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Former Yugoslavia: Investigating Violations of International Humanitarian Law and Establishing an International Criminal Tribunal

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M. Cherif Bassiouni

Abstract

This Article retraces some of the historic initiatives that have sought to establish a permanent international criminal court and focuses on the contemporary experience of the Commission of Experts Established Pursuant to Security Council Resolution 780 and the International Criminal Tribunal for the Former Yugoslavia. More particularly, it reflects upon the problems of investigating and prosecuting violations of international humanitarian law, and the interaction between pursuing an international criminal justice goal and political settlements of international disputes.

FORMER YUGOSLAVIA: INVESTIGATING VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW AND ESTABLISHING AN INTERNATIONAL CRIMINAL TRIBUNAL

*M. Cherif Bassiouni**

To criticize is to serve justice.

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INTRODUCTION

Since the end of World War I, the world community has sought to establish a permanent international criminal court, but that noble goal has yet to be realized. Instead, *ad hoc* tribunals have been established for a specific purpose and for a limited period of time.¹ These experiences, however, have paved the road for the establishment of a permanent system of international criminal justice. Following the unfulfilled efforts of World

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1. For a history of these efforts, see M. Cherif Bassiouni & Christopher Blakesley, M. CHERIF BASSIOUNI, A DRAFT INTERNATIONAL CRIMINAL CODE AND DRAFT STATUTE FOR AN INTERNATIONAL CRIMINAL TRIBUNAL 1-21 (1987); *The Need for an International Criminal Court in the New International World Order*, 25 VAND. J. TRANSNAT'L L. 151 (1992); M. Cherif Bassiouni, *The Time has Come for an International Criminal Court*, 1 IND. INT'L & COMP. L. REV. 1 (1991); see also BENJAMIN FERENCZ, AN INTERNATIONAL CRIMINAL COURT: A STEP TOWARD WORLD PEACE (Vols. I & II 1980).

War I, the International Military Tribunal at Nuremberg (IMT),² and the International Military Tribunal for the Far East at Tokyo (IMTFE),³ were established in 1945 and 1946 respectively. Then, in 1993, the U.N. Security Council established the International Criminal Tribunal for the Former Yugoslavia (ICTFY), which was followed by the International Criminal Tribunal for Rwanda (ICTR).⁴

The ultimate result of all these initiatives should lead to the establishment of a permanent international criminal court, but that goal has yet to be attained. This Article retraces some of these historic initiatives and focuses on the contemporary experience of the Commission of Experts Established Pursuant to Security Council Resolution 780 and the ICTFY. More particularly, it reflects upon the problems of investigating and prosecuting

2. Prosecution and Punishment of Major War Criminals of the European Axis (London Agreement), Aug. 8, 1945, 82 U.N.T.S. 279, 59 Stat. 1544; Annex to Prosecution and Punishment of Major War Criminals of the European Axis (London Charter), Aug. 8, 1945, 82 U.N.T.S. 279, 59 Stat. 1544.

3. Charter of the International Military Tribunal for the Far East, Special Proclamation by the Supreme Commander for the Allied Powers at Tokyo, T.I.A.S. no. 1589, *reprinted in* 4 TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES OF AMERICA 27 (1946); Charter dated January 19, 1946, T.I.A.S. no. 1589, *reprinted in* 4 TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES OF AMERICA 27 (1946) [IMTFE Proclamation]; Amended Charter dated 26 April 1946, T.I.A.S. no. 1589, *reprinted in* 4 TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES OF AMERICA 27 (1946) [hereinafter IMTFE Amended Charter]. For an analysis of the Tokyo proceedings, see ARNOLD C. BRACKMAN, *THE OTHER NUREMBERG: THE UNTOLD STORY OF THE TOKYO WAR CRIMES TRIALS* (1987); *THE TOKYO WAR CRIMES TRIAL: AN INTERNATIONAL SYMPOSIUM* (C. Hosoya et al. eds., 1986); RICHARD H. MINEAR, *VICTOR'S JUSTICE: THE TOKYO WAR CRIMES TRIAL* (1971); BERNARD V.A. RÖLING, *THE TOKYO TRIALS AND BEYOND: REFLECTIONS OF A PEACEMONGER* (1993).

4. The Security Council decided to establish an international criminal tribunal to prosecute those responsible for violations of international humanitarian law in the former Yugoslavia in Resolution 808. S.C. Res. 808, U.N. SCOR, 3175th mtg., U.N. Doc. S/RES/808 (1993). Pursuant to Security Council Resolution 808, the Secretary-General prepared a report containing comments on the articles of the statute of the tribunal. The tribunal's statute appears in an Annex to the Secretary-General's report. *Secretary-General, Report Pursuant to Paragraph 2 of Security Council Resolution 808*, U.N. Doc. S/25704/Add.1/Corr.1 (1993) [hereinafter *Report of the Secretary-General*]. The Security Council adopted the Secretary-General's draft of the statute without change in Resolution 827. S.C. Res. 827, U.N. SCOR, 3217th mtg., U.N. Doc. S/RES/827 (1993).

With respect to Rwanda, the Security Council first established a commission of experts to investigate violations in that civil war. S.C. Res. 935, U.N. SCOR, 49th Sess., 3400th mtg. at 1, U.N. Doc. S/Res/935 (1994). Based on that commission's work, the Security Council established a tribunal for Rwanda which has ties to the ICTFY. S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg. at 1, U.N. Doc. S/Res/955 (1994) (adopting and annexing the tribunal statute).

violations of international humanitarian law, and the interaction between pursuing an international criminal justice goal and political settlements of international disputes.⁵

I. HISTORICAL PRECEDENTS

In 1919, Article 227 of the Treaty of Versailles⁶ purported to create an *ad hoc* international criminal tribunal to prosecute Kaiser Wilhelm II for the "supreme offence" against peace.⁷ Articles 228 and 229 of the Treaty also provided that the victorious Allies would prosecute German war criminals.⁸ For political reasons, however, neither treaty mandate was enforced. The Kaiser sought refuge in the Netherlands and the Allies never pursued a request for his extradition.⁹ Additionally, the victorious Allies allowed Germany to prosecute a limited number of war criminals before its Supreme Court sitting in Leipzig,¹⁰ in order to avoid further alienating the Germans.

