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Enforcement of Nuremberg Norms: The Role for Mechanisms other than the ICC

In this courtroom 60 years ago it seemed as if the wrath of the world community descended upon the authors of aggressive war and unprecedented atrocities. This was because the Allies controlled Europe and they were united in their resolve to find perpetrators and evidence for the trials here.

One of the early tasks of the United Nations was to create a permanent international criminal tribunal to continue the role of the Nuremberg and Tokyo International Military Tribunals, bringing justice to international crimes for which national legal systems were inadequate. By 1954 the International Law Commission reported a draft statute for such a tribunal, but that was shelved pending completion of a draft code of offenses against the peace and security of mankind – and that draft code project dragged on for decades. In the early 1990s, the shocking events in former Yugoslavia, and then those in Rwanda, provoked the creation of ad hoc international criminal tribunals by the United Nations Security Council. Finally, rather than continuing to rely on the Security Council’s ad hoc approaches, the international community created a permanent International Criminal Court, a replica of the Nuremberg tribunal.

However, even after the end of the Cold War, the world is not united in the same way it was six decades ago, and bringing the wrath of the world community to bear on international crimes is more complex and no longer seamless. As a result, the powers of the new ICC are quite limited.

First, unlike the IMT, the ICC cannot deal with crimes against peace because nations could not agree on a durable definition of aggression. Second, it can only deal with crimes committed after its creation. Third, the Security Council can suspend the ICC’s power to deal with a particular situation for a year at a time. Fourth, while its jurisdiction over genocide is global, for other crimes against humanity and for war crimes its jurisdiction is limited to crimes committed within the territory of nations that are parties to the ICC statute or committed by citizens of parties¹, unless the U.N. Security Council deems otherwise for a particular situation. Finally, the ICC is authorized to deal only with the most serious crimes within its subject matter competence, and it cannot deal with a particular alleged crime if any nation having jurisdiction has shown that it is willing and able to genuinely complete investigation and prosecution of that crime.

All of the above restrictions have the effect of leaving punishment of a great many “Nuremberg crimes” to national legal systems. Critics of the ICC, particularly the United States, would like to see more restrictions, but many supporters of the ICC would like to remove some restrictions, or see its competence widened to include additional crimes. However, the ICC statute was the result of years of negotiations and numerous compromises for the sake of consensus. It is unlikely that major proposals to expand its power will be successful in the near future.

One burning question about the adequacy of the ICC is whether it can deal with the scourge of international terrorism. Aren’t attacks like 9/11, Bali, Madrid and London war crimes or crimes against humanity? In truth, such attacks probably do not fit the definition of war crimes because an armed conflict is required for war crimes and the violence perpetrated by Al Qaeda and its affiliates is not part of an armed conflict – and this determination is not one that is favorable to terrorists. If such attacks were deemed to be part of an armed conflict, captured perpetrators might have a claim to favorable prisoner of war treatment under the Geneva Conventions, or at least a basis to invoke the exhortation in

¹ Jurisdiction of the ICC is governed by Art. 12 of the Rome Statute, which means in general jurisdiction of the ICC is limited to the territoriality and personality-principle. However, I maintain that ICC jurisdiction over genocide is virtually universal because Art. IV of the Genocide Convention (1948) obligates parties to cooperate with an international criminal jurisdiction. Nearly every nation in the world is a party to the Convention. Since the genocide prohibition unquestionably belongs to a body of higher law, “jus cogens”, in my estimation the duty to extradite or prosecute in other words “aut dedere, aut judicare” applies, meaning that if nations cannot or will not prosecute a case, then ICC complementarily would apply – though only to crimes since the Statute went into effect (Art. 11 Rome Statute). At the very least, it would seem that the ability of parties to the Genocide Convention to oppose ICC action would be impaired by Article VI.

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Protocol I of 1977 that the broadest possible amnesty be granted to combatants after cessation of the conflict.

There is a good argument that attacks like those mentioned above constitute crimes against humanity because they are perpetrated by an organization against a civilian population. However, the natural construction of the term "organization" in the definition of crimes against humanity in the ICC Statute is either governmental organizations or rebel structures resembling those of a government. Because Al Qaeda is not a government and does not aspire to become the government of any of the victim nations mentioned above, it is unlikely to qualify as an organization for these purposes.

