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From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court

M. Cherif Bassiouni*

INTRODUCTION

The history and record of international criminal investigation and adjudication bodies, from the Treaty of Versailles to the International Criminal Court for Rwanda, clearly demonstrate the need to establish a permanent international criminal court. In the absence of such a court, not only have many atrocities gone unpunished, but every one of the ad hoc tribunals and investigations that has been created has suffered from the competing interests of politics or the influence of a changed geopolitical situation. As the history of the United Nations' efforts to establish a permanent international criminal court and a code of crimes evince, this task is controversial and complex. Nevertheless, the lessons of the past seventy-five years dictate its fundamental importance.

Between 1919 and 1994 there were five ad hoc international investigation commissions, four ad hoc international criminal tribunals, and three internationally mandated or authorized national prosecutions arising out of World War I and World War II. These processes were established by different legal means with varying mandates, many of them producing results contrary to those originally contemplated.

The investigations and prosecutions were established to appease public demand for a response to the tragic events and shocking conduct during armed conflicts. Despite public pressure demanding justice,

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investigative and adjudicating bodies were established for only a few international conflicts. Domestic conflicts, no matter how brutal, drew even less attention from the world's major powers, whose political will has been imperative to the establishment of such bodies. The Rwanda Tribunal, the only tribunal authorized to prosecute genocide, crimes against humanity, and war crimes committed during a non-international armed conflict, has had little success to date.

Even when tribunals and investigative commissions were established, their professed goal—the pursuit of justice by independent, effective and fair methods and procedures—was seldom upheld. Instead, the establishment and administration of these bodies were subordinated to realpolitik goals. They were, in varying degrees, controlled or influenced by political considerations, at times exercised overtly and, at other times, through more subtle techniques. Political decisions often led to the logistical, personnel, and legal difficulties that contributed to the malfunctioning of the tribunals. Bureaucratic and financial methods were used to direct, curtail, check, and ultimately terminate these bodies for political reasons. Politicians often intentionally allowed time to pass so that public interest in justice waned, public pressure eroded, and they were no longer compelled to ensure the success of the bodies.

A telling example of the interplay between law and politics characteristic of these bodies is the allocation of responsibility during the different trial stages. Frequently, there was total separation between the establishment of the bodies and their administration. Similarly, the investigation stage was separated from the adjudication, and in each case, without exception, the judicial bodies that pronounced sentences were terminated immediately after the adjudication. The sentence execution stage, involving pardons and releases before the full execution of sentences, was typically the responsibility of a political administrator whose decisions were not necessarily motivated by justice concerns.

This compartmentalization contributes to the over-all difficulty of assessing the nature, intent, and impact of the political decisions which created, administered, and ended these bodies. Those who were present at one stage were rarely present at subsequent ones. Furthermore, institutional records documenting the various stages seldom reflect the activity occurring behind the political curtain. Persons inside the political process are reluctant to betray those who appointed them to their positions by divulging the political considerations that influence the operation of the bodies. The true history of these institutions is therefore often incomplete.

If the lessons of the past are to instruct the course of the future, then the creation of a permanent system of international criminal

justice with a continuous institutional memory is imperative. But such a system must be independent, fair and effective, in order to avoid the pitfalls experienced in the past. Above all, it must be safeguarded from the vagaries of realpolitik. Compromise is the art of politics, not of justice.

These points will be illustrated through an examination of the previous ad hoc investigative commissions and international criminal tribunals. This Article then reviews the United Nations' efforts to establish an international criminal court and to codify certain international crimes.

I. AD HOC INTERNATIONAL INVESTIGATIVE COMMISSIONS AND INTERNATIONAL CRIMINAL TRIBUNALS SINCE 1919

There have been five international investigative commissions,¹ four ad hoc international tribunals,² and three internationally mandated prosecutions³ since 1919. Because all these processes were either insti-

1.

1. The 1919 Commission on the Responsibilities of the Authors of War and on Enforcement of Penalties (1919 Commission);
2. The 1943 United Nations War Crimes Commission (1943 UNWCC);
3. The 1946 Far Eastern Commission (FEC);
4. The 1992 Commission of Experts Established Pursuant to Security Council Resolution 780 (1992) to Investigate War Crimes and other Violations of International Humanitarian Law in the Former Yugoslavia (1992 Yugoslavia Commission of Experts); and
5. The 1994 Independent Commission of Experts Established Pursuant to Security Council Resolution 935 (1994) to Investigate Grave Violations of International Humanitarian Law in the Territory of Rwanda (1994 Rwanda Commission of Experts).

A commission called The Commission on the Truth was established under the peace agreements between the government of El Salvador and the Frente Farabundo Martí para la Liberación Nacional (FMLN). This Commission was, therefore, established pursuant to an agreement between a government and an internal insurgency movement. Nevertheless, the three Commission members were designated by the Secretary-General of the United Nations. It is unclear whether this Commission can be deemed an international commission as in the case of the others mentioned herein. For the report of the Commission see *Letter dated 29 March 1993 from the Secretary-General addressed to the President of the Security Council*, U.N. SCOR, 48th Sess., U.N. Doc. S/25500 (1993).

2.

1. The 1945 International Military Tribunal to Prosecute the Major War Criminals of the European Theater (IMT);
2. The 1946 International Military Tribunal to Prosecute the Major War Criminals of the Far East (IMTFE);
3. The 1993 International Criminal Tribunal for the Former Yugoslavia (ICTFY); and
4. The 1994 International Criminal Tribunal for Rwanda (ICTR).

3.

1. 1921–1923 Prosecutions by the German Supreme Court Pursuant to Allied Requests Based on the Treaty of Versailles (Leipzig Trials);
2. 1946–1955 Prosecutions by the Four Major Allies in the European Theater Pursuant to Control Council Law No. 10 (CCL 10); and

tutionally linked or related by reason to the conflict which gave rise to their establishment, they are best understood through an historical analysis.

A. The 1919 Commission on the Responsibilities of the Authors of War and on Enforcement of Penalties

The first international investigative commission was established at the end of World War I by the victorious Allies when the Allied and Associated Powers convened the 1919 Preliminary Peace Conference in Paris.⁴ At the Conference, the representatives of the Allies negotiated Germany's surrender and a peace treaty, whose terms they dictated. Much of the debate among the Allies addressed issues concerning the prosecution of Germany's Kaiser Wilhelm II, German war criminals, and Turkish officials for "crimes against the laws of humanity."⁵ Ultimately, after much compromise, the Allied representatives agreed on the terms of the Treaty of Peace Between the Allied and Associated Powers and Germany, concluded at Versailles on 28 June 1919.⁶ Article 227 of the Treaty provided for the creation of an ad hoc international criminal tribunal to prosecute Kaiser Wilhelm II for

3. 1946-1951 Military Prosecutions by Allied Powers in the Far East Pursuant to Directives of the FEC.

4. Prior to the 1919 Commission, the Carnegie Endowment for International Peace established a nongovernmental commission of international personalities to investigate alleged atrocities committed against civilians and prisoners of war during the First Balkan War of 1912 and the Second Balkan War of 1913. CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE, *THE OTHER BALKAN WARS: A 1913 CARNEGIE ENDOWMENT INQUIRY IN RETROSPECT WITH A NEW INTRODUCTION AND REFLECTIONS ON THE PRESENT CONFLICT* BY GEORGE F. KENNAN (1993) [hereinafter *BALKAN WARS*]. The seven members appointed to the Commission by the Carnegie Endowment were from the following countries: Austria-Hungary (1), Britain (1), France (2), Germany (1), Russia (1), and the United States (1). At the onset of the Second Balkan War, in order to give the western world a "clear and reliable picture of what was going on in the affected region," the Commission investigated the conflict and the conduct of individuals. *Id.* at 6. Several fact-finding missions were conducted by the Balkan Commission and subsequently a substantial report based on the Commission's findings was published. The Balkan Commission released its report in July 1914. In August, World War I began and the report became relevant to history.

The atrocities reported by the Balkan Commission bear an uncanny resemblance to those that were reported by the 1992 Yugoslavia Commission of Experts. Compare, for an assessment of the similarities, the CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE, *REPORT OF THE INTERNATIONAL COMMISSION TO INQUIRE INTO THE CAUSES AND CONDUCT OF THE BALKAN WARS* (1914), reprinted in *BALKAN WARS*, *supra*, to the *Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780* (1992), U.N. SCOR, 49th Sess., Annex, U.N. Doc. S/1994/674 (1994) [hereinafter *Final Report*]; Annexes to the *Final Report*, U.N. SCOR, 49th Sess., U.N. Doc. S/1994/674/Add.2 (1994) [hereinafter *Annexes*].

5. For information on the Armenian genocide, see generally VAHAKN N. DADRIAN, *THE HISTORY OF THE ARMENIAN GENOCIDE* (1995); Vahakn N. Dadrian, *Genocide as a Problem of National and International Law: The World War I Armenian Case and its Contemporary Legal Ramifications*, 14 YALE J. INT'L L. 221 (1989); ARNOLD J. TOYNBEE, *ARMENIAN ATROCITIES* (1915).

6. Treaty of Peace Between the Allied and Associated Powers and Germany, concluded at Versailles, June 28, 1919, 2 Bevans 43 [hereinafter *Treaty of Versailles*].

initiating the war.⁷ The Treaty also provided in Articles 228 and 229 for the prosecution of German military personnel accused of violating the laws and customs of war before Allied Military Tribunals or before the Military Courts of any of the Allies.⁸

The official inter-governmental Commission established by the Preliminary Peace Conference was called the Commission on the Responsibilities of the Authors of War and on Enforcement of Penalties.⁹ Its mandate was to investigate and report on the responsibility of those who had initiated the war and those who had violated the laws and customs of war in order to prosecute them.¹⁰ The Commission held closed meetings for two months and conducted intensive investigations.¹¹ This work was supposed to culminate in the charging of named individuals for specific war crimes. Based on subsequent developments in the administration of the Commission's mandate, however, it is reasonable to question whether the Allies' intentions were to pursue justice or whether they only intended to use symbols of justice to achieve political ends.

7. *Id.* art. 227, at 136.

8. Article 228 states:

The German Government recognizes the right of the Allied and Associated Powers to bring before military tribunals persons accused of having committed acts in violation of the laws and customs of war. Such persons shall, if found guilty, be sentenced to punishments laid down by law. This provision will apply notwithstanding any proceedings or prosecution before a tribunal in Germany or in the territory of her allies.

The German Government shall hand over to the Allied and Associated Powers, or to such one of them as shall so request, all persons accused of having committed an act in violation of the laws and customs of war, who are specified either by name or by the rank, office, or employment which they held under the German authorities.

Article 229 states:

Persons guilty of criminal acts against the nationals of one of the Allied and Associated Powers will be brought before the military tribunals of that Power.

Persons guilty of criminal acts against the nationals of more than one of the Allied and Associated Powers will be brought before military tribunals composed of members of the military tribunals of the Powers concerned.

In every case the accused will be entitled to name his own counsel.

Id., arts. 228 and 229, at 137.

9. The Commission was comprised of two members from each of the five Great Powers: the United States of America, the British Empire, France, Italy, and Japan. The additional states composing the Allied and Associated Powers were Belgium, Bolivia, Brazil, China, Cuba, Czechoslovakia, Ecuador, Greece, Guatemala, Haiti, the Hedjaz, Honduras, Liberia, Nicaragua, Panama, Peru, Poland, Portugal, Romania, the Serb-Croat-Slovene State, Siam, and Uruguay. *CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE, THE TREATIES OF PEACE 1919-1923* 3 (1924). The additional states, having a special interest in the matter, met and decided that Belgium, Greece, Poland, Romania, and Serbia should each name a representative to the Commission as well. Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, *Report Presented to the Preliminary Peace Conference, March 29, 1919*, 14 AM. J. INT'L L. 95, 96 (1920) [hereinafter 1919 COMMISSION REPORT].

10. 1919 COMMISSION REPORT, *supra* note 9, at 95.

11. JAMES F. WILLIS, PROLOGUE TO NUREMBERG: THE POLITICS AND DIPLOMACY OF PUNISHING WAR CRIMINALS OF THE FIRST WORLD WAR 68 (1982).

The Commission completed its report in 1920 and submitted a list of 895 alleged war criminals,¹² who were to be tried by the Allied tribunal. The Commission also sought to charge Turkish officials and other individuals for "crimes against the laws of humanity"¹³ based on the so-called Martens Clause contained in the Preamble of the 1907 Hague Convention.¹⁴ That clause states:

Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under *the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.*¹⁵

In reliance upon the Martens Clause, the Convention contained only a portion of the laws of humanity and other general principles of law which should be applicable to armed conflicts. That partial codification did not reject the rest of the potentially applicable positive international law, but merely deferred codification until another time when

12. Sources conflict as to the number of alleged war criminals listed for prosecution. See TELFORD TAYLOR, *THE ANATOMY OF THE NUREMBERG TRIALS* 17 (1992) (stating that the Allies presented a list of 854 individuals, including political and military figures); M. CHERIF BASSIOUNI, *CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW* 200 (1992) [hereinafter *CRIMES AGAINST HUMANITY*] (stating that the Allies submitted a list of 895 named war criminals); Remigiusz Bierzanek, *War Crimes: History and Definition*, in 3 *INTERNATIONAL CRIMINAL LAW* 29, 36 (M. Cherif Bassiouni ed., 3 vols., 1987) [hereinafter *ICL*] (stating that 901 names appeared on the list).

13. *CRIMES AGAINST HUMANITY*, *supra* note 12, at 170. See generally EUGÈNE ARONEANU, *LE CRIME CONTRE L'HUMANITÉ* (1961); PIETER DROST, *THE CRIME OF STATE* (2 vols. 1959); Egon Schwelb, *Crimes Against Humanity*, 23 *BRIT. Y.B. INT'L L.* 178 (1946).

14. Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, preamble, 36 Stat. 2277, 2779-80, 1 Bevans 631, 632 [hereinafter 1907 Hague Convention]. See also CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE, *THE PROCEEDINGS OF THE HAGUE PEACE CONFERENCES: TRANSLATION OF OFFICIAL TEXTS—THE CONFERENCE OF 1899* 548 (1920). For a commentary on the Martens clause, see Paolo Benvenuti, *La Clausola Martens e la Tradizione Classica del Diritto Naturale nella Codificazione del Diritto dei Conflitti Armati*, *SCRITTI DEGLI ALLIEVI IN MEMORIA DI GIUSEPPE BARILE* 173 (1993). Similar renditions of the Martens Clause, named after Fyodor Martens, the Russian diplomat and jurist who drafted the clause, appear in each of the 1949 Geneva Conventions and the 1977 Protocols. See Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, art. 63(4), 6 U.S.T. 3114, 3152, 75 U.N.T.S. 31, 68; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, art. 62(4), 6 U.S.T. 3217, 3254, 75 U.N.T.S. 85, 120; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 158(4), 6 U.S.T. 3516, 3622, 75 U.N.T.S. 287, 392; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 142(4), 6 U.S.T. 3316, 3424, 75 U.N.T.S. 135, 242; Protocol Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) adopted June 8, 1977, referenced in 16 *I.L.M.* 1391.

15. 1907 Hague Convention, *supra* note 14, preamble (emphasis added).

greater political consensus could be obtained. The Commission felt justified in relying upon the Martens Clause to develop the charge of "crimes against the laws of humanity." The United States and Japan, however, specifically opposed it on the grounds that the Commission's mandate was to investigate violations of the laws and customs of war and not the uncoded, so-called "laws of humanity."¹⁶

Although charges were to be brought against Turkish officials for the large-scale killing of Armenians in Turkey in 1915, no action was ever taken.¹⁷ These charges were based on the authority of the Treaty of Sèvres of 1920 between the Allies and Turkey,¹⁸ which provided for Turkey's surrender of accused persons to be tried presumably for "crimes against the laws of humanity." But the Treaty of Sèvres was not ratified and its provisions were never implemented. Instead, it was replaced in 1923 by the Treaty of Lausanne,¹⁹ which did not contain any provisions on prosecutions, but rather had an unpublicized annex granting Turkish officials amnesty.²⁰

Because the Allies were concerned about the stability of Turkey and eager not to alienate the new Turkish ruling elite which was partial to the western powers, Turkish officials were given impunity for war crimes. At that time, the Bolshevik Revolution of 1917 which toppled the Tsarist regime was causing concern in England and France. Turkey, on the border of the new communist regime, and the controlling power over the Bosphorus and Dardanelles Straits, through which the Russian Navy would have to transit to reach the Mediterranean from the Black Sea, was needed in the "western camp." Political concerns, thus, prevailed over the pursuit of justice.

16. See Memorandum of Reservations Presented by the Representatives of the United States to the Report of the Commission on Responsibilities, Annex II, Apr. 4, 1919, reprinted in 14 AM. J. INT'L L. 127, 144-51 (1920) [hereinafter Annex II]; Reservations by the Japanese Delegation, Annex III, Apr. 4, 1919, reprinted in 14 AM. J. INT'L L. 151 (1920).

17. See Dadrian, *Genocide as a Problem of National and International Law: The World War I Armenian Case and its Contemporary Legal Ramifications*, supra note 5, at 223. The Turkish Government and Turkish writers have consistently denied that such a massacre ever took place. Instead, they argue that there were ethnic confrontations between Armenians and other Turks which resulted in casualties on both sides. See Vahakn N. Dadrian, *Documentation of the Armenian Genocide in Turkish Sources*, in 2 GENOCIDE: A CRITICAL BIBLIOGRAPHIC REVIEW 86 (Israel W. Charney ed., 1991).

18. Treaty of Peace between the Allied Powers and Turkey, Aug. 10, 1920 (Treaty of Sèvres), reprinted in 15 AM. J. INT'L L. 179 (Supp. 1921).

19. Treaty with Turkey and Other Instruments, July 24, 1923 (Treaty of Lausanne), reprinted in 18 AM. J. INT'L L. 1 (Supp. 1924).

20. *Id.* See also M. Cherif Bassiouni, *The Time Has Come for an International Criminal Court*, 1 IND. INT'L & COMP. L. REV. 1, 2-4 (1991).

B. The Allies' Failure to Establish Prosecutions Pursuant to the Treaty of Versailles

The Treaty of Versailles did not link the 1919 Commission to eventual prosecutions recognized under its Articles 228 and 229, resulting in an institutional vacuum between the investigation and prosecution stage. Therefore, if the outcome of investigating was no longer politically useful, it could be reduced to a report that was easy to ignore and ultimately forget. If, however, the investigation outcome became politically useful, it could be used for eventual prosecutions.