Prior to the signing of the Treaty of Versailles, the Allies established an investigative body called the Commission on the Responsibilities of the Authors of War and on Enforcement of Penalties at the Preliminary Peace Conference (the "Commission").¹¹ There were, however, no institutional links between the investigative Commission and the judicial bodies subsequently established by the Treaty of Versailles. Consequently, the findings of the Commission were neither binding nor con-

5. See generally Anthony D'Amato, *Peace vs. Accountability in Bosnia*, 88 AM. J. INT'L L. 500 (1994); Theodor Meron, *The Case for War Crimes Trials in Yugoslavia*, FOREIGN AFF., Summer 1993, at 122; Theodor Meron, *War Crimes in Yugoslavia and the Development of International Law*, 88 AM. J. INT'L L. 78 (1994); James C. O'Brien, *The International Tribunal for Violations of International Humanitarian Law in the Former Yugoslavia*, 87 AM. J. INT'L L. 639 (1993).

6. Treaty of Peace with Germany (Treaty of Versailles), 11 MARTENS NOUVEAU RECUEIL [M.N.R.] (3D) 321, 323 (1919).

7. *Id.*

8. *Id.* arts. 228-29, 11 M.N.R. at 324.

9. The government of the Netherlands viewed the charge against the Kaiser as a "political offence," because a Head of State's decision to go to war is within the prerogative of national sovereignty. See Quincy Wright, *The Legality of the Kaiser*, 8 AM. POL. SCI. REV. 121 (1919).

10. See CLAUD MULLINS, *THE LEIPZIG TRIALS: AN ACCOUNT OF THE WAR CRIMINALS TRIALS AND A STUDY OF GERMAN MENTALITY* (1921); JAMES WILLIS, *PROLOGUE TO NUREMBERG: THE POLITICS AND DIPLOMACY OF PUNISHING OF WAR CRIMINALS OF THE FIRST WORLD WAR* (1982).

11. This Commission was established by the Preliminary Peace Conference of Paris, which produced the Treaty of Versailles.

clusive as to any party or against any person. Out of the 20,000 people investigated, the Commission identified 895 persons believed to have committed war crimes.¹² Despite the Commission's extensive report, only twelve military officers were convicted before the Imperial Supreme Tribunal of Germany at Leipzig.¹³

The 1919 Commission also sought to charge persons for crimes against the laws of humanity¹⁴ based on the preamble to the 1907 Hague Convention,¹⁵ but the United States and Japan were opposed.¹⁶ The charges were to be brought against Turkish military and political officials for the mass killing of Armenians in 1915.¹⁷ These charges were also based on the authority of the Treaty of Sèvres of 1920¹⁸ between the Allies and Turkey, which provided for Turkey's surrender of accused persons to be tried for war crimes and presumably for "crimes against the laws of humanity." Political considerations, however, caused the Allies to change their mind. As a result, the provisions of the Treaty of Sèvres were never carried out, because the Treaty was never ratified. In 1923, it was replaced by the Treaty of Lausanne,¹⁹ which did not mention prosecutions and in fact con-

12. COMMISSION ON THE RESPONSIBILITIES OF THE AUTHORS OF WAR AND ON ENFORCEMENT OF PENALTIES, REPORT PRESENTED TO THE PRELIMINARY PEACE CONFERENCE, PAMPHLET NO. 32 (1919), *reprinted in* 14 AM. J. INT'L. L. 95 (1920) [hereinafter 1919 COMMISSION REPORT].

13. *Id.* The maximum sentence imposed was three years, erasing any hope that this formal exercise could serve as a future deterrent to others. During these proceedings, the accused were cheered by crowds attending the trials and outside the courtrooms. The accused were transformed from war criminals to national heroes and martyrs of foreign oppression. Thus, what was intended to be a punitive action to deter such conduct in the future actually gave rise to nationalistic fervor.

14. See M. CHERIF BASSIOUNI, *CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW* (1992) [hereinafter *CRIMES AGAINST HUMANITY*].

15. Convention Regarding the Laws and Customs of Land Warfare, Oct. 18, 1907, 3 M.N.R. 461, 36 Stat. 2277 (1908).

16. See 1919 COMMISSION REPORT, *supra* note 12, at 144-50; *Memorandum of Reservations Presented by the Representatives of the United States to the Report of the Commission on Responsibilities*, Annex II, Apr. 4 1919, *reprinted in* 14 AM. J. INT'L L. 95, 127 (1920); *Reservations by the Japanese Delegation*, Annex III, Apr. 4 1919, *reprinted in* 14 AM. J. INT'L L. 95, 151 (1920).

17. See Vahakn N. Dadrian, *Genocide as a Problem of National and International Law: The World War I Armenian Case and its Contemporary Legal Ramifications*, 14 YALE J. INT'L L. 221 (1989).

18. Treaty of Peace Between the Allied Powers and Turkey, signed at Sèvres, Aug. 10, 1920 (Treaty of Sèvres), 1920 Gr. Brit. T.S. No. 11 (Cmd. 961), *reprinted in* 15 AM. J. INT'L L. 179 (Supp. 1921).

19. Treaty with Turkey and Other Instruments, signed at Lausanne, July 24, 1923

tained an annex that gave Turkish officials amnesty. By 1923, the "political will" of the Allies to pursue justice in the sense of prosecuting and punishing violators of international humanitarian law had all but dissolved.

In 1926, the International Association of Penal Law and the International Law Association undertook a significant initiative with the Inter-Parliamentary Union for the establishment of a permanent international criminal court.²⁰ Their efforts proved unproductive. The world, it was then said, was too disparate and not ready for such an international institution. In 1927, my predecessor as President of the International Association of Penal Law, Vespasien Pella, was Romania's delegate to the League of Nations and in 1937 was one of the principal sponsors for the establishment of a specialized international criminal court to enforce the Terrorism Convention.²¹ The members of the League of Nations were all eager to eradicate terrorism with a war of words, but few were willing to take collective action. Thus, only India ratified this instrument and the court never came to be.

Interestingly enough, neither one of these initiatives addressed the question of investigations. Indeed, diplomats who negotiate and draft treaties are far removed from the realities and exigencies of criminal investigations. Consequently, whether from lack of experience or some other motive, the requirements of effective investigation are seldom addressed in such treaties.

A few years later, the atrocities of World War II made the need for international prosecutions inevitable. The victorious Allies established the International Military Tribunal at Nuremberg through the London Agreement of August 8, 1945, to which the IMT's Charter was appended.²² The Agreement was signed by the four Major Allied Powers and later acceded to by

(Treaty of Lausanne), 1923 Gr. Brit. T.S. No. 16 (Cmd. 1929) *reprinted in* 18 AM. J. INT'L L. 1 (Supp. 1924).

