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Wrestling Tyrants: Do We Need an International Criminal Justice System?

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Symposium—
***Crimes Without Borders: In Search of an International
Justice System***

Keynote Speaker

**Wrestling Tyrants: Do We Need an International Criminal
Justice System?**

*Christopher L. Blakesley**

EPITAPH ON A TYRANT BY W.H. AUDEN (1939)

*Perfection, of a kind, was what he was after,
And the poetry he invented was easy to understand;
He knew human folly like the back of his hand,
And was greatly interested in armies and fleets;
When he laughed, respectable senators burst with laughter,
And when he cried the little children died in the streets.¹*

Too many children die in the streets. Auden's poem resonates; inspiring an appreciation of the profound importance of considering the questions about establishing a functional international criminal justice system. Our all too common inhumanity to each other is staggering. Professor Carter's work wrestling the tyrant does us honor.² This symposium and Professor Carter's work will stimulate empathy for victims of this inhumanity and ideas of whether an international criminal justice system can be viable and, if so, how. This symposium celebrates our good friend, Distinguished Professor Linda Carter, and explores issues related to an international legal system including: whether one is needed, whether and how one might be established, and what such a system needs to include. I am honored to participate with you in this colloquium

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1. W.H. Auden, Epitaph of a Tyrant, in *THE ENGLISH AUDEN POEMS, ESSAYS, AND DRAMATIC WRITINGS, 1927–1939*, 239 (Edward Mendelson ed., 1978).

2. See, e.g., LINDA E. CARTER, MARK S. ELLIS, & CHARLES H. JALLOH, *THE INTERNATIONAL CRIMINAL COURT IN AN EFFECTIVE GLOBAL JUSTICE SYSTEM* (expected publication 2016); Linda E. Carter, *The Challenge of "Firsts" in International Criminal Justice: First Courts, First Judges, and Issues of First Impression*, in *PROTECTION HUMANITY: ESSAYS IN INTERNATIONAL LAW AND POLICY IN HONOR OF NAVANETHAM PILLAY* 349, 366 (Eboe-Osuji ed., 2010); Linda E. Carter, *The Principle of Complementarity and the International Criminal Court: The Role of Ne Bis in Idem*, 8 *SANTA CLARA J. INT'L L.* 165 (2010); Linda E. Carter, *The Future of the International Criminal Court: Complementarity as a Strength or a Weakness?*, 12 *WASH. U. GLOBAL STUD. L. REV.* 451 (2013); Linda E. Carter, *The International Criminal Court in 2021*, 18 *SW. L. SCH. J. OF INT'L L.* 199 (2011).

considering this important subject in honor of Professor Carter's tremendous contributions to it, to the legal community, and the community at large.

Institution of an integrated, multi-level, and multi-dimensional international criminal justice system may enhance the value of the International Criminal Court and provide additional effective means of dealing with international problems created by or unaddressed in any unilateral or bilateral criminal justice system.³ It would seem that an international criminal justice system ought to be better than just a tribunal. Rather than deflecting domestic concentration on law enforcement, the proposed system ought to be a complementary and incremental effort, which will enhance all criminal justice processes.

Obviously there are questions concerning the implementation of an international criminal justice system, including issues related to sovereignty, bases of jurisdiction, which crimes should be within the system's purview, which law will apply, and practical concerns related to the composition, structure, and procedure of the various parts of the system.⁴ Any international criminal justice system, like the International Criminal Court, unfortunately faces significant and difficult negative attitudes.⁵ Imperfections become exaggerated and exploited by those with vested interests in opposing them. Although an international criminal justice system admittedly can never be a perfect solution to international or transnational crime—no human endeavor is—the questions should not be approached with a negative attitude, but rather with a view toward determining whether more effective benefits can be found through what such a system might provide.

W.H. AUDEN, *DANSE MACABRE* (1937)

*It's farewell to the drawing-room's civilised cry,
The professor's sensible whereto and why,
The frock-coated diplomat's social aplomb,
Now matters are settled with gas and with bomb.*⁶

Auden's poetry often echoes life's pain and suffering, often caused by actions taken by so many, destroying and damaging so many and so much.⁷ The pain is personal and general. Atrocity, depredation, and tyranny are ancient and current. Have we reached a place and time where issues are too often settled by gas and bomb, or have we always been there? At any rate, we ignore the need to address such outrage at our peril; lest we become functional enablers of atrocity,

3. See M. Cherif Bassiouni & Christopher L. Blakesley, *The Need for an International Criminal Court in the New International World Order*, 25 VAND. J. TRANSNAT'L L. 151, 165, 168, 179 (1992).

4. *Id.* at 160.

5. *Id.* at 179.