The two major provisions of the Treaty of Versailles, Articles 227 and 228, were not implemented. Regarding prosecution of the Kaiser under Article 227, the Kaiser sought refuge in the Netherlands, and through diplomatic channels the Allies discussed the possibility of an eventual request for the Kaiser's surrender. The response from the Netherlands, whose sitting monarch was the Kaiser's cousin, was not positive. As a result, the Allies did not formally request his extradition, and there was no formal judicial or administrative process in which the Kaiser's extradition was denied.²¹ The Allies blamed the Netherlands, and some saw this as a way to avoid establishing a tribunal pursuant to Article 227. The Allies were not ready to create the precedent of prosecuting a Head of State for a new international crime. Indeed, this was evident in the choice of words used by the Allies in drafting Article 227, authored primarily by representatives of Great Britain:

The Allied and Associated Powers publicly arraign William II of Hohenzollern, formerly German Emperor, *for a supreme offence against international morality and the sanctity of treaties.*

21. Through diplomatic channels, the Allies requested that the Netherlands "make the Kaiser available for trial," but the Netherlands reportedly denied that request, allegedly speculating that it was made as a political formality and that the Allies would not exert effort to secure his surrender. TELFORD TAYLOR, *THE ANATOMY OF THE NUREMBERG TRIALS* 16 (1992). The legal grounds for denying the request were that the "offense charged against the Kaiser was unknown to Dutch law, was not mentioned in any treaties to which Holland was a party, and appeared to be of a political rather than a criminal character." *Id.* See also Quincy Wright, *The Legality of the Kaiser*, 13 AM. POL. SCI. REV. 121 (1919). The Netherlands discouraged formal extradition requests because extradition treaties applied only to cases in which a criminal act occurred. The Netherlands viewed the charge against the Kaiser as a "political offence" because a Head of State's decision to go to war is within the prerogative of national sovereignty and, therefore, not a crime under Dutch Law. See James W. Garner, *Punishment of Offenders Against the Laws and Customs of War*, 14 AM. J. INT'L L. 70, 91 (1920); WILLIS, *supra* note 11, at 66. For a discussion of the political offense exception to extradition, see M. CHERIF BASSIOUNI, *INTERNATIONAL EXTRADITION IN UNITED STATES LAW AND PRACTICE* Ch. VIII (3d ed. 1996); CHRISTINE VAN DEN WINGAERT, *THE POLITICAL OFFENCE EXCEPTION TO EXTRADITION: THE DELICATE PROBLEM OF BALANCING THE RIGHTS OF THE INDIVIDUAL AND THE INTERNATIONAL PUBLIC ORDER* (1980).

A special tribunal will be constituted to try the accused, thereby assuring him the guarantees essential to the right of defence

In its decision the tribunal will be guided by the highest motives of international policy, with a view to vindicating the solemn obligations of international undertakings and the validity of international morality

The Allied and Associated Powers will address a request to the Government of the Netherlands for the surrender to them of the ex-Emperor in order that he may be put on trial.²²

The text does not refer to a known international crime, but characterizes the purported crime of aggression as a "political" crime. Thus, the Dutch Government had a valid legal basis to reject the Allies' attempt to secure the surrender of the Kaiser for trial if such a request was to be formally presented. It was not. Article 227, quite possibly, was intended to fail. It offered a concession to the European masses, who saw the Kaiser as an ogre of war, and to the French and Belgian Governments, who wanted to humiliate Germany for initiating the war.

As for the prosecutions intended by Article 228, by 1921, the zest of the Allies to set up joint or even separate military tribunals had waned, and new developments in Europe required that Germany not be further humiliated. In order to avoid jeopardizing the stability of the already vulnerable Weimar Republic,²³ the Allies asked Germany to prosecute a limited number of war criminals before the *Reichsgericht* (the Supreme Court of Germany) in Leipzig instead of establishing an Allied Tribunal, as provided for in Article 228.²⁴

C. *The Leipzig Trials*

In response to the Allied request to undertake prosecutions, Germany, which had previously passed a national law to implement provisions of Articles 228 and 229, passed new legislation to assume jurisdiction under its national laws in order to prosecute accused offenders before its Supreme Court, sitting at Leipzig. Under German

22. Treaty of Versailles, *supra* note 6, art. 227, at 136 (emphasis added).

23. According to the leader of the British Mission at the Leipzig Trials, the post-war German Government convinced the Supreme Council that an attempt to arrest many of those named on the Allies' list of war criminals would bring down the government. CLAUD MULLINS, *THE LEIPZIG TRIALS: AN ACCOUNT OF THE WAR CRIMINALS' TRIALS AND A STUDY OF GERMAN MENTALITY* 9 (1921).

24. The Allies, however, maintained that even though they allowed the Germans to conduct the trials before a German court, they reserved the right to set aside the German judgments and carry out the provisions of Article 228 of the Treaty of Versailles. That did not occur, however. *Id.* at 26. See also WILLIS, *supra* note 11, at 142.

law, the Procurator General of the Supreme Court had the right to decide which cases would be brought to trial. The Allies, therefore, had to submit their cases, including evidence, to the Procurator General who had prosecutorial discretion. From the original list of 895 prepared by the 1919 Commission, the Allies submitted only forty-five names for prosecution.²⁵ Despite the 1919 Commission's extensive report and the Allies' supplemental information conveyed to the German Procurator General, only twelve military officers were ultimately prosecuted before the *Reichsgericht*.²⁶ There were no other national or Allied proceedings against any of those accused of war crimes by the 1919 Commission or any of the cases rejected for prosecution by the German Procurator General.

Although the armistice between Germany and the Allies was signed on November 11, 1919, the trials at Leipzig did not begin until May 23, 1921.²⁷ By 1923, the Allies' political will to pursue justice by prosecuting and punishing those who had violated international humanitarian law all but dissolved. International public interest dissipated, and domestic political concerns in the Allied countries overshadowed any remaining concerns that some academics, intellectuals, and public-spirited citizens still had in Belgium, France, and Great Britain. By then, the United States was in the throes of isolationism, with its rejection of President Woodrow Wilson's internationalist views, evidenced by Congress' refusal to have the United States become part of the League of Nations.

The Leipzig trials exemplified the sacrifice of justice on the altars of international and domestic politics of the Allies.²⁸ The Treaty commitment to try and punish offenders if Germany failed to do so was never carried out. The political leaders of the major powers of that time were more concerned with ensuring the future peace of Europe than pursu-

25. ICL, *supra* note 12, at 36.

26. Those convicted received sentences ranging from six months to four years, but not all were required to serve these lenient terms. *Id.* During these proceedings, the accused were cheered by crowds that attended the trials and gathered outside the courtrooms. In the eyes of the public, the accused were considered national heroes and became martyrs of foreign oppression. Thus, what was intended to be a deterrent to future violations of international humanitarian law, gave rise to nationalistic fervor and a sense of indignation which became a unifying force in Germany against the Allies. *See id.* at 36-37. The National-Socialist Party (the Nazi Party) seized power in 1932, only nine years after the Leipzig trials.

The German Procurator General, however, did bring his own cases against German soldiers for crimes committed during the war. For example, three German soldiers were convicted of robbing a Belgian innkeeper and were sentenced to terms of imprisonment ranging from two to five years. WILLIS, *supra* note 11, at 130. The result showed that the German court was willing to impose harsher sentences on those accused by the German authorities than on those accused by the Allies. *Id.*

27. CRIMES AGAINST HUMANITY, *supra* note 12, at 202.

28. *Id.*

ing justice.²⁹ Indeed, it was a common belief that World War I was "the war to end all wars," and that the League of Nations would usher a new world order that would prevent future wars. The Allies, however, missed the opportunity to establish an international system of justice that would have functioned independently of political considerations to ensure uncompromised justice.

The weak processes of international criminal justice following World War I not only failed to deter the military leaders who initiated World War II, but enhanced their cynicism. During a 1939 speech, Hitler reportedly stated in connection with his plans to "cleanse" (his early euphemism for exterminate) Jews, Gypsies, and others from the Third Reich: "Who after all is today speaking about the destruction of the Armenians?"³⁰ Hitler's words reflect a view still common today that the rule of might overshadows the rule of law.³¹

D. The 1943 United Nations War Crimes Commission

The atrocities of World War II compelled the need for international prosecutions after the Allied victory. In 1942, the Allied Powers signed an agreement at the Palace of St. James,³² establishing the United Nations War Crimes Commission (UNWCC).³³ The Declaration of St. James was the first step leading to the establishment of the International Military Tribunal (IMT) at Nuremberg. Despite high expectations for the UNWCC, for all practical purposes this inter-governmental, treaty-created, investigative body was subordinated to political

29. TAYLOR, *supra* note 12, at 15.

30. WILLIS, *supra* note 11, at 173 (quoting Adolf Hitler, Speech to the Chief Commanders and Commanding Generals on the Obersalzberg (Aug. 22, 1939) in 7 BRITISH DOCUMENTS ON FOREIGN POLICY, 1919-1939, THIRD SERIES, at 258 (E.L. Woodward et al. eds., 1949-55)); Winfried Baumgart, *Zür Ansprache Hitlers vor den Führern der Wehrmacht am 22 August 1939: Eine Quellenkritische Untersuchung*, VIERTELJAHRSHEFTE FÜR ZEITGESCHICHTE, Apr. 1968, 120. But see Türkaya Ataöv, *Hitler and the "Armenian Question"* (Monograph, Ankara University, 1992).

31. Who now remembers Biafra, Bangladesh, Cambodia, Uganda, Burundi, Liberia, and other genocides and mass murder? See, e.g., GUY RICHARD ET AL., *L'HISTOIRE INHUMAINE: MASSACRES ET GÉNOCIDES DES ORIGINES À NOS JOURS* (1992); Matthew Lippman, *The Drafting of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide*, 3 B. U. INT'L L. J. 1 (1985). More recently one author put the toll of mass killings at over 160 million victims. See R.J. RUMMEL, *DEATH BY GOVERNMENT* (1994). See also KAMPUCHEA: DECADE OF THE GENOCIDE (Kimmo Kiljunen ed., 1984); REPORT OF THE CAMBODIAN GENOCIDE PROJECT (1984); LEO KUPER, *GENOCIDE* (1981); JOHN STRENLAW, *THE INTERNATIONAL POLITICS OF THE NIGERIAN CIVIL WAR 1967-1970* (1977).

32. The Inter-Allied Declaration, Jan. 13, 1942, reprinted in PUNISHMENT FOR WAR CRIMES: THE INTER-ALLIED DECLARATION SIGNED AT ST. JAMES' PALACE, LONDON, ON 13 JANUARY 1942, AND RELATIVE DOCUMENTS (Inter-Allied Information Committee, London, undated). See also UNITED NATIONS WAR CRIMES COMMISSION, HISTORY OF THE UNITED NATIONS WAR CRIMES COMMISSION AND THE DEVELOPMENT OF THE LAWS OF WAR 89-92 (1948) [hereinafter HISTORY OF THE UNWCC].

33. Even though this Commission's name was preceded by "United Nations," it was unrelated to the world body founded in San Francisco in 1945.

considerations and ultimately relegated to a role far inferior to that which was expected by the Allies.

The UNWCC was comprised of representatives from seventeen nations, most of which were governments in exile possessing only limited powers.³⁴ Given the uncertain future of these exiled governments, the UNWCC had little political influence and support.³⁵ Under the aegis of the Allied Powers, the UNWCC was to investigate and obtain evidence of war crimes.³⁶ Despite this mandate, the Allied Powers did not provide the UNWCC with an investigatory staff, adequate support staff, or sufficient funds to conduct its work. In fact, within a few months of its creation, the first Chairman of the UNWCC, Sir Cecil Hurst, announced that the Commission would be unable to fulfill its mandate.³⁷ The UNWCC relied on governments to submit reports, but by the end of 1942 it had only received seventy cases which contained incomplete or insubstantial information. Even after the chairman's exhortations to Allied Governments, there were very few new government submissions.³⁸

Only after the Allies liberated German-occupied territories did they realize the extent of the atrocities committed. Thereafter, British and U.S. forces began to develop a list of suspected war criminals in order to separate them from other liberated prisoners.³⁹ At that point, the British Government began to press the UNWCC to complete its work.⁴⁰

Despite the initial lack of cooperation from and among the various governments, the UNWCC was able to achieve remarkable results in amassing 8,178 "dossiers" on alleged war criminals and serving as a clearinghouse of information among governments.⁴¹ Although the UNWCC collected information pertaining to allegations of war crimes, it was not institutionally linked to the IMT or to the Subsequent Proceedings by the Allied occupation forces in Germany pursuant to Allied Control Council Law No. 10, each of which had its own investigative teams,⁴²

34. ANN TUSA & JOHN TUSA, *THE NUREMBERG TRIAL* 22 (1984) [hereinafter TUSA & TUSA].

35. TAYLOR, *supra* note 12, at 26-27.

36. The UNWCC was limited to investigating war crimes only. Thus, even though some of its members desired to investigate the allegations of atrocities committed against the Jews, they could not because such acts constituted "crimes against humanity" and not war crimes. TUSA & TUSA, *supra* note 34, at 22.

37. HISTORY OF THE UNWCC, *supra* note 32; TUSA & TUSA, *supra* note 34, at 22.

38. TUSA & TUSA, *supra* note 34, at 23.

39. *Id.* at 29.

40. *Id.*

41. The UNWCC examined the 8,178 "dossiers" submitted by governments, and if satisfied with the contents, recommended prosecution of the individual. The "dossiers" amounted to 24,453 accused, 9520 suspects, and 2556 material witnesses. HISTORY OF THE UNWCC, *supra* note 32, at 508-09.

42. Control Council Law No. 10 and proceedings under it are discussed below at text accompanying notes 79-82.

nor was it linked to the International Military Tribunal for the Far East (IMTFE) and the Allied Military Tribunals or Commissions in the Far East. However, the information that the UNWCC collected was relied upon by various governments in subsequent national prosecutions.⁴³

Between 1942 and 1945, political support for the body waned. As the United States began to dominate the IMT proceedings and conduct its Subsequent Proceedings pursuant to CCL No. 10⁴⁴ in the very same courthouse at Nuremberg, U.S. support for the UNWCC evaporated. The UNWCC's moral influence over governments to compel cooperation in the pursuit of accused war criminals and to either prosecute or extradite such persons was substantially eroded. This was particularly evident with respect to those accused Italian war criminals who were never prosecuted.⁴⁵

E. The International Military Tribunal at Nuremberg

While the UNWCC was collecting evidence, the Four Major Allied Powers had to reach a decision with respect to the prosecution and punishment of war criminals, particularly the leaders of the Nazi regime, as called for by the Moscow Declaration signed in 1943 by Churchill, Roosevelt, and Stalin.⁴⁶ Britain initially favored summary execution of "major" war criminals, such as Hitler or Himmler on the basis that "their 'guilt was so black' that it was 'beyond the scope of any judicial process.'"⁴⁷ In comparison, as early as the discussions at the Palace of St. James in 1942, Stalin advocated a special international

43. By 1948, European countries and the United States had brought a total of 969 cases in their respective courts, involving 3470 accused, of whom 952 were sentenced to death, 1905 were imprisoned, and 613 were acquitted. HISTORY OF THE UNWCC, *supra* note 32, at 518.

44. See FRANK M. BUSCHER, THE U.S. WAR CRIMES TRIAL PROGRAM IN GERMANY, 1946-1955 (1989); TELFORD TAYLOR, FINAL REPORT TO THE SECRETARY OF THE ARMY ON THE NUREMBERG WAR CRIMES TRIALS UNDER CONTROL COUNCIL LAW NO. 10 (1949); JOHN A. APPLEMAN, MILITARY TRIBUNALS AND INTERNATIONAL CRIMES (1954).

45. See *infra* text accompanying notes 83-88. The United States and Britain prosecuted a small number of Italian war criminals, mostly those accused of committing crimes against their respective military personnel. Eighty-one defendants were tried in 40 proceedings by the British in Italy. See R. JOHN PRITCHARD & JANE L. GARWOOD-CUTLER, THE ALLIED WAR CRIMES TRIALS OF SUSPECTED ITALIAN WAR CRIMINALS, 1945-1949: A FORGOTTEN LEGACY WITH VITAL LESSONS FOR THE PRESENT DAY (forthcoming). Those accused by UNWCC of war crimes outside Italy, however, were, to the best of the author's knowledge, never prosecuted.

46. Declaration on Security (The Moscow Declaration), 9 DEP'T ST. BULL. 308 (1943), *reprinted in* 38 AM. J. INT'L L. 5 (1944). One of the most influential steps toward the establishment of the Military Tribunal at Nuremberg was the convening of an ostensibly private group of statesmen, scholars and public officials under the name of the London International Assembly. That group developed many of the concepts and some of the norms that went into the Statute of the IMT. See THE PUNISHMENT OF WAR CRIMINALS: RECOMMENDATIONS OF THE LONDON INTERNATIONAL ASSEMBLY (Report of Commission I) (1944).

47. TAYLOR, *supra* note 12, at 29.

tribunal for prosecuting Hitler, his close advisers, and senior military leaders.⁴⁸ Similarly, the United States and France both preferred the establishment of an international tribunal to prosecute war criminals.⁴⁹ The Americans and French wanted the tribunal to record history, educate the world, and serve as a future deterrent. Great Britain was fearful that fair procedures would allow the accused to use the tribunal as a forum for propaganda and self-justification. Essentially because of the United States' insistence through President Truman and Justice Robert Jackson, the idea of an international criminal tribunal came into fruition.

The proceedings were not without flaws. The U.S.S.R. used the tribunal to rewrite history: they sat in judgment over Germans accused of crimes for which the Soviet Union was responsible, like the disappearance of approximately 15,000 Polish prisoners, including between 8,300 and 8,400 Polish officers.⁵⁰ Moreover, Britain's fears that the IMT proceedings would provide the accused with a platform for self-justification were validated when Goering outdid Robert Jackson during his cross-examination and as his lawyer harangued the Tribunal for two days.⁵¹ Nevertheless, the evidence of the horrible acts committed overshadowed anything that the defendants or their lawyers had to say. Ultimately, the higher values and goals sought to be achieved by the United States, France, and Great Britain prevailed.

Because the four major Allied Powers had different national criminal procedures, drafting the IMT Charter was particularly difficult.⁵² While British and American procedures were both adversarial in nature and

48. *Id.* at 26. See also ARON N. TRAININ, *HITLERITE RESPONSIBILITY UNDER CRIMINAL LAW* (Rothstein trans., 1945) (1942). In 1946, Professor Trainin recalled his contribution to the prosecutions of German war criminals in A.N. Trainin, *Le Tribunal Militaire International et le Procès de Nuremberg*, in 17 *REVUE INTERNATIONALE DE DROIT PENAL* 263 (1946). The USSR was, however, dealing with alleged war criminals within their territory by summary execution. TAYLOR, *supra* note 12, at 52.

49. TAYLOR, *supra* note 12, at 32.

50. J.K. ZAWODNY, *DEATH IN THE FOREST: THE STORY OF THE KATYN FOREST MASSACRE* at 5 (1962).

51. See, e.g., TAYLOR, *supra* note 12, at 319.

52. This difficulty was also faced by the judges of the Tribunal for the former Yugoslavia in elaborating Rules of Procedure and Evidence. The Rules were adopted by the Tribunal on February 11, 1994. International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991 (ICTFY), 2d Sess., *Rules of Procedure and Evidence adopted on 11 February 1994*, U.N. Doc. IT/32 (1994). Changes to the Rules of Procedure and Evidence continued on an ad hoc basis until September 1996.