It is therefore not surprising that the ICC prosecutor has shown little if any inclination to try to deal with Al Qaeda terrorism. Accordingly, it is likely that the task of dealing with terrorism will remain with national courts, along with Nuremberg crimes that escape the grasp of the ICC due to the many restrictions described above.

National legal systems

While national prosecutions have their disadvantages, they also have surprising advantages. The main advantages come from the normality of national criminal process. This begins with the rules of procedure in any given national system. The mere fact that these procedures have been in place for a long time gives them advantages.

Procedural strengths

First, national procedures are not open to attack as ad hominem the way that ICC procedures are. Normal national procedures are used for a wide range of suspects, not just for persons suspected of Nuremberg crimes. Second, national procedures have been tested for effectiveness and found adequate, while the ICC's procedures are untested and are a unique hybrid of adversarial and inquisitorial approaches. Third, there are numerous prosecutors, judges, and defense attorneys who are highly experienced with national procedures. For ICC cases, all legal actors will be learning the ICC's procedures year by year, and for many years there will be a shortage of experienced defense counsel. It is worth noting that the first case heard by the ICTY, the Tadic case, was actually developed by the Bavarian state prosecutor, and was chosen partly because it was a nearly completed package that would be easier for an untested prosecutorial team to handle. Fourth, national procedures are apt to be more efficient, not only because the legal actors are more experienced but also because standards of relevance for evidence are rather narrow. In contrast, the ICC procedures are designed to permit the prosecutor to turn the proceedings into a show trial, and under the principle of equality of arms, this means that the defendant can do the same. The current trial of Slobodan Milosevic before the ad hoc International Criminal Tribunal for Former Yugoslavia is an excellent example. The case is entering its third year, and its crucial messages have been obscured by the sheer volume of tedious evidence. Moreover, the defendant has been able to propagandize his version of the history surrounding the alleged crimes, causing many in Serbia to believe that the government of Serbia was not responsible for crimes in Bosnia against Moslems. In contrast, a recently discovered videotape of Serbian auxiliary police participating in the slaughter of captives at Srebrenica has created an opportunity for trials in Serbian courts, and many observers expect that national trials of minor perpetrators will do more the teach the Serb populace about their government's culpability than the ICC's trials of higher-ranking defendants.

Substantive strengths

Normal national substantive law can also have advantages. In a national proceeding the prosecutor can prosecute persons suspected of Nuremberg crimes simply for conspiracy to commit murder, etc. This can make the likelihood of success greater because there is no need to prove beyond a reasonable doubt certain attending circumstances. In the ICC, the attending circumstances are part of the definition
of substantive offenses, meaning the more must be proved to obtain a conviction. There is reason to believe that such circumstances should have been treated as grounds for ICC jurisdiction rather than elements of substantive crimes.

One result of the strain of using jurisdictional factors as elements of substantive crimes is that for unusual crimes against humanity an ICC prosecutor might have to rely on Article 7(1)(k) of the ICC Statute, which states that crimes against humanity include, “Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.” This involves “crime by analogy”, and some may argue that it is justified because innovation by creative perpetrators should not prevent their punishment when they cause harm to society but do not use the particular methods encompassed by the penal law. One argument in favor of crime by analogy was stated as follows: “...wrong may be committed...even in cases where there is no law against what is being done...What is right can be learned not only from the law, but also from the concept of justice which lies behind the law and may not have found perfect expression in the law.”

Some may find such a natural law argument persuasive, but it was offered to justify the use of crime by analogy in Nazi Germany by Reich Minister of Justice Franz Gurtner. Actually, all modern legal systems reject crime by analogy, and a prohibition against crime by analogy even appears in the ICC Statute in Article 22(2). A prosecutor in a national legal system would not have to resort to crime by analogy to charge defendants who behaved in that general way because conduct of that kind will readily fit one or more of the many national criminal proscriptions, such as assault.

Having a complete set of national criminal proscriptions to work with can also put things in useful perspective. For example, some argue that the ICC should be empowered to deal with the international crime of torture, which is defined in relevant part as infliction of “severe” mental or physical suffering. However, if the ICC were so empowered and it heard a case of alleged torture, if it determined that the suffering inflicted fell short of “severe,” the ICC could not mandate any punishment for the underlying conduct. The defendant would have to be acquitted or the case would have to be dismissed for lack of jurisdiction. In contrast, a national legal system would have a crime of assault that would apply to lesser unjustified inflictions of suffering.