6. W.H. Auden, *Danse Macabre*, in COLLECTED POEMS 129 (E. Mendelson ed., 1976).

7. *Id.*

torture, and other depredations. Respect for our common value as human beings and the importance of mitigating suffering perhaps necessitate a proper and just international criminal justice system. Perhaps we need a valid, viable, and honorable international criminal justice system that promotes humanitarian values, accountability for those in any state or group who have committed atrocity, and which maintains human rights protections for both those accused of and those who fall victim to atrocity. Great poetry and fiction provide insight into and inspiration for the need. Consider Goran Simić's lovely and terribly sad poem, written in 1993, alluding to several of my favorite characters forlornly bearing witness to the destruction and burning of Sarajevo's Town Hall (Vijećnica)—the National University Library.⁸

LAMENT FOR VIJEĆNICA by Goran Simić

*The National Library burned for three days last August
and the city was choked with black snow.
Set free from the stacks, characters wandered the streets,
mingling with passers-by and the souls of dead soldiers.
I saw Werther sitting on the ruined graveyard fence;
I saw Quasimodo swinging one-handed from a minaret.
Raskolnikov and Mersault whispered together for days
in my cellar; Gavroche paraded in camouflage fatigues;
Yossarian was already selling spares to the enemy; for
a few dinars young Sawyer would dive off Princip's bridge.
Each day more ghosts and fewer people alive; and
the terrible suspicion formed that the shells fell just for me.
I locked myself in the house. I leafed through tourist guides.
I didn't come out until the radio told me
how they'd taken ten tons of coals from the deepest cellar
of the burned-out National Library.⁹*

Too many great works and monuments to heritage go up in smoke.¹⁰ An international criminal justice system is an exercise in public international law, comparative law, language, and culture. These are intellectual activities—verbs—that can be useful in revealing and making functional the “instinctive and

8. Goran Simić, *Lament for Vijećnica*, in *SPRINTING FROM THE GRAVEYARD* 14 (David Harsent trans., 1997), available at <http://permalink.gmane.org/gmane.education.libraries.mela/8352> (on file with *The University of the Pacific Law Review*).

9. *Id.*

10. See Patty Gerstenblith, *The Destruction of Cultural Heritage: A Crime against Property or a Crime against People?*, 15 *J. MARSHALL REV. INTELL. PROP. L.* 336, 354–55 (2016) (citing just one example of such crimes).

deepest moral values” innate in us.¹¹ Language, culture, poetry, and fiction provide inspiration for and insight into the need for an international criminal justice system.¹² This is because these reveal our common personhood and solidarity, which underlie our need for such a system.¹³ Considering the need to establish a viable international criminal justice system and what it needs to be is also something of a jurisprudential reflection on crime and punishment, which are part of the ethos, pathos, and logos of life and law. Law, itself, is like a language—a culture. An international criminal justice system ultimately will have its own culture, language, nature, and law. Considering the need for such a system and figuring out what it needs to be are a matter of applying international law and comparative law.¹⁴ The way we address this need will be an intellectual memoir for better or worse. Professor Carter’s life in these arenas is a positive and important intellectual and action memoir. This symposium plays a part in our and Professor Carter’s memoir.

Language, culture, international law, and comparative law are obvious elements of an international criminal justice system.¹⁵ Understanding culture and language in all their variegated forms is crucial for any establishment of a viable international criminal justice system.¹⁶ Consider the roots of the need for an international criminal justice system in every people’s experience with war, crime, atrocity, punishment, and expiation. One could place a special focus on the role of torture, excuses for, or accommodation of torture and their impact on domestic and international criminal justice systems.¹⁷

It should not be surprising that literature, language, and comparative analysis are crucial to any valid consideration of establishing a sound and just international criminal justice system. In fact, an international criminal justice

11. Christopher L. Blakesley, *Law, Language, Crime, and Culture: The Value and Risks of Comparative Law*, 49 CRIM. L. BULL. 438, 461–62 (2013).

12. *Id.* at 479.

13. *Id.* at 463.

14. *Id.* at 480.

15. *Cf.*, LINDA CARTER & FAUSTO POCAR, EDS., INTERNATIONAL CRIMINAL PROCEDURE: THE INTERFACE OF CIVIL LAW AND COMMON LAW LEGAL SYSTEMS (Edward Elgar, 2013); Christopher L. Blakesley, *Law, Language, Crime, and Culture: The Value and Risks of Comparative Law*, 49 CRIM. L. BULL. 438 (2013); Linda E. Carter, *Le développement de la procédure pénale internationale : Le défi d’un mélange entre les systèmes de droit romano-germanique et de la common law (Developing International Criminal Procedure: The Challenge of Blending Civil and Common Law Legal Systems)*, available at <http://fsjp.ucad.sn/images/stories/fsjp/lejpcarter.doc> (on file with *The University of the Pacific Law Review*); Linda E. Carter, *The Importance of Understanding Criminal Justice Principles in the Context of International Criminal Procedure: The Case of Admitting Evidence on Appeal* (Gabiella Venturini & Stefania Bariatti eds.); LIBER FAUSTO POCAR: INDIVIDUAL RIGHTS AND INTERNATIONAL JUSTICE (Giuffrè ed., 2009).

16. Nora V. Demleitner, *Combating Legal Ethnocentrism: Comparative Law Sets Boundaries*, 31 Az. St. L.J. 737, 740 (1999).

17. *See, e.g.*, CHRISTOPHER L. BLAKESLEY, TERROR AND ANTI-TERRORISM: A NORMATIVE AND PRACTICAL ASSESSMENT 178 (2006) [hereinafter TERROR AND ANTI-TERRORISM]; Linda E. Carter, *Torture and the War on Terror: The Need for Consistent Definitions and Remedies*, 6 J. NAT’L SECURITY L. & POL’Y 291 (2012).

system would functionally be a mixed system comprised of Romano-Germanic, Common Law, as well as other systems, elements, and approaches.¹⁸ It would require a mixture of international law and domestic law or of international law and that of domestic legal systems.¹⁹

Comparative law also serves as a springboard from which to ponder law and philosophy in the context of an international criminal justice system. International criminal courts provide a useful example of the value and challenges of such a system, because they are actually experiments in comparative law and international law, mixing legal systems and procedures.²⁰ Although wholesale or simplistic borrowing is harmful, carefully comparing how disparate systems resolve similar problems is most helpful and important in trying to develop an international criminal justice system.²¹