So far, the Tribunal has amended its rules 11 times. These many changes also evidenced the fact that international prosecutions require *sui generis* rules and that domestic legal experiences may not be relevant to such processes. Some of these considerations were raised at the Second Session of the Preparatory Committee on the Establishment of an International Criminal Court in connection with discussions and proposals on rules of procedure and evidence. *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, Vol. I, U.N. GAOR, 51st

based on the common law, France had a civil law system, and the Soviet Union had its own new brand of "socialist justice."⁵³ The representatives of the Allies reconciled their different legal systems in a mixed process.⁵⁴ The London Agreement of August 8, 1945 established the IMT and had an annex containing the charter of the new tribunal.⁵⁵ The legal amalgamation, according to Justice Jackson, worked to the advantage of the defendants. They could, for example, take the stand and testify under oath in their own defense or simply present an unsworn statement to the court at the end of a trial without submitting to cross-examination.⁵⁶

The drafters were also faced with the arduous task of defining the crimes for which the defendants would be prosecuted. The Charter ultimately provided in Article 6 for the prosecution of the following substantive crimes: (a) crimes against peace; (b) war crimes; and (c) crimes

Sess., Supp. No. 22, paras. 212-93, U.N. Doc. A/51/22 (1996) [hereinafter *Preparatory Committee Report*].

For a discussion of the Tribunal's rules, see M. CHERIF BASSIOUNI (WITH THE COLLABORATION OF PETER MANIKAS), *THE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA* (1996) [hereinafter BASSIOUNI, *YUGOSLAVIA TRIBUNAL*]; VIRGINIA MORRIS & MICHAEL SCHARF, *AN INSIDER'S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA* (1995) [hereinafter MORRIS & SCHARF, *AN INSIDER'S GUIDE*].

53. See, e.g., *THE CRIMINAL JUSTICE SYSTEM OF THE USSR* (M. Cherif Bassiouni & Valeri M. Savitsky eds., 1979); *SOVIET CRIMINAL LAW AND PROCEDURE* (Harold Berman trans., 2d ed. 1972); HAROLD BERMAN, *JUSTICE IN THE USSR* (1963).

54. See John F. Murphy, *Norms of Criminal Procedure at the International Military Tribunal, in THE NUREMBERG TRIAL AND INTERNATIONAL LAW* 61 (George Ginsburgs & Vladimir N. Kudriavtsev eds., 1990). The same mixed approach favoring the Common Law's adversary-accusatorial model is evident in the Rules of Procedure and Evidence of the ICTFY, see *supra* note 52, and the proposals presented to the 1996 Preparatory Committee on the Establishment of an International Criminal Court, *supra* note 52.

55. Prosecution and Punishment of Major War Criminals of the European Axis, Aug. 8, 1945, 82 U.N.T.S. 279, 59 Stat. 1544, 3 Bevans 1238 [hereinafter London Agreement]; Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, Charter of the International Military Tribunal, 59 Stat. 1544, 1546, 82 U.N.T.S. 279, 284 [hereinafter London Charter].

56. REPORT OF ROBERT H. JACKSON, UNITED STATES REPRESENTATIVE TO THE INTERNATIONAL CONFERENCE ON MILITARY TRIALS at x-xi (U.S. Gov't Prtg. Off. 1949) [hereinafter JACKSON REPORT]. It should be noted, however, that from a procedural and evidentiary legal perspective, the IMT was not without fault. At the trial, defendants were frequently denied the right to confrontation and cross-examination of witnesses that were available to the prosecution. Instead, they had to use affidavits. There was no appeal, a right now guaranteed in the 1966 International Covenant on Civil and Political Rights. Even Justice Jackson noted these mistakes in his report to the President, wherein he admits to mistakes in the "proceedings of this novelty." *Id.* at 440.

Since World War II, however, the impact of international and regional human rights norms and standards have significantly affected criminal procedures in most countries of the world. See, e.g., M. CHERIF BASSIOUNI, *THE PROTECTION OF HUMAN RIGHTS IN THE ADMINISTRATION OF CRIMINAL JUSTICE: A COMPENDIUM OF UNITED NATIONS NORMS AND STANDARDS* (1994); M. Cherif Bassiouni, *Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions*, 3 DUKE J. COMP. & INT'L L. 235 (1993).

against humanity.⁵⁷ From the perspective of the principles of legality, the easiest to define of the three crimes was "war crimes." War crimes in Article 6(b) included customary law as identified, *inter alia*, by reference to the 1907 Hague Convention⁵⁸ and conventional law as evidenced in the 1929 Geneva Convention Relative to the Treatment of Prisoners of War.⁵⁹ A more difficult legal issue was whether "crimes against humanity" under Article 6(c) existed under a combination of sources of international law, namely conventions, custom, and general principles of law.⁶⁰ Because "crimes against humanity" had not been a part of treaty law, the Allies needed to avoid a rigid interpretation of the principles of legality in order to avoid enacting *ex post facto* legislation that could be successfully challenged in court. Thus, the rationale for "crimes against humanity" was predicated on a theory of jurisdictional extension of war crimes. The reasoning was that war crimes applied to certain protected persons, namely civilians, in time of war between belligerent states, and "crimes against humanity" merely extended the same "war crimes" proscriptions to the same category of protected persons within a particular state, provided it is linked to the initiation and conduct of aggressive war or to war crimes.⁶¹ As a result of this interpretation, crimes committed before 1939 were excluded from prosecution.

It is evident from the adoption of Article 6(c) that the United States radically changed its position from that taken before the 1919 Commission that "crimes against the laws of humanity" did not exist in positive international law.⁶² Yet no legal development took place between 1919 and 1945 that could have explained this change of position. In the case of Nazi atrocities, the facts drove the law, and politics were also a consideration.

Prosecution for "crimes against peace" was without legal precedent, save for the failed attempt after World War I to prosecute the Kaiser under Article 227 of the Treaty of Versailles.⁶³ Article 6(a) of the Charter provided for the prosecution of those who directed or partici-

57. London Charter, *supra* note 55, art. 6.

58. 1907 Hague Convention, *supra* note 14.

59. The 1929 Geneva Convention Relative to the Treatment of Prisoners of War, July 27, 1929, 118 L.N.T.S. 343, 47 Stat. 2021, 2 Bevans 932.

60. CRIMES AGAINST HUMANITY, *supra* note 12, at 18-32; Schwelb, *supra* note 13.

61. See CRIMES AGAINST HUMANITY, *supra* note 12, at 18-47; M. Cherif Bassiouni, *International Law and the Holocaust*, 9 CAL. W. INT'L L. J. 201 (1979). See also Leila Sadat Wexler, *The Interpretation of the Nuremberg Principles by the French Court of Cassation*, 32 COLUM. J. TRANSNAT'L L. 289 (1994); Schwelb, *supra* note 13.

62. Annex II, *supra* note 16, at 144. Curiously, however, to date, there is no international convention on "crimes against humanity." See M. Cherif Bassiouni, "Crimes Against Humanity": *The Need for a Specialized Convention*, 31 COLUM. J. TRANSNAT'L L. 457 (1994).

63. See *supra* notes 21-22 and accompanying text.

pated in a war of aggression against other nations in violation of treaties and the principles of international law. This was the best legal basis the Allies could come up with.⁶⁴ The Soviet Union wanted to include the phrase "by the European Axis,"⁶⁵ in order to make the initiation of a war of aggression a crime limited to the leaders of the European Axis and avoid the application of that same norm to any of its own conduct.⁶⁶ Justice Jackson, then representative of the United States at the London Conference, prevailed in his view that the limiting phrase should not be included. Jackson stated that the American representatives would not draft a law that would be akin to a "bill of attainder," which is prohibited by the United States Constitution⁶⁷ and that the prohibition against aggression is universal and could also be applied against the United States.⁶⁸ The United States had thus also changed its position from that of post-World War I by deciding to make war of aggression a crime under international law,⁶⁹ a position that subsequently changed once again during the Cold War era when it was no longer politically convenient.⁷⁰

64. The Allies particularly relied on the 1928 General Treaty for the Renunciation of War as an Instrument of National Policy (Kellogg-Briand Pact or Pact of Paris) of August 27, 1928 as a legal justification for "crimes against peace." 94 L.N.T.S. 57, 46 Stat. 2343, *reprinted in* 22 AM. J. INT'L L. 171 (Supp. 1928).

65. Annex II, *supra* note 16, at 65.

66. See JACKSON REPORT, *supra* note 56, at vii-viii. It is likely that the Soviet Union desired to avoid codifying a broad definition of crimes against peace that could be used again in the future. Without such a definition, the Soviet Union would be free to act as it wished without repercussions. The lack of definition would also allow the USSR to avoid being held criminally accountable for its invasion and seizure of a part of Poland in the fall of 1940, pursuant to the secret Pact of Non-Aggression between Germany and the USSR, as well as its subsequent invasion of Finland.

67. U.S. CONST., art. I, § 10, cl. 3; art. I, § 10, cl. 1.

68. JACKSON REPORT, *supra* note 56, at vii-viii.

69. See, e.g., M. Cherif Bassiouni & Benjamin Ferencz, *The Crime Against Peace*, in 1 INTERNATIONAL CRIMINAL LAW 174-76 (M. Cherif Bassiouni ed., 3 vols., 1987); BENJAMIN FERENCZ, DEFINING INTERNATIONAL AGGRESSION, THE SEARCH FOR WORLD PEACE: A DOCUMENTARY HISTORY AND ANALYSIS (1975). The U.N. Charter prohibits aggression, and the Security Council has the power under Chapter VII to take measures, including sanctions, to preserve and maintain peace. U.N. CHARTER, arts. 2(3), 2(4), 39-51. See generally THE UNITED NATIONS CHARTER: A COMMENTARY (Bruno Simma ed., 1994). It is noteworthy that there has never been an international convention explicitly making aggression an international crime. Other than the General Assembly's 1974 Resolution, G.A. Res. 3314, U.N. GAOR, 29th Sess., Supp. No. 31, at 143, U.N. Doc. A/9631 (1974), defining aggression and adopted by consensus, there is no definition of that crime. Consequently, its definition has posed problems to the 1996 Preparatory Committee on the Establishment of an International Criminal Court. See *Preparatory Committee Report*, *supra* note 52.

70. See *Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14 (June 27) (explaining the position of the United States in connection with the case). Commenting on that position, see THE INTERNATIONAL COURT OF JUSTICE AT A CROSSROADS (Lori Fisher Damrosch ed., 1987). In support of the United States' particular position, see JEANNE KIRKPATRICK & ALAN GERSON, RIGHT V. MIGHT: INTERNATIONAL LAW AND THE USE OF FORCE (1989). For different perspectives, see LAW AND FORCE IN THE NEW INTERNATIONAL ORDER (Lori Fisher Damrosch & David J. Scheffer eds., 1991).

The IMT Charter developed the law of armed conflict in a progressive manner. Article 8 of the IMT Charter removed the defense of "obedience to superior orders," making it only a mitigating factor that would not exonerate a defendant from being held responsible for his actions. This was contrary to what most military laws provided for at the time World War II started.⁷¹ The judgments of the IMT did not entirely follow the prescription of Article 8, however, and allowed the defense when the subordinate had no alternative moral choice in refusing to carry out the order.⁷²

Once the procedural and legal issues were resolved, the IMT Charter was appended to the London Agreement of August 8, 1945, which established the IMT.⁷³ The London Agreement was signed by the Four Major Allies and later acceded to by nineteen states.⁷⁴ The Four Major Allies assembled individual prosecution teams, which also had their own investigators. The American team provided most of the documents that were used as evidence as well as practical and logistical support for the other teams.⁷⁵

At the time, over one million Allied troops occupied Germany, with complete access to prisoners of war, civilian witnesses, and government documents. The collection of evidence was made easy by what Telford Taylor has called the "Teutonic penchant for meticulous record keeping."⁷⁶

71. LASSA OPPENHEIM, *INTERNATIONAL LAW* 264-65 (1st ed. 1906). The *BRITISH MANUAL OF MILITARY LAW*, No. 443 (1914) relied upon Oppenheim in its formulation. Oppenheim's recognition of the defense remained in the first five editions up to 1940, when it changed to become the basis for the IMT's Article 8 which denied the defense. U.S. Dep't of the Army, *Field Manual* 27-10 (1940) reflected the same position in § 345(1). On November 15, 1944, a revision of § 345(1) limited, but retained, a qualified defense. *But see* U.S. DEP'T OF THE ARMY, *FIELD MANUAL* 27-10: *THE LAW OF LAND WARFARE* (1956). For a historical evolution of the question, see Leslie C. Green, *Superior Orders and Command Responsibility*, 27 *CAN. Y.B. INT'L L.* 167 (1989); Major William H. Parks, *Command Responsibility for War Crimes*, 62 *MIL. L. REV.* 1 (1973).

72. *See generally* NICO KEIJZER, *MILITARY OBEDIENCE* (1978); LESLIE C. GREEN, *SUPERIOR ORDERS IN NATIONAL AND INTERNATIONAL LAW* (1976); YORAM DINSTEIN, *THE DEFENCE OF 'OBEDIENCE TO SUPERIOR ORDERS' IN INTERNATIONAL LAW* (1965); EKKEHART MÜLLER-RAPPA, *L'ORDRE SUPÉRIEUR MILITAIRE ET LA RESPONSABILITÉ PÉNALE DU SUBORDONNÉ* (1965).

73. *See* London Agreement, *supra* note 55; London Charter, *supra* note 55.

The seat of the IMT was the subject of considerable discussion among the Four Major Powers. Berlin was finally agreed upon, at the insistence of the USSR, for its symbolic significance. Nuremberg, however, was to be the effective seat from the beginning. The reason at first was quite simple, the German courthouse (actually the seat of a court of appeals) was the only one that was not destroyed or heavily damaged. Subsequently, it was advanced that the choice was symbolic, because Hitler had first announced plans for "ethnic cleansing" in a speech in that city in 1936. However, the former practical reason was probably the basis for the decision.

74. *See* London Agreement, *supra* note 55.

75. There was no reliance on the work of the UNWCC. *See supra* text accompanying notes 41-43.

76. TAYLOR, *supra* note 12, at 57.

The IMT indicted twenty-four persons, of whom twenty-two were prosecuted. Three defendants were acquitted, twelve were sentenced to death by hanging, three were sentenced to life imprisonment, and the others were sentenced to terms of imprisonment ranging from ten to twenty years.⁷⁷ Hermann Goering committed suicide at the end of the trial. All of the defendants were German and no other defendants from the European Axis Powers were indicted or tried before the IMT. No Allied Military personnel were prosecuted for any war crimes against Germans. These proceedings, even though just with respect to the accused, were one-sided.⁷⁸

F. Control Council Law No. 10

Subsequent to the London Charter, the Allies, by virtue of Germany's unconditional surrender, exercised sovereignty over Germany and enacted Allied Control Council Law No. 10 which permitted the Allies to prosecute German nationals in their respective zones of occupation.⁷⁹ Political will, sufficient resources, control of the territory, and the nature of the German military and civil service systems combined to make the prosecutions at Nuremberg effective. The same consideration made the Subsequent Proceedings under CCL 10 by the Americans, British, and French equally effective. The Russians, however,

77. CRIMES AGAINST HUMANITY, *supra* note 12, at 210.

78. For a critical perspective of the IMT, see AUGUST VON KNIEREM, *THE NUREMBERG TRIALS* (1959); Hans Ehard, *The Nuremberg Trial against the Major War Criminals and International Law*, 43 AM. J. INT'L L. 223 (1949); A. Frederick Mignone, *After Nuremberg*, 25 TEX. L. REV. 475 (1947); Gordon Ireland, *Ex Post Facto from Rome to Tokyo*, 21 TEMPLE L.Q. 27 (1947). Many of the concerns raised by the authors cited above are also present in the following: Georg Schwarzenberger, *The Judgment of Nuremberg*, 21 TUL. L. REV. 329 (1947); Hans Kelsen, *Will the Judgment in the Nuremberg Trial Constitute a Precedent in International Law*, 1 INT'L L.Q. 153 (1947); Gordon W. Forbes, *Some Legal Aspects of the Nuremberg Trial*, 24 CAN. B. REV. 584 (1946); A.L. Goodhart, *The Legality of the Nuremberg Trials*, 58 JURID. REV. 1 (1946). For the views of four defense counsels at the IMT, see Herbert Kraus, *The Nuremberg Trials of the Major War Criminals: Reflections after Seventeen Years*, 13 DEPAUL L. REV. 233 (1964) (Chief Counsel for Schacht); Carl Haensel, *The Nuremberg Trials Revisited*, 13 DEPAUL L. REV. 248 (1964) (Chief Counsel for the S.S. and S.D.); Otto Kranzbuhler, *Nuremberg Eighteen Years Afterwards*, 14 DEPAUL L. REV. 333 (1965) (Chief Counsel for Donitz); Otto Pannenbecker, *The Nuremberg War Crimes Trial*, 14 DEPAUL L. REV. 348 (1965) (Chief Counsel for Frick). For two other authors who address the question of Allied violations, see JAMES BACQUE, *OTHER LOSSES: THE SHOCKING TRUTH BEHIND THE MASS DEATHS OF DISARMED GERMAN SOLDIERS AND CIVILIANS UNDER GENERAL EISENHOWER'S COMMAND* (1991) and ALFRED M. DE ZAYAS, *THE WEHRMACHT WAR CRIMES BUREAU: 1939-1945* (1989). In the latter book, the author reveals that the German Army established a bureau to record war crimes committed by the Allies against German military personnel. These apparently uncontroverted violations were never pursued by the Allies.

79. Allied Control Council Law No. 10, *Punishment of Persons Guilty of War Crimes, Crimes against Peace and against Humanity*, 20 December 1945, Official Gazette of the Control Council for Germany, No. 3, Berlin, January 31, 1946, reprinted in BENJAMIN B. FERENCZ, *AN INTERNATIONAL CRIMINAL COURT: A STEP TOWARD WORLD PEACE* 488 (1980) [hereinafter CCL 10].

proceeded in a summary manner with little or no regard for legal considerations.⁸⁰

Prosecutions in the Allied zones of occupation could be said to be in the nature of domestic, as opposed to international, prosecutions because the Allies were presumably exercising sovereign power in Germany as a result of that country's unconditional surrender.⁸¹ CCL 10 was, nevertheless, patterned after the IMT's charter, and Article II of the IMTFE provided for the same three crimes as in the IMT's statute Article 6. The only difference in Article II(c), concerning "crimes against humanity," was the removal of the connection to the initiation of war or to war crimes.⁸²

G. The Instrument of Surrender to Italy

Since CCL 10 was promulgated by the Four Major Allies acting as the sovereign authority in Germany, it did not apply to other Axis countries which were also defeated and occupied by the Allies. Thus, for example, Italy was occupied by the United States and Great Britain subject to a Surrender Treaty, which provided for the prosecution and extradition of war criminals.⁸³ The goals of the Treaty, however, were supplanted by the fear of communism that was pervasive in Europe. The Major Powers believed that reformed fascists were the best opponents of communism and therefore did not actively pursue their prosecution or extradition for fear of the internal political repercussions. The UNWCC listed 750 Italian war criminals whose different charges included the following:⁸⁴ illegal use of poisonous gas in violation of the 1925 Geneva Protocol⁸⁵ against Ethiopian civilians and combatants, killing of innocent civilians and POWs, torture and mistreatment of prisoners, bombing ambulances, destruction of cultural property, and other violations of the laws of armed conflicts during the Italo-Abyssinian war.⁸⁶ In addition, the UNWCC had extensive evidence of

80. With respect to prosecutions in certain eastern and central European countries as well as extrajudicial execution, see István Deák, *Post World War II Political Justice in a Historical Perspective*, 149 *MIL. L. REV.* 137 (1995).

