

International Criminal Courts:  
The Legacy of Nuremberg

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//// (Footnote: J.D. Harvard Law School, 1943; former Prosecutor, Nuremberg war crimes trials. The Sloan Lecture was delivered extemporaneously on November 17, 1997. This article reflects the main points covered in the lecture and is updated to include developments to the end of 1997.)////

## INTRODUCTION

Since Professor Emeritus Blaine Sloan is a dear and admired friend who recruited me to serve as an Adjunct Professor at Pace Law School, it is a particular pleasure to be invited to deliver the annual lecture that bears his name. It is a singular honor to follow Sloan Lectures by my friends Robert Rosenstock, now a member of the International Law Commission, Professors Oscar Schachter, and Louis Henkin of Columbia, Michael Reisman of Yale and Stephen Schwebel, now President of the International Court of Justice, as well as other noted and distinguished scholars of international law. The topic I shall address is a contentious one but upon its successful resolution may depend the future safety and welfare of humankind.

## PRELUDE TO NUREMBERG

### 1- Early Roots

International law itself is of relatively recent origin. True it is that Plato and Aristotle and universalist scholastics like St. Augustine and Thomas Aquinas discussed the legality or illegality of war but these were futuristic musings more than reflections of an existing legal system. Hugo Grotius - "the father of international law" - recognized that peace and justice go hand in hand. He warned, in 1646, that "...the state which transgresses the laws of nature and of nations cuts away also the bulwarks of its own future peace." At the end of the 18th century, Immanuel Kant, Jacques Rousseau and other philosophers authored plans for perpetual peace but it was Jeremy Bentham who is credited with first use of the expression "international law" - little more than two-hundred years ago.

The American revolution ushered in a dramatic era in the rule of law. Building on the emerging ideas of liberty and democracy, thirteen independent colonies in America cast off the yoke of the British crown and adopted a new legal system to regulate independent states with widely different social and political

views. The people who adopted the Constitution agreed that it was necessary that many rights of sovereignty had to be ceded to a central government strong enough to execute its own laws by its own tribunals. The Constitution gave Congress broad authority to define and punish "Offenses against the Law of Nations". Ideas that inspired the legal system that had been evolving over centuries were gradually developed by experience and judicial interpretation. Paradoxically, acceptance of legal restraints opened liberating new horizons for humankind.

Just about one hundred years ago, in 1899, twenty-six sovereign states convened in the Hague in what was called "The International Peace Conference." The convocation was intended to end an unbearable arms race between Russia and France. Aside from hortatory declarations, the Hague conferees were not ready to curb their options to resort to force or to empower any impartial authority to maintain the peace. They did manage to agree upon a Convention with Respect to the Laws and Customs of War on Land. Upon closer examination, it did not inhibit war but merely urged future combatants to kill themselves in a more humane manner. It's preamble proclaimed that "population and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity and the requirements of the public conscience." What that meant was not spelled out and some of the "First Peace Conference" participants were soon killing each other in the same old way.

Because the Russians and Japanese were at war, the Second Hague Peace Conference had to be postponed. It was convened in 1907 and by that time, the number of states participating was increased to forty-four. The United States delegation, instructed by its distinguished Secretary of State Elihu Root, spoke out forcefully, as it had in 1899, in favor of settling international disputes by binding arbitration or judicial process. But, the call for third-party settlements was coupled with exceptions if the U.S. felt the issues involved "vital interests, independence and honor" or "purely American questions". Other nations expressed even more reservations about accepting independent judicial authority. No serious consideration was given to the thought expressed by some that there should be an international criminal court. As French diplomat and Nobel Prize winner Le'on Bourgeois, who had been at both Hague conferences, said: "We did not see clearly enough that in the society of States just as in relations of individuals there is no lasting peace without juridical organization..." ////(For cite see ICC p.14)

## 2- World War I

The first major effort to curb international crimes by international law arose after World War I. In 1914, Europe, divided by competing military alliances was a powder keg waiting to explode. The fuse was lit when a Serbian nationalist assassinated Austrian Archduke Francis Ferdinand on the bridge at Sarajevo. Lacking any institution with authority to maintain peace, the disputing parties had no choice but to call upon their allies and resort to force. Without effective international law, the only alternative was war.

Germany launched an attack across the neutral territory of Luxembourg and Belgium. Soon the world was engulfed as twenty-three nations went to war against Germany and its allies. Despite ambiguous restraints enunciated in the Hague Conventions of 1889 and 1907, improved techniques and implements of warfare became more devastating than ever before. New weapons, such as tanks, planes, dirigibles and submarines, expanded the target areas and victimized civilian populations that were supposed to have been protected. Germany's use of poison gas and sinking of hospital ships evoked cries of outrage. By the time the war ended, losses were estimated at ten million soldiers dead, ten million civilians dead, twenty million dead from epidemic or famine and twenty million more wounded. All hearts cried out for a more peaceful world.

Reconciliation could not even begin without first bringing to justice those individuals whose unconscionable atrocities had violated "the laws of humanity" and who had been responsible for starting the war itself. The five victorious powers (France, England, Italy, the United States and Japan) convened a Peace Conference in Versailles in 1919 and appointed a 15-member Commission to Consider the Responsibility of the Authors of the War. After investigation and due deliberation, the Commission, chaired by U.S. Secretary of State Robert Lansing, concluded : "All persons belonging to enemy countries, however high their position...who have been guilty of offenses against the laws and customs of war or the laws of humanity are liable to criminal prosecution." ////(For cite see ICC p.177)////

Although the Commissioners held that Germany had declared war in pursuance of a policy of aggression, they felt that a trial on that issue would be very prolonged and difficult since

international law had not yet advanced to a stage where a premeditated war of aggression ("which the public conscience reproveth and which history will condemn") could be treated as a punishable offense under established law. The Americans, in particular, argued that no international court had ever before tried a sovereign head of state for aggressive war. For the future, however, the Commissioners recommended that penal sanctions be provided "for such grave outrages against the elementary principles of international law." //(((For cite see ICC p.27.)

To avoid allegations of ex post facto law, the German Kaiser was not charged with aggression but, instead, the Treaty of Versailles provided that he would be arraigned "for a supreme offense against international morality and the sanctity of treaties." Other Germans who had committed war crimes or atrocities would be handed over for trial by allied courts. But Germany refused to honor the treaty and Holland, noting that there was no competent international criminal court available to act on the basis of existing statutes making aggression by a sovereign punishable, refused to extradite the Kaiser - and he was never tried for anything. German officers who committed atrocities were not handed over either and got off with light sentences by a German court. The effort to deter aggression and war crimes by international law after World War I had gotten off to a slow start.