As Auden describes, counterfeit values always resemble the true; torturers, mass murderers, and terrorists propound their "vision" of "truth" to promote their atrocities.²²

W.H. AUDEN, MUSEE DES BEAUX ARTS

*About suffering they were never wrong,
The Old Masters: how well they understood
Its human position; how it takes place
While someone else is eating or opening a window or just
walking dully along;
How, when the aged are reverently, passionately waiting
For the miraculous birth, there always must be
Children who did not specially want it to happen, skating
On a pond at the edge of the wood:
They never forgot
That even the dreadful martyrdom must run its course
Anyhow in a corner, some untidy spot
Where the dogs go on with their doggy life and the torturer's horse
Scratches its innocent behind on a tree.
Only God can tell the saintly from the suburban,
Counterfeit values always resemble the true;
Neither in Life nor Art is honesty bohemian,
The free behave much as the respectable do.²³*

18. Blakesley, *supra* note 11, at 439.

19. *Id.*

20. Carter, *supra* note 2.

21. *Id.* at 366.

22. W.H. AUDEN, *Musée des Beaux Arts*, in COLLECTED POEMS 146-47 (E. Mendelson ed., 1976).

23. *Id.*

W.H. AUDEN, IN TIME OF WAR, COMMENTARY,

from Journey to a War (1939)

*Violence shall synchronize your movements like a tune,
And Terror like a frost shall halt the flood of thinking.
Barrack and bivouac shall be your friendly refuge,
And racial pride shall tower like a public column
And confiscate for safety every private sorrow.*²⁴

Poets warn of the dangers of ignoring or accommodating atrocity.²⁵ Ignoring it absorbs us into the abyss; into the destructive and self-destructive miasma of evil. Similarly, as Thomas Merton warns in his essay, *The Plague of Albert Camus*, and as Albert Camus himself suggests in his novel, *The Plague*,²⁶ and in his essay, *L'Homme Révolté* (1954),²⁷ revolution, "freedom fighting," terrorism, counter-terrorism are often used as "facile justification of mass murder."²⁸ Jean Paul Sartre was wrong to suggest that violence against non-combatants is justified when committed by freedom-fighters. He believed that all those not engaged in fighting oppression are enemies, hence, the equivalent of combatants or oppressors.²⁹ Camus was correct to reject the noted Sartrean ethic to the extent that it finds virtue in torture or slaughtering innocents even for a supposed just cause.³⁰ Even if killing innocents is deemed to be an efficient means to intimidate an "enemy" or to render a population insecure to promote an end considered by the actors to be valid or just, it is not morally or legally justified.

24. W.H. AUDEN, *In Time of War, Commentary*, in THE ENGLISH AUDEN POEMS, ESSAYS, AND DRAMATIC WRITINGS, 1927–1939, 266 (Edward Mendelson ed., 1978).

25. *Id.*

26. Thomas Merton, *The Plague of Albert Camus: A Commentary and Introduction*, in THE LITERARY ESSAYS OF THOMAS MERTON 181 (Patrick Hart ed., 1981).

27. Albert Camus, *L'HOMME RÉVOLTÉ (The Rebel)* (Gallimard, 1951), *discussed in Merton, supra note 26*.

28. Albert Camus asks, "[c]an there be any historic action that does not eventually end in mass murder?", in *L'HOMME RÉVOLTÉ (The Rebel)* (1951); *discussed in Merton, supra note 26*, at 181, 199.

29. Ironically, this famous atheist harkens back to St. Augustine on this point. Jefferson D. Reynolds notes that:

St. Augustine of Hippo was born in 354 at Thagaste, an inland city of the Roman province of Africa. He formed his principles of warfare from the Old Testament and religious leaders such as Abraham, Moses, Joshua, Samson, Gideon, David and Judas Maccabeus. St. Augustine established a punitive model for warfare, making no distinctions between combatants and civilians. No distinction was required under this model because there is no moral difference between the two. St. Augustine's moral emphasis on the guilt of the enemy population could justify violence against it. The premise of guilt as justification for war was also justification to protect those who were not guilty (citations omitted).

Jefferson D. Reynolds, *Collateral Damage on the 21st Century Battlefield: Enemy Exploitation of the Law of Armed Conflict, and the Struggle for A Moral High Ground*, 56 A.F. L. REV. 1, 4–5, n. 12 (2005).

30. See Merton, *supra note 26*, at 181, 185, 194.

Unfortunately, some groups and some governments alike are deluded about this.³¹ Those who allow, affirm, or acquiesce to oppressing others, torture, or in the slaughter of innocents must not be allowed to do so with impunity.³² One can defend and protect the innocents of the world, without destroying other innocents or corrupting oneself. One way to assist in the protection may be a proper international criminal justice system. What applies to insurgents or other non-state actors who use torture and other terror tactics also applies to governments and state actors.