81. The nature of the separate proceedings was different. The U.S. proceedings were before civilian judges, while the British, French, and Russian trials were before military courts. See TAYLOR and BUSCHER, *supra* note 44.

82. CCL 10, *supra* note 79, art. II(c).

83. The Instrument of Surrender of Italy, art. 29, Sept. 29, 1943, 61 Stat. 2742, 2746, 3 Bevans 775, 781.

84. See CRIMES AGAINST HUMANITY, *supra* note 12, at 85, 227. Various governments submitted to the UNWCC charges against Italians. The total number of charged and listed Italian war criminals equalled 1204. HISTORY OF THE UNWCC, *supra* note 32, at 511.

85. The use of poisonous gas was in violation of the 1925 Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 26 U.S.T. 571, 94 L.N.T.S. 65, T.I.A.S. No. 8061.

86. HISTORY OF THE UNWCC, *supra* note 32, at 68, 189-90.

crimes committed by the Italian military personnel in Greece, Libya, and Yugoslavia during World War II. The governments of Ethiopia, Greece, Libya, and Yugoslavia requested extradition of the war criminals pursuant to Article 29 of the instrument of surrender of Italy, but the occupying forces of Italy, the United States, and the United Kingdom did not act on their requests.⁸⁷ Subsequently, in 1946, the Italian government denied requests for extradition.⁸⁸ In short, political views once again prevailed over justice considerations.

H. The Far Eastern Commission and the International Military Tribunal for the Far East at Tokyo

The Far Eastern Commission (FEC)⁸⁹ was agreed to in Moscow in December 1945 as a measured response to the request of the U.S.S.R. The FEC gave the U.S.S.R. some element of control over the future of Japan as a reward for its late entry into the war, but left control of the FEC to the United States. It consisted of eleven states, with the four Major Allies having veto power. The Commission, whose seat was in Washington, transmitted its directives to an advisory group known as the Allied Council for Japan, seated in Tokyo. The United States, the U.K., China, and the U.S.S.R. were the only members of the Allied Council for Japan, and they were to oversee the occupational policies and practices for Japan.

The FEC was not an investigative body but a political one, which was to establish a policy of occupation for Japan and to coordinate the Allied policies in the Far East. The Commission played an important role in providing the joint Allied political umbrella for prosecution and other policies related to suspected war criminals, their trials, the carrying out of their sentences, and their release. Ultimately, however, "the Far Eastern Commission became little more than a debating society, and when a peace treaty was finally signed with Japan, it died a quiet death."⁹⁰

Control over occupational matters rested with General Douglas MacArthur as the Supreme Commander for the Allied Powers (SCAP). Virtually every aspect of justice in the Far East was guided by MacArthur's views and his political perspectives on the region. General MacArthur opposed the Commission's establishment because it allowed the U.S.S.R. a role and a veto. As he stated, "The very nature of its

87. See *supra* note 45.

88. CRIMES AGAINST HUMANITY, *supra* note 12, at 228.

89. See generally *Activities of the Far Eastern Commission, Report by the Secretary General, February 26-July 10, 1947*, 16 DEPT ST. BULL. 804-06 (1947) [hereinafter FEC Report].

90. CRIMES AGAINST HUMANITY, *supra* note 12, at 293.

composition and procedures eventually made the Far Eastern Commission ineffective."⁹¹

On January 19, 1946, General MacArthur, in his capacity as the SCAP for the Pacific Theater, and on behalf of the FEC, promulgated an order establishing the IMTFE.⁹² Unlike the IMT, the IMTFE was not a treaty-based creation. Why the IMT and not the IMTFE required a treaty for its creation has never been explained, but several political considerations seem relevant. First, the Soviet Union had entered the war against Japan a few weeks before the latter was defeated, and the United States was concerned about the ambitions of the Soviet Union in the Far East. Furthermore, the United States did not want the U.S.S.R. to have any influence over these proceedings.⁹³ The United States was also concerned about Japan's post-World War II course of conduct. Thus, everything that was done by the FEC and the IMTFE

91. DOUGLAS MACARTHUR, REMINISCENCES 292 (1964).

92. See Special Proclamation: Establishment of an International Military Tribunal for the Far East, Jan. 19, 1946, T.I.A.S. No. 1589, at 3, 4 Bevens 20 [hereinafter IMTFE Proclamation]. On the same day General MacArthur issued his proclamation, the Charter for the IMTFE was adopted. Pursuant to a policy decision by the FEC, the Charter was later amended by General's Order No. 20, issued by MacArthur. See Charter for the International Military Tribunal for the Far East, approved Apr. 26, 1946, T.I.A.S. No. 1589, at 11, 4 Bevens 27 [hereinafter IMTFE Amended Charter]. The IMTFE consisted of 11 members. Nine were representatives from countries which had signed Japan's surrender agreement: Australia, Canada, China, France, the Netherlands, New Zealand, the Soviet Union, the United Kingdom, and the United States. See Instrument of Surrender by Japan, Sept. 2, 1945, 59 Stat. 1733, 1735, 3 Bevens 1251, 1252. India and the Philippines were subsequently added as members due to their status as members of the FEC. See IMTFE Amended Charter, *supra*. The arraignment of the 28 defendants on 55 counts was on May 3, 1946, and the judgment was rendered on November 11, 1948, two years after the IMT's. The charges were for "crimes against peace" and "war crimes," not for "crimes against humanity" and no organization was charged. At the IMT, by contrast, the SS and SA were charged with, and found to be, criminal organizations. See APPLEMAN, *supra* note 44, at 238.

For a complete historical record of the IMTFE, see generally THE TOKYO WAR CRIMES TRIAL: THE COMPLETE TRANSCRIPTS OF THE PROCEEDINGS OF THE INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST IN TWENTY-TWO VOLUMES (R. John Pritchard & Sonia Magbanua Zaide eds., 1981); THE TOKYO WAR CRIMES TRIAL: THE COMPREHENSIVE INDEX AND GUIDE TO THE PROCEEDINGS OF THE INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST IN FIVE VOLUMES (R. John Pritchard & Sonia Magbanua Zaide eds., 1981); YUK TANAKA, HIDDEN HORRORS: JAPANESE WAR CRIMES IN WORLD WAR II (1996).

93. The political and military tensions between the United States and the Soviet Union during the IMTFE proceedings affected the proceedings in many ways. For instance, all information related to the existence of a bacteriological weapons research lab located in Manchuria during World War II was purposely kept from the IMTFE. Professor Bernard Röling believed that this information was withheld by American military authorities who wanted to reap the benefits of the research and keep the information from the Soviets. Professor Howard Levie has a differing view, however, believing that the information was withheld by both the Americans and the Soviets because both countries had access to the information and wanted to prevent the other from obtaining research results. See HOWARD LEVIE, TERRORISM IN WAR: THE LAW OF WAR CRIMES 141 (1992). Professor Levie highlights Soviet criticisms of the IMTFE, including accusations that the IMTFE displayed anti-Soviet tendencies and was influenced by the overwhelming American presence in its administration. *Id.* at 145.

was guided by MacArthur's wishes, as were the United States Military Commissions to try Japanese Military personnel in the Philippines and other areas of the Far East Military Theater of Operations that he subsequently established pursuant to his authority as the SCAP in that Pacific Japan Theater. Although MacArthur tried to preserve the appearance of detachment from the various legal proceedings he had set in motion, his heavy hand was evident throughout.

On April 3, 1946, the FEC issued a policy decision on the "Apprehension, Trial and Punishment of War Criminals in the Far East."⁹⁴ Article 6(a) of the FEC's decision empowered the SCAP, General MacArthur, to establish an agency, acting under his command, to investigate reports of war crimes, collect and analyze evidence, and arrange for the apprehension of suspects. Article 6(a) also gave the SCAP the power to decide what individuals or organizations would be prosecuted and before which court they would appear.⁹⁵

Participants in the FEC, and later in the IMTFE, were chosen on a representational basis. Each individual member acted as a representative of his country's government, and not in an individual capacity.⁹⁶ This led to a politicization of the FEC and the IMTFE and affected the internal workings of these bodies as well as the quality of justice they administered. The proceedings themselves were fraught with procedural irregularities and marred by abuses of judicial discretion.⁹⁷ The defendants were chosen on the basis of political criteria, and their trials were generally unfair.⁹⁸ Others, such as Allied military personnel, were conspicuously absent from the list of defendants. None of the Allies was prosecuted for war crimes. In addition, the application of the law with respect to some of the defendants was at least dubious, if not

94. See FEC Report, *supra* note 89.

95. See FEC Report, *supra* note 89, at art. 6(a). Accused war criminals were divided into Class A, B, and C. The first IMTFE proceedings were against 28 senior Japanese officials considered Class A suspected war criminals, though clearly some of them did not deserve being placed in that category, according to most experts on the subject. For an early appraisal, see Solis Horwitz, *The Tokyo Trial*, 465 INT'L RECONCILIATION 473 (1950). For a more recent appraisal, see LEVIE, *supra* note 93, at 141.

96. While the choice of judges at the IMT was made by the respective Four Major Powers, the U.S., British, and French judges and their alternates were highly qualified and known for their personal integrity and independence. The judges from the USSR, who were military officers, were believed to be less knowledgeable than their western counterparts and subject to their government's directives, though their performance on the bench paralleled that of their western counterparts. This was not the case at the IMTFE, however. With the exception of Röling (Netherlands), Pol (India), and Bernard (France), many of the judges appeared politically motivated, especially the president, and General MacArthur's influence seemed rampant. See APPLEMAN, *supra* note 44, at 239-44 (referring to page numbers in the transcript evidencing prejudice and unfairness, particularly by Presiding Judge Sir William Webb of Australia). LEVIE, *supra* note 93, is equally critical.

97. See APPLEMAN, *supra* note 44, at 239-58.

98. See CRIMES AGAINST HUMANITY, *supra* note 12, at 211-12.

erroneous.⁹⁹ The execution of sentences was also inconsistent, controlled by the political whims of General MacArthur, who had the power to grant clemency, reduce sentences, and release convicted war criminals on parole.¹⁰⁰ Ultimately, not one of the twenty-five convicted persons who was sentenced to prison remained incarcerated for his full term; every one was released by the end of the 1950s.¹⁰¹ This was also true of all those who were convicted as war criminals by the Allied military tribunals in the Far East.¹⁰²

In 1949, the FEC issued a formal advisory to all nineteen Allied powers in the Far East that Japanese war crimes trials should be held no later than September 30, 1949.¹⁰³ Subsequently, the Treaty of Peace with Japan, signed at San Francisco on September 8, 1951 by forty-eight States, provided in Article II that all convicted war criminals should be transferred to Japan to serve the remainder of their sentences under the SCAP's control.¹⁰⁴ This was done to effectuate early releases and therefore, between 1951 and 1957, all convicted war criminals in the Far East were released on parole or had their sentences commuted.¹⁰⁵

Previously, however, on November 3, 1946, Emperor Hirohito, on the occasion of the promulgation of Japan's new American-inspired Constitution, signed an Imperial Restrict (edict) pardoning all members of the Japanese armed forces who may have committed offenses during the course of the war.¹⁰⁶ The edict was tacitly approved by General MacArthur, but it was not publicized to avoid opposition from public opinion in Allied countries. Subsequently, Japan passed Law No. 103 of 1952, establishing a Commission to oversee the repatriation and release of Japanese convicted war criminals.¹⁰⁷ This Japanese Commission acted in reliance on Article II of the Treaty of Peace, which provided for the repatriation to Japan of convicted war criminals.¹⁰⁸

Unlike in Germany, where those accused and convicted of war crimes became, for the most, pariahs in their society, the Japanese did

99. Bernard V.A. Röling, *The Nuremberg and the Tokyo Trials in Retrospect*, in 1 A TREATISE ON INTERNATIONAL CRIMINAL LAW 600-01, 605-07 (M. Cherif Bassiouni & Ved P. Nanda eds., 1973).

100. See LEVIE, *supra* note 93.

101. See John Mendelsohn, *War Crimes Trials and Clemency in Germany and Japan*, in AMERICANS AS PROCONSULS: UNITED STATES MILITARY GOVERNMENT IN GERMANY AND JAPAN, 1944-1952 226 (Robert Wolfe ed., 1984).

102. *Id.*

103. R. John Pritchard, *The Gift of Clemency Following British War Crimes Trials in the Far East, 1946-1947*, 7 CRIM. L.F. 15, 18 (1996).

104. Pritchard, *supra* note 103, at 37.

105. *Id.* at 37-49.

106. *Id.* at 24.

107. *Id.* at 38.

108. *Id.* at 37.

not view such persons as criminals but as victims.¹⁰⁹ For the Japanese, the trials were victors' vengeance couched in terms of victors' justice.¹¹⁰

I. Politics of Defendant Selection in the Far East

The influence of politics on the selection of defendants was evident in the FEC policy decision on February 3, 1950 not to prosecute the Emperor Hirohito of Japan as a war criminal.¹¹¹ The decision was based on a need preserve the image of the Emperor, who had agreed to the unconditional surrender of Japan as a means of ensuring better political cooperation by the post-World War II Japanese ruling elite and to obtain support for the administration of the occupied Japanese territories.¹¹²

Politics also played an important role subsequent to the IMTFE prosecutions, when the United States conducted trials in the Philippines,¹¹³ and Australia, China, France, the Netherlands, the Philippines, the U.K., the United States, and the U.S.S.R. all conducted

109. Indeed, Class A war criminals convicted by the IMTFE became members of Cabinet, and one became Prime Minister:

Shigemitsu Mamoru, a career diplomat, who was Foreign Minister in Tojo Mideki's Wartime Cabinet and who signed on behalf of Japan the Instrument of Surrender on September 2, 1945, on board the USS Missouri, was sentenced by the IMTFE to seven years imprisonment. He was released on parole 21 November 1950, and in November 1951 he was given clemency. Shigemitsu became Foreign Minister in December 1954. During his two years as Minister, he was instrumental in obtaining the Allies' clemency and ultimately, in 1957, the release of all Japanese held in captivity. On 7 April 1957, the Japanese Government announced that with the concurrence of a majority of the Allied Powers represented on the IMTFE, all major Japanese war criminals were granted clemency and unconditionally released forthwith. Kishi Nobusake, another Class A criminal suspect, was tried and convicted in further proceedings after the first Tokyo Trial, but later became Prime Minister in January 1956 and served until July 1960. He also held the portfolio of the Ministry of Foreign Affairs for some time in 1956.

Letter from Dr. R. John Pritchard to the author (Jan. 30, 1996) (on file with the author).

110. See generally A.C. BROCKMAN, *THE OTHER NUREMBERG, THE UNTOLD STORY OF THE TOKYO WAR CRIMES TRIALS* (1987); *THE TOKYO WAR CRIMES TRIAL* (C. Hosoya et al. eds., 1986); PHILIP R. PICCIGALLO, *THE JAPANESE ON TRIAL: ALLIED WAR CRIMES OPERATIONS IN THE EAST 1945-1951* (1979); SABURO SHIROKAWA, *WAR CRIMINAL: THE LIFE AND DEATH OF HIROTA KOKI* (1977); RICHARD H. MINEAR, *VICTOR'S VENGEANCE: THE TOKYO WAR CRIMES TRIAL* (1971).

111. 22 DEP'T ST. BULL. 244 (1950). MacArthur reportedly instigated the decision because he felt that prosecuting the Emperor would make pacification of Japan a difficult task, costing the United States many casualties at the hands of Japanese guerrillas.

112. WILLIAM MANCHESTER, *AMERICAN CAESAR: DOUGLAS MACARTHUR 1880-1964*, 484-91 (1978).

113. For the two major cases, see *In re Yamashita*, 327 U.S. 1 (1946); *Homma v. United States*, 327 U.S. 759 (1946). See also RICHARD LAEL, *THE YAMASHITA PRECEDENT: WAR CRIMES AND COMMAND RESPONSIBILITY* (1982); A. FRANK REEL, *THE CASE OF GENERAL YAMASHITA* (1949). A description of MacArthur's role in this case and of the unfairness of these proceedings is described in lay terms by MANCHESTER, *supra* note 112, at 484-85. But see MACARTHUR, *supra* note 91, at 318-19.

trials in the Pacific Theater.¹¹⁴ Unlike proceedings in Germany under CCL 10, the Allied Military Prosecutions in the Far East were only for war crimes; they did not include "crimes against humanity."

The prosecution, conviction, and execution of General Tomoyuki Yamashita in the Philippines¹¹⁵ exemplifies how political considerations resulted in the release of convicted war criminals and in condemnation of those whose role in the atrocities was negligible or non-existent. General Yamashita was the last Japanese Commander in the Philippines before the Allied Forces landed.¹¹⁶ MacArthur, who had escaped from the Philippines before it fell to Japanese forces, had vowed to return and punish the Japanese for their brutal occupational practices and for war crimes. MacArthur ordered the trial of Yamashita even though Yamashita had not ordered or even been aware of any war crimes; Yamashita had only been in command in the Philippines for less than a month before it was re-taken by the Allied forces. In December 1945 General MacArthur set up a special Military Commission to prosecute Japanese war criminals in the Philippines.¹¹⁷ General MacArthur influenced the military judges who applied an inappropriate legal standard that has not been applied since in cases of command responsibility: Yamashita was held responsible for acts of his subordinates which he had not ordered and of which he was unaware.¹¹⁸ The

114. For example, from 1946 to 1948, the British Army held 305 war crimes trials in the Pacific Theater. A total of 889 suspected war criminals were tried in 931 prosecutions, of whom 553 were convicted. See Pritchard, *supra* note 103.