Although world public opinion strongly favored President Woodrow Wilson's proposal for a League of Nations, isolationist sentiment by a minority of U.S. Senators blocked ratification of the Treaty and the United States was unable to join the League. Hoping that it might be able to become a member later, the U.S. became involved in all important League deliberations. Determined to seek future peace through law, the League appointed an Advisory Committee of Jurists to draw up plans for the creation of a Permanent Court of International Justice. The Jurists, included Elihu Root and his very able assistant Dr. James Brown Scott, who had recommended such a court at the Hague Peace Conference in 1907.

The eminent Jurists favored an international arbitral court with compulsory jurisdiction and Mr. Root proposed that consideration also be given to the establishment of a High Court of International Justice "to try crimes against international public order and the universal law of nations." The idea of establishing such a criminal court before rather than after the

crimes occurred had considerable appeal. But several members first wanted to know which crimes would be prohibited by "the universal law of nations". Root argued that definitions could be developed as the court expanded its jurisdiction. He asked the key question: "Are the Governments of the world prepared to give up their individual sovereign rights to the necessary extent?"  
/////(For cite see ICC p.38) The rhetorical question was left unanswered. Unfortunately for humankind, Elihu Root's 1920 suggestion that an international criminal court be created was quietly brushed aside by the political leaders of the major powers.

A host of distinguished legal experts from all parts of the world continued to argue strongly for an international court with compulsory jurisdiction and a criminal court that could hold individuals responsible for acts that violated the peace and security of humankind. The Assembly of the League of Nations declared that "a war of aggression can never serve as the means of settling international disputes and is, in consequence, an international crime." ////(For cite see ICC p.45) The Kellogg-Briand Pact renouncing war as an instrument of national policy was signed in Paris in 1928 by most nations. That same year, the Pan-American Conference declared that " a war of aggression constitutes a crime against mankind." ////(id.) But nothing was done to create a criminal court to punish the perpetrators of the most serious of international crimes. In diplomatic chambers the whisper was heard: "The time is not yet ripe." Humankind would pay dearly for the indecision of the decision-makers.

### 3- World War II

Germany began to rearm and nations of Europe, clinging to old traditions, formed new military alliances as the preferred means to maintain peace. When King Alexander of Yugoslavia and the French Foreign Minister were assassinated by a Croatian nationalist while the King was on a visit to Marseilles in 1934, the world was rocked by outrage. But the League seemed unable to calm the nations involved, and memories of 1914 evoked great fears. France quickly drafted legal conventions to prohibit such acts of terrorism and to establish an international criminal court to try offenders. The drafts were considered and revised by members of the League in preparation for a Diplomatic Conference expected in 1937 - presumably to approve the convention and create the court. By that time, however, passions had cooled. The only state to ratify the revised terrorism convention was India. No state ratified the Convention for an International Criminal

Court. - not one! Inaction was an invitation to pending disaster.

Japan, after invading Manchuria, in violation of the Covenant of the League and the Kellogg Pact, had shown its contempt by walking out of the League in 1934. Italy committed brazen aggression against Ethiopia in 1935. The limited economic sanctions finally applied by hesitant France and England were too little and too late. In March 1938, German troops invaded Austria and in 1939 began their march of conquest over Europe. The League was helpless. Behind the Blitzkrieg of the German tanks, Nazi extermination squads killed without pity or remorse every Jew, Gypsy or perceived adversary they could lay their hands on. In defiance of the accepted rules of the Hague Conventions, millions of civilians were forced into slave labor, millions of prisoners-of-war were murdered or starved to death while many millions more were simply annihilated in gas chambers and concentration camps. In 1941, Japan attacked the United States in a sneak bombardment at Pearl Harbor. Japanese troops engaged in massive atrocities in all areas they occupied. It would require complete military defeat and unconditional surrender before anything could be done to bring the German and Japanese war criminals to justice.

#### 4- Germany is Warned

The leaders of the United States, and Great Britain, beginning in 1941, repeatedly issued public warnings that German violations of the rules of international law would be punished and that superior orders would be no defense. A public declaration in London on January 12, 1942 by the "governments in exile" of nations overrun by the Nazis made clear that one of the principal aims of the war was "the punishment through the channel of organized justice, of those guilty or responsible for these crimes." Fact-finding Commissions were established and it was made abundantly clear to all who wanted to see that it was the Allied intent to bring to justice those who flouted established laws of humanity. The British government assumed that it was beyond question that Hitler and a number of other arch-criminals, including Italy's Dictator Mussolini, would suffer the death penalty. Rather than try such leaders in a long judicial proceeding, the British (noted for "fair play") felt that "execution without trial is the preferable course." ////(For cite see ICC p.450) The United State (noted for its "wild-west") preferred the rule of law.

Secretary of War Henry Stimson, a former Wall Street lawyer, persuaded President Franklin D. Roosevelt that only those who had

been found guilty beyond doubt in a court of law should be punished. The Soviet Government favored trials before special international criminal tribunals. Roosevelt and Britain's Prime Minister Winston Churchill spoke out clearly and eloquently, calling upon the German people to resist Hitler's crimes and leaving no doubt of the Allies intent to place on trial those leaders who were responsible for the aggressions and atrocities being committed.

Allied radio and press condemned crimes by the Japanese - their slaughter and rape of the Chinese at Nanking and the brutal torture and murder of civilians and American soldiers and fliers. The German people were explicitly told on March 24, 1944 that there would be an accounting for "the systematic murder of the Jews of Europe." Yet, the crimes continued unabated. It could not, have come as a surprise to any of the German or Japanese defendants to find themselves in the dock after the war and to have to answer for their deeds in a court of law.

## THE NUREMBERG TRIBUNALS

### 1- The International Military Tribunal (IMT)

It took just about six weeks of negotiation in London for the victorious allies, each represented by distinguished jurists, to reach agreement on a Protocol for establishing the International Military Tribunal and defining its jurisdiction, powers and general procedures. Only three categories of crimes were to be punished:

- 1- Crimes against Peace (planning, preparing and waging aggressive war),
- 2- War Crimes (condemned in Hague Conventions of 1899 and 1907) and
- 3-Crimes Against Humanity (such as genocide) which by their magnitude shock the conscience of humankind.

Each provision of the 30-articles was carefully considered in order to reach an accord that seemed fair and acceptable to the four partners representing the United States, Great Britain, France and the Soviet Union. On the eighth day of August 1945, the Charter was signed and the first International Military Tribunal in the history of humankind was thereby inaugurated.

On October 18, 1945, twenty-four major Nazi war criminals were accused of conspiracy to commit Crimes against Peace, War Crimes and Crimes against Humanity, as detailed in the indictment.



A Chief Prosecutor had been appointed for each of the four victorious powers. The Chief Prosecutor for the United States, and the principal architect of the London Charter, was Robert H. Jackson, on leave from the U.S. Supreme Court. He set the tone and goals:

"That four great nations, flushed with victory and stung with injury stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of the law is one of the most significant tributes that Power has ever paid to Reason...We must never forget that the record on which we judge these defendants today is the record on which history will judge us tomorrow. To pass these defendants a poisoned chalice is to put it to our own 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." ////(cite R. H. Jackson, *The Case Against the Nazi War Criminals* (NY, Knopf, 1946, pp.3-7)////

And so it did !