Those with power, trying to maintain it, expand it, or those trying to gain it, sometimes use ideology based on religion and demonization of “others,” to claim “justification” for atrocity.³³ Self-justification is self-delusion and works only to prompt counter-vengeance, more atrocity, and destruction of whatever values are claimed. Intentional or reckless destruction of innocents to accomplish any goal or purpose is criminal.³⁴ Crimes against humanity and other international atrocity continue in a frightening cycle—tyranny of torture and death.³⁵ Our common obligation as human beings is to fight passionately to do what we can to save the lives of people under the yoke of atrocity and to provide honorable and fair justice.³⁶

Are atrocity and the usual response to it sometimes of one cloth? They may be when intentionally or recklessly committed against innocents. Simone Weil

31. See, e.g., BLAKESLEY, *supra* note 17, at 176–182, 194–195; Carter *supra* note 17, at 291. See also WAYNE R. LAFAVE, CRIMINAL LAW Ch. 7 (3d ed. 2000); ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW 46–119 (3d ed. 1982); GEORGE FLETCHER, RETHINKING CRIMINAL LAW 235–391 (1978). Cf. JOSEPH CONRAD, THE HEART OF DARKNESS (Signet Classic, 1950); JOSEPH CONRAD, LORD JIM (Penguin, 1968); WILLIAM FAULKNER, THE SOUND AND THE FURY (Norton Critical Ed., 2d ed., 1994); WILLIAM FAULKNER, LIGHT IN AUGUST (Random House, 1930); WILLIAM FAULKNER, SANCTUARY (Random House, 1931), especially see André Malraux’s classic preface in the French version. All of this is discussed brilliantly in Thomas Merton, *Faulkner and His Critics*, in THE LITERARY ESSAYS OF THOMAS MERTON 117–23 (New Directions ed., 1981). See also R. v. Dudley and Stephens [1884] 14 Q.B.D. 273, 285–86 (U.K.); R. v. Howe [1987] 1 A.C. 417 (H.L.) (U.K.); United States v. Holmes, 26 F. Cas. 360 (C.C.E.D. Pa. 1842); GLANVILLE WILLIAMS, TEXTBOOK OF THE CRIMINAL LAW 604 (2d ed. 1983); John Smith, *Justification and Excuse on the Criminal Law, and Necessity and Duress*, the Hamlyn Lectures (1989). On the moral problem of choosing one’s victim, see Andrew Ashworth, *Justifications, Necessity, and the Choice of Evils*, in PRINCIPLES OF CRIMINAL LAW 153–54 (3d ed. 1999).

32. Impunity needs to be and occasionally is challenged. In June 2016, impunity and lack of accountability for sexual violence by members of UN “peacekeeping forces” in the Central African Republic, prompted a top UN whistle blower to resign in protest. See Obi Anyadike, Top UN whistleblower resigns, citing impunity and lack of accountability, IRIN NEWS (June 7, 2016), <https://www.irinnews.org/analysis/2016/06/07/exclusive-top-un-whistleblower-resigns-citing-impunity-and-lack-accountability> (UN whistleblower Anders Kompass, who exposed the sexual abuse of children by French and African peacekeepers in Central African Republic, is to resign in protest over what he sees as the organisation’s failure to hold its senior officials to account) (on file with *The University of the Pacific Law Review*).

33. Jefferson D. Reynolds, *Collateral Damage on the 21st Century Battlefield: Enemy Exploitation of the Law of Armed Conflict, and the Struggle for A Moral High Ground*, 56 A.F. L. REV. 1, 12 (2005).

34. See Merton, *supra* note 26, at 181.

35. *Id.* at 182.

36. *Id.* at 186.

and Thomas Merton were not far off in expressing this, as they described a great beast, which is the urge to collective power, “the grimmest of all the social realities.”³⁷ “The void underlying the symbols and the myths of nationalism, of capitalism, communism, fascism, racism, totalism is in fact filled entirely by the presence of the beast—the urge to collective power.”³⁸ I would add to that list just about any other ideology or claimed value used to promote violence against innocents. Thus, perversion of religion, or morality, or abuse of sovereignty, self-determination, liberation, freedom, and even democracy, cause terrible harm and cause people to do horrific things to each other.³⁹ By manipulating a people’s sense of community, ethnicity and heritage, by prompting fear that a group is under attack or being destroyed, and by fostering insecurity and xenophobia, leaders can cause their followers to do unspeakable acts. And, of course, one can add to the list the perversion of national security, which often is “a chimerical state of things in which one would keep for oneself alone the power to make war while all other countries would be unable to do so.”⁴⁰ We must, individually and in our nations and groups, explode the myths created and used to prompt us to violence and those who commit crimes that pose a vicious threat to peace and human dignity should not have impunity.⁴¹ One might ask whether we have a common core of values that may allow us to recognize these crimes and to condemn them fairly and justly?⁴²

Hannah Arendt suggested that mercy is not possible if there is no possibility of punishment!⁴³ It is not true and may be dangerous to suggest that somehow *not* punishing those who commit atrocities lends itself to peace. By the same token,

37. See Thomas Merton, *The Answer of Minerva: Pacifism and Resistance in Simone Weil*, in THE LITERARY ESSAYS OF THOMAS MERTON 134, 138 (Patrick Hart ed., 1981) [hereinafter *The Answer of Minerva*], analyzing SIMONE WEIL, *The Power of Words*, in SIMONE WEIL, SELECTED ESSAYS 1934–1943 (1962). See also SIMONE WEIL, A FELLOWSHIP OF LOVE 155–60 (1964).

38. Merton, *supra* note 26, at 138.

39. See Ecclesiastes 1:2 ([it seems that] everything is [or may be turned into] vanity).

40. Merton, *supra* note 37, at 139 (quoting Simone Weil).

41. See BLAKESLEY, *supra* note 17, at 176–182, 194–195.

42. See *Id.* at 176–82, 194–95; Blakesley *supra* note 11, at 443–61. Cf. Nora V. Demleitner, *Combating Legal Ethnocentrism: Comparative Law Sets Boundaries*, 31 AZ. ST. L. J. 737 (1999).

