

DePaul University

From the Selected Works of M. Cherif Bassiouni

Spring 2003

Justice and Peace: The Importance of Choosing Accountability Over Realpolitik

M. Bassiouni, *DePaul University*



Available at: <https://works.bepress.com/m-bassiouni/15/>

HEINONLINE

Citation:

M. Cherif Bassiouni, Justice and Peace: The Importance of Choosing Accountability over Realpolitik, 35 Case W. Res. J. Int'l L. (2003)

Provided by:

Rinn Law Library

Content downloaded/printed from [HeinOnline](#)

Mon Nov 27 12:18:47 2017

- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at <http://heinonline.org/HOL/License>
- The search text of this PDF is generated from uncorrected OCR text.
- To obtain permission to use this article beyond the scope of your HeinOnline license, please use:

[Copyright Information](#)



Use QR Code reader to send PDF to your smartphone or tablet device

JUSTICE AND PEACE: THE IMPORTANCE OF CHOOSING ACCOUNTABILITY OVER REALPOLITIK*

M. Cherif Bassiouni[†]

At the end of the Second World War, the world collectively pledged “never again.” While the intention of this global promise may have been sincere, its implementation has proved elusive. There have been over 250 conflicts in the twentieth century alone, resulting in the deaths of an estimated 75 to 170 million persons. Both State and non-state actors routinely commit extra-judicial execution, torture, rape and other violations of international human rights and humanitarian law. In most cases, political considerations permit perpetrators of gross violations of human rights to operate with impunity. Yet, alongside the sad truth of our consistently violent world stands the moral commitment of the post-war pledge and the related vision of peace, justice and truth.

The human rights arena is defined by a constant tension between the attraction of *realpolitik* and the demand for accountability. *Realpolitik* involves the pursuit of political settlements unencumbered by moral and ethical limitations. As such, this approach often runs directly counter to the interests of justice, particularly as understood from the perspective of victims of gross violations of human rights. Impunity, at both the international and national levels, is commonly the outcome of *realpolitik* which favors expedient political ends over the more complex task of confronting responsibility. Accountability, in contrast, embodies the goals of both retributive and restorative justice. This orientation views conflict resolution as premised upon responsibility and requires sanctions for those responsible, the establishment of a clear record of truth and efforts made to provide redress to victims.

The pursuit of *realpolitik* may settle the more immediate problems of a conflict, but, as history reveals, its achievements are frequently at the expense of long-term peace, stability, and reconciliation. It is difficult to achieve genuine peace without addressing victims’ needs and without

* This keynote address by M. Cherif Bassiouni was delivered on February 28, 2003 at the War Crimes Research Symposium at Case Western Reserve School of Law. This lecture was edited by the editorial staff of the Case Western Reserve Journal of International Law. As it is a speech, it does not include citations to the assertions made. Questions regarding factual assertions in the text should be addressed to the author. This lecture was given as the keynote address

† Distinguished Research Professor of Law, President, International Human Rights Law Institute, DePaul University College of Law; President, International Institute for Higher Studies in Criminal Sciences (Siracusa, Italy); President, International Association of Penal Law (Paris, France).

providing a wounded society with a sense of closure. A more profound vision of peace requires accountability and often involves a series of interconnected activities including: establishing the truth of what occurred, punishing those most directly responsible for human suffering, and offering redress to victims. Peace is not merely the absence of armed conflict; it is the restoration of justice, and the use of law to mediate and resolve inter-social and inter-personal discord. The pursuit of justice and accountability fulfills fundamental human needs and expresses key values necessary for the prevention and deterrence of future conflicts. For this reason, sacrificing justice and accountability for the immediacy of *realpolitik* represents a short-term vision of expediency over more enduring human values.

The conflict between *realpolitik* and justice seldom takes a visible form. Instead, it is generally concealed from the general public. Often, the decision to pursue *realpolitik* strategies takes place during secret negotiations or through processes and formalities designed to obfuscate the truth and manipulate public perceptions. Some mechanisms of concealment are formal in nature, such as introducing weak components into legal norms and judicial institutions in order to deprive them of the capacity to ensure accountability. In this way, where advocates of *realpolitik* must accept a legal norm of accountability, they often neutralize its potential and render its impact limited and insubstantial. The goals of *realpolitik* can also be achieved by creating legal institutions with a mandate to administer justice, and then, imposing bureaucratic, logistical and financial constraints to render them ineffective or only marginally effective.