The trial was open for all to see. The record, in four languages, was available for all to read. The defendants were represented by able counsel of their own choosing. The judgment, handed down a year after the trial began, was clear, comprehensive and persuasive. It was rendered by prominent jurists of high calibre. The accused men, who were responsible for the cruelest crimes ever seen on the face of the earth, were given the kind of a trial which they, in the days of their pomp and power, never gave to anyone. It has withstood the test of time as a fair articulation of evolving international law.

In its comprehensive Judgment, the Tribunal traced the history of international criminal law and the growing recognition in treaties, conventions and declarations, that aggressive war was an illegal act for which even a head of state could be brought to account. There was no longer anything ex post facto about such a charge. Leaders who deliberately attacked neighboring states without cause must have known that their deeds were prohibited and it would be unjust to allow them to escape merely because no one had been charged with that offense in the past. "The law is not static" said the Tribunal, "but by continued adaptation follows the needs of a changing world." Aggressive war was condemned as "the supreme international crime." ////(For cite see ICC p.72-73)////

The evidence, based in large part on captured German records, was overwhelming that crimes of the greatest cruelty and horror had been systematically committed pursuant to official policy. The IMT, citing the Hague Conventions and prevailing customs of civilized nations, rejected Germany's argument that rules of war had become obsolete and that "total war" was legally permissible. Regarding Crimes against Humanity (such as extermination and enslavement of civilian populations on political, racial or religious grounds,) the law took another step forward on behalf of humankind - a step that was long overdue. The findings and judgment of the IMT helped to usher in a new era for the legal protection of fundamental human rights.

The lead IMT defendant, Field Marshal Hermann Goering, after he was sentenced to be hanged, committed suicide. Hitler's Deputy Martin Bormann, who had mysteriously disappeared, was sentenced to death, in absentia. Other defendants were hanged or sentenced to long prison terms. Some were acquitted and released. The Charter was adhered to by nineteen other nations and both Charter and Judgment of the IMT were unanimously affirmed by the first General Assembly of the United Nations. They have become expressions of binding common international law.

## 2- Twelve Subsequent Trials at Nuremberg

As the trial against Goering et al. was drawing to a close, it was recognized that Nazi crimes of such enormity could only have been committed in collaboration with large segments of German society. The four Allies, however, were unable to agree on joint subsequent trials. As a compromise, the quadripartite Control Council that governed Germany enacted a law authorizing each of the four Powers to carry on with such prosecution in its own zone of occupation as it might see fit.. The United States decided to conduct a dozen subsequent trials in the Nuremberg courthouse.

The London Charter of the IMT, supplemented by Control Council Law number 10, provided the jurisdictional basis for the subsequent proceedings. The defendants included German doctors responsible for illegal medical experiments, lawyers and judges who had perverted their oaths and distorted law for Nazi advantage, high-ranking Wehrmacht and SS officers who were responsible for a host of atrocities, leaders of the Foreign Ministry who had aided and abetted Nazi plans for illegal conquest and industrialists who treated concentration camp inmates in their employ as "less than slaves." ////(cite B. Ferencz, LESS

THAN SLAVES (Harvard, 1979)////

The Chief of Counsel for the twelve subsequent Nuremberg trials was Brigadier General Telford Taylor, a Harvard Law School graduate who had served with Justice Jackson. (We later became law partners in New York and Taylor went on to become Emeritus Professor at Columbia Law School and Yeshiva University.) In his 1949 "Final Report to the Secretary of the Army," General Taylor emphasized that the most important crime within the jurisdiction of the Nuremberg tribunals was war-making itself. In the "Ministries Case" it was held that the German conquest of Austria and Czechoslovakia (nations that surrendered without firing a shot,) constituted a crime against peace. Not only was it held to be criminal to conquer another country by military force, but it is no less a crime to conquer by overwhelming military threats.

It was also made clear in Control Council Law No. 10 and some of the subsequent judgments (Einsatzgruppen and Hostages cases) that, contrary to the view of the IMT, Crimes against Humanity "are crimes against international law even when committed by nationals of one country against their fellow nationals or against those of other nations irrespective of belligerent status." Taylor correctly noted that the main achievement of additional war crimes trials was the further clarification and elucidation of international law. He cautioned that unless governments seriously endeavored to establish a permanent international penal jurisdiction, and to take steps to enforce the Nuremberg principles, the Germans would conclude (erroneously) that Nuremberg was "for Germans only."

Please allow me a personal aside. General Taylor designated me the Chief Prosecutor for what was known as the "Einsatzgruppen Case." Twenty-two defendants were indicted in that trial - and convicted - of murdering over a million people. Thirteen of the accused, including six SS Generals, were sentenced to death; the others to prison terms. Relying on captured top secret German reports, I was able to rest the prosecution's case after only two days. The defense, with its alibis, denials and excuses, went on for months before being refuted. A brief extract from the Opening Statement may reflect the spirit that animated the prosecution:

May it please your Honors:

It is with sorrow and with hope that we here disclose the deliberate slaughter of more than a million innocent and

defenseless men, women and children. This was the tragic fulfillment of a program of intolerance and arrogance. Vengeance is not our goal, nor do we seek merely a just retribution. We ask this Court to affirm by international penal action man's right to live in peace and dignity regardless of his race or creed. The case we present is a plea of humanity to law...//////Cite TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS, Vol. IV, The Einsatzgruppen Case (US Gov't, 1949) p.30.)

After detailing some of the crimes committed by each defendant, I concluded with the warning :

The defendants in the dock were the cruel executioners, whose terror wrote the blackest page in human history. Death was their tool and life was their toy. If these men be immune, then law has lost its meaning and man must live in fear.

Those words were spoken in the Nuremberg courtroom on 29 September 1947. I was then 27 years old. It was my first case. Fifty years later, on 18 September 1997, my warning was quoted by President Antonio Cassese of the International Criminal Tribunal for Yugoslavia in concluding his annual Report to the General Assembly of the United Nations. I am still making "a plea of humanity to law" - a plea for a permanent international criminal court which will deter aggression and other crimes against humanity so that people everywhere may live without fear in peace and human dignity.