The absence of a [complete] “common core” of values and legal norms, however, should not be interpreted as lack of a common humanity but rather as recognition of different normative values and possibly institutional processes. Moreover, a group’s identification of difference may serve to “create[]” “the community and “create[]” the difference with the outside world.” Such a process may be psychologically necessary to counteract the perceived pressure to achieve cultural and legal uniformity, as expressed through universal human rights standards.

Referencing Mark Van Hoecke & Mark Warrington, *Legal Cultures, Legal Paradigms and Legal Doctrine: Towards a New Model for Comparative Law*, 47 INT’L & COMP. L.Q. 495, 498, 536 (1998). See also LAURA NADER, INTRODUCTION, in LAW IN CULTURE AND SOCIETY 1, 7–8 (Laura Nader ed., 1997); Cf. CONRAD, *supra* note 31, and accompanying citations.

43. Hanna Arendt, *paraphrased* by Aryeh Neier, in his presentation at the *Meeting of Experts, Association Int’l de Droit Pénal, December 4–8, 1994, Siracusa, Italy*. See also generally ARYEH NEIER, WAR CRIMES: BRUTALITY, GENOCIDE, TERROR, AND THE STRUGGLE FOR JUSTICE (1998).

prosecuting or punishing without being scrupulous in ensuring fairness and justice is just about as dangerous.⁴⁴ Fair justice may be *required* for real peace. At least some culprits ought to be required to meet justice—a proper legal fate domestically or internationally. Generalissimo Augusto Pinochet came close; although not extradited to Spain by the United Kingdom, he was held in the United Kingdom and extradited to Chile, with legal decisions that he is not to be immune from prosecution.⁴⁵ Pinochet died before he completed his face-off with earthly justice.⁴⁶ Spain and Italy prosecuted some Argentine and Chilean military officials for their conduct in their dirty wars in those two countries.⁴⁷ Also, more recent ad hoc and special international criminal courts, like those for the conflicts in Chad, Lebanon, Sierra Leone, East Timor, and Cambodia, sometimes combine international and local judges.⁴⁸ Sometimes the tribunal is a part of the national

44. See Christopher L. Blakesley, *Autumn of the Patriarch: The Pinochet Extradition Debacle and Beyond—Human Rights Clauses Compared to Traditional Derivative Protections Such as Double Criminality*, 91 J. CRIM. L. & CRIMINOLOGY 1, 17 (2000).

45. *Id.* at 15–16.

46. *Id.*

47. See, e.g., Debora Rey & Luis Andres Henao, *Argentine court sentences ex-dictator for Operation Condor*, A.P. (May 27, 2016), <http://bigstory.ap.org/article/7dd39e6ad03a42d893d6458cd2b25289/argentine-court-sentences-ex-dictator-operation-condor> (on file with *The University of the Pacific Law Review*). See also the case of Ricardo Miguel Cavallo, extradited by Mexico to Spain in June 2003; see HUMAN RIGHTS WATCH, available online at: www.hrw.org/reports/2001 and 2004 (last visited on 3 August 2005). On January 11, 2006, Spanish prosecutor Dolores Delgado formally charged Ricardo Miguel Cavallo of genocide, organized terrorism, crimes against humanity and murder, TRIAL INTERNATIONAL, <https://trialinternational.org/latest-post/tricardo-miguel-cavallo/>, case of Ricardo Miguel Cavallo (last visited on January 6, 2006) (on file with *The University of the Pacific Law Review*). TRIAL INTERNATIONAL notes that it is “un projet de l’association TRIAL (Track Impunity Always—Association Suisse Contre l’Impunité).” See also generally Giulia Pinzauti, *Symposium An Instance of Reasonable Universality: The Scilingo Case*, 3 J. INT’L CRIM. JUST. 1092, 1095–97 (Nov. 2005); Alicia Gil Gil, *Symposium: The Flaws of The Scilingo Judgment*, 3 J. INT’L CRIM. JUST. 1082 (Nov. 2005); Christine A.E. Bakker, *Note and Comment A Full Stop To Amnesty in Argentina: The Simón Case*, 3 J. INT’L CRIM. JUST. 1106–07, 1119 (Nov. 2005). See also Jonathan Miller, *Judicial Review and Constitutional Stability: A Sociology of the U.S. Model and its Collapse in Argentina*, 21 HASTINGS INT’L & COMP. L. REV. 77, 151–52, 176 (1997) (explaining collapse of judicial independence in Argentina, resulting in a highly politicized judicial review which de facto always supported the actions of the executive branch).