The creation of the human rights system in the wake of the Second World War and its intimate link to the promise of "Never Again" have formalized the conflict between the *realpolitik* and a politics of accountability. These issues are especially serious where there is a need to face extreme political violence, as in the wake of armed conflict or in response to atrocities committed by authoritarian regimes. While there exist many cases where the international community has dealt with these issues, it is useful to review the tension between *realpolitik* and accountability in a few specific instances including: the response to German aggression following the First World War, the failure to respond to the Turkish genocide committed against the Armenian people, the Nuremburg and Tokyo Tribunals, and responses to the conflict in the former Yugoslavia. In reviewing these cases, one can see an evolving concerns with the importance of formal mechanisms of accountability as well as what might be a growing moral realization of the central role of justice in establishing the foundations for genuine and long-lasting peace.

After the First World War – Realpolitik and German Aggression

One notable example of early 20th century *realpolitik* arose after World War I in connection with the peace treaties between the Allies and both

Germany and Turkey. With respect to the Germans, the 1919 Treaty of Versailles provided for two extraordinary developments in international criminal accountability. First, the Treaty established a legal basis to prosecute the Kaiser of Germany for initiating what we would call today a war of aggression. Second, the Treaty provided for the prosecution of German military personnel for war crimes.

As to the first development, the drafters of the relevant article in the Treaty, Article 227, defined the crime for which the Kaiser was to stand trial as a “supreme offence against international morality and the sanctity of treaties.” The crime was phrased in such vague political terms that it allowed the Netherlands to give political asylum to the Kaiser on the grounds that no such crime, as defined in Article 227, existed. Thus, his purported prosecution was prevented.

However, even if the Kaiser would have been prosecuted, his defense could have been that such a legal norm could not constitute a crime under the “principles of legality” of all the world’s major legal systems. In fact, the drafters probably never intended to prosecute the Kaiser. The British drafters of the definition were not eager to prosecute a crowned head, particularly when the family lineage of that crowned head was related to their own monarchy. The example of Article 227 is a key example of a situation where a legal norm is purposely drafted to be ambiguous to prevent its effective application and, ultimately, as a means of supporting impunity.

The effort to enforce the second development in international criminal accountability – the prosecution of German war criminals – began with the work of the Commission on the Responsibilities of the Authors of the War and on Enforcement of Penalties (the “1919 Commission”), established by the victorious Allies in 1919. The Commission’s work was also compromised by political considerations. At first, the Commission investigated war crimes and compiled a list of some 20,000 people it believed should be prosecuted for war crimes. However, it took a significant amount of time to conduct the investigations leading to the final list and, gradually, the Allies lost their interest in prosecution. By 1922, three years after they began, the Allied governments had still not formed the tribunals described in Articles 228 and 229 of the Treaty. In fact, they were ready to let bygones be bygones. However, in Europe, particularly in France, an influential group of academics, intellectuals, and journalists continued to press for prosecution. In response, the Allies pacified advocates of accountability by requesting that Germany take on the responsibility for the prosecutions. In addition, the Allies determined that the list had to be reduced, and settled for the prosecution of 895 individuals instead of the original 20,000.

The German government, however, thought that 895 was too high a number. After extensive political negotiations with Germany, the Allies dramatically reduced the number of prosecutions to forty-five. Of those

forty- five individuals, only twenty-two were prosecuted by Germany in 1923. One of the more severe penalties resulting from these prosecutions was three years of imprisonment. That three-year sentence purported to punish one of the worst crimes in naval warfare history in which a U-boat sank a hospital ship carrying approximately three hundred wounded and then surfaced to machine-gun the survivors found hanging to rafts on the high seas. By the time these prosecutions occurred, the passage of time had dampened the enthusiasm of justice proponents, and the interest of Allied governments. The advocates of *realpolitik* at the time understood the demand for justice more or less as they see it today, as, at worst, a nuisance and, at best, a tool to achieve their goals. In this case, as in many similar situations, they saw the passage of time as an important ally to avoid prosecutions and evade the complex demands of accountability.