## WAR CRIMES TRIALS AFTER NUREMBERG

### 1- Tokyo and Other Trials

The International Military Tribunal in particular, and the twelve subsequent trials at Nuremberg, laid the basic foundations for the later development of international criminal law. No sooner was World War II brought to a halt than the United States army conducted a number of war crimes trials held, symbolically, in the former German concentration camp at Dachau. ////(CITE: I was a war crimes investigator during World War II and, as a Sergeant of Infantry, entered several concentration camps to collect evidence of the atrocities committed there. The searing horrors I witnessed certainly enhanced my determination to help create a more humane world.) The defendants put on trial by the U.S. army (even before the Nuremberg trials began) were captured Nazi officers and guards accused of responsibility for crimes

committed in the camps. Also indicted were Germans who had committed atrocities against captured Allied prisoners of war. These proceedings were in the nature of traditional courts-martial or military commissions enforcing customary rules of war.

Similar war crimes trials took place in the zones occupied by the British, French and Soviet military governments. Many suspects were returned to the scene of their crimes to stand trial. The post-war German governments (East and West) later conducted a large number of "denazification" proceedings, war crimes investigations, and a considerable number of prosecutions against their own nationals. With the passage of time, such proceedings became increasingly difficult, and the number of convictions waned - as did the severity of sentences. Nonetheless, the published decisions, of varying quality and durability, added to the growing body of war crimes law and precedents.

Programs of restitution and compensation to Nazi victims, particularly by the West German government, helped to bring a measure of recompense to the victims. It was my privilege to direct the U.S. Military Government program to recover heirless property and to use the proceeds for the benefit of survivors. I helped to negotiate the so-called "reparations treaty" between West German, the State of Israel and a consortium of major Jewish organizations that I represented as Counsel. In that capacity, I organized and directed a vast legal-aid network throughout the world to assist needy Nazi victims with their compensation claims. These efforts helped to diminish bitterness and hatreds by demonstrating that - whatever may have been the shortcomings - an historic initiative was being taken to redress some of the injuries. Coupled with the attempt to bring major criminals to justice, the restitution efforts helped to create an atmosphere more conducive to future peace.

While the Nuremberg trials were still in progress, a similar trial against Japanese Ministers, Ambassadors, Admirals and Generals was taking place in Tokyo. General Douglas MacArthur, as Supreme Commander for the Allied Powers in the Far East, appointed military tribunals to try Japanese leaders accused of aggression, war crimes and crimes against humanity. The court was composed of judges from eleven countries that had been at war with Japan. The trial before the IMT for the Far East (IMTFE) lasted more than two years and was the biggest trial in recorded history. All of the accused were found guilty and seven were sentenced to hang.

There were several dissenting opinions. Judge Pal of India argued that none of the defendants should have been convicted since all nations and leaders should share some responsibility for the war and its inevitable consequences. His thoughtful opinion argued that human compassion was an integral part of justice - reflecting the feeling that war breeds criminality and the only effective way to achieve justice is to maintain peace.

For many of the Japanese, the trials in the Far East were considered more vengeance than justice. They pointed to the atomic bombings of Hiroshima and Nagasaki as manifestations of U.S. inhumanity and hypocrisy. The residue of such sentiments continues to this day. Japan's leaders honor their war heroes but fail to compensate victims of Japanese atrocities. Post-war Germany provided over one hundred billion DM to indemnify victims of Nazi persecution. The United States provided compensation to its citizens of Japanese descent who were unlawfully interned as security-risks after the Japanese attack on Pearl Harbor. But the post-war Japanese governments have not yet fully come to grips with their past. They have even failed to provide compensation to the many women from occupied territories who were abducted to become what the Japanese euphemistically call "comfort women." There is nothing comfortable about being forced to submit to mass rapes in bordellos provided as recreation for Japanese soldiers. This shameful chapter of Japanese history has yet to be adequately redressed. Creating a world of justice and peace requires more dedication and effort than has thus far been demonstrated. Of course, victims of crimes against humanity, wherever they may be, should - as far as possible - be entitled to appropriate compensation from those who caused the injury.

The Nuremberg tribunals were dissolved and the Prosecutors went home. Only a small sampling of criminals (less than 200) could be brought to justice in the thirteen Nuremberg trials. It had been the pledge of both Justice Robert Jackson and General Telford Taylor, speaking as authorized representatives of the United States, that these trials were never intended to be "victor's justice" but were meant to marshal in a new era which made aggression, crimes against humanity and war crimes punishable under binding international law that would apply equally to all nations and their leaders. The instrumentality most competent to consider the implementation of this promised new rule of world law was the United Nations.

2- Codification of Law via the United Nations

The first General Assembly of the new U.N. unanimously affirmed the legal principles laid down in the Charter and Judgment of the IMT: aggression, war crimes and crimes against humanity were punishable crimes for which even a head of state could be held to account. Superior orders would be no excuse but could be considered in mitigation. Inspired by the horrors revealed at the Nuremberg trials, the Assembly promptly passed another resolution calling for a convention to prohibit and punish the crime of genocide - by such tribunal as might later prove acceptable to the parties. Experts were soon designated to draw up a Code of Crimes against the Peace and Security of Mankind and to draft statutes for an international criminal court to punish such offenses.

Committees of distinguished jurists from many nations began to codify international penal law and to consider the establishment of a permanent international criminal court. Nations with different legal systems, cultures and perceptions had differing views as to what was appropriate, desirable or possible. Comprehensive drafts were debated in 1951 and 1953 but cold-war rivalries plus the reluctance of states to curb their sovereignty blocked effective action. The old excuse again heard from diplomats was that "the time was not yet ripe." The United Nations, of course, was completely dependent upon its sovereign state members. Many experts agreed that the differences could have been reconciled if there had been sufficient political will to do so. But, unfortunately, that decisive political ingredient was absent. The situation was further exacerbated by the "cold-war" between the capitalist United States and the communist Soviet Union and their respective allies. The result was that progress was stymied and the desired consensus was beyond reach.

To justify the inaction, it was argued that there was no need for an international criminal court until there was agreement on the code of crimes to be enforced by the court. Furthermore there was no possibility of agreeing on the code unless there was agreement on the definition of aggression - which was the most serious of all international crimes. Without such a definition there could be no code of crimes and without a code there was no need for a court. The only thing left to do was to try to reach agreement on the definition of aggression - that took about 25 years.

As the cold-war thawed, it was possible for the U.N. to reach a consensus definition of aggression in 1974. It wasn't a very

good definition since, in order to reach consensus, it was necessary to include several clauses of such deliberate ambiguity as to allow states to by-pass the apparent restraints.////Cite: B. Ferencz, "The United Nations Consensus Definition of Aggression: Sieve or Substance" 10 J. of Int.. L. and Eco., Dec. 1975 pp. 701-724)///// The definition was intended as a guide to the Security Council that was vested with U.N. Charter responsibility for determining when aggression had occurred. In fact, the definition confirmed that only the Security Council had authority to determine that fact. The Council never relied on the definition and it was later argued that the definition lacked the precision required by a penal statute These flaws would not have been insurmountable had states really been willing to abandon aggressive war as an instrument of national policy - as required by the Kellogg-Briand Pact of 1928, and the U.N. Charter. But, all that could be achieved at that time was a willingness to resume work on the draft code of crimes and the international criminal court that had been lying idle. The International Law Commission, a body of supposedly independent experts - not noted for their speed - was asked to resume work on those moribund projects. In the meanwhile, the world went back to killing as usual.