48. See, e.g., Linda E. Carter, *International Judicial Trials, Truth Commissions, and Gacaca: Developing a Framework for Transitional Justice from the Experiences in Sierra Leone and Rwanda*, in THE SIERRA LEONE SPECIAL COURT AND ITS LEGACY: THE IMPACT FOR AFRICA AND INTERNATIONAL CRIMINAL LAW (Charles C. Jalloh ed., 2014); Chad-Jason Burke, *Hissène Habré trial provides model for international justice*, THE GUARDIAN (May 30, 2016) (the Extraordinary African Chambers - CAE), available at http://www.theguardian.com/world/2016/may/30/hissene-habre-trial-provides-model-for-international-justice?CMP=Share_AndroidApp_Tweet (on file with *The University of the Pacific Law Review*); *Special Tribunal for Lebanon*, The Hague Justice Portal, <http://www.haguejusticeportal.net/index.php?id=10042>. (last visited Aug. 22, 2016, 12:06AM) (on file with *The University of the Pacific Law Review*); *Ad-Hoc Court for East Timor*, GLOBAL POLICY FORUM, <https://www.globalpolicy.org/international-justice/international-criminal-tribunals-and-special-courts/adhoc-court-for-east-timor.html> (last visited Aug. 22, 2016, 12:06AM) (on file with *The University of the Pacific Law Review*); *Introduction to the ECCC*, Extraordinary Chambers in the Courts of Cambodia.gov, <https://www.eccc.gov.kh/en/about-eccc/introduction> (last visited Aug. 22, 2016, 12:06AM) (on file with *The University of the Pacific Law Review*).

judiciary.⁴⁹ The “mixed tribunal” for Sierra Leone was under funded.⁵⁰ The jury is still out, so to speak, on whether the oft and long troubled Cambodia Tribunal to credibly prosecute some of the Khmer Rouge mass-murderers, torturers, and *genocidaires*.⁵¹ Sometimes justice is long delayed.⁵²

Refusal of governments to allow trials of their own functionaries for the violation of international humanitarian law endangers peace and justice. This cries out for serious consideration of an international criminal justice system. Those who have suffered the pain of terror, torture, rape, and slaughter of loved ones will hold that pain within themselves. They and humanity need catharsis, which an international criminal justice system may help provide. If not addressed, rage festers and violent blood feud will rage on. Still, mercy must also be considered, such as when those who committed the atrocities were kidnapped children, manipulated by threats, coercion, drugs, and “brain-washing.” These children do not fit well into the status of willing atrocity mongers or executioners.⁵³

49. See, e.g. Carter, *International Judicial Trials, Truth Commissions, and Gacaca: Developing a Framework for Transitional Justice from the Experiences in Sierra Leone and Rwanda*, supra note 48; Linda E. Carter, *Justice and Reconciliation on Trial: Gacaca Trials in Rwanda*, 14 N.E. J. INT'L AND COMP. L. 41 (2007); Burke, supra note 48; Salil Shetty, *The Long Road to Justice for Chad's Hissène Habré*, AL JAZEERA (May 30, 2016), available at <http://www.aljazeera.com/indepth/opinion/2016/05/long-road-justice-chad-hissene-habre-160530143401443.html> (on file with *The University of the Pacific Law Review*); Prosecutor v. Muhimana, Case No. ICTR-95-1B-T, Judgment (Apr. 28, 2005) [hereinafter *Muhimana Judgment*]; Cf., Prosecutor v. Hategekimana, Case No. ICTR-00-55B-T, Judgment, ¶¶ 30, 725 (Dec. 6, 2010) (¶ 30 notes that “the evidence does not establish that [the victim] was a Tutsi or that she was raped with genocidal intent” and concludes at ¶ 725 that the victim was a Hutu “but she was raped and killed because of the perceived political affiliation of her father.”). Political affiliation, of course, unlike national, ethnic, racial, or religious identity, is not protected by the Genocide Convention. Referenced in Shayna Rogers, *Sexual Violence or Rape as a Constituent Act of Genocide: Lessons from the Ad Hoc Tribunals and a Prescription for the International Criminal Court*, 48 GEO. WASH. INT'L L. REV. 265, 286, n.121 (2016).

50. UNIVERSITY OF CALIFORNIA AT BERKELEY, WAR CRIMES STUDIES CENTER, INTERIM REPORT ON THE SPECIAL COURT FOR SIERRA LEONE 3 (2005), available at http://www.hrcberkeley.org/download/BWCSC_Interim_Report.pdf (on file with *The University of the Pacific Law Review*); Statute of the Special Court for Sierra Leone, Aug. 14, 2000, <http://www.sierra-leone.org/specialcourtstatute.html>, n.8 (last visited Apr. 31, 2006) (on file with *The University of the Pacific Law Review*).

51. See generally Robert Petit, *Lawfare and International Tribunals: A Question of Definition? A Reflection on the Creation of the “Khmer Rouge Tribunal,”* 43 CASE W. RES. J. INT'L L. 189 (2010); Kathryn M. Klein, *Bringing the Khmer Rouge to Justice: The Challenges and Risks Facing the Joint Tribunal in Cambodia*, 4 NW. U. J. INT'L HUM. RTS. 549 (2006). On the Khmer Rouge auto-genocide generally, see CRAIG ETCHESON, *AFTER THE KILLING FIELDS: LESSONS FROM THE CAMBODIAN GENOCIDE* (2005); DAVID P. CHANDLER, *VOICES FROM S-21: TERROR AND HISTORY IN POL POT'S SECRET PRISON* (2000); *the Cambodian Genocide Program*, <http://www.yale.edu/cgp/> (last visited May 31, 2006) (on file with *The University of the Pacific Law Review*); Peace Pledge Union Information, *Talking about Genocide—Genocides Cambodia 1975*, available at http://www.ppu.org.uk/genocide/g_cambodia1.html (last visited June 1, 2006) (on file with *The University of the Pacific Law Review*).

52. See, *Belated Justice in Argentina and Chad*, N.Y. TIMES, (June 1, 2016), www.nytimes.com/2016/06/01/opinion/belated-justice-in-chad-and-argentina.html?_r=0 (on file with *The University of the Pacific Law Review*).

