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ASSESSING INTERNATIONAL CRIMINAL ADJUDICATION OF HUMAN RIGHTS ATROCITIES

Diane Marie Amann*

We meet just days after U.S. President William J. Clinton decided to sign the treaty that would establish the International Criminal Court (ICC).¹ With this action, the United States joined a number of countries that rushed to sign before December 31, 2000, and so to continue to help shape the court. They included states like Yemen, Iran, and Israel.² These three, along with the United States, were among the few that had refused to vote in favor of the treaty when it was adopted at a diplomatic conference in Rome in 1998. By the end of 2000, 139 states, out of the 189 states in the United Nations, had signed the Rome Treaty. Twenty-seven had ratified, nearly half the sixty needed for the treaty to enter into force.³ That means it is increasingly likely that the ICC will some day come into being.

The Rome Treaty calls for creation of a permanent, international court, which will hear cases of individuals charged with most serious crimes: crimes against humanity, genocide, war crimes, and, perhaps later, aggression. It will operate prospectively; that is, only persons suspected of committing crimes after the court has begun may be haled before it. It will sit at The Hague, but its jurisdiction will be global.

These developments make my own topic extremely timely. It is whether, and to what extent, international criminal adjudication is the appropriate method for redressing human rights atrocities. Now is an apt time to ask such questions, not only because of the landmark movement toward an ICC, but also because of the predecessors of the ICC that have

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¹ See Steven Lee Myers, *U.S. Signs Treaty for World Court to Try Atrocities*, N.Y. TIMES, Jan. 1, 2001, at A1; see also Rome Statute of the International Criminal Court, U.N. Doc. No. A/CONF.183/9 (July 17, 1998) [hereinafter ICC Statute].

² See *CICC International Criminal Court Home Page*, at <http://www.igc.org/icc/Rome/html/ratify.htm> (visited Jan. 19, 2001) (listing Iran, Israel, and Yemen as signatories).

³ See *id.* (stating number of states who had signed or ratified by end of 2000); *the UN in Brief* at <http://www.un.org/Overview/brief.html> (visited Feb. 20, 2001) (stating number of U.N. members). See also ICC Statute, *supra* note 1, art. 126 (stating number of ratifications needed).

come into being in the last decade. For the first time since the immediate post-World War II period, *ad hoc* tribunals are adjudicating international crimes – crimes that, even if they occur within one state's borders, offend the international community. Thus the International Criminal Tribunal for Rwanda has considered charges arising out of the 1994 massacres in Rwanda, and the International Criminal Tribunal for the former Yugoslavia charges stemming from the protracted conflict in the Balkans.⁴ Other tribunals have been proposed: one for Sierra Leone, one for East Timor, and one for Cambodia.⁵

Why this sudden influx of international criminal law enforcement? There is a perception that atrocities have increased, coupled with a demand for accountability. Why? Since World War II, military and paramilitary forces engaged in so-called low-level conflicts have committed mass killings and genocide, systematic rapes, torture, and abductions. CNN carries, to my home in California and to this hotel in Cape Town, disturbing images. Images of child soldiers carrying AK-47s. Images of malnourished refugees. Images of amputated mothers struggling to hold their babies. Images that provoke response. Similar images surely existed a century ago, but fewer people saw them, and those who did had fewer tools to insist that something be done.⁶ Today, we see more and insist more. Thus we begin to realize the promise of the human rights movement: that when individuals or states commit certain offenses, even against their own people, the international community will take action.⁷

⁴ See Statute of the International Tribunal for Rwanda, S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg., Annex, U.N. Doc. S/RES/955 (1994), reprinted in 33 I.L.M. 1598 (1994); Statute of the International Criminal Tribunal for the Former Yugoslavia, S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., Annex, U.N. Doc. S/RES/827 (1993), reprinted in 32 I.L.M. 1159 (1993).

⁵ See Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, U.N. SCOR, 52d Sess., U.N. Doc. S/2000/915 (2000); David Lamb, *Cambodia Moves to Create a Tribunal on Khmer Rouge*, L.A. TIMES, Jan. 3, 2001, at A1; Nora Boustany, *East Timorese Leader Encourages U.S. Role in Volatile Indonesia*, WASH. POST, Sept. 22, 2000, at A20.