Country	Trials	Accused	Convictions
Australia	296	924	844
China	605	893	504
France	39	230	198
Netherlands	448	1,038	969
Philippines	72	169	133
U.K.	314	933	777

(including proceedings that Canada would have undertaken)

U.S.A.	474	1,409	1,229
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R. John Pritchard, *The Quality of Mercy: Appellant Procedures, the Confirmation and Reduction of Sentences and the Exercise of the Royal Prerogative of Clemency towards Convicted War Criminals*, 8 BRITISH WAR CRIMES TRIALS IN THE FAR EAST, 1946-48 (R. John Pritchard ed., 21 vols., forthcoming) (manuscript at 8, on file with author).

115. See *supra* note 113.

116. REEL, *supra* note 113. Reel was a JAG Captain who was one of General Yamashita's defense counsels at these proceedings. For a critical view, see CRIMES AGAINST HUMANITY, *supra* note 12, at 376-82. For other military trials, see LAWRENCE TAYLOR, A TRIAL OF GENERALS (1981).

117. The Military Commission was established by General MacArthur's Special Order 110, Oct. 1, 1945, para. 24. The record of the trial is found in *United States of America v. Tomoyuki Yamashita*, Records of the Military Commission Established by General Douglas MacArthur, reprinted in RICHARD L. LAEL, THE YAMASHITA PRECEDENT: WAR CRIMES AND COMMAND RESPONSIBILITY 97 (1982).

118. See Parks, *supra* note 71, at 1; TELFORD TAYLOR, NUREMBERG AND VIETNAM: AN AMERICAN TRAGEDY (1968).

United States Supreme Court regrettably denied Yamashita's Petition for a writ of habeas corpus, but two Justices, Murphy and Rutledge, wrote compelling dissents.¹¹⁹

J. Comparison of the Legal Bases for Setting up the IMT, IMTFE, and CCL 10 and Far East Allied Military Prosecutions

The use of different legal mechanisms for the establishment of these ad hoc tribunals produced divergent results as to substance and procedure. The IMT and IMTFE Charters both provided for the prosecution and punishment of those accused of committing "crimes against peace," "war crimes," and "crimes against humanity."¹²⁰ The respective instruments are substantially the same, with a few exceptions. One such exception is that Article 5(c) of the IMTFE Charter provided that persecution on political and racial grounds constituted "crimes against humanity," whereas Article 6(c) of the IMT Charter included religious grounds as well. Such an inclusion was necessary in the IMT Charter because of the Holocaust.¹²¹ Also with respect to "crimes against humanity," the IMT Charter provided that "inhumane acts committed against any civilian population" were subject to prosecution. The IMTFE Charter eliminated the phrase "against any civilian population" from Article 5(c), thereby expanding the class of persons beyond civilians only. The definition was dubiously broadened "to make punishment possible for large-scale killing of military personnel in an unlawful war."¹²²

CCL 10, which governed the Subsequent Proceedings of the Allies in their respective zones of occupation in Germany, also provided for the prosecution and punishment of "crimes against peace," "war crimes," and "crimes against humanity."¹²³ CCL 10 proceedings were not, however, conducted pursuant to a treaty or by promulgation of a military order by the commanding officer of occupying forces, but rather were mandated pursuant to a joint decision taken by the four Allies who occupied Germany after that country's unconditional surrender. The legal authority advanced by the Allies was that they carried out the functions of government in Germany. Such a reasoning meant that the CCL 10 proceedings were part of the domestic law of Germany. But when each of the four Allies set out its own system of justice, with all

119. *In re Yamashita*, 327 U.S. 1, 26-81 (1946).

120. London Charter, *supra* note 55; IMTFE Amended Charter, *supra* note 92.

121. See M. Cherif Bassiouni, *International Law and the Holocaust*, 9 CAL. W. INT'L L.J. 202 (1979); CRIMES AGAINST HUMANITY, *supra* note 12, at 34.

122. B.V.A. RÖLING, *THE TOKYO TRIAL AND BEYOND 3* (Antonio Cassese ed., 1993). See also Bernard V.A. Röling, *The Nuremberg and Tokyo Trials in Retrospect*, in *A TREATISE ON INTERNATIONAL CRIMINAL LAW* 590 (M. Cherif Bassiouni & Ved P. Nanda eds., 1973).

123. CCL 10, *supra* note 79.

but the United States' being of a military nature, the legal fiction of national proceedings was inverted.¹²⁴

The definition of "crimes against humanity" contained in Article II(c) of the CCL 10 differed from the IMT and IMTFE Charters in two ways. First, Article II(c) expanded the list of crimes to include imprisonment, torture, and rape. Second, it eliminated the requirement that "crimes against humanity" be connected to the war by omitting the words "before or during the war" contained in Article 6(c) of the IMT's Charter. Furthermore, with respect to "persecution," Article II(c) broadened the category of crimes against humanity in a way that strained the principles of legality by eliminating the requirement that "crimes against humanity" be in the "execution of or in connection with any crime within the jurisdiction of the Tribunal." Unlike the IMT's judgment on sentences, the IMTFE's sentences could be unilaterally reduced by General MacArthur, though he never used that authority.¹²⁵

The proceedings in the Far East before separate military tribunals were sanctioned by the FEC, and to that extent the FEC is somewhat similar to CCL 10. Each Allied Power prosecuted Japanese and persons of other nationalities who were their prisoners of war. There was, however, no treaty or jointly promulgated law defining crimes. Each Allied Power established its own field military tribunals or commissions which applied its respective military laws and procedures. Although the FEC was a policy body, General MacArthur was the sole executor of that policy. The legal basis for his authority was that Allied Forces in the Far East were still under the Allied Power's control and that included their military trials. Though the FEC was used to achieve the overall policy goals of the Allies, it was essentially the body through which the United States actuated some of its occupational policies. This was evident in the FEC's decision to end prosecutions by 1950 and to repatriate to Japan by 1953 all those who were convicted.

K. The Years of Silence: 1955–1992

By 1955 CCL 10 Proceedings had ended in Germany. Prior to that, the Far Eastern Military Tribunals had also ended, and by 1958 all IMTFE convicted war criminals were released. In the west, Germany continued to prosecute persons charged with crimes arising out of World War II, as did some other countries. Still, since World War II there have been many conflicts for which no international investigative

124. CRIMES AGAINST HUMANITY, *supra* note 12, at 87–146 (discussing the principles of legality). Germany subsequently conducted its own national proceedings before its ordinary criminal courts.

125. LEVIE, *supra* note 93, at 142.

or prosecutorial bodies were ever set up.¹²⁶ Justice was the Cold War's casualty.

However, since the end of the Cold War, new initiatives have developed in connection with the conflicts in the former Yugoslavia and Rwanda and in connection with the establishment of a permanent international criminal court.

L. The Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)

On October 6, 1992, the Security Council adopted Resolution 780, establishing a Commission of Experts to investigate and gather evidence of "grave breaches of the Geneva Conventions and other violations of international humanitarian law" in the conflict in the former Yugoslavia.¹²⁷ The history of the Commission and its work is fraught with the influences of politics. Resolution 780 defined the mandate of the Commission of Experts as follows:

2. [The Security Council] *requests* the Secretary-General to establish, as a matter of urgency, an impartial Commission of Experts, to examine and analyze the information submitted pursuant to resolution 771 (1992) and the present resolution, together with such further information as the Commission of Experts may obtain through its own investigations or efforts, of other persons or bodies pursuant to resolution 771 (1992), with a view to providing the Secretary-General with its conclusions on the evidence of grave breaches of the Geneva Conventions and other violations of international humanitarian law committed in the territory of the former Yugoslavia.¹²⁸

126. See *infra* note 222.

127. S.C. Res. 780, U.N. SCOR, 47th Sess., U.N. Doc. S/RES/780 (1992) [hereinafter Resolution 780]. Note that there is an uncanny resemblance between the problems facing the Commission of Experts and those of the UNWCC. See *supra* text accompanying notes 34–38.

128. Resolution 780, *supra* note 127, para. 2. The Secretary-General appointed five members to the Commission of Experts on October 25, 1992: Professor Frits Kalshoven (Netherlands) as Chairman; Professor M. Cherif Bassiouni (Egypt); Commander William J. Fenrick (Canada); Judge Keba M'Baye (Senegal); and Professor Torkel Opsahl (Norway). Professor Kalshoven resigned from the Commission of Experts due to medical reasons in August 1993 and Professor Opsahl, who was the Acting Chairman in July–August, passed away in September. As a result, on October 19, 1993, the Secretary-General appointed Professor Bassiouni as Chairman and Professor Christine Cleiren (Netherlands) and Judge Hanne Sophie Greve (Norway) as new members. Even though he is a naturalized U.S. citizen, Professor Bassiouni, a native born Egyptian, was listed as being from Egypt, because it was felt that no representative of the Permanent Members of the Security Council should be on the Commission of Experts.

The Commission of Experts interpreted its mandate as requiring the collection of all relevant information and evidence concerning violations of international humanitarian law that it could secure in light of its resources and capabilities.¹²⁹ The Commission of Experts' efforts resulted in 65,000 pages of documents, a database cataloguing the information in these documents, over 300 hours of videotape, and 3300 pages of analysis, which comprise the Annexes to the Commission of Experts' Final Report.¹³⁰ All of this information and evidence was turned over to the Tribunal's Prosecutor between April and August 1994.

The political climate and the intensity of the conflict at that time created a situation in which the pursuit of a political settlement was deemed a priority.¹³¹ The pursuit of justice was a response to international humanitarian concerns and to the terrible atrocities of the war that the media brought so vividly to the attention of world public opinion. But, because the major powers did not want to intervene militarily, the U.N. and EC mediators had neither a stick nor a carrot to induce cessation of hostilities.

The establishment of an international investigative body with the broadest possible mandate since Nuremberg was not conducive to the pursuit of political settlements when the very leaders involved in the negotiations could also become the targets of the investigation. Political settlement negotiations could not be conducted while the prospects of criminal investigation and eventual prosecution existed. In the face

129. See M. Cherif Bassiouni, *The Commission of Experts Established pursuant to Security Council Resolution 780: Investigation of Violations of International Humanitarian Law in the Former Yugoslavia*, 5 CRIM. L.R. 279-340 (1994); M. Cherif Bassiouni, *The United Nations Commission of Experts Established pursuant to Security Council Resolution 780* (1992), 88 AM. J. INT'L L. 784-805 (1994) (translated into French and reprinted with modifications in 66 REVUE INTERNATIONALE DE DROIT PÉNAL, 1-2, 1 (1995)); M. Cherif Bassiouni, *Investigating Violations of International Humanitarian Law and Establishing an International Criminal Tribunal*, 25 SECURITY DIALOGUE 409 (1994).

130. The analytical reports were prepared by or under the direction of the Chairman of the Commission of Experts, M. Cherif Bassiouni. The staff of the Prosecutor's Office at the Tribunal reviewed them for purposes of relating sensitive information before the reports were submitted to the Secretary-General, who then transmitted them to the Security Council in December 1994 as Annexes to the Final Report of the Commission of Experts. See *Final Report of the Commission of Experts Established pursuant to Security Council Resolution 780* (1992), U.N. SCOR, 47th Sess., Annex, U.N. Doc. S/1994/674 (1994); Annexes to the Final Report, U.N. SCOR, 47th Sess., U.N. Doc. S/1994/674/Add.2 (1994).

131. For a more ample description of what follows, see *supra* note 129. See also M. Cherif Bassiouni, *Sexual Violence: An Invisible Weapon of War in the Former Yugoslavia* (Occasional Paper #1, 1996, International Human Rights Law Institute, DePaul University); and M. Cherif Bassiouni, *The Commission of Experts Established pursuant to Security Council Resolution 780: Investigating Violations of International Humanitarian Law in the Former Yugoslavia*, 7-11 (Occasional Paper #2, 1996, International Human Rights Law Institute, DePaul University). With respect to the conflicting approaches to peace and justice, see Payam Akhavan, *The Yugoslav Tribunal At Crossroads: The Dayton Peace Agreement and Beyond*, 18 HUM. RTS. Q. 259 (1996). Cf. Anonymous, *Human Rights in Peace Negotiations*, *id.* at 249. This article, which appeared under the authorship of "Anonymous," probably a member of the Vance-Owen staff, argues that these peace efforts were not in contradiction with the pursuit of justice.

of this dilemma, the choice made was to favor politics over justice. As a result, the Commission never received any funding from the U.N. to conduct its field investigations. The limited resources provided by the U.N. only covered the bare minimum of administration costs for a short period of time.¹³² Moreover, the U.N. frequently placed bureaucratic and financial hurdles in the Commission's way. Consequently, the Commission resorted to external funding sources and accepted the aid of volunteers and personnel contributed by certain governments. A document collection and database operation was set up at the International Human Rights Law Institute (IHRLI) of DePaul University in Chicago under the direction of this writer and entirely funded by private sources. While the IHRLI's work was opposed by the U.N. bureaucracy, it was eventually recognized as contributing a great amount of information. In fact, it was on the basis of the IHRLI's work that the Commission produced its Final Report and Annexes.

The Commission of Experts undertook thirty-five field missions which included mass grave exhumations and the world's largest rape investigation. Participants in all of these missions, with the exception of the Commission members and the three secretariat staff members of the Commission, were either contributed by governments or were volunteers. As the Commission's work and the IHRLI database work grew and became substantial enough to evidence patterns of criminality that could not have occurred without design and senior political and military leadership involvement, the Commission's work became threatening to the political process. While press reports charging responsibility for "ethnic cleansing," "systematic rape," and other systematic violations of international humanitarian law could be ignored, evidence substantiating these allegations was a real threat. Consequently, it became politically necessary to terminate the work of the Commission while attempting to avoid the negative consequences of such a direct action.

There could have been a problem in circumventing the tenth preambular paragraph of Security Council Resolution 827 which states:

Pending the appointment of a Prosecutor of the International Tribunal, the Commission of Experts established pursuant to resolution 780 (1992) should continue on an urgent basis the collection of information relating to evidence of grave breaches of the Geneva Conventions and other violations of international humanitarian law as proposed in its interim report.¹³³

132. This situation is reminiscent of the situation facing the UNWCC discussed above at text accompanying notes 34-38.

133. S.C. Res 827, U.N. SCOR, 48th Sess., at preamble, U.N. Doc. S/RES/827 (1993) [hereinafter Resolution 827].

Nevertheless, by employing bureaucratic measures, an obstruction of justice was carried out quietly. An administrative decision was taken—probably at the behest, but certainly with the support of, some of the Permanent Members—leaving no legal trace of the deed. Thus, the Chairman was administratively notified that the Commission should end its work by April 30, 1994. When the Commission's mandate was terminated, it still had over \$250,000 in a trust fund and had not yet completed its Final Report. Between April 30 and December 31, 1994, the Chairman completed the Final Report and the Annexes and then continued to work until July 1995 to see that they were published by the United Nations.

M. The International Criminal Tribunal for the Former Yugoslavia

On February 22, 1993, following the submission of the Commission of Experts' First Interim Report,¹³⁴ the Security Council provided for the establishment of such a tribunal.¹³⁵ Resolution 808 stated that the Security Council:

Decides that an international criminal tribunal shall be established for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991.¹³⁶

Resolution 808 requested that the Secretary-General report back on the matter of establishing an ad hoc international tribunal within sixty days.¹³⁷ The Report of the Secretary-General pursuant to this request was issued on May 3, 1993 and contained a draft Statute for the Tribunal and commentaries on the provisions of the Statute.¹³⁸ Subsequently, the Security Council unanimously approved Resolution 827 which established the Tribunal and approved the Secretary-General's draft of the Statute without change.¹³⁹ Thus, the Tribunal, with its

134. *Interim Report of the Commission of Experts Established pursuant to Security Council Resolution 780 (1992)*, U.N. SCOR, 48th Sess., Annex, at 20, U.N. Doc. S/25274 (1993).

135. S.C. Res. 808, U.N. SCOR, 48th Sess., U.N. Doc. S/RES/808 (1993).

136. *Id.* at preamble.

137. *Id.*

138. *Report of the Secretary-General pursuant to paragraph 2 of Security Council Resolution 808 (1993)*, U.N. SCOR, 48th Sess., U.N. Doc. S/25704 (1993) [hereinafter Report of the Secretary-General]. For commentary on the Statute, see BASSIOUNI, YUGOSLAVIA TRIBUNAL, *supra* note 52, and MORRIS & SCHARF, AN INSIDER'S GUIDE, *supra* note 52.

139. Resolution 827, *supra* note 133, at paras. 1–2. For insights into the establishment of the ICTFY and the politics surrounding it, see Peter Burns, *An International Criminal Tribunal: The Difficult Union of Principles and Politics*, in THE PROSECUTION OF INTERNATIONAL CRIMES 125 (Roger S. Clark & Madeleine Sann eds., 1996) and David P. Forsythe, *Politics and the International Tribunal for the Former Yugoslavia*, *id.* at 185.

seat in The Hague, officially came into legal existence on May 25, 1993. The judges were elected on September 15, 1993, and the Prosecutor took office on August 15, 1994. The Tribunal was subsequently named by its Judges, the "International Criminal Tribunal for the Former Yugoslavia" (ICTFY).

Article 1 of the Statute states that the ICTFY "shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 in accordance with the provisions of the present Statute."¹⁴⁰ The Statute also establishes individual criminal responsibility, including that of a Head of State, for certain violations committed during the temporal jurisdiction of the ICTFY. These crimes are (1) grave breaches of the Geneva Conventions of 1949;¹⁴¹ (2) violations of the laws or customs of war;¹⁴² (3) genocide;¹⁴³ and (4) crimes against humanity.¹⁴⁴ Unlike other ad hoc tribunals such as the IMT and IMTFE, the ICTFY is not limited to the prosecution of some offenders. Rather, its jurisdiction applies to all those who violated international humanitarian law, irrespective of their side in this conflict.

As a judicial organ, the Tribunal must be independent, according to established general principles of law.¹⁴⁵ The fact that the Tribunal is a subsidiary organ of the Security Council does not affect the independence of the Tribunal per se, and Article 16 of the Statute specifically provides for the Prosecutor's independence, though he or she is appointed by the Security Council.¹⁴⁶ In fact, the Tribunal is kept at a distance from the Security Council through its administration by the Office of Legal Affairs of the U.N. Secretariat. Its internal workings are subject to the U.N.'s administrative rules. Furthermore, the Security Council does not fund the Tribunal. Instead the Security Council requested that the General Assembly do so through the regular budget

140. Article 1 of the Statute of the International Tribunal. The Statute is set out as an annex to *Report of the Secretary-General*, *supra* note 138, and is reprinted in 32 I.L.M. 1192 [hereinafter Statute].

141. *Id.* art. 2.

142. *Id.* art. 3.

143. *Id.* art. 4.

144. *Id.* art. 5.

145. See G.A. Res. 40/32, U.N. GAOR, 40th Sess., U.N. Doc. A/RES/40/32 (1985), endorsing the Basic Principles on the Independence of the Judiciary, adopted by the Seventh Crime Congress, Milan (26 Aug.-6 Sept. 1985); DRAFT PRINCIPLES ON THE INDEPENDENCE OF THE JUDICIARY AND ON THE INDEPENDENCE OF THE LEGAL PROFESSION, 5 NOUVELLES ÉTUDES PÉNALES (M. Cherif Bassiouni ed., 1982). Fifty-four national constitutions provide for an independent judiciary, and an additional 32 explicitly require that criminal trials be conducted by an independent and impartial tribunal. See M. Cherif Bassiouni, *Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions*, 3 DUKE J. COMP. & INT'L L. 235, 271 & nn.170-71 (1993).