53. See, e.g., MARK A. DRUMBL, *ATROCITY, PUNISHMENT, AND INTERNATIONAL LAW* (2007); Lucia H. Seyfarth, *Child Soldiers to War Criminals: Trauma and the Case for Personal Mitigation*, 14 CHICAGO KENT J.

Herman Melville understood the self-destructive dangers of seeking vengeance in lieu of proper and honorable justice.

All that most maddens and torments; all that stirs up the lees of things; all truth with malice in it; all that cracks the sinews and cakes the brain; all the subtle demonisms of life and thought; all evil to crazy Ahab, were visibly personified, and made practically assailable in Moby Dick. "He piled upon the whale's white hump the sum of all the general rage and hate felt by his whole race from Adam down; and then, as if his chest had been a mortar, he burst his hot heart's shell upon it."⁵⁴

An international criminal justice system will only be acceptable if it is established and proceeds in a manner that is beyond reproach in terms of fairness and human rights in relation to investigation, prosecution, and trial. Any tribunal unscrupulous in protecting the accused from abuses and deprivation of civil liberties would be a dangerous institution. Justice Jackson stated beautifully and poignantly the importance of an honorable and just tribunal in his opening remarks as chief prosecutor at the Nuremberg Trials.⁵⁵

INT'L & COMP. L. 117, 122–25 (2013); David Gray, *An Excuse-Centered Approach to Transitional Justice*, 74 FORDHAM L. REV. 2621, 2630, 2630 nn.87–92 (2006), referencing RACHEL BRETT & MARGARET MCCALLIN, CHILDREN: THE INVISIBLE SOLDIERS (2d ed. 1998); Sara A. Ward, *Criminalizing the Victim: Why the Legal Community Must Fight to Ensure that Child Soldier Victims are not Prosecuted as War Criminals*, 25 GEO. J. LEGAL ETHICS 821, 825–26 (2012); Cf., Cristina Martinez Squiers, *How the Law Should View Voluntary Child Soldiers: Does Terrorism Pose a Different Dilemma?*, 68 SMU L. REV. 567 (2015); Norimitsu Onishi, *Children of War in Sierra Leone Try to Start Over*, N.Y. TIMES, May 9, 2002, at A14; *How to Fight, How to Kill: Child Soldiers in Liberia*, HUMAN RIGHTS WATCH, Feb. 2004, at 1, 1–3, available at <http://www.hrw.org/reports/2004/liberia0204> (on file with *The University of the Pacific Law Review*); *Stolen Children: Abduction and Recruitment in Northern Uganda*, HUMAN RIGHTS WATCH, Mar. 2003, at 1, 7–10, available at <http://www.hrw.org/reports/2003/uganda0303> (on file with *The University of the Pacific Law Review*); "You'll Learn Not to Cry:" *Child Combatants in Colombia*, HUMAN RIGHTS WATCH, Sept. 2003, at 1, 7–10, available at <http://pantheon.hrw.org/reports/2003/colombia0903/colombia0903.pdf> (on file with *The University of the Pacific Law Review*)

54. HERMAN MELVILLE, *MOBY DICK; OR, THE WHALE* 135–36 (1851).

55. See SENATE COMMITTEE ON FOREIGN RELATIONS AND HOUSE COMMITTEE ON FOREIGN AFFAIRS (JOINT COMM. PRINT), COUNTRY REPORTS ON HUMAN RIGHTS FOR 1984, 99th Cong., 1st sess., 1985, 1159–69. For the evolution of U.N. efforts, see M. Cherif Bassiouni, *The Time has Come for an International Criminal Court*, See also John B. Anderson, *An International Criminal Court—An Emerging Idea*, 15 NOVA L. REV. 433 (1991). See REPORT OF THE INTERNATIONAL LAW COMMISSION, 42nd Session, U.N.G.A.O.R. Supp. No. 10 (A/45/10) 20 July 1990, 36–54; Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia [[Serbia and Montenegro]], Request for the Indication of Provisional Measures, (1993) I.C.J. Reports 3, 32 I.L.M. 890 (1993) (wherein Bosnia and Herzegovina filed suit against Serbia and Montenegro "for violating the Genocide Convention" and other illegal conduct in violation of customary international law).

Early convictions in Bosnia presented some due process problems. The problem has already arisen in relation to the conviction and issuance of death sentences by a Bosnian military court of two Bosnian Serbs for war crimes. Their confessions may have been coerced. See "Bosnia Convicts and Sentences to Death 2 Serbs," 9 INT'L ENF.L.RPTR. 147 (1993); John F. Burns, "2 Serbs to be Shot for Killings and Rapes," New York Times 31 March 1993, at A6, col. 4; David B. Ottaway, "Bosnia Convicts 2 Serbs in War Crimes Trial," WASHINGTON POST, 31 March 1993, at A21, col. 1. See generally Christopher L. Blakesley, *Obstacles to the Creation of a Permanent War Crimes Tribunal*, 18 FLETCHER F. WORLD AFF., 77, 97–98 (1994).