Realpolitik and the Failure to Face the Armenian Genocide

Another important and tragic development in international criminal accountability involved the world's response to the Turkish government's mass killing of Armenians in 1915. The 1919 Commission that allowed for institutionalized impunity for German war crimes took cognizance of the fact that Turkey, an ally of Germany, killed an estimated 250,000 to 1,000,000 Armenians as part of a policy of political persecution.

Prior to the 1919 Commission's work on this matter, nothing in international legal norms contemplated individual criminal responsibility under international law for public officials and others who committed crimes against their own citizens. The 1919 Commission, however, found that the Preamble to the 1907 Hague Convention contained a reference to "the laws of humanity." The 1919 Commission concluded that the systematic killing of a civilian population pursuant to state policy, however tacit, violated the "laws of humanity," and that the Turkish officials, who had engaged in such acts, either by commission or omission, were to be charged with "crimes against the laws of humanity."

The United States and Japan opposed such a notion on the basis that it violated legal positivism, and issued a formal written dissent to that effect. Interestingly, however, the 1920 Treaty of Peace between the Allied Powers and Turkey, known as the Treaty of Sevres, specifically provided for the prosecution of Turkish officials, many of whom were already in British custody and were being held in Malta. Because of the objections of the United States and Japan, however, the Treaty of Sevres was never ratified. Instead, it was replaced in 1923 by the Treaty of Lausanne, which contained an unpublished protocol guaranteeing amnesty to the very persons who were to be prosecuted under the Treaty of Sevres.

The reason for this amnesty was the emergence of a new geopolitical reality that made Turkey, the former enemy, a necessary ally against the emerging power of the communist Soviet Union. Since the first line of Western defense against Russian communism was Turkey, the Allies could not afford to offend the sensitivities of the country's nationalistic government who openly denied the mass murder of Armenians (and continue to deny its severity to this day). In light of Turkey's emerging political importance, attempts at accountability were frustrated and impunity was achieved *de jure* by the unpublished protocol. Thus, justice for the victims of the Armenian killings was forsaken for the political compromise of *realpolitik*. Only a few years later, in 1939, Adolf Hitler was speaking to his generals on the eve of the invasion of Poland and is reported to have asked, "Who now remembers the Armenians?" That comment encapsulates the harsh victory of *realpolitik*, reminding us of the serious risks associated with failing to demand accountability for severe political violence.

The Innovation of Nuremburg and the Ineffectuality of the Tokyo Tribunal

In the wake of the Second World War, the Allies faced the difficult issue of what to do with high-ranking leaders of the fallen Nazi regime. In light of the terrible destruction of the war and the public revelation of the Holocaust, there was great pressure to demand accountability, either through decree of the victors, as some advocated, or, through an adjudicative process grounded in rule of law. The decision to create the International Military Tribunal at Nuremberg (the "IMT" or "Nuremberg tribunal") and the International Military Tribunal for the Far East at Tokyo (the "IMTFE" or "Tokyo tribunal") represent landmark cases of choosing law over political might. While the Allies could have engaged in any mechanism of punishment, they chose a system that respected basic ideas of rational accountability, providing those accused with the possibility of defending themselves in court in a system that required prosecutors to prove guilt through the presentation of objective and compelling evidence.

This process rested on the United States and other Allies willingness to accept the idea of "crimes against the laws of humanity" through the definition a new kind of crime, "crimes against humanity." The atrocities of World War II made it imperative to revisit the need to prosecute those who committed severe acts of violence which were later described in Article 6(c) of the Nuremberg Charter as "crimes against humanity." It should be stated, however, that since the Nuremberg Charter there has never been a specialized international convention on "crimes against humanity" (fortunately, the Statute of the International Criminal Court includes a progressive definition of that crime).

