EDITORIAL COMMENTS

INTERNATIONAL CRIMINAL LAW AND THE ROLE OF DOMESTIC COURTS

The proper role of domestic courts in cases involving international crimes has been hotly debated, some arguing in favor of domestic prosecution,[1] and others in favor of international prosecution.[2] Scholars in the latter group believe that domestic courts or other procedures cannot be trusted with the effective prosecution of grave international crimes. Unlike the Statutes of the International Criminal Tribunals for the Former Yugoslavia and Rwanda (ICTY and ICTR, respectively),[3] that of the future international criminal court (ICC) seeks to bridge this gap by giving preference to domestic procedures if they have been conducted in a bona fide way.[4] The concept of complementarity is fundamental to the design of the ICC Statute: if in a case otherwise eligible for consideration by the ICC a bona fide examination of the alleged crime was undertaken and disposed of by a state (whether or not it is a party to the ICC Statute), the matter will not be admissible before the ICC.[5]

Difficult questions abound, not the least of which is how the ICC should evaluate the bona fides of those domestic procedures. However, I would like to examine a broader matter here: the substantial increase in domestic prosecutions of international crimes stimulated by the work of the ICTY and the ICTR, as well as the impending establishment of the ICC and its rule of complementarity.

After the termination of the Tokyo and Nuremberg Tribunals,[6] domestic courts rarely attempted to prosecute Nazi fugitives from justice for international crimes they had committed during World War II. Still more rarely did domestic courts prosecute other persons who had committed international crimes subsequent to World War II. Until the establishment of the ICTY and the ICTR, opinion generally characterized prosecutions of international crimes merely as victors' vengeance and a historical anomaly. Yet suddenly an enormous number of prosecutions for such crimes are taking place in the domestic courts of

[1] *See, e.g.*, José E. Alvarez, *Crimes of States/Crimes of Hate: Lessons from Rwanda*, 24 YALE J. INT'L L. 365 (1999).

[2] *See, e.g.*, Lynn Sellers Bickley, *U.S. Resistance to the International Criminal Court: Is the Sword Mightier Than the Law?* 14 EMORY INT'L L. REV. 213, 272–75 (2000); Leila Nadya Sadat & S. Richard Carden, *The New International Criminal Court: An Uneasy Revolution*, 88 GEO. L.J. 381, 385 (2000).

[3] Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, UN Doc. S/25704, annex (1993), *reprinted in* 32 ILM 1192 (1993); Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, Between 1 January 1994 and 31 December 1994, SC Res. 955, annex, UN SCOR, 49th Sess., Res. & Dec., at 15, UN Doc. S/INF/50 (1994), *reprinted in* 33 ILM 1602 (1994).

[4] United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome Statute of the International Criminal Court, July 17, 1998, UN Doc. A/CONF.183/9*, *corrected* Nov. 10, 1998, and July 12, 1999, *obtainable from* <http://www.un.org/law/icc/index.html>, *reprinted in* 37 ILM 999 (1998) (uncorrected version) [hereinafter ICC Statute]. See the Web site *supra* for a current report on the status of ratifications and other information on the ICC.

[5] ICC Statute, *supra* note 4, Art. 17.

[6] *See* Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, annex, Aug. 8, 1945, 59 Stat. 1544, 82 UNTS 279; Protocol to Agreement and Charter, Oct. 6, 1945, 59 Stat. 1586, 3 Bevans 1286; Charter of the International Military Tribunal for the Far East, Jan. 19, 1946, TIAS No. 1589, 4 Bevans 20, *as amended* Apr. 26, 1946, 4 Bevans 27.

Rwanda.[7] Similar cases have gone forward in South Africa.[8] The Spanish court's indictment of Augusto Pinochet led not only to proceedings in the domestic courts of Spain, but also to extradition proceedings in England, as well as indictments in Belgium, France, and Switzerland.[9] While Pinochet was ultimately released to return to Chile, his homecoming was not to the safe haven he had enjoyed in the past. Rather, the courts revoked his immunity and that of others and, despite earlier resistance (even under democratically elected governments),[10] the possibility of civil and criminal actions in Chile for the international crimes Pinochet's regime is alleged to have committed has become real. As a consequence of other developments along these lines, including the indictment and arrest by Senegal of Chad's ex-President Hissein Habré and similar efforts in Cambodia, Sierra Leone, Togo, and East Timor,[11] persons who have committed international crimes, other than current heads of

[7] *See* Alvarez, *supra* note 1; Ian Fisher, *Crisis Points up Tough Choice for Tribunal on Rwanda*, N.Y. TIMES, Dec. 19, 1999, §1, at 3.