20. In recent times, Parliamentarians for Global Action have made this initiative one of its principal goals. See JAMES A. LEACH & M. CHERIF BASSIOUNI, PARLIAMENTARIANS FOR GLOBAL ACTION, OCCASIONAL PAPER NO. 1: AN INTERNATIONAL CRIMINAL COURT (Oct. 1992).

21. Annex to Convention for Prevention and Punishment of Terrorism, Nov. 16, 1937, League of Nations O.J. No. 19, at 23, League of Nations Doc. C.546(1) M.383(1) 1937 V (1938).

22. See London Agreement, *supra* note 2, 82 U.N.T.S. 279, 59 Stat. 1544; London Charter, *supra* note 2, 82 U.N.T.S. 279, 59 Stat. 1544.

nineteen states. Subsequent to the London Charter, the Allies, as Germany's occupation forces, enacted Law No. 10 by Germany's Control Council, which permitted the Allies to prosecute German nationals in their respective zones of occupation.²³ Following, in 1946, General Douglas MacArthur, in his capacity as Supreme Allied Commander for the Pacific Theater, promulgated an order establishing the International Military Tribunal for the Far East.²⁴ All three tribunals were *ad hoc* institutions limited as to both subject matter and *in personam* jurisdiction.

The IMT and IMTFE relied on their investigative units to produce the evidence on which the prosecution relied. No separate or special investigative bodies were established. In both cases, the Four Major Allies contributed resources, personnel, and information. Because each Allied Power had its own "Chief Prosecutor,"²⁵ he relied essentially on the investigations conducted by his own country. In IMT proceedings, however, the U.S. team provided most of the investigative support to the other three Allies. Whereas, in IMTFE proceedings, the United Kingdom and Australia shouldered a significant part of that burden along with their U.S. counterpart.²⁶ In connection with Control Council Law No. 10 Proceedings, the Four Major Allies relied on separate investigative and evidence gathering capabilities of their military forces. The United States and the United Kingdom cooperated much more closely, but both had difficulty securing cooperation from the USSR, as did France.

The separate investigations occurred, even though the Allies set up an international investigative commission. An "Agreement," signed at the Palace of St. James on 13 January 1942,²⁷

23. Allied Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes against Peace and against Humanity, Dec. 20, 1945, OFFICIAL GAZETTE OF THE CONTROL COUNCIL FOR GERMANY, No. 3, Berlin (Jan. 31, 1946), *reprinted in* 1 FERENCZ, *supra* note 1, at 488.

24. IMTFE Proclamation, *supra* note 3; IMTFE Amended Charter, *supra* note 3.

25. See, e.g., ROBERT H. JACKSON, REPORT TO THE INTERNATIONAL CONFERENCE ON MILITARY TRIALS (U.S. Dep't State Pub. no. 3080, 1949).

26. For the IMTFE proceedings, see THE TOKYO WAR CRIMES TRIALS: THE COMPLETE TRANSCRIPTS OF THE PROCEEDINGS OF THE INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST (R. John Pritchard & Sonia M. Zaide eds., 1981); THE TOKYO JUDGMENT (Bernard V.A. Röling & C. Fritz Reüter eds., 1977).

27. The Inter-Allied Declaration, signed at St. James Palace on 13 January 1942, *reprinted in* PUNISHMENT FOR WAR CRIMES: INTER-ALLIED DECLARATION SIGNED AT ST. JAMES PALACE, LONDON, ON 13 JANUARY 1942, AND RELATIVE DOCUMENTS (United Nations Office, New York, undated).

established the 1943 United Nations War Crimes Commission (UNWCC).²⁸ The St. James Declaration was the first in the series of steps leading to the establishment of the IMT. Thereafter, the Moscow Declaration²⁹ provided for the punishment of war criminals, but did not address the questions of investigations and establishing a tribunal. This came up later in the London Agreement of 8 August 1945,³⁰ which recalled the St. James and Moscow Declarations. Yet the 1943 UNWCC was not institutionally linked to the IMT or the IMTFE, nor did it play the role of the investigative body for the IMT or the "subsequent proceedings" pursuant to Control Council Law No. 10 by virtue of which each of the Four Major Allies could prosecute Germans in their respective zones of occupation. One would have expected the 1943 UNWCC to be the appropriate body to carry out an overall investigative function, but lack of institutional links evidencing a certain political will, lack of resources, and bureaucratic difficulties caused the 1943 UNWCC to become a clearinghouse of information between Allied governments and governments of countries that had been occupied by the European Axis Powers. Thus, the only inter-governmental, treaty-created investigative body was relegated, for no fault of its own, to a lesser role than that expected or intended. Regrettably, the absence of political will to support this institution further eroded its moral influence over governments to cooperate in the pursuit of alleged war criminals and to prosecute or extradite such persons.³¹

Thus the two internationally established investigative bod-

28. See generally UNITED NATIONS WAR CRIMES COMMISSION, HISTORY OF THE UNITED NATIONS WAR CRIMES COMMISSION AND THE DEVELOPMENT OF THE LAWS OF WAR (1948) [hereinafter HISTORY OF THE UNWCC].

29. Declaration of Four Nations on General Security (The Moscow Declaration), 9 DEP'T ST. BULL. 308 (1943).

30. London Agreement, *supra* note 2, 82 U.N.T.S. 279, 59 Stat. 1544.

31. For example, the UNWCC had extensive evidence of crimes committed by the Italian military in Ethiopia, Libya, Yugoslavia, and Greece during the war. Overall, the UNWCC determined that 1286 accused Italians should be prosecuted by the Allies pursuant to Italy's surrender treaty. See 4 Bevens, 311 (1970); HISTORY OF THE UNWCC, *supra* note 28, at 511. The UNWCC had "dossiers" alleging violations such as the killing of innocent civilians and POWs, torture and mistreatment of prisoners, bombardments of hospitals, destruction of cultural property, and the use of poisonous gas. See CRIMES AGAINST HUMANITY, *supra* note 14, at 85. The governments of Ethiopia, Yugoslavia, and Greece requested extradition of the war criminals pursuant to Article 35 of the instrument of surrender of Italy. The occupying forces of Italy, the United States, and the United Kingdom, denied their requests. Subsequently, in 1946, the Italian government also denied the requests. *Id.* at 227-28. At the time, fear of communism was pervasive

ies, the 1919 Commission and the 1943 UNWCC, were not institutionally linked to the judicial bodies created by essentially the same powers. They were also compromised by political considerations when it suited the same powers that established them. With respect to the 1943 UNWCC, the United States wanted to control the IMT proceedings instead of allowing an international body with all of its attendant weaknesses to be in charge of such a delicate function as investigations. This was not, however, the case with the 1919 Commission, where French and U.K. military personnel were dominant and other European Allies were supportive. The 1919 Commission produced a significant amount of information whose value no one could deny. Unfortunately, the prosecutorial power was shifted by the Allies to the German Procurator General of the Imperial Tribunal in Leipzig. Thus, the merits of the 1919 Commission's investigative efforts were no longer relevant.