### 3- International Crimes Continue Unabated

There is no need to recount here all of the instances since the end of World War II when nations and armies resumed their aggressions, crimes against humanity and war crimes. Since the U.N. Charter proclaimed its primary purpose: "to save succeeding generations from the scourge of war," over 100 million people have been killed in over a hundred armed conflicts around the world. . One need only mention names like Pol Pot, Idi Amin, Saddam Hussein and many others to conjure up images of Hitler, Himmler, and Stalin. Korea, Vietnam, Cambodia, Iran, Iraq, the Middle-East, Africa, Latin America, Europe, Afghanistan and many other places became killing fields where enormous numbers of innocent people were massacred, subjected to crimes against humanity and victimized by aggressions and war crimes while the international community stood helplessly by and let it happen - to their everlasting shame!

When Iraq committed brazen aggression by attacking its friendly neighboring Arab state of Kuwait, the United Nations Security Council - spurred by the United States with its enormous oil interests in the area - finally did what it was supposed to do under the U.N. Charter When its many resolutions, calling upon



Iraq to desist, were scorned, a flurry of new resolutions authorized an international military force (led by the United States) to use all necessary means to drive out the aggressors. After Iraq was routed, the Council imposed a host of new conditions and sanctions designed to secure peace in the area in future. These included reparations to those who had been injured.

What was glaringly absent was U.N-authorized action to bring to justice those who were responsible for the aggression, the crimes against humanity and the clear violations of the laws of war that accompanied Iraq's unlawful invasion of Kuwait. As should have been expected, the world community has had nothing but grief from Iraq ever since. Instead of following the Nuremberg principle of punishing only the guilty after a fair trial, economic sanctions were imposed on the civilian population of Iraq - many of whom might have disagreed with the aggressive policies of their government. Saddam Hussein, Iraq's despotic leader, remains at the head of the government and thumbs his nose at the world community's efforts to curb his production of weapons of mass destruction.. The lessons of Nuremberg seemed to have been forgotten.

The situation changed when, following the dissolution of the Soviet Union, former multi-ethnic Yugoslavia fell apart. Rival ethnic groups declared their independence as sovereign states and, around 1991, sought to unify or expand their national territories by force. Television broadcasts in 1992 vividly portrayed concentration camps in Bosnia and Serbia the likes of which had not been seen since Buchenwald and Dachau. Reliable newspapers reported that thousands of Moslem women were being systematically raped and then murdered by Croats or Serbs determined to clear the area for their own groups. A new phrase was coined - "ethnic cleansing" - to describe the brutal driving out of ethnic minorities from regions claimed by those of different religious persuasion or origin. There is nothing "clean" about the filthy practice reminiscent of Nazi genocide against Jews, Gypsies and others. Nor were the crimes limited to one side only. Finally - unfortunately too late to prevent the crimes - the Security Council decided to act.

#### 4- The Security Council Intervenes

In 1992, the Security Council established a Commission of Experts to investigate evidence of violations of humanitarian law in the territory of the former Yugoslavia. Its Chairman, Professor M. Cherif Bassiouni of DePaul University, a distinguished expert

on international criminal law, managed (under very difficult circumstances) to amass an enormous amount of evidence to document the reported atrocities. It was no longer possible for the world to do nothing. Having been humiliated by its failure to restore peace and arrest criminals in Somalia, the United States was not willing to send its troops into former Yugoslavia. But the time had come to apply the rule of law to punish past criminality and to deter future criminality in former Yugoslavia.

(1) An Ad Hoc International Criminal Tribunal for Yugoslavia (ICTY).

Once the political will to act was aroused, the U.N. Security Council was able to create the International Criminal Tribunal for Yugoslavia in very short order. Comprehensive draft statutes for an international criminal tribunal had been prepared by special U.N. committees in 1951 and 1953 and expert groups had also detailed how such a court could be created. A Council resolution of February 22, 1993 (Res. 808) called upon the Secretary-General to submit statutes for an ad hoc international criminal tribunal within 60 days. It was done. The Tribunal came into existence on May 25. (Res. 827). The new court, with its seat in the Hague, was the first international criminal tribunal since Nuremberg.

This is not to suggest that it was an easy birth. Quite the contrary. There were enormous problems of staffing, funding, training and obtaining cooperation and support and overcoming logistical, legal and procedural problems that no one could have foreseen. Difficult investigations, including exhumation of mass graves, the formation of sensitive units to deal with female victims and witnesses (particularly in mass rape cases,) the assignment of competent defense counsel, translators, security personnel and administrators all presented novel problems that had to be overcome. And they were overcome.

The Tribunal was fortunate to obtain the services of Professor Antonio Cassese, a renowned international legal scholar of Italy, as President of the Tribunal. The first Chief Prosecutor, Richard Goldstone (who resigned and was replaced in October 1996 by esteemed Judge Louise Arbour of Canada) was a Supreme Court judge and famous human rights advocate from South Africa. Eleven experienced judges, including Texan Gabrielle Kirk McDonald, came from different legal systems, Their carefully reasoned opinions reflected the high calibre of the new court.

The number of prosecutions by the ICTY during its formative years has been limited. Only a few cases were completed and appeals are still pending. Most of the accused are still at liberty. But every newborn must first crawl before it can walk or run. Perhaps the biggest disappointment has been the failure of the Security Council to enforce its own mandates. High-ranking persons who have been indicted for genocide, mass killings, rape and "ethnic cleansing" continue to walk the streets of former Yugoslavia with apparent impunity. A few arrests have recently been made by international forces assigned to maintain peace but the Council has relied on the states concerned to apprehend criminals within their territories. Such states as the Federal Republic of Yugoslavia and Republika Srpska refuse all cooperation, arguing that, under their constitutions, it is illegal to hand their national over to a foreign court..

The ad hoc tribunal for Yugoslavia is an organ of the Security Council created pursuant to the U.N. Charter. All U.N. members are legally bound to support Charter mandates. That has not been done. . It sets a very dangerous precedent if the Council, to which the maintenance of peace has been entrusted, allows its orders to be flouted with impunity. The absence of any independent enforcement mechanism or financial resources seriously handicaps the new court. Nonetheless, in reporting to the United Nations nearly four years after the Tribunal was established, President Cassese described the Tribunal as "a vibrant, fully functioning judicial body." Let us hope that it will get even more vibrant with time. It is up to the public to demand of their political leaders that complete support, by every available means, be given to the ICTY for it is opening a new legal horizon on which the peace of humanity may depend.