[8] *See, e.g.*, Bruce W. Nelan, *Facing up to a Violent Past; Powerful Members of the Old Guard Are Indicted for a 1987 Massacre*, TIME, Dec. 11, 1995, at 63.

[9] Auto de Procesamiento 10.12.98 del Juez Garzón [Indictment Dec. 10, 1998, by Judge Garzón] may be found (in Spanish) at <http://puntofinal.cl/especial/justicia/justicia.html> (visited Nov. 14, 2000). For a summary in English, see Derechos, *The Criminal Procedures against Chilean and Argentinian Repressors in Spain: A Short Summary* <http://www.derechos.net/marga/papers/spain.html> (visited Nov. 24, 2000). The validity of the Spanish indictment was upheld in Audiencia nacional, div. crim., Nov. 4, 1998, No. 19/97, & Nov. 5, 1998, No. 1/98, *summarized in* 93 AJIL 690 (1999), *obtainable from* <http://www.derechos.org/nizkor/chile/juicio/>. For an unofficial English translation of Order No. 1/98, see THE PINOCHET PAPERS: THE CASE OF AUGUSTO PINOCHET IN SPAIN AND BRITAIN 95 (Reed Brody & Michael Ratner eds., 2000).

By 1998, the Swiss government had also sent an extradition request to the United Kingdom (UK), and criminal proceedings had begun or were planned in national courts in Belgium, France, Italy, Luxembourg, and Sweden. *See* Brief Amicus Curiae submitted by Amnesty International—Panel of Judges of the House of Lords, para. 3, *obtainable from* <http://www.derechos.org/nizkor/chile/juicio/amicus.html>. Prosecutions initiated against Pinochet include Trib. gr. inst., Paris, orders of Nov. 21, 1998 (Chanfreau), Nov. 12, 1998 (Banquet & Klein), Dec. 10, 1998 (Enrique Ropert Contreras & Père Jarlan), *summarized in* 93 AJIL at 696; Trib. 1st inst., Brussels (investigating magistrate), Nov. 8, 1998, *summarized in* 93 AJIL at 700. *See also* Regina v. Secretary of State for the Home Department, *ex Parte* Belgium; Regina v. Secretary of State for the Home Department, *ex Parte* Amnesty International Ltd., Nos. CO/236/2000, CO/238/2000 (Q.B., Feb. 15, 2000) (on challenges to the UK home secretary's decision not to extradite Pinochet to Spain on the ground that he is unfit for trial and referencing other requests for extradition by France, Belgium, and Switzerland). English court decisions are available in LEXIS, Legal (excluding U.S.), United Kingdom, Case Law File. For the letters from the Home Office to the Spanish, Belgian, Swiss, and French Ambassadors announcing the termination of extradition proceedings (Mar. 2, 2000), see THE PINOCHET PAPERS, *supra*, at 465 (Spain), 477 (Belgium), 478 (Switzerland), 479 (France).

For the request for extradition from England to Spain, see Regina v. Bartle & Commissioner of Police, *ex Parte* Pinochet, [1998] 3 W.L.R. 1456 (H.L.), *reprinted in* 37 ILM 1302 (1998), *aff'd & rev'd in part*, [1999] 2 W.L.R. 827 (H.L.), *reprinted in* 38 ILM 581 (1999). Decisions of the UK House of Lords are available online at <http://www.parliament.the-stationery-office.co.uk/>.

[10] *See* Chanfeau Orayce v. Chile, Cases 11.505 et al., Inter-Am. C.H.R. 512, OEA/ser.L/V/II.98, doc.7 rev. (1997), *obtainable from* <http://www.cidh.oas.org/annualrep/97eng/97ench3a43an.htm>; Clifford Krauss, *Pinochet Ruled No Longer Immune from Prosecution*, N.Y. TIMES, Aug. 9, 2000, at A3; Clifford Krauss, *A New Drive Gathers Steam to Avert Trial for Pinochet*, N.Y. TIMES, Aug. 12, 2000, at A6; Clifford Krauss, *Judge Reinstates* Pinochet *Case with New Order for House Arrest*, N.Y. TIMES, Jan. 30, 2001, at A3.

[11] *Ex-Chad Ruler Is Charged by Senegal with Torture*, N.Y. TIMES, Feb. 4, 2000, at A3.