These historical precedents indicate that the investigations and prosecutions should not be conducted by separate bodies, particularly with respect to *ad hoc* institutions. If, however, the purpose of the investigation is independent of prosecution, either because prosecution is not impending, or because prosecution is intended to focus only on selected cases, then a separate investigative body is necessary. The need becomes particularly acute when an eventual prosecution is not likely to encompass the investigation of policies and patterns of violations in large scale victimization contexts. Thus, an independent body capable of working as a clearinghouse for government interchange, such as the 1943 UNWCC, and also capable of conducting its own investigation, as was the case with the 1919 Commission, is indeed an appropriate formula. But nothing of the sort ever developed.

Since the end of World War II, there have been two other international instruments referring to the establishment of an international criminal jurisdiction. The 1948 Genocide Convention³² provides in Article 6:

and the Major Powers believed that reform fascists of the army were the best opponents of communism. In short, political views prevailed over justice.

32. Convention on the Prevention and Punishment of the Crime of Genocide, G.A. Res. 260, U.N. GAOR, 3d Sess., U.N. Doc A/810 (1948) (entered into force Jan. 12, 1951).

Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.³³

Similarly, the 1972 Apartheid Convention³⁴ establishes in Article 5 that:

Persons charged with the acts enumerated in article II of the present Convention may be tried by a competent tribunal of any State Party to the Convention which may acquire jurisdiction over the person of the accused or by an international penal tribunal having jurisdiction with respect to those States Parties which shall have accepted its jurisdiction.³⁵

Although both conventions provide for an international means of enforcement, the States Parties have opted not to establish an international jurisdiction. Furthermore, neither the 1948 Genocide Convention nor the 1972 Apartheid Convention provides for a mechanism of investigation of the violations of their respective provisions, even in the context of referring to an international criminal tribunal or jurisdiction. In 1979, this author was asked by the United Nations to prepare a draft statute for the enforcement of the Apartheid Convention.³⁶ But the only merit of that endeavor was that it served as one of the models for the International Law Commission (the "ILC") work on the establishment of a permanent international criminal court between 1992 and 1994.

After World War II prosecutions, the General Assembly asked the ILC to elaborate a statute for a permanent international criminal court and to codify a Draft Code of Offenses

33. *Id.* at 175.

34. International Convention on the Suppression and Punishment of the Crime of Apartheid, G.A. Res. 3068, U.N. GAOR, 28th Sess., Agenda Item 53, U.N. Doc. A/RES/3068 (1973); see also M. Cherif Bassiouni & Daniel Derby, *Final Report on the Establishment of an International Criminal Court for the Implementation of the Apartheid Convention and Other Relevant Instruments*, 9 HOFSTRA L. REV. 523 (1981).

35. HUMAN RIGHTS: A COMPILATION OF INTERNATIONAL INSTRUMENTS 83 (1993).

36. *Study on Ways and Means of Insuring the Implementation of International Instruments Such as the International Convention on the Suppression and Punishment of the Crime of Apartheid, Including the Establishment of the International Jurisdiction Envisaged by the Convention*, U.N. Doc. E/CN.4/1426 (1980). See generally Bassiouni & Derby, *supra* note 34.

Against the Peace and Security of Mankind.³⁷ Since 1947, neither of these aims has yet come to fruition,³⁸ although progress by the ILC is evident.³⁹ The General Assembly at its 49th session considered the ILC 1994 Draft Statute for an interna-

37. G.A. Res. 177, U.N. GAOR, 2d Sess., U.N. Doc. A/CN.4/4 (1947).

38. For a history of the International Law Commission's efforts, see Leo Gross, *Some Observations on the Draft Code of Offenses against the Peace and Security of Mankind*, 15 ISR. Y.B. HUM. RTS. 224 (1985); D.H.N. Johnson, *The Draft Code of Offenses Against the Peace and Security of Mankind*, 4 INT'L & COMP. L.Q. 445 (1955); Sharon Williams, *The Draft Code of Offenses Against the Peace and Security of Mankind*, in INTERNATIONAL CRIMINAL LAW 109 (M. Cherif Bassiouni ed., 1985). For a Commentary on the 1991 Final Draft Code of Offenses Against the Peace and Security of Mankind adopted by the ILC, see *Commentaries on the International Law Commission's 1991 Draft Code of Crimes Against the Peace and Security of Mankind*, 11 NOUVELLES ETUDES PÉNALES (1993).

