including the Government of Canada. The right to trial by jury is entrenched in the Canadian Charter of Rights and Freedoms.³⁸

As desirable as universal ratification and implementation of the Rome treaty are, we can achieve much the same result if the different countries of the world emulate the Canadian system. The more countries of the world there are that are prepared to prosecute international criminals the closer we are to a truly international criminal law system.

If one looks from the hindsight of sixty years at the international human rights institutions which have developed, they are very unlike the post World War II proposed international criminal court. It is unusual to find in the U.N. system a first instance remedy. Instead what we have are

38. Can. Const. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 11(f).

supervisory or appeal mechanisms. First instance remedies are left to the states.

For instance, in the International Covenant on Civil and Political Rights, each state party undertakes to take the necessary steps to adopt such measures as may be necessary to give effect to the rights recognized in the Covenant.³⁹ Each state party undertakes to ensure that any person whose rights are violated shall have an effective remedy, determined by a competent authority, which shall enforce the remedy, when granted⁴⁰. The Human Rights Committee, established under the Covenant, is not there to provide the remedy, just to monitor compliance. Even for those countries which have signed the optional protocol which allows for individual complaints to the Human Rights Committee, the individual must have exhausted all domestic remedies before the complaint is admissible for consideration by the Committee.

What Canada is doing, by allowing for prosecution of international criminals against humanity, is very much in line with that model. The Canadian system provides a remedy to victims of crimes against humanity which is in accordance with Canada's own constitutional process.

What is the logic behind promoting an international criminal court, rather than international criminal law applied by domestic courts? Four reasons have been given. One is that international crimes, and in particular, war crimes and crimes against humanity, were likely to be tolerated or even ordered by governments. The governments who tolerated or ordered these crimes were unlikely to prosecute them.

Second, historically when international crimes have been punished, they were judged by *ad hoc* tribunals established by victors pronouncing only on those offenses defined in the instruments giving the tribunals jurisdictions. The *ad hoc* nature of the tribunals was not an ideal of abstract justice. While it could not be said that these special arrangements were unjust, a permanent court applying the full range of international criminal law would be a more satisfactory form of justice.

Third, the creation of an international criminal court contributes overall to an effective international legal order. Such a court is one component of an overall mechanism that would emphasize the integrated nature of world society.

Fourth, an effective international criminal court has a more significant deterrent effect on international crimes than national criminal courts could have. An international criminal court speaks to all humanity. National

39. International Covenant on Civil and Political Rights art. 2, Dec. 16, 1966, 999 U.N.T.S. 171.

40. *Id.* at art. 3.

criminal courts are directed to people over whom these courts have jurisdiction.

National efforts, such as Canada's, to prosecute international crimes, can be perfectly proper and appropriate. It offers a form of justice as satisfactory as a world court would. It is decidedly not victor's justice.

Other reasons given for ratification and implementation of the Rome treaty, however, remain valid. The point of deterrence is a particularly important one.

A crime against humanity trial has a very different deterrent message from an ordinary criminal trial. An ordinary criminal trial, of say, murder, has a deterrent effect, even if the effect is just local to the community where the trial takes place.

But the importance of the message of a trial for crimes against humanity is diminished substantially if the message just gets out to the local community where the trial takes place. Indeed, much of the hesitancy about prosecuting crimes against humanity comes from looking at deterrence from a narrow local focus.

There are many places in the world where crimes against humanity have happened recently, where future crimes against humanity are eminently possible. Yet Canadian trials are little known in those places. Their impact is diluted by distance and the local nature of the jurisdiction being asserted in Canada.

An international criminal court has this advantage. Its message is more clearly international. Its deterrent impact is more effective.

So there is reason to work for ratification of the Rome treaty, even while we prosecute locally, even as there is reason to prosecute locally while we work for ratification of the Rome treaty. The very fact of local prosecution, if it spreads widely enough, amongst enough countries, will make ratification of the Rome treaty more likely.