On Cambodia, see Identical Letters Dated 21 January 1999 from the Permanent Representative of Cambodia to the United Nations Addressed to the Secretary-General and the President of the Security Council, UN Doc. A/53/801–S/1999/67 (1999); Seth Mydans, *Of Top Khmer Rouge, Only One Awaits Judgment*, N.Y. TIMES, Mar. 14, 1999, §1, at 6; Elizabeth Becker, *U.N. Panel Wants International Trial for Khmer Rouge*, N.Y. TIMES, Mar. 2, 1999, at A1.

In UN Security Council Resolution 1315, the UN Secretary-General was requested to negotiate with the government of Sierra Leone to establish a special court for international crimes committed in that country. SC Res. 1315 (Aug. 14, 2000), *obtainable from* <http://www.un.org/documents>. The Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, UN Doc. S/2000/915 (Oct. 4, 2000), *obtainable from id.*, is before the Security Council pursuant to Resolution 1315. *See also* Barbara Crossette, *Sierra Leone Will Be Site of Tribunal on Atrocities*, N.Y. TIMES, Oct. 6, 2000, at A12; Barbara Crossette, *U.N. to Establish a War Crimes Panel to Hear Sierra Leone Atrocity Cases*, N.Y. TIMES, Aug. 15, 2000, at A6.

Similar developments are taking place in East Timor. The High Commissioner of Human Rights of the Commission on Human Rights, in "Question of Violations of Human Rights and Fundamental Freedoms in Any Part of the World," reported that the UN Transitional Administration in East Timor recommended a variety of options, all based on the establishment of domestic courts with jurisdiction over international crimes committed in East Timor. UN Doc. E/CN.4/2000/27, para. 25 (Mar. 29, 2000), *obtainable from* <http:/www.unchr.ch>. This report also stated that nongovernmental organizations that were consulted recommended the establishment of

state or accredited diplomats, are no longer generally seen as safe from prosecution either in their home countries, with or without immunity, or during travels to other countries.[12] Indeed, these developments may reflect the entry of a new era in which domestic prosecutions for international crimes will flourish (assuming such crimes continue to be committed).

The developments recounted above appear to have had a reciprocal influence on the international environment. The ICTY and the ICTR have legitimated the prosecution of international crimes to the international community and have elaborated on the pertinent law through their statutes, rules, and judgments. They have thus created a substantial and tangible body of jurisprudence, which was lacking in the past.[13] The negotiations leading up to the conclusion of the ICC Statute and the work of the Preparatory Commission have augmented this process.[14] Many of these developments have been prominently reported in the popular press and have spawned a growing body of scholarship. Through these advances governments have become accustomed to the idea that international criminal law constitutes a real and operative body of law, which in turn has facilitated domestic prosecutions of persons accused of these crimes. The entry into force of the ICC Statute will only accelerate and strengthen this movement, for it not only establishes an international court, but also legitimates and even gives priority to national prosecutions.

Once established, the ICC will have jurisdiction over important international crimes. In some circumstances, a state may find it in its interest to allow a prosecution to go forward before the ICC, considering the matter too dangerous to be handled domestically and preferring trial before a distant international tribunal. In other situations, the state may not be capable of properly prosecuting an international criminal matter. In most cases, however, the state may well wish to retain control over such prosecutions. To allow its own nationals or aliens charged with the commission of crimes on its territory to be prosecuted by a distant international tribunal would deprive the state of control and suggest the inadequacy of its domestic legal system. Furthermore, the state may not wish to have an international court find that its procedures in dealing with persons accused of such crimes are inadequate.

States rarely submit matters to international tribunals that could be resolved through diplomatic negotiations controlled by the states concerned. As a rule, states wish to manage issues themselves and voluntarily refer matters to international tribunals only when no other choice presents itself or when it enables the resolution of international disputes arising from domestic difficulties of limited national concern.[15] In most situations, states find it more desirable to resolve a matter domestically than to surrender responsibility to an international body.[16]

Similar motivations may be involved in the context of cases that might be cognizable before the ICC. Furthermore, the design of Article 17 of the ICC Statute, which deals with issues of admissibility in the light of the rule of complementarity, makes it even more likely that

an international tribunal for these crimes. *Id.*, para. 30; *see* Sonny Inbaraj, *Rights—East Timor: Pressure for International Tribunal Grows*, Inter Press Serv., Jan. 26, 2000, *available in* LEXIS, News, Curnws.

Spain has requested the extradition from Mexico of a former Argentine official accused of international crimes in Argentina, including torture of Spanish citizens. *See* Tim Weiner & Ginger Thompson, *Wide Net in Argentine Torture Case*, N.Y. TIMES, Sept. 11, 2000, at A6. Brazil is also revisiting the subject. *See* Larry Rohter, *Brazil Opens Files on Region's Abuses in Age of Dictators*, N.Y. TIMES, June 9, 2000, at A10; *Criminal Law and Procedure*, UN L. REP., Aug. 2000, at 146–48.