The Nuremberg tribunal and the Tokyo tribunal constituted a major historic development in the establishment of individual criminal responsibility under international law. Through these processes, heads of state were no longer given immunity and the traditional defense of "obedience to superior orders" was eliminated. However, significant differences exist in the structure of these two tribunals. The original Nuremberg tribunal was a product of the London Treaty of August 8, 1945, which was signed by four countries and acceded to by nineteen others. In the Far East, on the other hand, the tribunal's foundation rested on General MacArthur's proclamation establishing another tribunal patterned after Nuremberg and his subsequent appointment of its judges. While the Nuremberg tribunal is widely viewed as a major historical step in the evolution of international norms of accountability, the Tokyo tribunal reveals how adjudicative bodies can be used to support *realpolitik*.

The Nuremberg tribunal indicted twenty-four people, of which twenty-two stood trial. In the subsequent American, British, Russian, and French proceedings, another 50,000 people were tried. However, due to political considerations, the prosecution process differed in Europe and the Far East. In Germany, prosecutions were conducted not only before the IMT, but also before Allied tribunals in their respective zones of occupation and by German tribunals and other national tribunals elsewhere. In the Far East, however, there were no national Japanese prosecutions. Twenty-eight persons were tried before the IMTFE, and various military tribunals of the nineteen Allies tried some 5,700 persons in various countries of the Far East.

The Japanese reacted against having their citizens jailed in so many different places. After most of the prosecutions ended in 1951, the Japanese government successfully negotiated an agreement whereby all convicted Japanese prisoners were allowed to return to Tokyo and serve their sentences there. The official Treaty of Peace was signed in San Francisco in 1953, and by the end of that year not one of the more than 15,000 Japanese prisoners of war who had been convicted of war crimes remained in prison. Most telling is the fact that, by 1954, two of the major war criminals convicted by the IMTFE became the Prime Minister and the Minister of Foreign Affairs of Japan.

By that time, the United States had based its future Southeast Asia policy on Japan's stability and strength, and it was important that the Japanese not feel humiliated by the consequences of World War II. Indeed the Japanese, unlike the Germans, did not feel morally blameworthy for their deeds during World War II. Their culture also made them more susceptible to humiliation, and the United States was careful to avoid placing them in that situation. In return, Japan became a strong ally of the United States. Thus, political considerations overshadowed the need to provide effective accountability.

When MacArthur entered Tokyo, Emperor Hirohito was still in power. Nevertheless, the Emperor was never charged with the crime of aggression or any other crime, despite the fact that Japan could never have gone to war had he not explicitly approved the action. Moreover, not a single person indicted or prosecuted for the horrific violations that have come to be known as the "Rape of Nanking." Instead of focusing on accountability, MacArthur structured the Tokyo Tribunal to function as a strategy for achieving control over the occupied territories. To the extent that justice could be manipulated, it was. For example, General Yamashita was condemned in the Philippines not for crimes of which he had no knowledge. His conviction was based on the idea that a commanding officer bears criminal responsibility for what he should know about what his troops might do, even though he had issued specific orders to his troops prohibiting crimes against civilians. However, General MacArthur pursued this prosecution to set an example that was useful for the post-war occupation. The guiding vision for these prosecutions, then, was political strategy.

Justice was used by MacArthur as an illusion in true Potemkin fashion. Just as the Russian General Potemkin built villages in Crimea along the river so that Catherine the Great would have the impression that the Crimean peasants were well-fed, well-nourished, and satisfied, so too did the prosecutions in the Far East give the impression that justice was being done. In fact, what we witnessed in the Far East is what might be termed as Potemkin international criminal justice. We see a little bit of criminal justice, a little bit of realism on occasion, and a few effective trials.

Bartering Justice and Yugoslavia

The 1991-95 war in the former Yugoslavia is another example of bartering justice for political negotiation, and then witnessing increased atrocities (in Kosovo) that reflected the process of negotiation. The atrocities occurring during the 1991-95 war were broadcast and published all over the world. This display may well have pushed world public opinion to the limits of its tolerance eventually pressuring the major powers to act.