## (2) An Ad Hoc International Criminal Tribunal for Rwanda (ICTR)

In 1994, brutal civil war erupted between rival ethnic tribes in Rwanda. There were reports that perhaps half-a-million Tutsi and their supporters were being savagely massacred by the dominant Hutu government. The Security Council sent a small commission to investigate (Res. 935, July 1994) and it soon reported back that the crimes being committed were horrendous: many thousands of men, women and children being hacked to bits with machetes or bludgeoned to death with clubs in organized rampages of tribal animosity. It did not take the Council long to react to the public cries of outrage. United Nations forces were dispatched to Rwanda to help restore order to that battered country. Hutu

guerrillas continued to battle a Tutsi army, while hundreds of thousand of refugees fled in terror. Once more the Security Council moved swiftly to create an ad hoc international criminal court to bring the wrongdoers to justice as a means of helping to maintain peace.

The Statute for the International Criminal Tribunal for Rwanda was adopted at the end of 1994 (Res.955). It followed closely the general outlines of the ICTFY but was more explicit in assuring that even in a civil conflict violations of the rules of war would not be tolerated. The Court was authorized to prosecute for genocide, crimes against humanity and war crimes regardless of whether the strife was called an international conflict or a civil war. Because of the nature of the internal conflict, the inclusion of aggression as a crime within the jurisdiction of the court was not relevant. Only the specified crimes committed within the defined area during the year 1994 could be dealt with. The Rwanda court was thus a special tribunal of very limited jurisdiction.

To save money and personnel, the ICTR was to have the same Chief Prosecutor as the tribunal for crimes committed in former Yugoslavia and they would also share the same appellate chambers. Because Rwanda itself was largely devastated and lacked appropriate facilities, it was decided to locate the new ICTR not in Rwanda but in Arusha, in neighboring Tanzania. The new government of Rwanda, now led by Tutsi, promptly arrested over 100,000 Hutu people and others who were charged with genocide, mass rapes and mass murders. These suspects jammed the local jails of Rwanda that were totally inadequate. Few lawyers and fewer judges were left in the country. Neither the ICTY in the Hague nor the ICTR (with one foot in the Hague and the other in Tanzania) allowed the death penalty, which had been outlawed by the European Convention on Human Rights. Yet many of those who had been victimized and had seen their entire families wiped out by their neighbors of different ethnic affiliation demanded immediate justice; by which was meant death to the murderers.

Meanwhile, rival militias were still fighting and hiding in refugee camps in neighboring countries where the killings continued. Despite such enormous obstacles, the new government of Rwanda was thoroughly dedicated to re-establishing law and order in their devastated country. Minister of Justice Faustus Ntezelyayo and Chief Justice Laity Kama met with supporters in Europe and appealed for help and guidance. They were determined to overcome the difficulties. In contrast to the ICTY in the Hague, the Rwanda court had more suspects in detention than they could

possibly cope with quickly. National courts began screening and classifying offenders according to the severity of their crimes before they could be tried by rather summary proceedings in local courts.

The administrative problems faced by the ICTR in Arusha were even greater than those encountered by the new Yugoslavia criminal court in the Hague. Allegations of improprieties were promptly dealt with by U.N. inspectors and ineffective personnel were replaced. Undaunted, the ICTR began to conduct trials against some of the accused leaders in the court's custody. These international trials are now pending and witnesses are being heard in proceedings where the rights of the accused - some of high office - are being protected as well as the rights of victims and witnesses who cannot reveal their identities without jeopardizing themselves or their families. It is another on-going effort that illustrates humankind's determination to move - despite all difficulties - toward reconciliation, peace and justice by applying the rule of law.

Reports of similar atrocities in many other countries (Burundi, Algeria, Congo, for example) continued to appear in the media and pour into U.N. headquarters. The Security Council again considered the appointment of investigative commissions and the possibility of creating still another ad hoc criminal tribunal. Temporary tribunals - created after the event, and with only limited jurisdiction to deal with a few crimes in certain areas and only within a limited time frame - are better than doing nothing. But it is certainly not good enough. Law, to be worthy of its name, must apply equally to everyone, everywhere. What is needed now is a permanent international criminal court to condemn major crimes that threaten the peace and security of all human beings. It is the next logical step in the evolution of international criminal law. The challenge that now faces the world community is whether the time has finally come for the force of law to replace the law of force.

## COURTING A PERMANENT INTERNATIONAL CRIMINAL COURT

### 1- U.N. Prepares for an International Criminal Court (ICC)

We have noted that soon after the U.N. was formed, special committees began deliberations for the establishment of a permanent international criminal jurisdiction (as it was then called) and a code of international crimes to be enforced by a new international criminal court. These duties eventually devolved

upon the International Law Commission (ILC) now composed of 34 legal experts from diverse regions.

The initiative for putting an international criminal court back on the agenda of the United Nations came in 1989 from Prime Minister A.N.R. Robinson of Trinidad and Tobago, who had long been interested in the subject and who found that his country needed help in coping with international drug-traffickers. It was 1994 before the ILC, under prodding from the General Assembly, completed its 60-article draft Statute for an International Criminal Court. In 1996, it completed its Draft Code of Crimes Against the Peace and Security of Mankind. The necessary legal building blocks were thus put in place and the path was finally cleared for closing a glaring gap in the international legal order.

Beginning in 1994, the General Assembly established a number of successive committees to begin work on creating a permanent international criminal court, using the ILC draft as a basis. Of course, views varied and there was much hesitation about accepting such a drastic innovation.. Many small states did not see the relevance of such a tribunal and some powerful states were quite content with the existing legal order based on military might. But, as the issues were slowly clarified, and it became apparent that the Security Council, dominated by the "Big-5" with veto powers, could create ad hoc tribunals without further consultation, and that such "ad hocs" left much to be desired, the feeling began to grow that an independent permanent court set up before the crimes were committed would better serve the interests of world peace. By the end of 1996, the General Assembly was able to request the Preparatory Committee (PrepCom) to negotiate a consolidated text of a Convention or Statute that could be widely accepted in a treaty creating a permanent international criminal court. Italy agreed to host the final meetings that would take place in Rome during June and July 1998.

To be sure, the differences in points of view among 185 members of the United Nations, - and their lawyers - remain quite substantial. Debates on the terms and terminology of the draft continued in intermittent but intensive sessions throughout 1996 and 1997 and will continue in the spring of 1998 .Despite very skillful efforts by "PrepCom" Chairman Adriaan Bos, Legal Adviser to the Netherlands, delegates submitted a flurry of proposals for additions, clarifications, amendments or deletions. Even consolidated texts remained encumbered with brackets indicating absence of consensus on many points.