146. See Statute, *supra* note 140, arts. 16, 19, 20.

of that body. Since the Security Council established the Tribunal pursuant to its Chapter VII powers, this was an odd and unnecessary choice, and it has impeded the work of the Tribunal. If the Security Council had funded the Tribunal through its peacekeeping budget, the Tribunal would not have needed to go through the various stages of the General Assembly's budget procedures. At that time the General Assembly's budget was severely reduced, and as a result the Tribunal has been inadequately funded since its inception. The exercise of administrative and financial control over the Tribunal by U.N. headquarters' personnel subordinates important decisions concerning personnel, travel, and witness protection to New York. These arrangements hamper, delay, and frustrate the work of the Tribunal, particularly the investigatory and prosecutorial efforts.

Not all of the Security Council's Permanent Members supported the initiative for a Tribunal, which was seen as potentially disruptive of negotiations for a political settlement of the conflict. Some Security Council members, as well as other Member States, felt that such a judicial organ should be established by the General Assembly or by a multilateral treaty. Other members urged that this was an opportunity to establish a permanent international criminal court, but the political advantages of controlling ad hoc institutions by the Security Council prevailed.

The year long delay in the appointment of Richard Goldstone as Prosecutor is further evidence of the politicization of the Tribunal.¹⁴⁷ Although Resolution 827 provided for the continuation of the work of the Commission of Experts until the appointment of the Prosecutor,¹⁴⁸ the Commission of Experts was prematurely terminated as of April 30, 1994 by administrative fiat, while the Prosecutor was not appointed until July 15, 1994. Although this bureaucratic lag might have severed the institutional links between the Commission of Experts and the Prosecutor, requiring the Prosecutor to begin his investigations *ab initio* and delaying the issuing of any indictments, the Commission Chair and Prosecutor Goldstone established a direct personal link.¹⁴⁹

147. See BASSIOUNI, YUGOSLAVIA TRIBUNAL, *supra* note 52, at 210-12.

148. Resolution 827, *supra* note 133, para. 10.

149. See *Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991*, U.N. GAOR/SCOR, 49th Sess., at paras. 157-58, U.N. Doc. A/49/432, S/1994/1007 (1994):

157. Not long after the establishment of the Tribunal, the judges had the opportunity to meet with Mr. Cherif Bassiouni, Chairman of the Commission of Experts established pursuant to Security Council Resolution 780 (1992). On 25 February 1994, the Acting Deputy Prosecutor and other staff members of the Tribunal met in The Hague with Mr. Bassiouni and other members of the Commission. The work and findings of the Commission were discussed at length and certain materials were handed

The Prosecutor was able to indict twenty-two persons within months of taking office. Notwithstanding the difficulties faced by the Prosecutor's office, as of September 15, 1996, seventy-five persons have been indicted, one is being prosecuted, one plead guilty, and seven are being held in custody.

The Government of the Federal Republic of Yugoslavia (Serbia and Montenegro) and the Republica Srpska, the Bosnian Serb de facto government, have refused to recognize the competence of the Tribunal and have not cooperated with respect to the investigation and surrender of indicted persons.¹⁵⁰ This lack of cooperation has clearly hampered the ability of the ICTFY to bring indicted war criminals to trial.¹⁵¹

over to the office of the Prosecutor. Subsequently, the Acting Deputy Prosecutor visited the Commission's premises in Geneva. A staff member also visited Chicago to inspect and receive instruction on the Commission's computer database. The Acting Deputy Prosecutor also had meetings with most of the Commission's commissioners and staff members.

158. During April 1994, the Office of the Prosecutor obtained a copy of the Commission's database. Subsequently, in May 1994, all of the documents from Chicago, which form the basis of the information in the database, were received by the Tribunal. By the end of May 1994, action had commenced to scan those documents onto the Prosecutor's own computer system The Office of the Prosecutor has enjoyed a close working relationship with the Commission of Experts.

See also M. Cherif Bassiouni, *The Commission of Experts Established Pursuant to Security Council Resolution 780: Investigating Violations of International Humanitarian Law in the Former Yugoslavia* 5 CRIM. L.F. 279 (1994).

150. The Deputy Prime Minister and Federal Minister of Justice of the FRY, Professor Stojanovic, expressed the position of the FRY as follows:

The federal government is prepared to make it possible for one representative of the International Criminal Tribunal, and/or the prosecutor of the tribunal to be present within the framework of the United Nations Protection Force in Belgrade, without having the right to specifically display the title of the International Criminal Tribunal and/or the prosecutor of the tribunal. *This representative would be enabled contacts with responsible federal and republican bodies and non-governmental organizations, on the understanding that he would be in no position to undertake investigative action vis à vis domestic physical person.*

LAWYERS COMMITTEE FOR HUMAN RIGHTS, THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA: ESTABLISHMENT, ORGANIZATION, JURISDICTION AND PROCEEDINGS TO DATE 9 (1995) (citing *Letter dated December 20, 1994 from the Deputy Prime Minister and Federal Minister of Justice of the FR of Yugoslavia addressed to the Prosecutor of the Tribunal*, U.N. GAOR/SCOR, 49th Sess., U.N. Doc. A/50/56, S/1994/1450 (1994) (emphasis added)). The FRY also reiterated its view that a permanent international tribunal should be established to prosecute war criminals. By implication, the FRY took the position that in the absence of a permanent international tribunal, the FRY would undertake national prosecutions under Chapter XVI of the Criminal Code of the FRY. The letter concludes that the FRY "seriously calls into question assurances of the tribunal's impartiality, which may adversely affect future cooperation" due to the fact that the first indictments were against Serbians. The letter does not augur well for prospects of recognition of the Tribunal's jurisdiction, its supremacy over national prosecutions under Article 9 of the Statute, or acceptance of deferral of investigations and prosecutions before national authorities.

151. Still, the Prosecutor's office perseveres. See the judgement of Trial Chamber 1 in the case of Prosecutor v. Radovan Karadzic and Ratko Mladic, of July 11, 1996. These proceedings were pursuant to Rule 61 of the ICTFY's Rules of Procedure and Evidence to confirm the earlier indictments of these two accused persons. Case No. IT-95-5-R61 and Case No. IT-95-18-R61.

The future of the ICTFY is dependant upon the Security Council's determination that it is needed to maintain peace.¹⁵² Although the Tribunal was established by the Security Council pursuant to its powers under Chapter VII of the United Nations Charter, the Security Council has not used its sanction powers to enforce the orders of the Tribunal with respect to any defendant, nor has it taken any action against the Federal Republic of Yugoslavia or the authorities of the so-called Republica Srpska. Nor, after the Dayton Accords of 1995, will NATO forces, IFOR, apprehend indicted war criminals. Once again the pursuit of a political settlement prevails over justice.

N. The Rwanda Commission of Experts

In July 1994, the Security Council passed Resolution 935 establishing a commission of experts to investigate grave violations of international humanitarian law committed during the Rwandan civil war, including possible acts of genocide, and report its findings to the Secretary-General.¹⁵³ The Rwandan Commission lasted only four months which was not long enough for the Commission to effectively fulfill its investigatory mandate.

The Security Council made sure that the Rwanda Commission would not embark on the same path taken by the Commission of Experts for Yugoslavia. The Rwanda Commission was given a limited mandate, three months to carry it out, and no means to investigate any specific allegations. The three-man Commission spent a total of one week in the field, and conducted no investigations. Its report was patterned on the Final Report of the Commission of Experts for the Former Yugoslavia, but necessarily lacked the thoroughness of the latter. The Rwanda Commission Report was based on reports made by other bodies, and other media and published reports. On October 4, 1994, the Rwandan Commission submitted its preliminary report¹⁵⁴ to the Secretary-General, and on December 9, 1994 its final report.¹⁵⁵ These reports laid the groundwork for the Security Council to establish an ad hoc tribunal for Rwanda.

O. The International Criminal Tribunal for Rwanda (ICTR)

The Statute and the judicial mechanism for the Rwandan Tribunal were adopted in Security Council Resolution 955.¹⁵⁶ The article of the

152. BASSIOUNI, YUGOSLAVIA TRIBUNAL, *supra* note 52, at 244-51.

153. S.C. Res. 935, U.N. SCOR, 49th Sess., U.N. Doc. S/RES/935 (1994).

154. See Letter Dated 1 October 1994 from the Secretary-General Addressed to the President of the Security Council, U.N. SCOR, 49th Sess., U.N. Doc. S/1994/1125 (1994).

155. Letter Dated 9 December 1994 from the Secretary-General Addressed to the President of the Security Council, U.N. SCOR, 49th Sess., U.N. Doc. S/1994/1405 (1994).

156. S.C. Res. 955, U.N. SCOR, 49th Sess., U.N. Doc. S/RES/955 (1994) [hereinafter

Statute regarding individual criminal responsibility mirrors its counterpart article in the Statute for the ICTFY.¹⁵⁷ In fact, the "statute of the Rwanda tribunal . . . was an adaptation of the statute of the Yugoslav Tribunal to the circumstances of Rwanda . . ."¹⁵⁸ The Rwandan Tribunal has temporal jurisdiction from January 1, 1994 to December 31, 1994.¹⁵⁹ Like the ICTFY, the ICTR can prosecute for genocide¹⁶⁰ and "crimes against humanity."¹⁶¹ Because the conflict in Rwanda was a civil war, violations of the laws and customs of war and the Geneva Conventions of 1949 covering international conflicts will not be prosecuted.¹⁶² Rather, violations of Article 3 common to the Geneva Conventions of 1949 and of Additional Protocol 2 will be prosecuted.¹⁶³

Even though the statutes for the ICTR and the ICTFY differ, the tribunals share a common Prosecutor and a common Appellate Chamber. This is a curious formula for two separate ad hoc tribunals established separately by the Security Council through two unrelated resolutions. According to the Secretary-General, however, the "institutional links . . . ensure a unity of legal approach, as well as economy and efficiency of resources."¹⁶⁴ The decision to link the two bodies was not,

Rwanda Statute]. See Larry Johnson, *The International Tribunal for Rwanda*, 67 *REVUE INTERNATIONALE DE DROIT PÉNAL* 211 (1996); Payam Akhavan, *The International Criminal Tribunal for Rwanda: The Politics and Pragmatics of Punishment*, 90 *AM. J. INT'L L.* 501 (1996).

157. Compare Resolution 955, art. 6, *supra* note 156 to the Statute for the ICTFY, art. 7, *supra* note 140.

158. *Report of the Secretary-General Pursuant to Paragraph 5 of Security Council Resolution 955* (1994), U.N. SCOR, 50th Sess., at para. 9, U.N. Doc. S/1995/134 (1995). See also Johnson, *supra* note 156.

159. Rwanda Statute, *supra* note 156, art. 7.

160. *Id.* art. 2.

161. *Id.* art. 3. The Rwanda Statute's definition of that crime differs somewhat from that of the ICTFY. See BASSIOUNI, *YUGOSLAVIA TRIBUNAL*, *supra* note 52, at 491; Akhavan, *supra* note 156, at 503.

162. See BASSIOUNI, *YUGOSLAVIA TRIBUNAL*, *supra* note 52; Akhavan, *supra* note 156, at 504.

163. Rwanda Statute, *supra* note 156, art. 4. Akhavan states:

The most significant difference between the two Statutes relates to Article 4 of the Rwanda Statute, which includes violations of Article 3 common to the 1949 Geneva Conventions and of the 1977 Additional Protocol II within the subject matter jurisdiction of the Tribunal . . . [T]he Secretary-General had excluded common Article 3 and Additional Protocols I and II from the Yugoslav Statute on the grounds that they were not "rules of international humanitarian law which are beyond doubt part of the customary law." . . . The Report of the Secretary-General on the Rwanda Statute notes that the Security Council "has elected to take a more expansive approach to the choice of the applicable law than the one underlying the statute of the Yugoslav Tribunal. Furthermore, . . . the Report suggests that the Council has thereby included within the subject matter jurisdiction of the Rwanda Tribunal "international instruments regardless of whether they were considered part of customary international law or whether they have customarily entailed the individual criminal responsibility of the perpetrator of the crime."

Akhavan, *supra* note 156, at 503-04 (citations omitted).

164. *Report of the Secretary-General Pursuant to Paragraph 5 of Security Council Resolution 935* (1994), *supra* note 158, para. 9.

however, based on any valid legal argument. The United States, which pushed for this formula, wanted to avoid delays in selecting the Prosecutor as was the case with the ICTFY. The rationale for sharing the ICTFY Appellate Chamber was based entirely on a cost-saving consideration. The choice of a single Prosecutor was particularly ill-advised because no person, no matter how talented, can oversee two major sets of prosecutions separated by 10,000 miles. The idea that one can shuttle between The Hague, Netherlands and Arusha, Tanzania as part of a normal work schedule is nothing short of absurd. Sharing a single Appellate Chamber also poses two problems, though of a more benign legal nature. First, the substantive law applicable to the two Tribunals is different. That means that in an eventual interpretation of "crimes against humanity" under both Statutes, the Appellate Chamber must necessarily be inconsistent. Second, while the ICTFY judges rotate in the Appellate Chamber, the ICTR judges do not. One of the two Tribunals was destined to suffer and in time it became clear that the ICTR did.¹⁶⁵

The ICTR, like the ICTFY, is under the administrative and financial control of the United Nations. Only as of September 1996 did it become fully operational because of logistical, administrative, and financial problems. Yet, the Rwandan Government is holding 75,000 persons in custody, pending trial either before the ICTR or eventually, before its own tribunals. Thus, unlike the ICTFY which is fully operational but cannot apprehend those who are indicted, the ICTR has not been able to prosecute those held in custody. Unlike the ICTFY which is unlikely under prevailing political circumstances to prosecute anyone who could upset the delicately balanced political settlement achieved so far, the ICTR could accomplish a great deal. To date, however, it has been regrettably treated with neglect.

Because of the total devastation wrought by the Rwandan civil war, the Security Council was compelled to deal with many political, logistical, and practical problems in the establishment of the ICTR. The Security Council had to negotiate with the new government on the establishment of the Tribunal at a time when Rwanda was also a member of the Security Council. This situation complicated the Council's task, particularly because the views of that government and its expectations of an international tribunal differed from those of the rest of the Council. For instance, while the Government of Rwanda wanted

165. See *Financing of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other such Violations Committed in the Territory of Neighboring States Between 1 January and 31 December 1994, Report of the Secretary-General on the Activities of the Office of Internal Oversight Services, Note by the Secretary General*, U.N. GAOR, 51st Sess., Annex, U.N. Doc. A/51/789 (1997).

the new Tribunal to be able to impose the death penalty, the Council was opposed to it, because it had already decided against that penalty in connection with the ICTFY. In addition, the U.N. had some difficulty convincing the Rwandan Government to agree that the Tribunal would also prosecute Tutsi violations against Hutu victims. Finally, the U.N.'s Legal Counsel, Hans Correll, had to conduct extensive negotiations with the new Rwandan Government regarding the site of the Tribunal. Because of the absence of an effective infrastructure, and because the U.N. feared that a Tribunal in Kigali would be under the influence of the Rwandan Government which, after all, represented the victorious Tutsi who were the victims of Hutu crimes, the Tribunal was located in Arusha, Tanzania.

Establishing the Tribunal in another country was unprecedented, and required a U.N. host country agreement with Tanzania, which took some time to conclude. Because most defendants and witnesses would have to come from Rwanda, this is an enterprise fraught with logistical problems and practical difficulties. Moreover, Arusha is not the ideal place for locating the Tribunal, since there too, the U.N. had to build the Tribunal's infrastructure from scratch under trying conditions.

These difficulties demonstrate the fundamental inability of the Security Council to micro-manage action-oriented bodies that require constant attention to details. This experience led to what David Scheffer, Senior Counsel to U.S. Ambassador to the United Nations Madeleine Albright, called the Council's "Tribunal fatigue."

Ultimately, despite certain promising conditions, the logistical problems and administrative inefficiency of the ICTR make it unlikely that its prosecutions will become a landmark precedent. Moreover, its failures may prevent the Security Council from engaging in similar ad hoc endeavors in the future, thus rendering a permanent international criminal court even more necessary.

II. THE UNITED NATIONS' EFFORTS TO ESTABLISH AN INTERNATIONAL CRIMINAL COURT AND TO CODIFY CERTAIN INTERNATIONAL CRIMES

Between 1946 and 1996, the United Nations' efforts to codify certain international crimes and to establish an international criminal court have been carefully separated, though always intertwined. Though the Cold War hindered the codification process, progress has occurred since 1990.¹⁶⁶

166. The Preparatory Committee on the Establishment of an International Criminal Court

During the first session of the General Assembly in 1946, the United States sponsored Resolution 95(I) which affirmed "the principles of international law recognized by the Charter of the Nuremberg Tribunal and the judgment of the [IMT] Tribunal."¹⁶⁷ In 1947, the General Assembly directed the Committee on the Codification of International Law, the International Law Commission's [ILC] predecessor,¹⁶⁸ to formulate a general codification of offenses against the peace and security of mankind.¹⁶⁹ The Resolution mandated the ILC to:

- (a) formulate the principles of international law recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal, and
- (b) prepare a draft code of offenses against the peace and security of mankind, indicating clearly the place to be accorded to the principles mentioned in sub-paragraph (a) above.¹⁷⁰

Two years later, in compliance with the Resolution, the ILC started to "[formulate] the principles recognized in the Charter of the Nuremberg Tribunal" and to "[prepare] a draft code of the offenses against the peace and security of mankind."¹⁷¹ A subcommittee was formed and a special rapporteur was appointed to prepare a Draft Code of

recommended in its Report to the General Assembly that a diplomatic Conference be convened in 1998. See Preparatory Committee Report, *supra* note 52.

Note that the work of the International Association of Penal Law (AIDP) on the establishment of a permanent international criminal court and on the codification of international criminal law has been consistent since 1924. See Vespasian V. Pella, *Towards an International Criminal Court*, 44 AM. J. INT'L L. 37 (1950); 17 REVUE INTERNATIONALE DE DROIT PÉNAL, Nos. 3-4 (1936); 19 REVUE INTERNATIONALE DE DROIT PÉNAL, No. 1 (1948); 20 REVUE INTERNATIONALE DE DROIT PÉNAL, No. 1 (1949); 45 REVUE INTERNATIONALE DE DROIT PÉNAL, Nos. 3-4 (1974); *Draft Statute International Criminal Tribunal*, 9 NOUVELLES ÉTUDES PÉNALES (M. Cherif Bassiouni ed., 1992), translated into French and Spanish in 10 NOUVELLES ÉTUDES PÉNALES (M. Cherif Bassiouni ed., 1993); *Commentaries on the International Law Commission's 1991 Draft Code of Crimes Against the Peace and Security of Mankind*, 11 NOUVELLES ÉTUDES PÉNALES (M. Cherif Bassiouni ed., 1993); M. CHERIF BASSIOUNI, INTERNATIONAL CRIMINAL LAW: A DRAFT INTERNATIONAL CRIMINAL CODE (1980); 52 REVUE INTERNATIONALE DE DROIT PÉNAL (1981), revised and updated in M. CHERIF BASSIOUNI, A DRAFT INTERNATIONAL CRIMINAL CODE AND STATUTE FOR AN INTERNATIONAL CRIMINAL TRIBUNAL (1987).