39. See *Draft Statute for an International Criminal Court: Annex to the Report of the Committee on International Criminal Court Jurisdiction*, U.N. GAOR 7th Comm., 6th sess., Supp. No. 11, at 23, U.N. Doc. A/2136 (1952). Subsequent reports of the Committee on International Criminal Jurisdiction consisted of U.N. Doc. A/2186 (1952) and U.N. Doc. A/2186/Add. 1 (1952). The discussions of the Sixth Committee and of the General Assembly until the end of 1952 encompassed all three reports (U.N. Doc. A/2136, U.N. Doc. A/2186, U.N. Doc. A/2186/Add. 1). See also *Historical Survey of the Question of International Criminal Jurisdiction*, Memorandum by the Secretary-General, U.N. Doc. A/CN.4/7/Rev. 1 (1949), reprinted in FERENCZ, *supra* note 1, at 399. The chronology of relevant United Nations documents, reports and resolutions are: G.A. Res. 1187, U.N. GAOR, 12th Sess., Supp. No. 18, at 52, U.N. Doc. A/3805 (1957) (tabling *Report of the Sixth Committee on International Criminal Jurisdiction*, U.N. Doc. A/3771 (1957)); G.A. Res. 898, U.N. GAOR, 9th Sess., Supp. No. 21, at 50, U.N. Doc. A/2890 (1954) (tabling *Report of the 1953 Committee on International Criminal Jurisdiction*); *Report of the Sixth Committee to the U.N. General Assembly considering the (Final) Report of the 1953 Committee on International Criminal Jurisdiction* (U.N. Doc. A/2645), U.N. GAOR, 10th sess., Supp. No. 9, U.N. Doc. A/2827/Corr. 1 (1954); *Report of the 1953 Committee on International Criminal Jurisdiction to the Sixth Committee*, U.N. GAOR, 9th sess., Supp. No. 12, at 23, U.N. Doc. A/2645 (1953); *Report of the International Law Commission on the Question of International Criminal Jurisdiction*, U.N. GAOR, 7th sess., Supp. No. 11, U.N. Doc. A/2136 (1951); *Report of the Sixth Committee to the U.N. General Assembly concerning the Report of the International Law Commission on the Question of International Criminal Jurisdiction*, U.N. GAOR, 5th sess., U.N. Doc. A/1639 (1950); *Report of the International Law Commission to the U.N. General Assembly on the Question of International Criminal Justice*, U.N. GAOR, 5th sess., Supp. No. 12, at 18, U.N. Doc. A/1316 (1950); *Report of the International Law Commission on the Question of International Criminal Jurisdiction*, U.N. Doc. A/CN.4/15 (1950). For current developments concerning an International Criminal Jurisdiction, see *Report of the International Law Commission*, U.N. GAOR, 49th Sess., Supp. No. 10, U.N. Doc. A/49/10 (1994); International Law Commission, *Revised Report of the Working Group on the Draft Statute for an International Criminal Court*, U.N. GAOR, 45th Sess., A/CN.4/L.490 (1993); International Law Commission, *Revised Report of the Working Group on the Draft Statute for an International Criminal Court: Addendum*, U.N. GAOR, 45th Sess., A/CN.4/L.490/Add. 1 (1993); *Report of the International Law Commission*, U.N. GAOR, 47th Sess., Supp. No. 10, U.N. Doc. A/47/10 (1992); *Report of the International Law Commission*, U.N. GAOR, 44th Sess., Supp. No. 10, at 255, U.N. Doc. A/46/10 (1991); *Report of the International Law Commission*, U.N. GAOR, 46th Sess., Supp. No. 10, at 3, U.N. Doc. A/46/10 (1994). See also *supra* note 2.

tional criminal court and requested that an inter-sessional meeting be held in April 1995 to examine the draft and report to the 50th session in the Fall of 1995. Nevertheless, the political will of governments seems to be lacking thus far.⁴⁰ The argument remains that the world is too disparate and not ready for such a global institution operating outside the political control of governments, especially the permanent members of the Security Council. But world public opinion is, on this question, ahead of governments and demands an international system of criminal justice.

II. LEGAL TECHNIQUES IN ESTABLISHING *AD HOC* INTERNATIONAL CRIMINAL TRIBUNALS

In comparison, the *ad hoc* international criminal tribunals of yesterday and today have the same goal — that of dispensing justice and punishing war criminals. Earlier tribunals, however, had their genesis in vastly different instruments. In 1919, the parties involved in World War I established a tribunal by the Treaty of Versailles and, thus, with the presumed consent of all the parties, including those defeated. After World War II, the Four Major Allies collectively established the IMT by signing the London Agreement to which nineteen other states acceded. The Allies, however, imposed the IMT on the defeated powers without their presumed acquiescence.⁴¹

General Douglas MacArthur, acting as the Supreme Commander for the Allied Powers, unilaterally created the IMTFE through a general military order.⁴² There was, therefore, no treaty, nor participation in the institution-creating process by the

40. In November 1992, the Sixth Committee of the General Assembly asked the ILC to prepare a draft statute for an international criminal court, but failed to give the ILC any direction as to the questions the Assembly wanted answered. See G.A. Res. 47/33, U.N. GAOR, U.N. Doc. A/Res/47/33 (1992); International Law Commission, *Revised Report of the Working Group on the Draft Statute for an International Criminal Court*, U.N. GAOR, 45th Sess., U.N. Doc. A/CN.4/L.490 (1993); International Law Commission, *Revised Report of the Working Group on the Draft Statute for an International Criminal Court: Addendum*, U.N. GAOR, 45th Sess., U.N. Doc. A/CN.4/L.490/Add. 1 (1993). The 1994 ILC report on an international criminal court was published in September 1994 as the *Report of the International Law Commission*, U.N. GAOR, 49th Sess., Supp. No. 10, U.N. Doc. A/49/10 (1994).

41. The IMT was presumed to be an international military tribunal but was similar to ordinary national criminal proceedings in Europe and the U.S.

42. Yet even though MacArthur, an American General, established the tribunal, the U.S. Supreme Court held that the tribunal was not a U.S. court. Rather, the

defeated party. The Tokyo tribunal, though modelled on the IMT, and appropriately called IMTFE, partook less than the IMT of the characteristics of ordinary criminal proceedings in most criminal justice systems of the world and more of a military commission or *cour martiale*. Between the establishment of the IMT and IMTFE, the occupying Allies in Germany established the basis for war crimes proceedings in their respective zones of occupation. In so doing, they relied on Control Council Law No. 10, whose legal authority was predicated on Germany's unconditional surrender. That surrender was presumed to have left the Allies, constituted as a "Control Council," as exercising sovereignty over Germany.

The establishment of the ICTFY followed yet another legal technique — a Security Council Resolution Pursuant to the Charter's Chapter VII authority.

The United Nations progressed gradually in this endeavor by first requiring the reporting of violations in Security Council Resolution 771.⁴³ Then, the Security Council established the Commission of Experts to investigate "grave breaches of the Geneva Conventions and other violations of international humanitarian law" in Resolution 780.⁴⁴ This was followed by Security Council Resolution 808,⁴⁵ which called for the establishment of an *ad hoc* war crimes tribunal for the former Yugoslavia and required the Secretary-General to submit a report on "all aspects" of the matter within sixty days.⁴⁶ No institutional links, however, were established between the Commission and the eventual tribunal.

France was first to present to the Security Council an insightful and detailed report for the attainment of international

Supreme Court maintained that the tribunal was merely created by an "agent of the Allied Powers." *Hirota v. MacArthur*, 338 U.S. 197, 198 (1948).