In the United States, 1992 was an election year and the government was unwilling to commit military personnel to what it considered a "European problem." In addition, European countries were not yet sufficiently shamed by the "ethnic cleansing" that occurred on their continent to take decisive action, despite the promise of "Never Again". Thus, there was no military intervention early in the conflict when concerted action might have saved tens of thousands of lives and prevented the mass migration of refugees related to the conflict. Worse yet, France and the United Kingdom had committed some 30,000 peacekeepers who turned out to be more exposed to danger than originally thought. Consequently, the peacekeepers were, for all practical purposes, potentially

vulnerable hostages, a fact that crippled the potential actions of both France and the United Kingdom.

In the face of that political reality, the dominant approach involved inducing the parties to accept a negotiated settlement. This state of affairs left the negotiators, mainly Lord David Owen, with very few bargaining chips. Political settlement could only be achieved by the acquiescence of the weakest party to the conflict, namely Bosnia, in favor of Serbia and Croatia. The only thing that prevented a settlement of this type was the daily media coverage of ethnic cleansing, rape, reports of torture, and the systematic destruction of personal and cultural property. Certainly, the last thing that Owen needed was a formal body that proved the criminality of Serbian leaders, such as Milosevic, and the victimization of the Bosnians. If that had happened, world public opinion might clamor for accountability. Milosevic and other Serbian leaders were unlikely to agree to any settlement that involved a serious commitment to accountability. For this reason, Owen thought that equal moral blameworthiness was needed to achieve a climate that would convince the Bosnians to accept whatever the Serbians dictated, and to avoid focusing on the prospect of the prosecution of Serbian leaders. To show otherwise, namely that one side committed heinous crimes against the other, was an impediment to *realpolitik*.

In October 1992, under pressure from the international civil society and at the behest of the United States, the Security Council of the United Nations established the Commission of Experts to Investigate the War Crimes and Other Violations of International Humanitarian Law in the Former Yugoslavia (the "Commission"). I had the honor of chairing the Commission which was given a broad mandate to investigate political violence in the region. Such a Commission, if it were to carry out its mandate to the fullest, would prevent the kind of political accommodation that rewards the perpetrators of crimes against humanity, war crimes, and perhaps even genocide.

This potentially powerful Commission was received with a mixed response. In order to insure that the Commission would not interfere with the ongoing peace negotiations, the United Nations did not provide the Commission with any resources to carry out its mandate of investigating violations of international humanitarian law and other crimes. Left to its own devices, the Commission obtained assistance outside of the United Nations system to conduct its investigations. However, even after overcoming the burden of inadequate resources, the Commission was further hampered by an array of United Nations bureaucratic hurdles.

The story of how the Commission overcame these hurdles is both extraordinary and, I believe, will one day be recognized as a major historic breakthrough. The Commission's thirty-nine field missions, including the largest mass rape investigation ever conducted, produced the longest Security Council report in history – some 3,500 pages, backed by more than 65,000 documents and more than 300 hours of videotapes. The

overwhelming evidence and the Commission's interim report of February 1993, were among the main reasons why the Security Council established the International Criminal Tribunal for the Former Yugoslavia (the "ICTY") in May 1993. The language of the Council's resolution establishing the tribunal reflected the Commission's findings.

Yet, while the Commission was operating, *realpolitik* was in full force. This is evidenced by the actions of Richard Holbrook and other key players in the process that led to the Dayton Accord of 1994. For example, Holbrook assisted in a secret negotiation in which the Croatian government would gain control of a Serb-inhabited region of Croatia in return for allowing the Serbian government to move Croats out of a region of Serbia. The Croatian government was allowed to move 200,000 Serbs out of an area in Croatia known as the Krajinas and the Serbian government was allowed to move a large number of Croats out a corridor stretching from Srebrenica to Brcko in the northernmost section of Bosnia, along the Drina River. Basically, this corridor would connect the Serb-inhabited areas of Bosnia with Serbia proper. The corridor was part of the greater Serbian plan.

Holbrook realized that achieving these ends through a public settlement or negotiation would be difficult. So, he arranged for the Croatian army to be re-trained by a major U.S. corporation headed by a former secretary of defense. With the agreement of the North Atlantic Treaty Organization ("NATO"), former U.S. military personnel trained them with weapons supplied by Germany. The new Croatian army became strong, well-disciplined, well-organized, and eventually moved on to the Krajinas. The American ambassador rode behind the reconnaissance forces to ensure that nothing worse than removal would happen to the Serbs in the region. Croatian control of the Krajinas, therefore, became the new reality, irrespective of issues of justice or of the rights of the people involved.