On the positive side it may be noted that, in recent negotiations, no state has taken the floor in opposition to the creation of an international criminal court. Practically all states agree that such a tribunal is desirable. U.S. President William J. Clinton, addressing the General Assembly on September 22, 1997, said:

"To punish those responsible for crimes against humanity and to promote justice so that peace endures, we must maintain our strong support for the U.N.'s war crimes tribunals and truth commissions. And before the century ends, we should establish a permanent international court to prosecute the most serious violations of humanitarian law."

U.N. Secretary-General Kofi Annan, addressing the International Bar Association on 12 June 1997, echoed similar sentiments of his predecessor Boutros Boutros-Ghali, when he said:

"The international criminal court is the symbol of our highest hopes for this unity of peace and justice. It is a vital part of an emerging system of international human rights protection."

The United States U.N. Representative, Ambassador Bill Richardson, expressed the view of many when he said:

"The time has come to create an international criminal court that is fair, efficient, and effective, and that serves as a deterrent and a mechanism of accountability in the years to come."

How to formulate a statute that will satisfy the parties - including the skeptics - that the new international criminal court will be "fair, efficient and effective"? There's the rub!

## 2- Major Points of Contention

### (1) Who Has Priority, National Courts or the ICC?

There seemed to be general agreement that an ICC would have jurisdiction only where national courts were unable or unwilling to deal with the crime in a fair way. The delegates called this "complementarity" to emphasize that the ICC was intended to complement and not replace national courts. But such major crimes as genocide, aggression, and crimes against humanity are almost

invariably committed by or with the connivance of a national state - which can hardly be expected to try itself. The ICC itself must be authorized to determine when it has priority. Finding the proper balance and agreed formulations in an interrelated and coherent text presented continuing problems.

## (2) What Crimes Fall Within the Jurisdiction of the Court?

All seemed agreed that the ICC should deal only with exceptionally serious crimes of major concern to the international community - so called "core crimes". The ILC draft listed only 5 categories of such crimes: genocide, aggression, serious war crimes, crimes against humanity and crimes established pursuant to nine specified treaties that had been widely accepted to curb war atrocities, terrorist acts (against aircraft, ships, diplomats or hostages) and drug trafficking. Norway suggested that additions to the "core crimes" might be considered at a review conference in the future. The inclusion of aggression and "treaty crimes" raised problems.

Some felt that aggression - which the Nuremberg tribunal had condemned as the supreme international crime - had not been adequately defined (despite the UN consensus definition of 1974) and that its inclusion might impair the independence of the court. It was feared that the Security Council might interfere with the ICC for political reasons. Germany, with strong support from many nations, proposed a compromise whereby the Security Council would, as the UN Charter requires, first have to determine that aggression by a state had occurred but any prosecution against individual leaders alleged to be responsible for the crime was to be left completely to the independent judgment of the ICC without any interference from the Council. The independence of the court could be specifically reaffirmed and the tribunal could balance matters by acquitting the accused if it did not agree with the Council's conclusion that aggression by a state had occurred. Whether war itself was a crime might have to be resolved by the plenipotentiaries meeting in Rome. It will be a test of their statesmanship as we enter the 21st century.

## (3) Who is Bound by What?

There was general agreement that the ICC would be established by a multilateral treaty. Some argued that accepting the treaty automatically vested the ICC with authority to hold any of the signatory's nationals responsible if they violated any "core crimes". Others objected to such "inherent jurisdiction" and



preferred the "opt-in" or "a-la-carte" system contained in the ILC Draft whereby, before ratification, a state might pick and choose which crimes it would declare to be binding on itself. This would, it was argued, encourage acceptability by more states and thus lead toward the desired goal of universality. Criminal law expert Professor Roger Clark of Rutgers University, appearing as the delegate of Samoa, asked how states could legally opt-out and avoid responsibility for crimes that were already universally condemned under common international law?

#### (4) Powers of the Prosecutor:

Many felt that the Prosecutor (male or female) should be given broad powers to investigate charges from almost any responsible source and decide *ex officio* whether indictment was warranted. Some argued that only state parties could lodge a complaint. Others, particularly those coming from continental law systems, wanted judicial review of the Prosecutor's discretion by some form of pre-trial chamber in order to assure proper balance and protection of the defendant's rights. Professor Bassiouni, as a delegate of Egypt, argued that such a judicial chamber would assure consistency and could help the Prosecutor in obtaining cooperation from reluctant states.

Guarding traditional notions of sovereignty, some argued that no prosecutions could be initiated without prior consent from various concerned states: where the accused was being detained or where the crime had occurred, the victim's state, and the state of which the accused was a national. But if the states themselves were supporters of the criminal acts, these hurdles might prove insurmountable. Michael Keegan of the ICTY pleaded for allowing the Prosecutor greater discretion. His colleague, William Fenrick, feared that if the Prosecutor had to obtain prior consent to on-site inspections or exhumations, local officials could frustrate vital investigations. Professor Clark warned about creating a "toothless" ICC.

The ILC draft - in a provision strongly supported by the United States and even more strongly opposed by many smaller states - prohibited any prosecution "arising from a situation" being dealt with by the Security Council - unless the Council gave its prior consent. This aroused suspicions and strong objections of many non-Council members who feared that the Council could paralyze the ICC and destroy its independence. Singapore suggested a sensible compromise: allow the ICC to proceed unless the Council decided otherwise. Greece added another useful

safeguard: set a time-limit within which the Council had to act or consent would be implied.

#### (5) Procedural Problems:

All agreed that the accused had to be guaranteed a fair trial. The ILC draft prescribed how the trial was to be conducted and the principles of law to be respected, such as the right of the accused to be present, to be presumed innocent and protected against double jeopardy or death penalty. But lawyers coming from different legal systems had different views about substance and wording. Many felt that such details could be left to the Rules which the ICC or the parties could later agree upon. Others felt that protecting the rights of witnesses and the accused was paramount and could not be left to the later discretion of the judges. At times it seemed that the legal experts were trying to anticipate every possible future problem and to elaborate in detail just how it should be resolved in a way that would satisfy their own legal or political system.

#### (6) Striving for Consensus:

In its search for common ground before the wrap-up meetings in Rome, the PrepCom divided itself into different teams or working groups to seek agreement on the substance and wording of the interlocking provisions of the proposed statute. Some focused on "Definitions and Elements of Crimes" (such as what activities should be considered "war crimes" and whether internal conflicts are to be governed by such restraints); others sought agreement on "General Principles of Criminal Law" that should be applicable (such as permissible defenses, mental incapacity, for example, or trial of minors etc.); some dealt with "Procedural Matters" or how to assure appropriate "International Cooperation and Judicial Assistance" (whether extradition treaties were applicable, whether prosecutors could investigate or arrest without prior approval, and how cooperation could be enforced against a reluctant state) or which "Penalties" would be applicable and whether compensation to victims should be covered. Every participant was offered an opportunity to present a modification of any proposal - a temptation that many competent lawyers (unfortunately) could not resist.