43. S.C. Res. 771, U.N. SCOR, 3106th mtg. at 2, U.N. Doc. S/RES/771 (1992).

44. S.C. Res. 780, U.N. SCOR, 3119th mtg. at 2, U.N. Doc. S/RES/780 (1992). See Generally, M. Cherif Bassiouni, *The Commission of Experts Established Pursuant to Security Council Resolution 780 (1992): Investigating Violations of International Humanitarian Law in the Former Yugoslavia*, 5 CRIM. L.F. 1 (1994); M. Cherif Bassiouni, *The United Nations Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)*, 88 AM. J. INT'L L. 784 (1994).

45. S.C. Res. 808, U.N. SCOR, 3175th mtg., U.N. Doc. S/RES/808 (1993).

46. *Id.* at 2.

criminal justice.⁴⁷ The report was prepared by a distinguished committee of jurists chaired by Procureur General Truche with Professor Alain Pellet, a member of the ILC, as Rapporteur.⁴⁸ Italy followed with a draft containing important textual language relating to most of the essential elements of the eventual tribunal.⁴⁹ The Commission was chaired by Professor Giovanni Conso, who later became Italy's Minister of Justice, and Professor Giovanni Grasso was the Rapporteur.⁵⁰ Then, the Minister of Foreign Affairs of Sweden submitted a comprehensive draft statute prepared by a committee of the CSCE chaired by Ambassador Corell of Sweden, now Under-Secretary-General and Legal Counsel of the U.N., with the participation of Ambassadors Turk of Austria and Thune of Norway.⁵¹ This proposal was part of a CSCE report that included substantive findings. The CSCE report was triggered on August 5, 1992, by the United Kingdom and supporting states who invoked the Moscow Human Dimension Mechanism with respect to Bosnia-Herzegovina and Croatia. Under this mechanism, the CSCE submitted several reports to the Commission of Experts.

The United States also circulated an unofficial text containing specific legal provisions covering several aspects of the prospective tribunal's statute.⁵² Additionally, Mexico presented an official report raising questions with respect to the Security

47. *Report of the Committee of French Jurists Established to Study the Establishment of an International Criminal Tribunal*, U.N. Doc. S/25266 (1993).

48. It was my privilege to have been consulted by this Commission.

49. *Statute of the Tribunal for War Crimes and Crimes Against Humanity Committed in the Territory of the Former Yugoslavia*, U.N. Doc. S/25300 (1993).

50. I had the honor of serving as a member of this Commission.

51. *Proposal for an International War Crimes Tribunal for the Former Yugoslavia*, U.N. Doc. S/25307 (Feb. 18, 1993). The CSCE text was modelled after the text of the draft statute that I had prepared and the International Association of Penal Law had published. M. Cherif Bassiouni, *Draft Statute for the Establishment of an International Criminal Tribunal*, 9 NOUVELLES ETUDES PÉNALES (1992). This draft statute was a revision of a text submitted by the International Institute of Higher Studies in Criminal Sciences (ISISC) to the *Eighth U.N. Congress on Crime Prevention and the Treatment of Offenders, Havana, Cuba, 27 August-7 September 1990*, U.N. Doc. A/Conf.144/NGO 7 (1990). It was based on an earlier draft prepared by this writer for the U.N. Commission on Human Rights, *Ad Hoc Committee on Southern Africa to enforce the Apartheid Convention of Jan. 19, 1980*, U.N. Doc. E/CN.4/1426, reprinted in 9 HOFSTRA L. REV. 553 (1981); see M. CHERIF BASSIOUNI, A DRAFT INTERNATIONAL CRIMINAL CODE AND DRAFT STATUTE FOR AN INTERNATIONAL CRIMINAL TRIBUNAL (1987).

52. There is no official document number for this circulated, but unofficial document.

Council's authority to establish such a tribunal pursuant to Chapter VII.⁵³ The Mexican position echoes *inter alia* an earlier Brazilian and Chinese concern expressed during the debate on Resolution 808 that such an approach stretches the limits of interpretation of Chapter VII of the Charter. While this concern is valid, there is no other alternative for the establishment of a tribunal with binding authority over all parties concerned as well as over Member-States. But, such an *ad hoc* initiative must be validated by the establishment of a permanent international criminal court. Indeed, a permanent court will also validate the historic *ad hoc* precedents, which only then will be seen as building blocks in the making of this new international institution. Otherwise, they will remain tainted by their *ad hoc* nature.

The Corell-Tuerk-Thune draft was the most detailed and comprehensive text submitted to the United Nations. Unlike other proposals, which viewed the tribunal as being established by the Security Council pursuant to Chapter VII of the Charter, the CSCE Committee contemplates that the tribunal would be established by a multilateral Convention. This position is understandable because the CSCE, assuming that it would sponsor such a proposal, could only establish such a tribunal by means of a treaty. This has also been the ILC's position in the formulation of its various proposals since 1951.⁵⁴ All of the other proposals submitted to the United Nations in connection with the *ad hoc* Tribunal for the former Yugoslavia were based on the Security Council's authority under Chapter VII. In no other way could such a tribunal be mandated and its orders binding upon all other Member-States.

The process of drafting the Statute of such an *ad hoc* tribunal progressed through the Legal Office of the United Nations, at the hands of skillful legal technicians and with the wide-ranging input of government officials and individual experts. The result provided was one of high legal quality though necessarily influenced by the views of certain governments.⁵⁵ This explains

53. *Views of the Government of Mexico Supplied Pursuant to Paragraph 2 of Security Council Resolution 808*, U.N. SCOR, U.N. Doc. S/25417 (1993).

54. *See supra* note 40.

55. Paragraph 13 of the Secretary-General's Report lists the following countries as submitting suggestions regarding the tribunal's statute: Australia, Austria, Belgium, Brazil, Canada, Chile, China, Denmark, Egypt, Germany, Iran (Islamic Republic of), Ireland, Italy, Malaysia, Mexico, Netherlands, New Zealand, Pakistan, Portugal, Russian

in part why the Secretary-General's report was adopted without change by Security Council Resolution 827.⁵⁶

The Security Council, however, did not want to leave open the possibility for amendments and revisions out of fear of delaying the adoption of the statute. Thus, some important clarifications and refinements of the statute were not made, leaving up to the tribunal the eventual task of clarifying certain legal issues. One unresolved issue is the omission of Additional Protocols I and II⁵⁷ to the 1949 Geneva Conventions⁵⁸ from Article 2 of the statute which restates the law of the 1949 Geneva Conventions.⁵⁹ The statute of the ICTFY is not without legal problems and *lacunae*, which hopefully the Tribunal's jurisprudence will resolve satisfactorily.