⁶ On earlier efforts to mobilize public outrage against atrocities, see ADAM HOCHSCHILD, *KING LEOPOLD'S GHOST* 164-66 (1998) (describing campaign against acts of Belgian colonizers in Congo); Dominique Marshall, *The Construction of Children as an Object of International Relations: The Declaration of Children's Rights and the Child Welfare Committee of League of Nations, 1900-1924*, 7 INT'L J. CHILDREN'S RTS. 103, 131-37 (1999) (stating that "new techniques of propaganda" helped early twentieth century activists use examples of children's suffering during World War I to campaign for international recognition of children's rights).

⁷ See *Regina v. Bartle* (H.L. Mar. 24, 1999) (Millett, J.), reprinted in 38 I.L.M. 581, 649 (1999) (stating that, by the latter part of the twentieth century, how "a state treated its own citizens within its own borders had become a matter of legitimate concern to the international community").

Action has been taken in the international criminal tribunals. Action also has been taken in transnational litigation, as evidenced by the criminal proceedings brought in Spain against former Chilean dictator Augusto Pinochet, by those brought in Senegal against former Chadian dictator Hissène Habré, and by those brought in Belgium against former Congolese Foreign Minister Abdulaye Yerodia Ndobasi.⁸ In addition, there are national prosecutions for international crimes. Rwandan courts try persons alleged to have committed genocide in 1994.⁹ In South Africa some individuals have been denied amnesty and subjected to national criminal process for crimes of apartheid.¹⁰ My paper concentrates on international criminal adjudication, though its considerations apply to all instances in which criminal process is used or contemplated for dealing with human rights atrocities.

When people talk about international criminal adjudication, they make many claims about its functions and purposes. An early example came, not surprisingly, from Nürnberg. It occurred in the second sentence of the opening statement of Justice Robert H. Jackson, who was the chief U.S. prosecutor at the first trial at Nürnberg. He told the judges: "The wrongs which we seek to condemn and punish have been so calculated, so malignant, and so devastating, that civilization cannot tolerate their being ignored, because it cannot survive their being repeated."¹¹

What do we find in this passage? We find Jackson suggesting that international criminal adjudication would enable retribution, would "condemn and punish" the people responsible, would give them their just deserts. Jackson contended that failing to do so would invite recurrence of

⁸ See Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium) (Order on Request for the Indication of Provisional Measures), No. 121 (Dec. 8, 2000), at http://www.icj_cij.org/icjwww/idocket/iCOBE/iCOBEorders/icobe_iorder_provisional_measure_20001208.htm (visited Jan. 19, 2001) (rejecting Congo's provisional request for annulment of international arrest warrant, but reserving ruling on merits of warrant); *Bartle*, *supra* note 7 (opinion of Browne-Wilkinson, J.), reprinted in 38 I.L.M. at 583-85 (describing Spanish efforts to effect Pinochet's extradition); Douglas Farah, *Chad's Torture Victims Pursue Habre in Court*, WASH. POST, Nov. 27, 2000, at A12 (describing aborted Senegalese proceedings and subsequent suits within Chad).

⁹ See Stephen Buckley, *Rwandan Suspects Face Trial and Error*, WASH. POST, Jan. 29, 1997, at A15.

¹⁰ See John Dugard, *Reconciliation and Justice: The South African Experience*, 8 TRANSNAT'L L. & CONTEMP. PROBS. 277, 300 (1998) (referring to cases in which denial of amnesty led to continuation of criminal process).

¹¹ Opening Statement of Justice Jackson (Nov. 21, 1945) in 2 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 98-99 (1948) [hereinafter Jackson Statement].

the wrongs committed, and that civil society could not withstand such recurrence. Conversely, Jackson implied, the acts of prosecution and punishment could help society to reconstruct itself in a civilized manner. Holding perpetrators accountable could offer a type of redress to victims and even deter wrongdoing. In that vision of a new society, one that will not brook impunity, we may detect a notion that international criminal adjudication is a way to sustain peace.