[12] *See* Laurie Goering, *Wariness of Arrest Abroad Keeps Many in S. America*, CHICAGO TRIB., Dec. 15, 1998, at 6; David Bosco, *Dictators in the Dock*, AM. PROSPECT, Aug. 14, 2000, at 26, *available in* 2000 WL 4739376.

[13] These documents and judgments are available online at the ICTY and ICTR Web sites < http://www.un.org/icty/index.html> and < http://www.ictr.org/>, respectively.

[14] For ICC developments, see the Web site *supra* note 4. *See also* Christopher Keith Hall, *The First Five Sessions of the UN Preparatory Commission for the International Criminal Court*, 94 AJIL 773 (2000).

[15] See Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273, 285–86 (1997), and references therein.

[16] This rationale closely follows the arguments made in support of subsidiarity within the context of the European Union. *See, e.g.*, George A. Bermann, *Taking Subsidiarity Seriously: Federalism in the European Community and the United States*, 94 COLUM. L. REV. 331 (1994).

states parties will seek to retain jurisdiction over prosecutions that may be within the court's authority. As prosecutions of the covered crimes increase internationally, before either the ICC or domestic courts, one can expect the barriers to domestic pursuit of such cases to continue to fall, as they did after the establishment of the ICTY and the ICTR. States risk the possibility that the ICC might take on prosecutions that could have been brought domestically. In such situations the ICC might determine that prior domestic proceedings had not met the standards set out in Article 17. As a consequence, I believe that states will feel impelled to try persons accused of such crimes and to pursue those cases in a bona fide way. If they are successful, we may find that few cases actually reach the ICC for prosecution.

This development will have an effect on all states, not only parties to the ICC, but also states that do not become parties to the ICC, including the United States.[17] As the ICC Statute now stands, nationals of the United States or other nonparty states who commit covered crimes abroad could be subject to ICC jurisdiction.[18] Domestic investigations and prosecutions by nonparty states, however, may serve as a ground for the admissibility defense under Article 17.

Rogue states, too, will be placed under substantial pressure to prosecute persons accused of international crimes or to surrender them for trial by other states or the ICC. A case in point concerns Libya and the initiatives to prosecute the persons accused of the Lockerbie bombing. At first it refused to cooperate.[19] Then it sought to prosecute the accused domestically,[20] but such prosecution did not attract international credibility.[21] Ultimately, Libya was forced to hand over the accused for foreign prosecution.[22] While this case may be unique, the situation demonstrates the growing pressure on states to conduct bona fide criminal proceedings regarding alleged offenders or to turn them over to others who will. Few states will have the fortitude even of Libya to resist that pressure.

While many supporters of the international criminal court consider that an active ICC docket would constitute a major step toward the suppression of international crimes, I believe that the real and more effective success will reside in the active dockets of many domestic courts around the world, the ICC having served first as a catalyst, and then as a monitoring and supporting institution. This is perhaps the best outcome, for the purpose of establishing the ICC is to eliminate impunity for international crimes. A single international

[17] *See* Barbara Crossette, *U.S. Resists War-Crimes Court as Canada Conforms*, N.Y. TIMES, July 22, 2000, at A4; Barbara Crossette, *U.S. Gains a Compromise on War Crimes Tribunal: Keeps Role as It Tries to Exempt Americans*, N.Y. TIMES, June 30, 2000, at A6.

[18] ICC Statute, *supra* note 4, Art. 12; *see* Jonathan I. Charney, *Progress in International Criminal Law?* 93 AJIL 452, 456 n.29 (1999).

[19] *See Kadafi Says He Won't Turn over Bomb Suspects*, L.A. TIMES, Nov. 29, 1991, at A40.

[20] *See* Michelle Faul, *Minister Says Libya Will Try Accused Agents*, AP, Dec. 8, 1991, *available in* 1991 WL 6218354.

[21] For example, the Security Council released the following statement on the subject:

> By its resolution 731 [1992], the Council demanded immediate compliance by Libya to the requests made to it by France, the United Kingdom and the United States to cooperate fully in establishing responsibility for the terrorist acts against the two airliners. Acting under Chapter VII of the Charter, the Council by resolutions 748 [1992] and 883 [1992] repeated those demands. Resolution 883 [1993] also required Libya to ensure that the two accused in the bombing of Pan Am flight 103 appeared for trial in the appropriate United Kingdom or United States court.

