

3. States shall co-operate with each other on a bilateral and multilateral basis with a view to halting and preventing war crimes and crimes against humanity, and shall take the domestic and international measures necessary for that purpose.

4. States shall assist each other in detecting, arresting and bringing to trial persons suspected of having committed such crimes and, if they are found guilty, in punishing them.

7. . . . States shall not grant asylum to any person with respect to whom there are serious reasons for considering that he has committed a crime against peace, a war crime or a crime against humanity.¹²

In other resolutions it was also affirmed that a refusal "to co-operate in the arrest, extradition, trial and punishment" of such persons is contrary to the United Nations Charter "and to generally recognized norms of international law."¹³ The International Law Commission's Draft Code of Crimes against the Peace and Security of Mankind, including genocide and serious war crimes, also recognizes the customary obligation of states "to try or extradite" those reasonably accused, and similar recognitions by text writers abound.

Such customary and treaty-based obligations, related even to the UN Charter, pertain even as states vote for UN resolutions or contemplate otherwise permissible measures for peace. In my opinion, the Security Council must itself "act in accordance with the Purposes and Principles" of the Charter (as set forth in Art. 24(2)) and (as expressed in Art. 25) its decisions are only binding if made "in accordance with" the Charter. As readers undoubtedly know, the Charter's purposes and principles include not merely peace, but also security, self-determination, human rights (which also lie behind prohibitions of genocide and most war crimes), "justice," and good faith fulfillment by members of their obligations assumed in accordance with the Charter. Article 1, paragraph 1 expressly recognizes the UN purpose of taking "effective collective measures . . . for the suppression of acts of aggression" and the settlement of disputes that might be peace threatening "in conformity with the principles of justice and international law." Thus, peace itself is to be conditioned by justice and law, a result also evident when one considers the various Charter purposes outlined above and their necessary effect as power-limiting policies or purposes under Articles 24 and 25 of the Charter.

Surely, Professor D'Amato's secret and "distasteful" deal could not be lawful under several treaties, including the UN Charter, nor under customary international law. It would necessarily be *contra obligatio erga omnes*. More egregious would be the short-term and long-term consequences of such a deal, serving as it would the very crimes condemned by humankind—a terrible and unlawful, if not complicitous, price that we simply cannot afford to pay.

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TO THE EDITORS IN CHIEF:

In his Editorial Comment *Peace vs. Accountability in Bosnia* (88 AJIL 500 (1994)), Professor Anthony D'Amato makes some interesting arguments suggesting that the simplest and most direct route to peace in the Balkans might be to

¹² GA Res. 3074, UN GAOR, 28th Sess., Supp. No. 30, at 78, UN Doc. A/9030 (1973).

¹³ See, e.g., GA Res. 2840, *id.*, 26th Sess., Supp. No. 29, at 88, UN Doc. A/8429 (1971); see also GA Res. 3074, *supra* note 12; GA Res. 96, UN Doc. A/64, at 188 (1946).

require the party committing the most war crimes to make more land concessions than the other parties and that that will prove to the wrongdoer that war crimes do not pay and are therefore not justified by military necessity. He suggests that no individual signatory to such a deal would have to face prosecution. The ad hoc criminal tribunal created by the Security Council would be told that since the parties have settled their dispute, the judges can all go home.

The idea of trading justice for peace will produce neither justice nor peace. Should the betrayed victims of mass rapes and other crimes against humanity cooperate with a regime of known lawbreakers without seeking retribution from the responsible criminals themselves? Requiring partial restitution of stolen property is hardly a deterrent. Allowing the wrongdoer to keep any portion of ill-gotten gains is to reward aggression, contrary to international law. Seizing private property of your own citizens and giving it to your enemy as atonement for sins of government leaders is no better. Tolerating genocide and making the tribunal a cancelable "bargaining chip" to encourage killers to stop slaughtering innocent people is hardly an acceptable way to support the idea of international law and order for which Professor D'Amato has always stood. The butchers of Serbia, Bosnia, Rwanda and elsewhere will be encouraged to believe they can get away with murder if their only risk is a possible boundary change. Professor D'Amato (who also finds his theoretical solution distasteful) must be kidding!

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Note from the Editor: Professor D'Amato will respond to these letters in the January 1995 issue of the *Journal*.

* The writer was a war crimes prosecutor at the Nuremberg trials.