These goals - retribution, deterrence, redress, and pacification - are even more explicit in the opinions emanating from the current international criminal tribunals. Tribunal judges assume that their work will effect retribution.¹² Some wax eloquently on their deterrence role. Thus the Rwanda Tribunal wrote that its efforts must be aimed at "dissuading for good those who will attempt in the future to perpetrate such atrocities by showing them that the international community was not ready to tolerate the serious violations of international humanitarian law and human rights."¹³ Similarly, the Yugoslavia Tribunal wrote that the *jus cogens* norm against torture "is designed to produce a deterrent effect, in that it signals to all members of the international community and the individuals over whom they wield authority that the prohibition of torture is an absolute value from which nobody must deviate."¹⁴

With regard to its duties to victims of atrocities, judges on the Yugoslavia Tribunal placed themselves within "the realm of international humanitarian law which has, as one of its prime objectives, the protection of the weak and vulnerable in such a situation where their lives and security are endangered."¹⁵

¹² See, e.g., *Prosecutor v. Furundzija*, Case No. IT-95-17/1-T, Judgement, para. 288 (Dec. 10, 1998), reprinted in 38 I.L.M. 317, 374 (1999) (stating that it is "right that *punitur quia peccatur* (the individual must be punished because he broke the law)" and that retribution is one of two important functions of punishment); *Prosecutor v. Kambanda*, Case No. ICTR 97-23-S, para. 28 (Sept. 4, 1998), reprinted in 37 I.L.M. 1411, 1419 (1998) (stating that "retribution of the said accused, who must see their crimes punished," is a key role).

¹³ *Kambanda*, *supra* note 12, para. 28, reprinted in 37 I.L.M. at 1419.

¹⁴ *Furundzija*, *supra* note 12, para. 154, reprinted in 38 I.L.M. at 349.

¹⁵ *Prosecutor v. Erdemovic*, Case No. IT-96-22-A, Appeals Chamber Judgement, para. 75 (Oct. 7, 1997) (Joint Separate Opinion of Judge McDonald and Judge Vohrah), at <http://www.un.org/erdemovic/appeal/judgement/erd-asojmcd971007e.htm> (visited Feb. 20, 2001).

According to another opinion, international criminal proceedings “contribute to appeasement and give the chance to the people who were sorely afflicted to mourn.”¹⁶

These consequences are deemed to promote peace. The Yugoslavia Tribunal has proclaimed that part of its “unique mandate” from the U.N. Security Council is “contributing to the restoration and maintenance of the peace . . .”¹⁷ Likewise, the Rwanda Tribunal has stated that it was established to “contribute to the process of national reconciliation and the restoration and maintenance of peace.”¹⁸

Can international criminal adjudication fulfill these promises? Alone, no.

Retribution will of course be visited on anyone whom an international criminal tribunal convicts and incarcerates. The reach of retribution is limited, however, by the random nature of international criminal adjudication. The Rwanda Tribunal has had some success in bringing governmental officials to justice. But the first defendant tried by the Yugoslavia Tribunal, Dusko Tadic, was little more than a free-lance thug.¹⁹ The tribunal devoted years to his case, while indicted Serbs of high rank roamed free. Though some of the latter group now have faced international prosecution, it is not today apparent that former Bosnian Serb leaders Radovan Karadzic and Ratko Mladic, or former Serbian President Slobodan

¹⁶ Prosecutor v. Erdemovic, Case No. IT-96-22, Sentencing Judgement, para. 65 (Nov. 29, 1996), at <http://www.un.org/erdemovic/trial/judgement/erd-tsj961129e.htm> (visited Feb. 20, 2001) [hereinafter *Erdemovic Sentencing Judgement*]. *Accord* Prosecutor v. Serushago, Case No. ICTR 98-39-S, para. 19 (Feb. 5, 1999), *reprinted in* 38 I.L.M. 854, 857 (1999) (stating that one of the tribunal’s purposes is to ensure redress of violations of international humanitarian law).

¹⁷ Prosecutor v. Tadic, Case No. IT-94-1-T, Sentencing Judgment, para. 7 (Nov. 11, 1999), *reprinted in* 39 I.L.M. 117, 120 (2000); *see also* Prosecutor v. Jelusic, Case No. IT-95-10, Judgment, para. 116 (Dec. 14, 1999), at <http://www.un.org/icty/brcko/trial1/judgement/index.htm> (visited Feb. 20, 2001).