The same type of operation was supposed to occur in the Srebrenica-Brcko corridor. This operation was controlled by General Radtko Mladic who moved approximately 4,000 troops to the region. The French president told the local French commander, General Jean-Vie, not to request any NATO strikes during this operation. When Mladic moved in, there were only 500 Dutch soldiers with small sidearm weapons who were easily overtaken by the superior Serbian force. As the attack on Srebrenica intensified, 7,000 men were killed. Their bodies were left in the surrounding fields. The day after the massacre, Ambassador Madeleine Albright showed satellite imagery of these corpses to the United Nation's Security Council. Needless to say, the day after the photo was displayed, the field was bulldozed and only a few remains were left behind.

Holbrook's treatment of the former Yugoslavia produced the Dayton agreements in 1994 which provided *de facto* impunity to the intellectual authors of the extreme violence of the Balkans, including Milosevic, Mladic, and Karadzic. The result was not peace, and certainly not

reconciliation, but a truce, a truce that was short-lived in light of the aforementioned massacre in Srebernia in 1995, and the commencement of "ethnic cleansing" in Kosovo in 1998. While agreements of this type may appear politically valuable in the short term, granting impunity to those responsible for crimes against humanity may not ultimately serve the goals of peace. Perhaps it is idealistic or naive of me to advocate accountability in such cases. However, I think that while it may be difficult to deal with the complex truth of political violence, its harsh reality has a way of resurfacing long after the half-truths and misrepresentations encouraged by *realpolitik* have been voiced and officially accepted.

The ICTY represents an attempt to deal with the truth, although it is not ideal. Even after it was established, few prosecutions occurred, because NATO forces were reluctant to apprehend indicted criminals for fear of retaliation. Even after prosecutions began, the ICTY has only partially achieved the true goals of accountability. Nevertheless, the establishment of the ICTY broke down psychological, political, and legal barriers that existed against international criminal justice. Soon thereafter, the International Criminal Tribunal for Rwanda (the "ICTR") was established. So, by 1994, it was evident that political accommodation would not be devoid of all accountability.

Certainly, the International Criminal Tribunal for the Former Yugoslavia has produced some very effective prosecutions, and there have been some successful prosecutions in the Rwanda tribunal. While we must recognize the great merits of these accomplishments, we must not forget that there is much left to be accomplished. I say this because major perpetrators remain at large, and will probably continue to remain at large for so long as they serve a political purpose. The battle, which previously pitted political accommodation against accountability, now focused on how political accommodation could co-opt accountability. Now, we must deal with this tension between the attempt to develop international criminal justice in its own right, and the *realpolitik* view of international criminal justice as a useful tool in the achievement of desired political results.

Acknowledging Suffering

Reviewing the complex political factors that determine broad policy responses to political violence often draws attention to the empowered actors whose decisions guide history. This perspective tends to mask the experiences of victims, the countless individuals whose human suffering defines the moral claim of the post-war demand of "Never Again." In considering these issues, I am reminded of a story which was told to me while the Commission was conducting its rape investigation in the former Yugoslavia. It is a difficult story to hear, but one that I carry like one carries a cross, a weight that bears with it both responsibility and a reminder of the real reasons for demanding accountability.

The events of this story occurred in 1993 when the Commission was investigating the Foca rapes that are now being prosecuted in the ICTY. Thirty-three women had volunteered to assist in the investigation. They were divided into eleven teams of three, each consisting of a prosecutor, a psychiatrist, and an interpreter. The teams traveled throughout the country with lists of witnesses, interviewing a total of 223 rape victims. We took great pains to protect the identity of these victims and to protect the integrity of the impending prosecutions. In order to avoid the potential danger of prior inconsistent statements that defense attorneys could use against the victims, the prosecutor for each team would take notes, in her own words, of each victim interview, and then present these reports to me in writing. The only written materials created would therefore be deemed attorney work-product and undiscoverable.