167. G.A. Res. 95, U.N. GAOR, 1st Sess., U.N. Doc. A/64/Add.1 (1946) [hereinafter Resolution 95]. See M. Cherif Bassiouni, *The History of the Draft Code of Crimes Against the Peace and Security of Mankind*, 27 ISRAEL L. REV. 247 (1993); Leo Gross, *Some Observations on the Draft Code of Offenses Against the Peace and Security of Mankind*, 13 ISRAEL Y.B. HUM. RTS. 9, 10 (1983); Sharon Williams, *The Draft Code of Offenses Against the Peace and Security of Mankind*, in BASSIOUNI, ICL, *supra* note 12, at 109.

168. G.A. Res. 174, U.N. GAOR, 2d Sess., at 105-10, U.N. Doc. A/519 (1947) [hereinafter Resolution 174].

169. G.A. Res. 177, U.N. GAOR, 2d Sess., at 9, U.N. Doc. A/CN.4/4 (1947).

170. *Id.* See also Gross, *supra* note 167, at 10.

171. 1 YEARBOOK OF THE INTERNATIONAL LAW COMMISSION vi (1949), referring to Resolution 174, *supra* note 168 and Resolution 95, *supra* note 167.

Offenses Against the Peace and Security of Mankind.¹⁷² That title was changed in 1988 to Draft Code of Crimes Against the Peace and Security of Mankind.¹⁷³

Concurrently, the task of formulating a Draft Statute for the Establishment of an International Criminal Court was assigned to another special rapporteur, who submitted his first report to the ILC in March 1950.¹⁷⁴ That report argued that a substantive criminal code and a statute for an international criminal court should complement one another.¹⁷⁵ Contrary to logic and rational drafting policy, these two codification projects remained separated.¹⁷⁶ In 1950, another rapporteur was appointed to study the further development of an international criminal court.¹⁷⁷ The two rapporteurs differed on whether the time was ripe for an international criminal court.¹⁷⁸

172. The first report was completed in 1950. *Report of the International Law Commission*, U.N. GAOR, 5th Sess., U.N. Doc. A/CN.4/25 (1950).

173. See *Report of the International Law Commission*, U.N. GAOR, 40th Sess., Supp. No. 10, at 145, U.N. Doc. A/43/10 (1988). The Draft Code of Offenses, subsequently the Draft Code of Crimes, was never intended to codify all international crimes. The number of crimes included within the code has fluctuated from a current high of twenty-five to a low of five. As of 1996, the categories of international crimes are: aggression, genocide, crimes against humanity, war crimes, crimes against United Nations and associated personnel, unlawful possession of, use or emplacement of weapons, theft of nuclear materials, mercenarism, apartheid, slavery and slave related practices, torture and other forms of cruel, inhuman or degrading treatment or punishment, unlawful human experimentation, piracy, aircraft hijacking and unlawful acts against international air safety, unlawful acts against the safety of maritime navigation and the safety of platforms on the high seas, threat and use of force against internationally protected persons, taking of civilian hostages, unlawful use of the mail, unlawful traffic in drugs and related drug offenses, destruction and/or theft of national treasures, unlawful acts against certain internationally protected elements of the environment, international traffic in obscene publications, falsification and counterfeiting, unlawful interference with international submarine cables, and bribery of foreign public officials. The three crimes most-recently included are: crimes against United Nations and associated personnel, mercenarism, and unlawful acts against the safety of maritime navigation and the safety of platforms on the high seas. See M. CHERIF BASSIOUNI, *INTERNATIONAL CRIMES: DIGEST/INDEX OF INTERNATIONAL INSTRUMENTS 1815-1985* (2 vols., 1985) [hereinafter *BASSIOUNI, DIGEST/INDEX*].

174. *Report of the International Law Commission on Question of International Criminal Jurisdiction*, U.N. GAOR, 5th Sess., U.N. Doc. A/CN.4/15 (1950).

175. *Id.* See also *Report of the International Law Commission*, U.N. GAOR, 5th Sess., Supp. No. 12, U.N. Doc. A/1316 (1950), and discussions on this report by the Sixth Committee of the General Assembly, reprinted in 2 BENJAMIN FERENCZ, *AN INTERNATIONAL CRIMINAL COURT* 265-305 (2 vols., 1980) [hereinafter *FERENCZ*].

176. That situation continued in part because of political considerations, and later, in part because the ILC's 1991 Draft Code of Crimes was not well received. *Commentaries on the International Law Commission's 1991 Draft Code of Crimes Against the Peace and Security of Mankind*, 11 NOUVELLES ÉTUDES PÉNALES (M. Cherif Bassiouni ed., 1993) [hereinafter *Commentaries on 1991 Draft Code*].

177. *Report of the International Law Commission*, U.N. GAOR, 5th Sess., U.N. A/CN.4/20 (1950).

178. *Id.*; *Report of the Sixth Committee to the General Assembly*, U.N. GAOR, 5th Sess., U.N. Doc. A/1639 (1950), reprinted in *FERENCZ*, *supra* note 175, at 306-11.

While many countries, such as the United Kingdom, believed the establishment of an international criminal court was desirable in theory, its establishment was doomed by the absence of consensus among the world's major powers.¹⁷⁹ The Soviet Union believed its sovereignty would be affected by the establishment of such a tribunal.¹⁸⁰ The United States was also not prepared to accept the establishment of such a court at the height of the Cold War. France, in 1950, was the only permanent member of the Security Council willing to support the establishment of an international criminal court.¹⁸¹

A Special Committee of the General Assembly was established in 1951, composed of representatives of seventeen states, for the purpose of drafting a convention for the establishment of an international criminal court.¹⁸² The substantive legal aspects of codification were given to one drafting body and the enforcement counterpart to another body.

In 1951, the Special Committee appointed to draft the statute for the formulation of an International Criminal Court finished its task, modeling the statute in part after that of the International Court of Justice.¹⁸³ The discussions and written comments, particularly those of major powers clearly, indicated that the project had no chance of acceptance and was politically premature.¹⁸⁴ Because these states did

179. *Id.* at 26-31.

180. *Id.*

181. *Id.* Currently, while no state openly opposes the establishment of such a court, some extend the debate as a way of delaying the drafting of a statute. If, despite these tactics, a compromise statute is adopted, it is likely that it will contain certain provisions that will reduce its effectiveness. *Report of the Ad Hoc Committee on the Establishment of an International Criminal Court*, U.N. GAOR, 50th Sess., Supp. No. 22, U.N. Doc. A/50/22 (1995). The writing is already on the wall with insistence by some states on "complementarity." See *Report of the Ad Hoc Committee on the Establishment of an International Criminal Court*, *supra*, at 6-7. The proposals that came out of the Second Session of the Preparatory Committee on "international cooperation," in effect would require the ICC to be subject to national laws and procedures on surrender of accused, and legal assistance to obtain evidence. See *Preparatory Committee Report*, *supra* note 52.

182. See *Report of the Sixth Committee*, reprinted in FERENCZ, *supra* note 175, at 298-305; *Report of the Ad Hoc Committee on the Establishment of an International Criminal Court*, *supra* note 181; M. Cherif Bassiouni, *Recent United Nations Activities in Connection With the Establishment of a Permanent International Criminal Court and the Role of the Association Internationale de Droit Pénal and the Istituto Superiore Internazionale di Scienze Criminali*, 67 REVUE INTERNATIONALE DE DROIT PÉNAL 127 (1996).

183. *Report of the Committee on International Criminal Court Jurisdiction*, U.N. GAOR, 7th Sess., Supp. No. 11, at 21-25, U.N. Doc. A/2136 (1952) [hereinafter 1951 Draft Statute]. See also *Comments Received from Governments Regarding the Report of the Committee on International Criminal Jurisdiction*, U.N. GAOR, 7th Sess., U.N. Doc. A/2186 and U.N. Doc. A/2186/Add.1. See also *Historical Survey of the Question of International Criminal Jurisdiction, Memorandum by the Secretary-General*, U.N. GAOR, 4th Sess., U.N. Doc. A/CN.4/7/Rev. 1 (1949), reprinted in FERENCZ, *supra* note 175, at 399.

184. See *Report of the Sixth Committee*, U.N. GAOR, 7th Sess., U.N. Doc. A/2275 (1952) and discussions on this report by the Sixth Committee, reprinted in FERENCZ, *supra* note 175, at 424-28.

not want to assume political responsibility for the demise of a permanent international criminal court within only five and six years, respectively, of the IMTFE and IMT's judgments,¹⁸⁵ the Committee, with some membership changes, revised the 1951 Draft Statute and finalized revisions in 1953.¹⁸⁶

The 1953 revised Draft Statute was submitted to the General Assembly, which found it necessary to first consider the ILC's work on the Draft Code of Offenses. The statute for an international criminal court was therefore tabled until the draft code of offenses was finalized.¹⁸⁷ The ILC's approved text of the Draft Code of Offenses, consisting of five articles and listing thirteen separate international crimes, was submitted to the General Assembly in 1954.¹⁸⁸

Article 2 of the 1954 Draft Code, the article dealing with aggression, did not define aggression, since another Special Committee had been established to develop a definition. The General Assembly therefore postponed further consideration of the 1954 Draft Code until the Special Committee on the Question of Defining Aggression submitted its report.¹⁸⁹ Consequently, the expected domino effect occurred: the 1953 Draft Statute for an ICC could not be considered before the 1954 Draft Code of Offenses, and the 1954 Draft Code of Offenses, could not be considered until aggression was defined. As a result, the 1953 Draft Statute and the 1954 Draft Code were tabled until aggression was defined.¹⁹⁰

The definition of aggression followed a long and arduous course. The General Assembly appointed a first Special Committee on the Question of Defining Aggression of fifteen members (1952–1954), then a second Special Committee of nineteen members (1954–1957), and then a third

185. In 1952 the Allies were still holding trials in Germany under CCL 10, *see supra* text accompanying notes 79–82, and in the Far East, *see supra* text accompanying notes 89–110.

186. *Report of the Committee on International Criminal Jurisdiction*, U.N. GAOR, 7th Sess., Supp. No. 12, at 21, U.N. Doc. A/2645 (1954). The revised statute made a number of changes to the 1951 Draft Statute in order to encourage more states to accept such a proposal, mostly softening the compulsory jurisdiction of the court by allowing more flexibility and voluntary participation on the part of states, including the opportunity for states to withdraw from the court's jurisdiction upon one year's notice. The Special Committee was eager to develop a project that was politically acceptable to the major powers, but even so, the political climate was still not ripe.

187. G.A. Res. 898 (IX), U.N. GAOR, 9th Sess., Supp. No. 21, at 50, U.N. Doc. A/2890 (1954) [hereinafter Resolution 898 (IX)].

188. *See Third Report Relating to a Draft Code of Offenses Against the Peace and Security of Mankind*, U.N. GAOR, 6th Sess., U.N. Doc. A/CN.4/85 (1954). *See also* D.H.N. Johnson, *The Draft Code of Offenses Against the Peace and Security of Mankind*, 4 INT'L COMP. L.Q. 445 (1955).

189. Resolution 898 (IX), *supra* note 187. *See also Report of the 1953 Committee on International Criminal Jurisdiction*, U.N. GAOR, 9th Sess. Supp. No. 12, U.N. Doc. A/2645 (1957); G.A. Res. 1187 (XII), U.N. GAOR, 12th Sess., Supp. No. 18, at 52, U.N. Doc. A/3805 (1957), which tabled the draft once again.

190. For a more detailed historical chronology and evolution, *see* Bassiouni, Gross, and Williams, *supra* note 167.

Special Committee of twenty-one members (1959–1967), and lastly a fourth Special Committee of thirty-five members (1967–1974).¹⁹¹ These four committees submitted various reports which were debated and discussed at length in committees and by the General Assembly. The last of the special committees finally completed its task in 1974, and the General Assembly adopted the definition of aggression by a consensus resolution.¹⁹² It is noteworthy that the definition of aggression, which took more than twenty years to define, was neither included in a multilateral convention nor even voted upon in the resolution that adopted it.

The General Assembly, having previously tabled further consideration of the 1954 Draft Code of Offenses on the ground that aggression first had to be defined, and also having tabled consideration of the 1953 Draft Statute for an international criminal court because the 1954 Draft Code had not been adopted first, logically would have had to reconsider these two items once aggression had been defined in 1974. Nevertheless, the General Assembly did not see fit to reconsider the question of the 1954 Draft Code of Offenses until 1978 nor did it elect to reconsider the question of the 1953 Draft Statute for an International Criminal Court. In 1982, a new rapporteur of the ILC produced his first report on the draft code,¹⁹³ which contained a variety of generalities concerning international criminal law, individual and state responsibility, and observations on the eventual contents of such a code.¹⁹⁴ The new Rapporteur was starting his work on the project *ab initio*, and it took him until 1991 to produce what was intended to be

191. For a history and documents relating to these committees, see BENJAMIN FERENCZ, *DEFINING INTERNATIONAL AGGRESSION* (1975).

192. G.A. Res. 3314 (XXIX), U.N. GAOR, 29th Sess., Supp. No. 31, at 142–43, U.N. Doc. A/9631 (1974). For a comparison of the various committee reports and alternative drafts until 1971, see M. Cherif Bassiouni, *The Definition of Aggression in International Law: The Crime Against Peace*, in 1 *A TREATISE ON INTERNATIONAL CRIMINAL LAW* 159 (M. Cherif Bassiouni & Ved P. Nanda eds., 1973); M. Cherif Bassiouni & Benjamin Ferencz, *The Crime Against Peace*, in 1 *INTERNATIONAL CRIMINAL LAW* 167 (M. Cherif Bassiouni 1986).

193. See *Report of the International Law Commission on the work of its thirty-fifth session*, U.N. GAOR, 38th Sess., Supp. No. 10, at 11–28, U.N. Doc. A/38/10 (1983).

194. It should be noted that the new rapporteur, like his predecessors, confined criminal responsibility to individuals, excluding organizations and states. But see FARHAD MALEKIAN, *INTERNATIONAL CRIMINAL RESPONSIBILITY OF STATES* (1985). The enunciation of the principles of state responsibility have, however, have since 1976 contained the notion of state criminal responsibility. See 2 *YEARBOOK OF THE INTERNATIONAL LAW COMMISSION*, U.N. GAOR, 31st Sess., U.N. Doc. A/CN/SER.A/1976 (1976); *Report of the International Law Commission*, U.N. GAOR, 36th Sess., Supp. No. 10, U.N. Doc. A/36/10 (1984). Commenting on this concept, see IAN BROWNLEE, *SYSTEM OF THE LAW OF NATIONS: STATE RESPONSIBILITY* 32–33 (1983); *YEARBOOK OF THE INTERNATIONAL LAW COMMISSION*, *supra*, at 26–54 (containing Special Rapporteur Ago's approach); Virginia Morris & M. Christiane Boushoyannies-Vrailes, *Current Development: The Work of the Sixth Committee at the Fiftieth Session of the U.N. General Assembly*, 90 AM. J. INT'L L. 491, 494 (1996).

a final text.¹⁹⁵ Because the report was criticized by governments and scholars¹⁹⁶ it was revised and adopted in 1996.¹⁹⁷

The question of an international criminal court came back to the ILC by an unexpected route. In 1989, the General Assembly requested the ILC to prepare a report on an international criminal jurisdiction for the prosecution of persons engaged in drug trafficking.¹⁹⁸ Contemporaneously, an NGO committee of experts, chaired by this author, prepared another draft statute in June of 1990, and submitted it to the Eighth United Nations Congress on Crime Prevention and the Treatment of Offenders.¹⁹⁹ The Eighth Congress recognized the need

195. *Report of the International Law Commission*, U.N. GAOR, 46th Sess. Supp. No. 10, U.N. Doc. A/46/10 (1991).

196. *Commentaries on 1991 Draft Code*, *supra* note 176.

197. *Draft Code of Crimes Against Peace and Security of Mankind: Titles and Articles on the Draft Code of Crimes Against Peace and Security of Mankind adopted by the International Law Commission on its forty-eight session*, U.N. GAOR, 51st Sess., U.N. Doc. A/CN.4L.532 (1996), revised by U.N. Doc. A/CN.4L.532/Corr. 1 and U.N. Doc. A/CN.4L.532/Corr.3.

198. G.A. Res. 43/164, U.N. GAOR, 43d Sess., Supp. No. 49, at 280, U.N. Doc. A/43/49 (1988); G.A. Res. 44/39 U.N. GAOR, 44th Sess., Supp.No.49, at 310, U.N. Doc. A/44/49 (1989). This recommendation was the consequence of a resolution adopted by the Special Session of the General Assembly of that year on the question of illicit traffic in drugs. Its sponsor was Trinidad and Tobago, whose former Prime Minister Arthur N.R. Robinson was the moving force behind it. Robinson deserves much credit for his untiring efforts to promote an ICC.

In a separate development in 1979, the Commission of Human Rights, Ad Hoc Working Group on Southern Africa, requested this author to prepare a draft statute for the establishment of an international criminal jurisdiction to implement the Apartheid Convention. International Convention on the Suppression and Punishment of the Crime of Apartheid, G.A. Res. 3068 (XXVIII), U.N. GAOR, 28th Sess., Supp. No. 30, U.N. Doc. A/9030 (1973) [hereinafter Apartheid Convention]. The Apartheid Convention contains explicit language in Article 5 for the creation of an international criminal jurisdiction. *Id.* at 75. Similarly, the Genocide Convention provides for the jurisdiction of an international criminal court for the crime of genocide, should such a court be established. Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, 78 U.N.T.S. 277.

The draft statute for the creation of an international criminal jurisdiction to enforce the Apartheid Convention was completed in 1980 and submitted to the Commission on Human Rights, which accepted it without discussion and circulated it to the Member States for their comments. *Study on the ways and means of insuring the implementation of international instruments such as the International Convention on the Suppression and Punishment of the Crime of Apartheid, including the establishment of the international jurisdiction envisaged by the Convention*, U.N. GAOR, 35th Sess., U.N. Doc. E/CN.4/1426 (1980). See also M. Cherif Bassiouni & Daniel H. Derby, *Final Report on the Establishment of and International Criminal Court for the Implementation of the Apartheid Convention and Other Relevant International Instruments*, 9 HOFSTRA L. REV. 523 (1981). No further action was taken.