¹⁸ *See, e.g.*, Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, § 1.1, para. 2 (Sept. 2, 1998), at <http://www.ictor.org/> (visited Feb. 20, 2001); *Serushago*, *supra* note 16, para. 19, *reprinted in* 38 I.L.M. at 857.

¹⁹ *See* Charles Trueheart, *U.N. Tribunal Finds Bosnian Serb Guilty*, WASH. POST, May 8, 1997, at A20 (describing Tadic as a “police reservist”).

Milosevic, will appear before the tribunal.²⁰ This record of randomness cannot satisfy those who hope to give those most culpable their just deserts.²¹

Randomness, and its relative, selectivity, also frustrate the goal of deterrence. Specific deterrence, which uses condemnation and punishment to hinder particular individuals from repeating their crimes, has minimal effect because few suspects will suffer punishment at the hands of international criminal tribunals. General deterrence, meanwhile, occurs only if condemnation and punishment of some individuals can persuade others not to commit the same crimes. Even in comprehensive, fully operative, domestic criminal justice systems, only a small fraction of perpetrators is selected for prosecution and punishment.²²

The numbers are too small to make a rational wrongdoer hesitate. That reality is compounded in the international arena, where lack of resources and political considerations tend to preclude prosecution of all but a few individuals. Even with the Nürnberg trial and the many similar trials that succeeded it, it is estimated that no more than 3.5 percent of all suspected German war criminals ever faced prosecution.²³

Can international criminal adjudication recompense, repair, help victims? The problems of randomness and selectivity confound this goal as well. They make it less likely that a victim will ever see the specific individual who harmed that victim brought to justice. Furthermore, international criminal tribunals, like criminal courts in common-law jurisdictions, are structured to limit the victim's role. In civil-law systems,

²⁰ Following this presentation the Yugoslav Tribunal did take custody of Milosevic, who now faces trial in three separate indictments. See Suzanne Daley, *A Full Charge of Genocide for Milosevic* N.Y. TIMES, Nov. 24, 2001 at A8.

²¹ But see MICHAEL P. SCHARF, *BALKAN JUSTICE* 222-23 (1997) (acknowledging criticism of decision to try Tadic yet arguing that he was "an ideal subject for the first trial," because the litigation not only helped the tribunal build "a pyramid of evidence leading to the principals ultimately responsible for the horrors in Bosnia" and "to work out the kinks in its procedures," but also gave some redress to some victims).

²² A 1988 statistical survey concluded that suspects were arrested in only 3 million of about 34 million serious crimes in the United States in 1986. AMERICAN BAR ASSOCIATION SPECIAL COMMITTEE ON CRIMINAL JUSTICE IN A FREE SOCIETY, *CRIMINAL JUSTICE IN CRISIS* 4-5 (1988).

²³ GARY JONATHAN BASS, *STAY THE HAND OF VENGEANCE* 300 (2000) (referring to estimates that of "at least 100,000 perpetrators of the Holocaust" - and perhaps five times that - by 1948, "only 3,500 Germans had been tried (not just for murdering Jews but for other war crimes, too)").

victims may join criminal litigation as *parties civiles*.²⁴ The *ad hoc* tribunals do not permit this; nor do they award reparations as part of punishment.²⁵

What about pacification? The claim that international criminal adjudication effects peace is somewhat breathtaking, and belied by the prolongation of conflict in the Balkans.

These shortcomings need not compel us to scrapping the whole project. Though international criminal adjudication alone may not fulfill any of these purposes, it yet may constitute one among several means to restoring civil society. Moreover, international criminal adjudication serves at least one other, important purpose. It provides a forum for enunciating societal condemnation of atrocities, a forum for making an historical record.

These condemnatory purposes have been explicitly embraced. Again I quote Jackson's opening statement at Nürnberg. He spoke at the outset of a multistate effort to bring to account twenty-two surviving leaders of the Nazi regime. They included top-echelon army, naval, and air force commanders; leaders of the security forces and the Hitler Youth; cabinet ministers; and Nazi ideologues. Despite the infamy of these "Major War Criminals," Jackson told the judges:

Merely as individuals their fate is of little consequence to the world.