Ironically, some of the authors of the infamous memoranda submitted to the U.S. President concerning permissible interrogation techniques made the mistake of focusing only on the international crime of torture. They cited the Convention Against Torture and the U.S. statute implementing it, and the Geneva Convention requirement that parties punish “grave breaches” of that Convention and leapt to the conclusion that it would be permissible to inflict a considerable amount of pain on interrogation subjects. They overlooked the prohibition of assault in the Uniform Code of Military Justice, which applies to military personnel “everywhere”.

Hopefully, legal advisors and prosecutors in most nations would not overlook ordinary criminal law that would apply to reprehensible conduct that falls short of the criteria for an international crime.

**Jurisdictional reach**

One might worry that relying on national legal systems to deal with crimes like those punished at Nuremberg would permit many offenders to escape punishment because of gaps in the web of national jurisdiction. For example, when crimes of that kind are committed by persons in government positions, such governments would prevent their legal systems from punishing them. However, the nation within whose territory a crime is committed is not the only one whose legal system may have jurisdiction over a crime. Nations have quite a range of traditional, non-controversial bases for criminal jurisdiction:

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2 Regarding standard of proof, Common Law nations speak of degrees of proof but elsewhere matters are either proved or not. The framers of the ICC statute were persuaded to use the common law phrase in Article 66, and it may mean something even when handled by civil law personnel. However, I see little reason to push it onto systems that have considered degrees of proof too subtle to be meaningful and I think there would be considerable resistance to such an effort.
Territorial jurisdiction extends not only to ships and aircraft registered in a given nation, but also to inbound aircraft and cruise ships using ports of that nation. Also, nations use “local effects” jurisdiction to deal with events outside of their territory that may produce effects within their territory – the U.S. uses such jurisdiction for conspiracies abroad that result in antitrust violations in the U.S. economy.

Jurisdiction can also be based on nationality. When based on the nationality of the perpetrator, it is called active nationality jurisdiction. This is used by civil law nations to apply their criminal law to their citizens everywhere, and used by common law nations for military offenses and a few other offenses. There is also passive nationality jurisdiction, based on the nationality of the victim, and it is used by many nations – including the U.S. – for a variety of international crimes.

As a result, a crime in one nation may fall under the jurisdiction of one or more other nations. Of course, obtaining custody of a perpetrator can be challenging. While most nations have extradition treaties with scores of other nations, a government whose agents are committing Nuremberg crimes is unlikely to honor requests for their extradition. However, crimes of this character are often committed in a situation of conflict and instability, meaning that there is a chance that the perpetrators will be forced to flee to another country. That is what happened in the Tadic case – the bully who ran a prison camp had migrated to Munich, and was identified by victims who had also migrated there.

Thus, there is a web of national jurisdiction that may trap perpetrators of Nuremberg crimes. There is also a web of evidence sharing through mutual legal assistance treaties. This means that witnesses and documents that are found in various nations can be brought to bear on a criminal prosecution in a distant nation, and the sum of this evidence may be sufficient to produce a conviction without cooperation from the nation where the crimes occurred. This kind of cooperation was found in the Demjanuk and Sawoniuk cases. The former involved deportation from the U.S. of a suspected war criminal for trial in Israel, and witnesses and documents were garnered from several nations, including the Soviet Union. The latter case was prosecuted in the United Kingdom and featured a trip by the entire court to the Eastern Europe site of the crimes.

The web is not without some gaps and technicalities of cooperation can be formidable, but the web is wider and more complete than one might have thought. It should be noted, however, that this web of cooperation applies when the criminal case is being heard in a normal court. When cases are to be heard by special courts or military courts cooperation is far less likely.

**Universal jurisdiction**

Some think that the web of cooperation against serious international crimes can be enhanced by the use of universal jurisdiction. A group of scholars gathered at Princeton a few years ago to promulgate “principles” regarding universal jurisdiction for serious international crimes, such as Nuremberg crimes. Their principles declared that nations should exercise universal jurisdiction in order to prevent impunity of perpetrators, and that other nations should cooperate with such exercises of jurisdiction, extraditing suspects and providing evidence.