Perhaps the most crucial question is whether the competence of the ICTFY to prosecute violators of the substantive law contained in its statute can continue beyond the stage in which the conflict affects "peace and security." This is the basis for the sanctions power of the Security Council under Chapter VII. When that stage passes, however, with a peace agreement between the parties, will the ICTFY still be able to exercise its juris-

Federation, Saudi Arabia, Senegal, Slovenia, Spain, Sweden, Turkey, United Kingdom of Great Britain and Northern Ireland, United States of America, and Yugoslavia. *Report of the Secretary-General*, *supra* note 4, at 5. Switzerland submitted suggestions to the Secretary-General as well. For a list of organizations that commented on the statute of the tribunal, see paragraph 14 of the report. In paragraph 17, the Secretary-General stated that he relied upon the work of the International Law Commission as well as the aforementioned states and organizations. *Id.* at 6.

56. See S.C. Res. 827, U.N. SCOR, 3217th mtg., U.N. Doc. S/RES/827 (1993).

57. 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) (ICRC 1977); 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (ICRC 1977).

58. Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 75 U.N.T.S. 31, 6 U.S.T. 3114; Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 75 U.N.T.S. 85, 6 U.S.T. 3217; Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S. 135, 6 U.S.T. 3316; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 1949, 75 U.N.T.S. 287, 6 U.S.T. 3516.

59. See *Commission of Experts Established to Security Council Resolution 780, Final Report*, U.N. SCOR, U.N. Doc. S/1994/674 (1994) (wherein the Commission concluded that the 1977 Protocols Additional to the Geneva Conventions applied to the conflict as part of international humanitarian law, even though not specifically mentioned in Article 2 of the statute).

diction? That is a question likely to arise, and it will probably require a decision of the International Court of Justice to determine whether the sanctions power of the Security Council under Chapter VII can survive the stage of peace after the threat of "peace and security" has passed.⁶⁰

III. ASSESSING THE PROCESSES OF JUSTICE

Governments, inter-governmental organizations, non-governmental organizations, and world public attention tend to equate the judicial process in the former Yugoslavia with the experience of the 1945 International Military Tribunal at Nuremberg. The latter, however, was a unique experience and what has developed in connection with the former Yugoslavia cannot be compared with that earlier landmark experience.

Four factors characterize and distinguish the Nuremberg precedent: (1) the facts were beyond anyone's imagination as the victimization was the largest in history ever to occur; (2) the Germans were defeated and the Allies occupied Germany over which they exercised total control; (3) a documentary trail existed because Germany had a well-established military and civilian administration system that carefully recorded facts and events; (4) the IMT proceedings were to deal only with "major war criminals," and the proceedings were in fact limited to twenty-four accused persons with only twenty-two actually tried.⁶¹

The case of the former Yugoslavia differs significantly: (1) the conflict is ongoing, and no one is in complete control of the territory or capable of seizing those who would eventually be prosecuted; (2) there is no paper trail or documentary record known at this stage, and the prosecutions will, thus, at first, be essentially based on testimony with all the attendant difficulties to that type of evidence; (3) some of the parties (the FRY, the so-called "Serb Republic of Krajina," and the so-called "Bosnian Serb Republic") have not recognized the competence of the

60. See, e.g., Order with Regard to Request for the Indication of Provisional Measures in the Case Concerning Questions of Interpretations and Application of the 1971 Montreal Convention Arising From Aerial Incident at Lockerbie (Libya v. U.K.; Libya v. U.S.), 1992 I.C.J. 3, reprinted in 31 I.L.M. 662 (1992); Vera Gowlland-Debbas, *The Relationship Between the International Court of Justice and the Security Council in Light of the Lockerbie Case*, 88 AM. J. INT'L L. 643 (1994).

61. See TELFORD TAYLOR, *THE ANATOMY OF THE NUREMBERG TRIALS* (1992) (for insight into establishment of IMT).

ICTFY; (4) the ICTFY is not going to prosecute only "major" criminals, but the opposite is, in fact, more likely to be the case because the decision-makers and military leaders involved in the conduct of this conflict are the persons negotiating a political settlement and expected to support whatever peace agreement is reached.

Because of practical and evidentiary difficulties, the effectiveness of the ICTFY prosecutions will principally depend on: (1) a capable, committed and politically independent prosecutor; (2) the availability of sufficient resources; (3) the ability to secure the evidence in a timely fashion; (4) ensuring the safety of victims and witnesses; (5) effective and capable management of the Prosecutor's office;⁶² (6) adequate funding by the General Assembly; (7) political support by major governments, (8) legal cooperation with the Tribunal by all concerned governments and by those in whose countries there is evidence to be obtained and accused to be apprehended; (9) reduction of U.N. bureaucracy in the administration of ICTFY; and (10) early judicial resolution of certain thorny legal issues left open by statute.

Some of these requirements are particularly significant in testimony-driven cases, because witnesses may forget and their stories colored by subsequent events. Furthermore, witnesses tend to move from place to place, making it difficult and time-consuming to subsequently locate them, which increases costs and reduces effectiveness of the proceedings. All of these attendant factors in testimony-driven cases make the timeliness of effective investigation more significant. Delays in that stage will, therefore, imply serious consequences on eventual prosecutions.

Additionally, the more time that passes, the less likely it is that documents can be recovered and authenticated and, also, that other physical evidence can be found and preserved. In time, crime scenes change and their reconstruction becomes difficult, costly, and at times impossible.

The success or failure of the ICTFY will hinge essentially on the political will of the major powers in the Security Council and

62. The requirements of an independent and capable Prosecutor have been satisfied with the appointment of Justice Richard Goldstone of the Supreme Court of South Africa as Prosecutor. Because the Tribunal was established in May 1993, pressures are already evident on the Prosecutor to produce indictments, even though he only took office on August 15, 1994. Wilbur G. Landrey, *War Crimes Tribunal: More than a Fig Leaf?*, ST. PETERSBURG TIMES, Sept. 4, 1994, at 1A.

the European Countries where witnesses are located. But it will also largely depend on the practical considerations raised above. The additional problems posed by the United Nations bureaucracy, which impact upon the work of the prosecutor's office, and the limited resources available in the face of the needs arising out of such large scale victimization increase the difficulties faced by the ICTFY.