What makes this inquest significant is that these prisoners represent influences that will lurk in the world long after their bodies have turned to dust. We will show them to be living symbols of racial hatreds, of terrorism and violence, and of the arrogance and cruelty of power. They are symbols of fierce nationalism and of militarism, of intrigue and war-making which have embroiled European generation after generation, crushing its manhood, destroying its homes, and impoverishing its life.²⁶

Later, Jackson said, "What these men stand for we will patiently and temperately disclose. We will give you undeniable proofs of incredible

²⁴ See Richard Vogler, *Criminal Procedure in France*, in *COMPARATIVE CRIMINAL PROCEDURE* 14, 25-27 (John Hatchard, Barbara Huber & Richard Vogler eds., 1996) (describing role of *partie civile* in France).

²⁵ The ICC, however, would permit victims' legal representatives to address it. ICC Statute, *supra* note 1, art. 68(3). Its statute also provides for awards of reparations. *Id.*, art. 75.

²⁶ Jackson Statement, *supra* note 11, at 99.

events. The catalog of crimes will omit nothing that could be conceived by a pathological pride, cruelty, and lust for power."²⁷

In these excerpts Jackson revealed an almost palpable desire to establish the record of World War II. He promised to expose not only the men on trial, but also the forces of evil that had fomented war and war crimes. Racism, power-mongering, nationalism, and militarism were to stand trial, no less than the defendants themselves. Guilt was to be established through "undeniable proofs." Thus future generations could not deny what had occurred, and might even learn from the tragedies of the past.²⁸

Today's international criminal judges articulate similar goals. Antonio Cassese, the first President of the Yugoslavia Tribunal, has written that in international criminal trials, "a fully reliable *record* is established of atrocities so that *future generations* can remember and be made fully cognisant of what happened."²⁹ The same tribunal wrote, in an oft-quoted portion of a 1996 opinion, that it "sees public reprobation and stigmatisation by the international community, which would thereby express its indignation over heinous crimes and denounce the perpetrators, as one of the essential functions of a prison sentence"³⁰

These comments endorse what certain theorists call the expressive nature of governmental action.³¹ Theories of expressivism analyze the message of a governmental act, such as a prosecution or a sentence to punishment. They are concerned not so much with the message that is conveyed or intended by the people speaking, but rather with the message that is understood by the people who hear it. Expressive theories posit that the act of doing something, without more, may yield an expressive harm or an expressive good.

In the domestic arena, U.S. constitutional doctrine disfavoring establishment of a state religion is said to exemplify the expressive component of the law.³²

²⁷ Id.

²⁸ See BASS, *supra* note 23, at 301-04 (contending that postwar trials precluded denial of atrocities).

²⁹ Antonio Cassese, *Reflections on International Criminal Justice*, 61 MOD. L. REV. 1, 1 (1998) (emphasis in original).

³⁰ Erdemovic Sentencing Judgement, *supra* note 16, para. 65.

³¹ On expressivism, see generally, e.g., Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503 (2000); Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413 (1999).

³² See Anderson & Pildes, *supra* note 31, at 1546-60.

For instance, placement of a Christian cross on a government seal conveys a message that non-Christians are unwelcome. The seal constitutes a governmental expression. Within a constitutional framework of religious tolerance, that expression, even if unaccompanied by affirmative acts excluding non-Christians, constitutes a harm in and of itself.

Expressivism has not been studied much in relation to international law, yet it may have particular utility in that arena. Much of international criminal law for the last fifty years was nothing but expression, in the form of treaty after treaty defining certain behavior as criminal.³³

There was virtually no enforcement in the fifty years after Nürnberg. Once enforcement resumed, it retained its original expressivist flavor, as international criminal tribunal judges expressly wrote that their rulings were meant to convey indignation.

To a U.S. lawyer, emphasis on the expressive aspect of prosecution might seem highly unorthodox, even discomfiting. There is a feeling in the United States that defendants ought not to stand as examples, as scapegoats, for other criminals. Preferred is the language of deterrence, assertions that prosecution of one individual in fact dissuades other from committing crimes. Such assertions do not convince. They may, in fact, mask a value-laden, expressive basis for the decision to prosecute certain conduct or to levy a certain sentence.³⁴ Furthermore, even in the United States, one occasionally reads of a prosecutor exhorting a jury to convict with words like these: "You must send a message. Punish this person to send a message."³⁵ Thus even in the United States, the notion that criminal adjudication can express condemnation is not new.