At about the same time, in Belgium, where a law authorized courts to use universal jurisdiction, the first results were arrest warrants for Mr. Abdulaye Yerodia Ndombasi (Yerodia), who at that time was the Minister for Foreign Affairs of The Democratic Republic of the Congo. and the Prime Minister of Israel, Ariel Sharon, for acts they allegedly committed before assuming those positions. The Democratic Republic of the Congo challenged the warrant for its foreign minister in the International Court of Justice and obtained a ruling that issuance of the warrant was improper because it mandated the arrest of someone whose presence in Belgium would involve a diplomatic visit. The same reasoning would apply to the warrant for Sharon because as head of government any visit by him to Belgium would be diplomatic in nature. In addition to the rebuff from the ICJ, the Belgian law was criticized by some nations, particularly the U.S. Ultimately it was revised to limit use of universal jurisdiction to cases that had a strong link to Belgium.

Meanwhile, universal jurisdiction has been in use in Spain where Judge Balthazar Garzon issued an extradition request for General Augusto Pinochet when he was visiting the U.K. Because the U.K. would not apply universal jurisdiction to the crimes in question it would not recognize Spain’s claim to
universal jurisdiction. However, a decision by the Law Committee of the House of Lords indicated that the U.K. would recognize Spanish passive nationality jurisdiction for the crime of torture for the time period in which the U.K. adopted such jurisdiction for that crime. However, that would have led to extradition only for a few cases of torture of Spanish citizens that occurred late in the period of military rule in Chile. That has not deterred Judge Garzon from issuing various warrants for other individuals based on universal jurisdiction.

Several nations, including Canada and the U.K. used universal jurisdiction for war crimes and crimes against humanity that occurred in World War II. The results were uninspiring because the difficulty of prosecuting decades-old crimes was aggravated by the distance between the trials and the evidence and witnesses.

In principle, universal jurisdiction for Nuremberg crimes is well established. However, there is no consensus about use of such jurisdiction by nations that do not have the individual in their custody. Use of universal jurisdiction by nations that do not have the individual in custody could lead to multiple simultaneous prosecutions and conflicting requests for cooperation. Moreover, the nation where the individual is found will insist that its action – prosecution or a decision not to prosecute – should be dispositive.

In any event, there is a dramatic practical limit on the workability of universal jurisdiction. When a prosecution is commenced in a nation that has little relation to the crime, evidence from other nations may be crucial, but those nations may not choose to cooperate. This can thwart a trial if a defendant has a credible claim that there is exculpatory evidence in a nation that refuses to cooperate. Under such circumstances it would be inappropriate to convict, but a dismissal of the case might be seen by some as an indication that the accused is innocent.

The U.S. never used universal jurisdiction even as to Nuremberg crimes from World War II. Instead, when a suspect was found inside the U.S. he would be deported, after being denaturalized if he was a citizen, based on lies on his application for citizenship. That is how Demjanuk was delivered to Israel. However, such an approach raised questions about the suitability of particular national legal systems for particular cases, especially during the Cold War.

**Bias**

Obviously, one great concern about relying on national legal systems to deal with serious international crimes is potential bias based on political factors. One way to deal with this is to add internationally-appointed judges to a national court, as has been done in Sierra Leone and is planned in Cambodia. This approach was proposed for crimes by Indonesian forces in East Timor, but Indonesia did not accept it. It will not be taken for the trials of major Iraqi leaders including Saddam Husscin, and those cases will suffer credibility deficits that could have been reduced by using international judges.

The ICC has a cure for bias in one situation. Where a nation tries its own agents for genocide, crimes against humanity or war crimes and acquits them, if the ICC regards the action as a white-wash, it can act like an appellate court, treating the acquittal as void and starting its own prosecution.

If delegating such appellate power to the ICC is acceptable when nations acquit their friends, it seems that such a delegation should be acceptable when a nation tries its enemies and convicts them, but there has been no active consideration of assigning such a role to the ICC or creating another court to perform that role. In contrast, when nations convict their own agents or acquit their enemies, the risk of bias is lower and so is the need for international oversight.

Creativity may produce other ways to limit potential bias in national prosecutions. For example, to deal with the Pan American Flight 103 bombing extended negotiations finally settled on a trial of Libyan suspects before a jury-less Scottish court sitting in the Netherlands.

Accordingly, the use of national legal systems – indirect enforcement – to deal with serious international crimes like those punished at Nuremberg can be quite effective, but there are still potential gaps in the web of cooperation against such crimes and some bias issues have not been seriously addressed.
Durchsetzung der Normen von Nürnberg: Strafverfolgungsmechanismen jenseits des Internationalen Strafgerichtshofes