One of my prosecutors was a Crown prosecutor from Canada with nine years of experience in violent crimes. She came to me in tears one day and announced that she was quitting and leaving the next day. In explanation, she told me the following story:

A man on crutches whose legs seemed to have been broken came over to see us. He looked as if he could have been sixty or eighty years old and aged beyond repair, but in actuality he was probably in his forties. He presented himself as a Catholic Croat who lived in the Serb area of Sarajevo. He had married a Serb woman who was the widow of a Muslim from Sarajevo, and who had two beautiful teenaged daughters. After she and the man on crutches married, he adopted her daughters and moved to her apartment on the Serb side of town. Together they opened a cafe with a soccer motif in the neighborhood, since he had been a soccer player with the Croatian soccer team in Sarajevo before their marriage. He often had lively discussions about soccer matches with the Serb youths who patronized his business before the war came. His neighborhood then became Serb-controlled, and the young thugs who joined the paramilitary and the police had free rein in their abuse of non-Serbs.

One day, a group of about a half a dozen young thugs who were soccer fans came into the café with weapons and hauled the man to the police station. They tied him up on the floor and started berating him because he won a championship for the Croatian soccer team against the Serb team. They then proceeded to take their rifle butts and break both of his legs so that he would never play soccer again. While he was laying there on the floor with two broken legs, the thugs went and got his wife and two daughters. They told the wife in the presence of her husband and her two daughters that unless she did everything they wanted, they would rape the two girls. The mother, in order to protect her daughters, complied and submitted to degrading and humiliating sexual acts. Totally unexpectedly, she was turned to face her husband and daughters, and one of the men slit her throat. While she was writhing on the floor dying, they raped the two girls in the presence of their stepfather. Then, when they were finished, they

slit the throats of the two girls. Next, in perhaps the worst possible cruelty, they took the man and dumped him out in the streets so he would serve as a living example of what could happen to others like himself and his family. The man came over to tell our team the story last night, and this morning I discovered that he had committed suicide during the night, leaving only the message: "I lived long enough to tell my story to someone in the hope that it will be told in the future."

Ever since that day, I have considered it my duty to convey the significance of this story around the world so that those tragic events of such a recent past are not easily forgotten. Sadly, it is precisely these sorts of stories – and there are so many of them – that are frequently lost. No books or theories on international justice could ever be as poignant as this particular testimony. Here is a victim who was dehumanized and wanted justice from the United Nations and from the world. I believe that we owe justice to this victim and to the countless other victims whom we do not know, but who have directly suffered acts of extreme violence, degradation and cruelty. We owe justice to victims all over the world, justice that punishes those responsible and prevents the recurrence of such acts. We also owe ourselves a commitment to accountability because if we forget our obligation to the unknown victims, we forget what it means to be human.

The Promise of International Justice

In reviewing key cases from the twentieth century, it is useful to think of the essential tensions between *realpolitik* and accountability as an evolving historical process defined by a series of interlinked circles. One circle is the intellectual circle, the circle of the evolution of ideas, ideas that derive from social values predicated on philosophic and religious values. That circle develops and expands over the course of time, but it is only capable of influencing other circles. The second circle is the circle of the evolution of international instruments from which we may derive proscriptive and prescriptive norms. The elements of enforcement of these norms are very sparse, but they begin to develop the body of binding legal obligation. The third circle is the circle of enforcement. History teaches us that proscriptions and prescriptions are largely meaningless in the absence of the effective, fair, and impartial enforcement and administration of justice. Nevertheless, while we have developed enforcement models at the national levels, for many reasons we have been reluctant to develop such models at the international level.

One such reason may be the intricate relationship between the administration of justice and notions of national sovereignty. Transcending the psychological attachment to national sovereignty in favor of an international system of enforcement may be too much for many to bear. Another reason for the failure to develop international enforcement models may be that those, like myself, who work in the field of criminal justice are

not broad-minded or open-minded enough to make the leap from the national model to the globalization of justice. In the last two decades, the media consistently has relayed to an ever-widening world audience the numerous tragedies that have occurred in almost every region of the world. As means of communication expanded and more people acquired greater access to news information, the cumulative impact of reported conflicts and victimization reached such a point in world public opinion that it became difficult for governments to ignore accountability and to allow perpetrators to benefit from impunity.