Before I discuss the particulars of evidence, some general considerations which may affect the credit of this trial in the eyes of the world should be candidly faced. There is a dramatic disparity between the circumstances of the accusers and the accused that might discredit our work if we should falter, in even minor matters, in being fair and temperate. Unfortunately, the nature of these crimes is such that both prosecution and judgment are often set by victor nations over vanquished foes.⁵⁶

Justice Robert H. Jackson once stated:

We must never forget that the record on which we judge these defendants is the record on which history will judge us tomorrow. To pass these defendants a poisoned chalice is to put it to our lips as well. We must summon such detachment and intellectual integrity to our task that this Trial will commend itself to posterity as fulfilling humanity's aspirations to do justice.⁵⁷

Procedural and other human rights protections for victims and the accused must be clarified and vigorously maintained for all individuals under all circumstances. To date, none of this has been done well in treaties.⁵⁸ Perhaps

56. See 9 ANN. HUM. RTS. REP. SUBMITTED TO CONG. BY U.S. DEP'T OF STATE, 99th Cong., 1st Sess., at 1163-64 (1985). For the evolution of U.N. efforts, see M. Cherif Bassiouni, *The Time has Come for an International Criminal Court*, 1 IND. INT'L & COMP. L. REV. 1, 1-7 (1991). See also Anderson, *supra* note 55 at 446-47; REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-SECOND SESSION 12-14 (Supp. No. 10 1990); Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide, 32 I.L.M. 890, 22-24 (1993) (wherein Bosnia and Herzegovina filed suit against Serbia and Montenegro "for violating the Genocide Convention" and other illegal conduct in violation of customary international law).

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57. Justice Robert H. Jackson, Chief Counsel for the Prosecution in the Nuremberg Trials, Opening Statement (Nov. 20, 1945). See statement by Justice Robert H. Jackson, Chief Counsel for the Prosecution in the Nuremberg Trials, Opening Statement (Nov. 20, 1945), in TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 101 (1947); Justice Robert H. Jackson, Chief Counsel for the Prosecution in the Nuremberg Trials, Opening Statement (Nov. 20, 1945), in THE TRIAL OF GERMAN MAJOR WAR CRIMINALS, INTERNATIONAL MILITARY TRIBUNAL SITTING AT NUREMBERG, GERMANY 5 (1946). Also quoted in TELFORD TAYLOR, THE ANATOMY OF THE NUREMBERG TRIALS 168 (1992); CHRISTOPHER L. BLAKESLEY, TERRORISM AND ANTI-TERRORISM: A NORMATIVE AND PRACTICAL ASSESSMENT 194-95, n.32 (2006); CHRISTOPHER L. BLAKESLEY, EDWIN B. FIRMAGE, RICHARD F. SCOTT & SHARON A. WILLIAMS, THE INTERNATIONAL LEGAL SYSTEM: CASES & MATERIALS 1328 (5th ed. 2001); Blakesley, *supra* note 55, at 87.

58. For example, although the right of detained foreign nationals to receive notice that they can contact their national consulate is identified in the Vienna Convention on Consular Relations, its implementation and consequences are not clarified in the treaty, leading to problematic situations especially in capital cases in the U.S. See Linda E. Carter, *Lessons from Avena: The Inadequacy of Clemency and Judicial Proceedings for Violations of the Vienna Convention on Consular Relations*, 15 DUKE J. COMP. & INT'L L. 259 (2005); Linda E.

customary international law and *jus cogens* principles as manifest in the domestic laws of virtually all nations provide the needed clarity and specificity. The penal codes of all nations and the customary rules of groups everywhere condemn intentional killing or maiming without justification or excuse. They condemn torture, at least when it is committed against their own. Even those nations or groups that claim some privilege, justification, or excuse to commit such conduct, do not accept its being committed by others against them! So it may be with a common core of crimes, which can be established by looking to the basic principles of nations, that conduct, which is deemed criminal when committed against that nation, may well be universally criminal. This is true, whether or not nations commit this conduct against others. Thus, the evidence of the universal condemnation of these offenses is found in the complex of international treaties, customary international law, and domestic criminal law.

The pretentious justifications, excuses, and rationalizations given by apologists for those who commit atrocity ring hollow and are frighteningly familiar.⁵⁹ Care must be taken to ensure that international and domestic and international action to obtain justice and to prosecute perpetrators does not fall into the same trap that ensnared those who committed the crimes. If we allow ourselves to descend to simple vengeance, terrorism, torture, and similar atrocity because of our fear or insecurity, or in the name of “fighting terrorism” or fighting for “freedom,” we are lost. We must remind ourselves of John Milton’s poignant warning: “So spake the Fiend, [*and with necessity*], The tyrant’s plea, excus’d his devilish deeds’ and it is still the shibboleth of the descendants of the Prince of Darkness.”⁶⁰

Carter, *Compliance with ICJ Provisional Measures and the Meaning of Review and Reconsideration under the Vienna Convention on Consular Relations: Avena and Other Mexican Nationals (Mex. v. U.S.)*, 25 MICH. J. INT’L L. 117 (2003); John Cary Sims & Linda E. Carter, *Representing Foreign Nationals: The Emerging Importance of the Vienna Convention on Consular Relations as a Defense Tool*, THE CHAMPION, at 1 (Sept./Oct. 1998).

59. JOHN MILTON, *PARADISE LOST*, bk. IV, at 125 lines 393–94 (Merrut Y. Hughes ed., Odyssey Press 1962) (1674); See also JOSEPH CONRAD, *LORD JIM* 86, 95, 357, 367 (1924); JOSEPH CONRAD, *HEART OF DARKNESS*, in *COMPLETE WORKS* (1926).

60. MILTON, *supra* note 59, at lines 393–94; see also CONRAD, *LORD JIM*, *supra* note 59, at 86, 95, 357, 367; CONRAD, *HEART OF DARKNESS*, *supra* note 59.