Security Council Welcomes Joint United Kingdom/United States Initiative, Netherlands Willingness, to Try Libyan Airline Bombing Suspects, SC Press Release SC/6566 (Aug. 27, 1998), *obtainable from* <http://www.un.org>; *see also* Paul Lewis, *U.N. Urged to Press Libya on Suspects in 2 Bombings*, N.Y. TIMES, Jan. 11, 1992, at A3 (stating that the United States and Britain argued that "the Libyan government cannot be expected to prosecute vigorously the agents it ordered to carry out the deed"); *U.S. Official Rules out Mediation over Lockerbie*, Agence France-Presse, Dec. 15, 1991, *available in* 1991 WL 3240146; *Japan Urges Libya to Cooperate over 1988 Lockerbie Bombing*, Agence France-Presse, Dec. 21, 1991, *available in* 1991 WL 3242316; *British Justice Renews Demand for Libya to Hand over Lockerbie Suspects*, Agence France-Presse, Dec. 13, 1991, *available in* WL 3239519.

[22] *See* Michael Binyon, *Libyan Parliament Backs Trial Deal*, TIMES (London), Dec. 16, 1998; *Libya Agrees to Deliver 2 Lockerbie Suspects; Gadhafi Seems Willing to Accept All Conditions*, CHICAGO TRIB., Mar. 21, 1999, at C6.

court can accomplish little, especially if its fundamental purpose is to promote international mores that discourage impunity. Success will be realized when the aversion to impunity is internalized by the domestic legal systems of all states. The test of that success is not a large docket of cases before the ICC, but persistent and comprehensive domestic criminal proceedings worldwide, facilitated by progress in a variety of contexts toward discouraging international crimes and avoiding impunity.

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THE UNITED STATES AND THE STATUTE OF ROME

As is well-known, the United States, at the conclusion of the Rome Diplomatic Conference in 1998, voted against the Statute of Rome,[1] which would establish a permanent international criminal court (ICC)—separate and apart from the United Nations. The ICC would have jurisdiction to try individuals—but not states—for the most serious crimes of international concern: genocide, war crimes, crimes against humanity, and possibly aggression, if the latter can be satisfactorily defined at a later date. The final vote in 1998 was 120 (in favor)-7 (against), with the United States in the minority in the company of Iran, Iraq, China, Israel, Sudan, and Libya, and in opposition to all its European allies and all its NATO allies. In view of the 120 affirmative votes at Rome and subsequent events, it seems altogether likely that the Statute of Rome will attract the necessary sixty ratifications and the new court will be brought into existence without the support of the United States, perhaps as early as 2002.

Since 1998 the American negotiating team has made extraordinary efforts to secure modifications in the statute that would "enable it to sign the treaty," first by suggesting amendments in the text, later by proposing "agreed interpretations" of certain provisions in the text, and more recently by seeking clauses in the "relationship agreement" between the proposed new court and the United Nations that would exempt certain U.S. nationals from the application of the court's jurisdiction so long as the United States is not a party or unless the United States gives it consent on a case-by-case basis. All of these suggestions have been rejected—sometimes peremptorily—by the so-called like-minded group, which became the dominant voting bloc at Rome and remains united in opposition to the U.S. position.

As these words are being written, the United States government seems poised to reject early participation in the establishment of a permanent international criminal court, as contemplated by the historic treaty concluded at Rome in July 1998.[2]

The long-term effects of this rejection are very serious for the court and perhaps even more serious for the United States, which will be persisting in not-so-splendid isolation from the most important international juridical institution that has been proposed since the San Francisco Conference in 1945.

The short-term effects will be that the United States, which has repeatedly and publicly declared its support in principle for a permanent international criminal court, will not become a member of the Assembly of States Parties and thus will not participate in shaping the court

[1] United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome Statute of the International Criminal Court, July 17, 1998, UN Doc. A/CONF.183/9*, *corrected* Nov. 10, 1998, and July 12, 1999, *obtainable from* <http://www.un.org/law/icc/index.html>, *reprinted in* 37 ILM 999 (1998) (uncorrected version) [hereinafter Statute of Rome or Rome Statute].

[2] Although President Clinton on December 31, 2000, authorized signature of the Rome treaty, he did so with a statement reiterating "concerns about significant flaws in the treaty" and announcing "I will not, and do not recommend that my successor submit the treaty to the Senate for advice and consent until our fundamental concerns are satisfied." 37 WEEKLY COMP. PRES. DOC. 4 (Jan. 8, 2001).