What is new is the priority that international criminal tribunals attach to this role. Thus in 1998, the Yugoslavia Tribunal reaffirmed that expression and denouncement are "essential functions" of international criminal

³³ See generally M. CHERIF BASSIOUNI & EDWARD M. WISE, *AUT DEDERE AUT JUDICARE: THE DUTY TO EXTRADITE OR PROSECUTE IN INTERNATIONAL LAW* (1995) (compiling treaties defining behavior that violates international criminal law).

³⁴ See Kahan, *supra* note 31, at 435.

³⁵ See, e.g., *Vail Skier Guilty in Fatal Crash*, L.A. TIMES, Nov. 18, 2000, at A13 (reporting that during trial of skier eventually found guilty of criminally negligent homicide for causing death of a skier with whom he collided, "[p]rosecutors had urged the jury - made up of skiers and snowboarders - to send a message that reckless skiing will not be tolerated"); *Teen Convicted in Fairfax Slaying*, WASH. POST, Sept. 20, 1991, at C03 (quoting state prosecutor who urged jurors "to send a message that the Fairfax community would not tolerate what 'smacks of a drive-by shooting'").

adjudication.³⁶ It then proceeded to list three aims of international criminal adjudication. Retribution and deterrence of course were mentioned. Sandwiched in between them, as an equal partner, was “stigmatisation,” or expression of moral condemnation.³⁷

How valuable is this expressive role of international criminal adjudication?

Certainly, international criminal adjudication may foster development of an historical record. Indeed, it may have value that cannot be found in other recordmaking forums, such as truth commissions or civil lawsuits. In many truth commissions, victims make statements in proceedings apart from perpetrators. Perpetrators may in fact never come before the commission, perhaps because a blanket grant of amnesty has eliminated any incentive to disclose past wrongdoings. In contrast, in a criminal trial the accusers and the accused confront each other face to face, in a proceeding focused on determining what happened in a precise situation. To the extent that there is power in anecdote, the narrative developed in the discrete trial may have more power.

Trials, moreover, are solemn events. Witnesses typically give evidence under oath, and judgments carry lingering effects. Even more than in civil litigation, criminal trials embody the sternest majesty of government. To brand someone a “criminal” carries a stigma more searing than the brand imposed by any other forum. Finally, criminal proceedings individuate guilt. They name as criminals identifiable individuals, rather than all members of a group. That individuation may help reconstruction by removing guilt from others.³⁸

These benefits ought not to justify indiscriminate use of this tool, because international criminal adjudication also impedes record-making. Judge Cassese described the record that would emerge as “fully reliable.”³⁹ In fact, what emerges out of international criminal proceedings is likely to be a constructed, fragmentary truth.

³⁶ Furundzija, *supra* note 12, para. 289, reprinted in 38 I.L.M. at 374-75 (speaking of “reprobation and stigmatisation”) (citing *Erdemovic Sentencing Judgement*, *supra* note 16, para. 65).

³⁷ *Id.*, para. 290, reprinted in 38 I.L.M. at 375.

³⁸ See Martha Minow, *The Work of Re-Membering: After Genocide and Mass Atrocity*, 23 *FORDHAM INT’L L.J.* 429, 430-31 (1999).

³⁹ Cassese, *supra* note 29, at 1.

On this point too Nürnberg is instructive. Justice Jackson had promised to "omit nothing" from the "catalog of crimes."⁴⁰ But he omitted much, admitting elsewhere in his statement that he would focus on "the Common Plan or Conspiracy" to wage aggressive war, and not on "the individual barbarities or perversions which may have occurred independently of any central plan."⁴¹ Thus the Nürnberg prosecution included and excluded evidence in accordance with its theory of the case, and chose particular defendants to represent different aspects of the Nazi regime.⁴² The judgment of International Military Tribunal undertook a further construction of the record. As one example, the prosecution had wanted crimes against humanity to include all that the Jews had suffered under Nazi rule.⁴³ The tribunal said no. Though it described various events as "revolting," "horrible," as events that "must not be forgotten," the tribunal refused to define prewar incidents as violations of international law.⁴⁴ Similarly, defense counsel wanted to present the Versailles Treaty as one of the causes of the Nazi rise to power; the tribunal excluded that evidence as irrelevant.⁴⁵ As in other criminal proceedings, the evidence on which the tribunal ultimately based its decision had survived a process of selection involving all actors in the litigation.⁴⁶ This form of selectivity renders the record made in an international criminal trial incomplete.