Many issues, on which reasonable men and women might differ, could hardly be adequately reconciled within the allotted time and will have to be carried over for further deliberation during the final pre-Rome sessions in New York scheduled for March 16 to

April 3, 1998. New working groups will then consider the "Composition and Administration of the Court and its Relationship to the United Nations." The definition and inclusion of aggression will require more discussion and several procedural questions that had to be deferred for lack of time will be open for debate. If, as seems likely, it will be impossible to reach agreement on many non-vital procedural details, it may be necessary to authorize the tribunal itself to establish or propose its own rules within approved guidelines..

Since the entire statute consists of articles that are interrelated in many ways, the final text requires a comprehensive overview in order to obtain a well coordinated and cohesive whole. Many nations participating in the debate come from different social and legal traditions, and may be distrustful of the intentions of some of their adversaries. It is understandable that there may be extreme caution before accepting compromises whose consequences may be uncertain. Different ministries - foreign affairs, national defense or judicial - may approach the problems from a different perspective, thus further exacerbating the difficulties.

All loose ends will have to be tied together in a report to the Diplomatic Conference that will set forth clearly the major points of difference and the options (indicated by remaining bracketed texts) so that the Plenipotentiaries, hopefully, can reach compromises and agree upon a final text ready for signature by the maximum number of countries. It will not be easy. But it can be done and it must be done for the sake of a more humane and peaceful world.

### 3- Where Do We Go From Here?

Many articles and issues of the draft statute prepared by the International Law Commission still remain to be clarified. If there is general agreement regarding changes to the ILC draft, the improvements should be made. Where general agreement is absent, compromise is vital. The search for consensus is desirable but it must not be allowed to become a trap in which the lowest common denominator becomes the norm. Nor should apparent unanimity be reached by adopting vague, exculpatory phrases designed to enable states to avoid legal obligations which they purport to accept. Powerful nations are surely tempted to retain the advantages of power just as less powerful states understandably resent being deprived of democratic equality. No nation or person should be above the law and the innocent need never fear the rule of law. By

accepting clearly binding minimum rules of the road, all nations can better serve their citizens who are the real sovereigns of modern society.

The proposed treaty does not deal with the past but only with the future. It can go into effect only after a still-unspecified number of states have ratified it. Treaties customarily bind only the signatory parties, in accordance with the terms of their acceptance. Additional checks and balances already exist to prevent the tribunal from becoming an instrument of tyranny: judges must be qualified and democratically elected, prosecutors and other staff members who fail in their duty can be removed from office, budgets are subject to control, and proceedings must be transparent for all the world to see. Possibilities for corruption, venality and inefficiency can be found in courts everywhere but to suggest that because abuses are imaginable courts should not exist is to doubt the rule of law itself. There must be greater confidence that judges and prosecutors will not betray their trust.

No provision is made in the statute for independent financing for the tribunal or enforcement of its judgments or decrees. These are obvious shortcomings that must be considered and eventually resolved. No court can be effective unless it can rely on the good faith of nations prepared to be bound by its terms. Some unanticipated defects will surely materialize but if there is confidence and good will they can surely be overcome. Those whom history has placed in a position to influence the future course of history must ask themselves what kind of a world they want. If they are distressed by the injustices and violence all around them, they should decide that the time is ripe to act and the time to act is now.

An amazing number of non-governmental associations from all over the world crowded the meetings of the PrepCom and submitted detailed proposals designed to enhance and expedite the work of the committee. Such renowned groups as Amnesty International and many respected human rights agencies, as well as European Law Students Associations and former Nuremberg Prosecutors and joined in a "Coalition for an International Criminal Court" that embraced hundreds of concerned private organizations seeking to place fundamental human rights of all men, women and children under the protective shield of an independent system of international criminal justice. Whether nations can meet the challenge by creating a permanent ICC remains to be seen when the conference of plenipotentiaries meets in Rome in the summer of 1998.

## CONCLUSION

The Nuremberg Tribunals were a precedent and a promise. As part of the universal determination to avoid the scourge of war, legal precedents were created that outlawed wars of aggression, war crimes and crimes against humanity. The implied promise held forth to the world was that such crimes would be condemned in future, wherever they occurred and that no person or nation would be above the law. After half a century, it now seems possible that the promise may yet be fulfilled.

Out of the tragedies of war came the hope and expectation that lawyers and statesmen could fashion a new legal system to help curb ancient habits of cruelty and killing. People who had seen too much suffering were reaching toward a more tranquil world in which persons everywhere could feel more secure under a mantle of legal protection against the worst forms of violent abuse. Nuremberg and similar proceedings were part of a process reflecting humankind's slow and difficult movement toward a more humane civilization.

There can be no instant evolution. Old and revered traditions can only be altered slowly to meet new needs in an ever-changing society. The world stands poised on the brink of taking an important step to close a glaring gap in the existing legal order. With sufficient imagination and determination it is possible to reach widespread agreement on binding new rules for the safety and well-being of people everywhere. It is inconceivable that man can invent the means for his own destruction yet lack the intellectual capacity to prevent it from happening.

To condemn massive atrocities without creating an effective method to apprehend and bring the criminals to justice is to mock the victims and encourage more criminality. Of course, it is necessary and useful that views of all nations are respectfully canvassed on issues that affect their welfare and independence. But the search for desired consensus must not be allowed to dilute and thereby undermine the vital substance of needed accords. Lawyers should deal with the heart of the problems and not be dithering about relatively insignificant details while humankind cries out to halt the incessant crimes against humanity. Do we need more Holocausts to prod us out of indecision?

Understandably, smaller nations fear that a politically

oriented Security Council might jeopardize the independence of a permanent judiciary. To gain greater acceptance as the impartial guardian of peace, Council reforms will be required. Its composition must be more democratic and its privileged vetoes restrained. It must also adopt new rules to assure that it will impartially carry out its Charter obligation to serve the peace of all nations large and small. Such Council changes are part of an evolutionary process that will take time but the process has already started. The most that can be done for an international criminal court now is to complete the treaty in Rome by compromise as expeditiously and effectively as possible - without losing sight of the ultimate goal and faith that it can be reached.

How long it will take before powerful nations ratify any treaty that may curb outmoded notions of sovereignty cannot be predicted. If the treaty route should fail or falter, a logical alternative would be action by the Security Council which has both power and authority to set up limited tribunals quickly if a threat to the peace demands such action. Hopefully, with insistence by groups dedicated to protecting human rights and with help from institutions teaching tolerance and understanding, it will be possible to persuade decision-makers that delay can be detrimental and dangerous and that all nations - in their own interest - should sign the pending treaty and move quickly toward its undiluted ratification..

In its search for new international institutions to maintain peace and human dignity, the legal community is itself on trial. It has a unique opportunity to acquit itself nobly. The basic standards articulated at Nuremberg must be upheld in Rome. The time has come to take a chance for peace.

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