The Prosecutor of the ICTFY will also have to contend with a number of other issues. Two of these are particularly significant. The first concern is how to enforce ICTFY orders for the surrender of accused violators when a party to the conflict refuses to do so. The only available means is for the Security Council to impose sanctions. But sanctions already exist, thus what more can be done? Furthermore, if sanctions are lifted as part of a peace agreement, it is unlikely that they may be reimposed to enforce ICTFY orders. The second difficulty may arise if the parties, in their peace agreements, include a provision allowing that each party will prosecute its own alleged violators. This has already been considered and tested in the October 1993 Agreement mediated by Lord David Owen between Fikret Abdic, acting as leader of the self-proclaimed autonomous region of Bihac, and Radovan Karadzic, the leader of the Bosnian Serb Republic. The Agreement was signed in Belgrade under the watchful eye of President Milosevic of Yugoslavia. The ICTFY can theoretically override sham national prosecutions. But is that a likely possibility?

The cumulative effect of all these factors is that the ICTFY faces many legal, practical, and political hurdles.

CONCLUSION

Politicians and diplomats responsible for setting up bodies mandated to investigate and prosecute violations of international humanitarian law often lack experience in criminal matters. A prosecutor's lack of experience in international and comparative criminal law and procedure can affect the work and results of the mandated bodies. Prosecutorial teams consisting of persons from different legal systems require "team building" and a great deal of guidance and direction as to the substantive and procedural legal issues as well as the many questions of how to do things in truly international endeavors. The lack of clarity

in the applicable substantive law of *ad hoc* tribunals and their potential for violating the principles of legality are also significant hurdles to overcome.

Trials can always occur at different times and places, but without the evidence, future trials are made more difficult, if not impossible. Thus, the most effective way of politically compromising justice is to administratively and financially delay or obstruct the investigative stage.⁶³ The obvious reason is that timely investigations can lead to politically undesired results. Indeed, the investigation of the alleged criminal conduct by military and political leaders who are essential to achieving a peaceful political settlement in a given conflict can impede the political process. This situation highlights the dilemma of pursuing political settlements while concurrently seeking to obtain justice. The two goals are, to say the least, incongruent. Pursuing these two goals contemporaneously is likely to result in compromising justice in favor of political settlements. That is indeed why so many international and non-international conflicts have resulted in *de jure* or *de facto* immunity for the leaders, as well as most of the perpetrators of international humanitarian law and international human rights law violations.

As time passes, the zest for justice diminishes and world public opinion loses its interest in international justice. That is when a certain pragmatic realism devoid of moral-ethical values overtakes the goal of pursuing justice. In the end, political leaders who prefer political settlements to the pursuit of justice can profess support for international justice without incurring its political liabilities.⁶⁴

This well-known scenario has been in the making in connec-

63. By separating the investigative from the judicial bodies, the work of the former may be disregarded by the latter, thereby fostering duplicating efforts. And when limited results are obtained by reason of non-reliance by prosecutorial or judicial bodies on the prior work of investigative bodies, the funding sources may tire and reduce their future support.

64. This is what leads some thinkers to believe that a more realistic goal than that of international criminal justice is the establishment of "truth commissions." Herman Schwartz, *What Can We Do About Balkan Atrocities?*, N.Y. TIMES, April 9, 1993, at 27A. "[T]ruth commissions" serve a useful purpose where one or a few facts need to be ascertained, like in the El-Mozote mass killing in El-Salvador and the murder of the Jesuit priests in that country. See *Commission on Truth for El Salvador, Annex to Report*, U.N. SCOR, U.N. Doc. S/25500 (1993). When it comes to large scale victimization, however, there is no substitute for careful and impartial criminal investigations.

tion with the pursuit of justice in the former Yugoslavia, undaunted by the criticism of those who believe that international justice should not be compromised by political objectives. Regrettably, this scenario has happened so frequently in connection with different conflicts that it has become a practice by political leaders and diplomats who consider justice as a trade-off for peace.

But allowing violators of international humanitarian law to benefit from *de jure* or *de facto* immunity enhances further violence and reduces deterrence. The consequences are increased violence in international relations and also increased manifestations of international and domestic criminality. Because all violence is on a continuum, what is permitted to go uncontrolled at one end of the continuum affects all other parts.

Every conflict brings painful reminders of the need for a permanent international criminal court,⁶⁵ or at least for a permanent international investigative body. The complacency of government leaders consistently results in inaction, compelling the need for occasional *ad hoc* tribunals that necessarily have ethical weaknesses and present other legal and practical difficulties.

As a prelude to the establishment of a permanent international criminal tribunal, the creation of this *ad hoc* Tribunal is both a test and a challenge that should not be allowed to fail. Any such failure or discrediting of the ICTFY will encourage rather than deter future violators of international humanitarian law. Establishing an *ad hoc* international criminal tribunal to try the authors of war crimes in the former Yugoslavia symbolizes the United Nations' dedication to the rule of law and the international legal order. Now, the world community must face the challenge of vesting that tribunal with the political support, resources, and other means necessary to bring justice to bear on those who transgress international humanitarian law.

65. After the Gulf Conflict militarily ended in 1991, there were demands for an *ad hoc* war crimes tribunal to try Saddam Hussein and some Iraqi military personnel, but nothing came of it. This was not, however, the case for Cambodia's Pol Pot and Khmer Rouge, who are responsible for an estimated two million deaths. See *War Crimes: Hearing Before the Subcomm. on Immigration, Refugees, and International Law of the House Comm. on the Judiciary*, 102d Cong., 1st Sess. 26-32 (1991) (statement of M. Cherif Bassiouni, Professor of Law, DePaul College of Law); *id.* at 44-56 (statement of Howard Levie, Professor Emeritus of Law, St. Louis University); *id.* at 64-73 (statement of John Norton, Professor of Law, University of Virginia); *id.* at 10-15 (statement of Telford Taylor, Brigadier General Ret. and Professor of Law, Cardozo Law School).

Until a clear-cut value-judgement is made to establish a permanent system of international criminal justice free from interferences and manipulations by those who are engaged in the political processes, the world community will be condemned to compromise justice and undermine the moral-ethical foundation of international relations.

Above all, it must never be forgotten that without justice, there can be no peace because peace is reconciliation between people and not a political settlement between leaders. For reconciliation between people to occur, there must be impartial, even-handed, and fair justice based upon the truth.