Selectivity, and randomness, also engender a separate problem: the risk of slippage into unfair show trials. Only a small number of individuals ever will face trial before an international criminal tribunal. Those defendants inevitably come to stand in the shoes of many others who escape criminal process. In Jackson's own words, the defendants become "living symbols" of evil; their fates may have less "consequence to the world" than the fact that by punishing them, society gives voice to its own outrage.⁴⁷ There is obvious danger in using individual human beings to represent the wrongs done by others. Such scapegoating invites unfairness to the person on trial. Jackson

⁴⁰ Jackson Statement, *supra* note 11, at 99.

⁴¹ *Id.* at 104; *see also id.* at 142.

⁴² *See* TELFORD TAYLOR, *THE ANATOMY OF THE NUREMBERG TRIALS* 85-90 (1993).

⁴³ *See* Jackson Statement, *supra* note 11, at 118-30.

⁴⁴ *United States v. Goering, Judgement* (Int'l Mil. Tribunal Sept. 30, 1946), *reprinted in* 6 F.R.D. 69, 130 (1946).

⁴⁵ *See* Herbert Kraus, *The Nuremberg Trial of the Major War Criminals: Reflections After Seventeen Years*, 13 DE PAUL L. REV. 233, 235 (1964).

⁴⁶ *See generally* Peter Arenella, *Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts' Competing Ideologies*, 72 GEO. L.J. 185, 197-202 (1983) (discussing reconstruction of facts in criminal proceedings).

⁴⁷ Jackson Statement, *supra* note 11, at 99.

himself, to justify convictions that some believed violated the principle of legality, made this disturbing argument:

I cannot subscribe to the perverted reasoning that society may advance and strengthen the rule of law by the expenditure of morally innocent lives but that progress in the law may never be made at the price of morally guilty lives.⁴⁸

One does not find such disregard of due process in the opinions of the *ad hoc* tribunals; still, some of its rulings have stirred concern. Most notable was its decision withholding the identity of certain witnesses, and thus thwarting defense efforts to investigate the witnesses' credibility.⁴⁹

International criminal adjudication is, in short, a powerful but dangerous instrument. It ought not to be viewed as some grand and ultimate cure for the ills of a ravaged society. Rather, international criminal adjudication should be used only when a specific context warrants. Consideration not only of its potential, but also of its limitations, is necessary. Because of the risk of injustice, international prosecution ought to be pursued only when it would serve a complex of objectives and purposes. When it would do little more than develop a representative record or express condemnation, it should be shunned in favor of a less repressive tool, like a truth commission.

Even as we apply circumspection in our use of international criminal adjudication, we should strive to improve the process. Recognizing the problems of randomness and selectivity, we should select, and seize, those believed to be most culpable. To cabin the inevitable symbolism of the process, we should not settle for defendants, like Mr. Tadic, who cannot shoulder that symbolism. We should consider creative reparations, orders of restitution, to victims. And we should make fairness a priority. One of the great defects of today's international criminal tribunals is the absence of a defense organ, which stymies development of a knowledgeable and zealous defense bar.⁵⁰ There is great need in the realm of international criminal adjudication for consistency, for entrenchment of principles, for uniform rules.

⁴⁸ *Id.* at 147.

⁴⁹ See Prosecutor v. Tadic, Case No. IT-94-1-T, Trial Chamber Decision on the Prosecutor's Motion Requesting Protective Measures (Aug. 10, 1995), reprinted in 7 CRIM. L.F. 139 (1996). For further discussion on this and other fairness concerns, see Diane Marie Amann, *Harmonic Convergence? Constitutional Criminal Procedure in an International Context*, 75 IND. L.J. 809, 848-51 (2000).

⁵⁰ See Diane Marie Amann, *The Rights of the Accused in a Global Enforcement Arena*, 6 ILSA J. INT'L & COMP. L. 555, 564-65 (2000).

The United States, and other countries, did the right thing by signing the Rome Treaty a couple days ago. A permanent ICC is an essential step toward the consistency necessary so that international criminal adjudication properly may serve as one, though not the only, means to societal reconstruction.