The ultimate question, then, is how to develop value neutral rules that can be enforced upon all sides. Ideally, for pure enforcement purposes, one might wish to develop a supranational system of justice, but such a concept remains internationally unacceptable. The next best choice is an international system accepted by consent of the states. If a system is based on broad international consent, however, it will be only as strong as the states wish it to be. An additional problem with such an international system is the effect of a weak member. If one state's enforcement of the agreed international norms is sufficiently weak that it will become a state of refuge for international criminals, that state will be the Achilles heel of the international system.

Thus, we have now developed an International Criminal Court ("ICC") that will be international rather than supranational, that will be dependent upon states, and that will be complementary. This underlying principle creates the impression, or the feeling, of national systems that can be linked immediately and intimately to a mutually supportive international system. This impression, however, is an illusion as the domestic and international judicial realms remain quite separate. If the two systems were better connected, the ICC could be a true extension of national criminal jurisdiction, with the equivalent of a change of venue motion allowing some national cases to be brought before it. However, this is not the case and the current situation may, in fact, be all that is possible at this moment in history.

It is difficult to know where the ICC will take us. After all, each historic period witnesses the development of certain institutions, and these institutions become the bases and foundations for the next generation of institutions; and sometimes the weaknesses of one generation are cured by the next. Whenever I feel particularly discouraged, I look to my good friend Ben Ferencz, a former Nuremberg prosecutor, and say to myself, "I'll pick up from where he left off." Because if he had the fortitude to carry it forward for so many years, and if he is still in great spirits and full of enthusiasm, then I will do my share before passing it on to my students, and then they will do their share before finding someone else to carry on. In a sense, then, that is the evolutionary process with which we are dealing.

Now that the advocates of *realpolitik* have realized that they can no longer eliminate justice from the political settlement equation, as was the case after World War I and II and so many cases thereafter, the danger is that justice will be co-opted, subverted, and used as a fig leaf to achieve accommodation. Even so, the efforts of advocates of *realpolitik* to barter and compromise justice go on, and impunity is the carrot that they offer to leaders of conflicts who have committed terrible crimes, as a way of securing a political settlement.

In our globalized society, we can no longer exclude justice from our international legal system. The establishment of the ICC is a step in the direction of providing international criminal justice. However, the ICC will not prevent injustice, conflicts, or crimes. It will neither end impunity nor will it consistently achieve justice. The ICC is merely an added means by which to achieve accountability. However, it is a necessary institution for the attainment of the goals of international criminal justice, and it should be viewed as an incremental contribution to the achievement of these goals.

The choices facing the international community are not easy. There is real tension between the two goals of achieving political solutions and achieving higher values. And, just as there is a checks and balances system in place in the United States, there is an informal checks and balances system at the international level. This informal system consists of those few people who will continue to keep the pressure on governments, that will make it difficult for governments to make the most egregious or outrageous deals, that will denounce governments when necessary, and that will praise governments when they act honorably and in accordance with international humanist principles. These few people will ensure a sense of continuity and progress. While progress may be slow, the evolution of humankind and the history of law teaches us that progress has always been slow and painstaking.

It is my hope that in this age of globalization, when more people are studying law than ever, that these prospective lawyers will be the true legions of justice. No matter how limited their efforts and no matter how small their voices may be, I think these prospective lawyers will add a strong voice to what I call "international civil society," and I think international civil society is the necessary countervailing force to the forces of cynicism and *realpolitik*. The presence of an international civil society makes it more difficult for the forces of cynicism and *realpolitik* to achieve their ultimate goals of compromising justice.

I am convinced that there can truly be no peace without justice; and, certainly, there can be no justice without truth. Difficult as it may be, we should be dedicated to the pursuit of those goals. We should attempt to approximate them as best we can and to dedicate some of our efforts to preventing the cynics, the skeptics, and the advocates of *realpolitik* from compromising justice. If we fail to do so, we are condemned to repeat our mistakes.