199. *Draft Statute: International Criminal Tribunal*, U.N. GAOR, 45th Sess., U.N. Doc. A/Conf. 144/NGO.7 (1990), reprinted in 15 NOVA L. REV. 373 (1991). See also M. Cherif Bassiouni, *A Comprehensive Strategic Approach on International Cooperation for the Prevention, Control and Suppression of International and Transnational Criminality, Including the Establishment of an International Criminal Court*, 15 NOVA L. REV. 353 (1991). The committee of experts was assembled by the International Institute of Higher Studies in Criminal Sciences (Siracusa, Italy), in cooperation with the United Nation Crime Prevention Branch and the Italian Ministry of Justice.

for an international criminal court, and supported the ILC's continued efforts on this matter.²⁰⁰

The ILC discussed the nature of an international criminal tribunal, its *ratione materiae*, the conferment of jurisdiction, and the institution of criminal proceedings before the court, and decided to continue the discussion on this question in later sessions along with its further consideration of the 1991 Draft Code of Crimes.²⁰¹ Thus, the ILC did link its work in the Draft Code of Crimes to that of an eventual draft statute for an international criminal court, even though the General Assembly had not given it such a mandate. But later, the ILC and the General Assembly decoupled the two projects.

Although the ILC transcended the drug trafficking question which was the basis of its original mandate, the General Assembly did not raise any questions of scope. Wisely, the ILC started with a preliminary report in 1992,²⁰² and when that report was favorably received by the General Assembly, the ILC produced a comprehensive text in 1993,²⁰³ which it modified in 1994.²⁰⁴ The changes made in the ILC's 1994 Draft Statute for an International Criminal Court were intended to answer the political concerns of some of the world's major powers.²⁰⁵ Nevertheless, both the ILC and the Sixth Committee of the General Assembly decoupled the ILC's Draft Statute for an International Criminal Court from the Draft Code of Crimes, ostensibly because in 1994 the latter was not yet completed. In 1996, the ILC modified the Draft Code of Crimes,²⁰⁶ and took into account the experiences of the ICTFY

200. *Report of the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders*, U.N. GAOR, 45th Sess., U.N. Doc. A/Conf. 144/28 (1990).

201. *Report of the International Law Commission*, U.N. GAOR, 46th Sess., Supp. No. 10, at 198, U.N. Doc. A/46/10 (1991).

202. *Report of the International Law Commission*, U.N. GAOR, 49th Sess., Supp. No. 10, U.N. Doc. A/47/10 (1992).

203. See *Revised Report of the Working Group on the Draft Statute for an International Criminal Court*, U.N. GAOR, 48th Sess., U.N. Doc. A/CN.4/L.490 (1993); *Revised Report of the Working Group on the Draft Statute for an International Criminal Court: Addendum*, U.N. GAOR, 48th Sess., U.N. Doc. A/CN.4/L.490/Add.1 (1993).

204. *Report of the International Law Commission*, U.N. GAOR, 49th Sess., Supp. No. 10, U.N. Doc. A/49/10 (1994). See also M. Cherif Bassiouni, *Establishing an International Criminal Court: Historical Survey*, 149 MIL. L. REV. 49 (1995); Timothy C. Evered, *An International Criminal Court: Recent Proposals and American Concerns*, 6 PACE INT'L L. REV. 121 (1994); Michael P. Scharf, *Getting Serious about an International Criminal Court*, 6 PACE INT'L L. REV. 103 (1994). For an insightful contribution to work on the subject by its Deputy Secretary, see Manuel Rama-Montaldo, *Alcance de Algunos Conceptos Basicos Relativos al derecho Penal Internacional y a una Jurisdiccion Penal Internacional*, in *INTERNATIONAL LAW IN AN EVOLVING WORLD* 865-93 (Manuel Rama-Montaldo, ed., 1994).

205. James Crawford, *The ILC Adopts a Statute for an International Criminal Court*, 89 AM. J. INT'L L. 404 (1995). Professor Crawford, a distinguished member of the ILC, has contributed significantly to the 1994 Draft Statute and also to the Draft Code of Crimes which was adopted in 1996, *infra* note 206.

206. *Draft Code of Crimes Against the Peace and Security of Mankind: Titles and Texts of Articles on*

and the ICTR, as well as the debates of the Ad Hoc Committee and the Preparatory Committee on the International Criminal Court.

The ILC's perseverance and ingenuity in developing the limited 1989 mandate related to illicit drug trafficking into what became the Draft Statute for an International Criminal Court merits high praise. The 1994 Draft Statute was the basis upon which the General Assembly in 1994 established the Ad Hoc Committee on the Establishment of an International Criminal Court,²⁰⁷ and then in 1995 the Preparatory Committee for the Establishment of an International Criminal Court.²⁰⁸ The Preparatory Committee's Report was submitted to the General Assembly's 51st session on October 28, 1996, with a recommendation that the General Assembly extend the Preparatory Committee's term with a specific mandate to negotiate proposals with a view to producing a consolidated text of a Convention, Statute, and annexed instruments by 1998.²⁰⁹ This schedule is a setback for those who had hoped for a 1997 Plenipotentiary Conference.²¹⁰ A number of major powers are, however, reluctant to move faster and hope to defer the diplomatic conference to a later time.

Still, one consideration may prove to be the impetus for the setting up of a permanent court by 1998. The ICTFY and ICTR are established by the Security Council pursuant to its powers under Chapter VII of the Charter. By 1997 or 1998 the Security Council's ability to keep these ad hoc tribunals in operation may prove difficult.²¹¹ Since it would not be politically wise to simply abolish these tribunals, or cause them to die on the vine, a permanent court that could take over the remaining or prospective prosecutions would prove a most useful solution.²¹²

the Draft Code of Crimes against the Peace and Security of Mankind Adopted by the International Law Commission at its forty-eight session, U.N. GAOR, 48th Sess., U.N. Doc A/CN.4/L.532 (1996).

207. *Report of the Ad Hoc Committee on the Establishment of an International Criminal Court*, U.N. GAOR, 50th Sess., Supp. No. 22, U.N. Doc A/50/22 [hereinafter *Report of the Ad Hoc Committee*].

208. G.A. Res. 50/46, U.N. GAOR, 50th Sess., U.N. Doc A/RES/50/46 (1995). See also *Summary of the Proceedings of the Preparatory Committee on the Establishment of an International Criminal Court*, U.N. GAOR, 50th Sess., Supp. No. 22, U.N. Doc A/50/22 (1995).

209. *Preparatory Committee Report*, *supra* note 52.

210. M. Cherif Bassiouni, *Recent United Nations Activities in Connection With the Establishment of a Permanent International Criminal Court and the Role of the Association internationale de droit pénal and the Istituto Superiore Internazionale di Scienze Criminali*, 67 *REVUE INTERNATIONALE DE DROIT PÉNAL* 127 (1996).

211. See *supra* text accompanying notes 145-149.

212. For a useful comparison of the statutes see Christopher L. Blakesley, *Comparing the Ad Hoc Tribunal for Crimes against Humanitarian Law in the Former Yugoslavia and the Project for an International Criminal Court*, 67 *REVUE INTERNATIONALE DE DROIT PÉNAL* 139 (1996).

CONCLUSION: THE NEED FOR A PERMANENT SYSTEM OF INTERNATIONAL CRIMINAL JUSTICE

Invariably after each war in which violations of international humanitarian law occur and prosecutions ensue, a hue and cry develops in the defeated nations for the release of their citizens who were convicted of such crimes. As political pressure increases, the prosecutions are viewed as contrary to peace, and the crimes committed are overlooked.²¹³ But few think of the past's victims, or of the effect of a policy of impunity on the future. Only after the present political culture realizes that justice is an indispensable component of peace will the establishment of a permanent international criminal justice system be possible.

Following the Treaty of Versailles, the German people began to resist prosecutions. The President of the German Peace Delegation in Paris, Baron von Larsner, reported to the Allies that

the entire German Volk, without regard to class and party, [was] of the conviction that it [was] impossible to deliver up *the so-called war criminals* . . . no German official would lend a hand to the arrest of a German in order to deliver him up to the justice of the Entente [the Allies] The mere proposal of an order of this kind would create such a storm of indignation that *the entire peace structure would be gravely threatened*.²¹⁴

The Allies' avowed intentions to establish prosecutions stipulated in the Treaty of Versailles were, thus for political reasons, never realized. Instead, some token prosecutions were held at Leipzig.

The process of tampering, limiting, or curtailing justice after World War II was also evident when the recommendation of the 1919 Commission for the prosecution of Turkish Officials was set aside after the United States and Japan strongly opposed it. The Treaty of Sevres which had provided the Allies the right to prosecute Turkish officials was then never ratified. Instead, the Treaty of Lausanne provided for an amnesty in an unpublicized additional Protocol.

Then, after World War II, the policies of clemency in the Far East and in Germany are also illustrative. Within a few short years of the IMTFE's judgments, all convicted persons were released. The Em-

213. Occasionally the opposite occurs. See The Case of General Yamashita, *supra* notes 113, 116-119 and corresponding text.

214. VON LARSNER, 1 *DIE AUSLIEFERUNG DER DEUTSCHEN KRIEGSVERBRESHER IN ZEHN JAHREN SEIT VERSAILLES* 22 (H. Schnel & H. Draeger eds., 1929) (emphasis added), also cited in Remigiusz Bierzanek, *War Crimes: History and Definition*, in 1 *A TREATISE ON INTERNATIONAL CRIMINAL LAW* 559 (M. Cherif Bassiouni & Ved P. Nanda eds., 1973).

peror's 1946 amnesty edict and the 1951 Peace Treaty paved the way for the early release of all those convicted in Allies' military proceedings. General MacArthur was content with the symbolic post-war prosecutions but beyond that, his interest, as well as that of the U.S. Government, was to strengthen peace through a stable Japan. In Germany, the IMT's sentences were upheld, with the exception of some early releases on parole and commutation of sentences. Convictions under CCL 10, however, were commuted and parole was used more liberally.²¹⁵ In the Western zones of occupation, the Allies were eager to help Germany rebuild politically and economically.²¹⁶ Germany was by then clearly in the Western camp, which needed it to face the strong and defiant Eastern bloc.

In Italy, the Allies, in violation of the Articles of Surrender of 1945, simply did not prosecute or extradite any of the alleged war criminals to those states which requested them. Subsequently, Italy also refused to extradite any accused war criminals, including those whose "dossiers" had been carefully prepared by the UNWCC.

By 1992, bureaucratic hurdles, lack of resources, non-disclosure of evidence, and other more subtle means were used to avoid prosecutions. Thus, the Commission of Experts on the former Yugoslavia was not funded for investigations, and when it accumulated evidence perceived as dangerous to the political peace process, it was arbitrarily terminated. The ICTFY, notwithstanding all its public visibility, has only prosecuted one low-ranking Bosnian Serb violator,²¹⁷ and convicted one accused who pled guilty, but is unable to obtain jurisdiction over seventy-five indicted persons, including major offenders, which IFOR refuses to apprehend. The 1994 Rwanda Commission was not given a long enough mandate nor adequate resources to do any investigation, while the Rwanda Tribunal only commenced prosecution in 1997 of one person due to bureaucratic and financial difficulties.

These past experiences with ad hoc international tribunals confirm the need for a permanent system of international criminal justice.²¹⁸

215. See generally TELFORD TAYLOR, FINAL REPORT TO THE SECRETARY OF THE ARMY ON THE NUREMBERG WAR CRIMES TRIALS UNDER CONTROL COUNCIL NO. 10 (1949); FRANK M. BUSCHER, THE U.S. WAR CRIMES TRIAL PROGRAM IN GERMANY 1946-1955 (1989).

216. No industrialists were prosecuted at the IMT. See EUGENE DAVIDSON, THE TRIAL OF THE GERMANS (1969). Some industrialists were prosecuted in the United States. Subsequent Proceedings in *The Krupp Case*, *The Flick Case*, and the *I.G. Farben Case*. None of the Industrialists served more than five years. Almost all returned to their firms' ownership in whole or in part. See APPLEMAN, *supra* note 44, at 171-220. For the terrible suffering of those who worked in these industries as slave-labor, see BENJAMIN FERENCZ, LESS THAN SLAVES (1979).

217. See *Prosecutor v. Dusho Tadic aka "Dule"*, Case No. IT-94-I-AR 72 (2 October 1995). Opinion of the Appellate Chamber reprinted in *Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*, 7 CRIM. L. FOR. 51 (1996).

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

Because they only try certain offenders in certain conflicts, these tribunals and their laws and penalties raise fundamental questions about compliance with the principles of legality and about general considerations of fairness. After WWII many felt that the Allies were applying one law to themselves and another to the defeated. Prosecutions in Germany and in the Far East were labelled victors' vengeance. Indeed, the Roman Law maxim, *quod licet jovi non licet bovi*,²¹⁹ was not heeded in either context.²²⁰ Furthermore, ad hoc tribunals generally do not provide equal treatment to individuals in similar circumstances who commit similar violations. Thus, such tribunals create the appearance of uneven or unfair justice, even when the accused are properly deserving of prosecution. A permanent system of international criminal justice based on a preexisting international criminal statute would allow any person from any nation to be held accountable for violations. Equal treatment for violators would be guaranteed.

History also shows that investigative bodies should be institutionally linked to the prosecutorial organ of the tribunal that will adjudicate the cases. After World War I, for example, the work of the 1919 investigative commission was virtually nullified because the prosecutions were shifted from the international to the national level. Political considerations, namely the U.S. refusal to relinquish control over IMT proceedings, reduced the 1943 UNWCC to a collector and clearinghouse of information, rather than an investigative body. If a permanent international system of criminal justice is established, then an international investigative body would be out of the control of any single country. In addition, since an investigative body would logically be linked to the adjudicative body, its work could not be dismissed, overlooked, or relegated to a secondary role as were the 1919 Commission and the 1943 UNWCC.

There are also several practical reasons for advocating a permanent system of international criminal justice.²²¹ A permanent system would eliminate the necessity of establishing ad hoc tribunals every time the need arises. The decision to establish such tribunals, not to mention drafting the applicable statutes, takes considerable time during which the evidence of the crimes becomes more difficult to obtain, and the political will to prosecute dissipates. Moreover, a political debate is invariably reopened over the provisions of the statute, who will conduct

219. What is lawful for victors is not unlawful for vanquished.

220. The defense of "obedience to superior orders" was rejected, as was that of *tu quoque*. See ROBERT K. WOETZEL, *THE NUREMBERG TRIALS* 120-21 (1962); ARTHUR VON KNIEREM, *supra* note 78, at 312.

221. *Id.*

the prosecutions, and who will sit in judgment. Such pressures leave ad hoc tribunals vulnerable to political manipulation.

The work of the ILC from 1947 to 1996 has been painstakingly slow, facing constant political hurdles. In 1995, the Ad Hoc Committee on the Establishment of an International Criminal Court, and in 1996 the Preparatory Committee on the Establishment of an International Criminal Court made some progress. But now hard political decisions must be made. World public opinion favors the establishment of an effective and fair system of international criminal justice. Governments cannot forever ignore public opinion if they are to retain their political credibility.

Impunity must no longer be the reward of those who commit the most egregious international crimes and violations of human rights.²²² In addition to the many never prosecuted in the ad hoc tribunals established following certain international conflicts, many more criminals in internal conflicts have not been brought to justice. The quantum of human harm produced since World War II by conflicts of a non-international character—purely internal conflicts and victimization by tyrannical regimes²²³—far exceeds the combined casualty figures of

222. See *supra* note 31; Michael P. Scharf, *Swapping Amnesty for Peace: Was There a Duty to Prosecute International Crimes in Haiti?* 31 TEX. INT'L L.J. 1, 4 (1996); TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES (Neil J. Kritz ed., 3 vols. 1995); NAOMI ROHT-ARRIAZA, IMPUNITY AND HUMAN RIGHTS IN INTERNATIONAL LAW AND PRACTICE 14 (1995); Mark J. Osiel, *Ever Again: Legal Remembrance of Administrative Massacre*, 144 U. PA. L. REV. 493, (1995); Robert O. Weiner, *Trying to Make Ends Meet: Reconciling the Law and Practice of Human Rights Amnesties*, 26 ST. MARY'S L.J. 857, 867 (1995); RUDOLPH J. RUMMEL, DEATH BY GOVERNMENT (1994); Stephen P. Marks, *Forgetting the Policies and Practices of the Past: Impunity in Cambodia*, FLETCHER F., Summer/Fall 1994, at 18; Jo M. Pasqualucci, *The Whole Truth and Nothing But the Truth: Truth Commissions, Impunity and the Inter-American Human Rights System*, 12 B.U. INT'L L.J. 321, 368–69 (1994); Robert J. Quinn, *Will the Rule of Law End? Challenging Grants of Amnesty for Human Rights Violations of a Prior Regime: Chile's New Model*, 62 FORDHAM L. REV. 905, 912 (1994); Jamal Beromar, *Justice After Transition*, 4 J. DEMOCRACY 1, 3–14; *Sub Commission on the Prevention of Discrimination and the Protection of Minorities Progress Report on The Question of Impunity of Perpetrators of Human Rights Violation*, U.N. GAOR, 48th Sess., U.N. Doc. E/CN.4/Sub.2/1993/6 (1993); Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537, 2542 (1991); Naomi Roht-Arriaza, *State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law*, 78 CALIF. L. REV. 449, 475, fn. 137 (1990). The Inter-American Court of Human Rights took a position against impunity in the *Velazquez-Rodriguez* case, Inter-Am. C.H.R., OEA/Ser.C./Case 4/para.174 (1988), reprinted in 28 I.L.M. 291 (1989). Michael Reisman, *Institutions and Practices for Restoring and Maintaining Public Order*, 6 DUKE J. COMP. & INT'L L. 175 (1995).

223. "Tyrannical regimes" commit Genocide and Crimes Against Humanity. These are crimes within the contemplated jurisdiction of the ICC. They are also international crimes of *jus cogens* character for which there is universal jurisdiction. Furthermore these proscriptions apply in time of war and peace. "Tyrannical regimes" can also provoke reactions which may develop into conflicts of a non-international character, and even into conflicts of an international character (if foreign military intervention occurs). In these contexts, violations of the regulation of armed conflicts are war crimes. These crimes are also international crimes of a *jus cogens* nature to which universal jurisdiction attaches. An ICC would therefore have jurisdiction over such crimes.

World War I and World War II. Yet, the overwhelming majority of perpetrators have benefitted from impunity.

While an international justice system might not stop future conflicts, it would vindicate the victims of international crimes and remind ourselves and future generations of the victims' plight and the perpetrators misdeeds. To paraphrase the philosopher George Santayana, if we do not record and learn the bitter lessons of the past we are condemned to repeat our mistakes. That is why those who can, must speak up. For to criticize the flawed legal and political processes which unfolded in the past, is to serve justice as it ought to be in the future.