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THE PERENNIAL CONFLICT BETWEEN INTERNATIONAL CRIMINAL JUSTICE AND *REALPOLITIK*

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If societies, like human beings, had a genetically-imprinted survival instinct, it would be the "rule of law." But even in the age of globalization, our instinct for social survival has not reached such a developed level.

The putative instinct of social survival cannot be biologically demonstrated, but historical empirical evidence points in that direction. History records that a legal system has existed in every one of the 40 or so world civilizations over the past 7,000 years. Admittedly, the existence of law and legal institutions does not attest to the quality of justice attained in these civilizations. However, evident in every one of these civilizations is the constant struggle for the pursuit of power and wealth by some to the detriment of others. This struggle yields inequities and injustices that law and legal institutions have seldom successfully redressed. But whenever justice or equity has prevailed, it has been because of law and legal institutions—and almost always because persons dedicated to the law pursued such an outcome. Such persons generally encountered

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obstacles from power-holders and the proponents of power-interests. The pursuit of justice has never been easy, and all too frequently the power-holders and the servants of power-interests have prevailed, even over elementary fairness and basic rights.

In the last 50 years, national legal systems have qualitatively advanced far more than during the preceding 7,000 years. This advance is largely due to the impact of international human rights norms on national legislation. The concept of the rule of law and all that it comports—substantive and procedural norms and rules—has not only enhanced the attainability of justice, but it has contributed to the harmonization between national legislation and legal processes. To some extent, this permeation of international human rights norms and standards has also occurred in the international legal system.

The international and national legal systems differ with respect to participants, processes, structures, values, goals, decision-making processes, and above all, enforcement mechanisms and capabilities. More particularly, the international legal system, is essentially based on voluntariness and cooperation and therefore, lacks both effective enforcement deriving from collective decision-making and institutional capabilities to carry out enforcement. These problems are particularly apparent with respect to international criminal justice.

Reduced to its basics, what motivates states in their relations is not enduring values like those that bind human beings, but interests whose significance and timeliness are in constant flux. Thus, the dominant feature of interstate relations is by state interests. Nevertheless, the evolution of interstate and international relations since World War II (WWII)—until now defined by the Westphalian concept of sovereignty and the Hegelian concept of state interest bridled only by prudence and good judgment—indicates that a significant change has occurred. This change is characterized by commonly-shared values that transcend the unilateral pursuit and preservation of power and wealth that are now part of the global equation. This result is reflected in the many changes that have occurred in the international legal system in the 20th century, particularly with respect to multilateral decision-making and limitations on state sovereignty deriving from commonly-shared

values and interests. As a result of these changes, the international legal system now includes the concept of international criminal accountability for the commission of certain international crimes as well as the emerging concept of the duty to protect as a harm-preventing measure. These concepts are separate and apart from the United Nations collective security system. Furthermore, both international criminal accountability and the duty to protect partake of the same commonly-shared values and interests. If nothing else, protection is a means of prevention, as is accountability with respect to its deterrent effect. Indeed, criminal accountability promotes advances in international human rights protection because, at a minimum, victims' rights include bringing their perpetrators to justice. This link is evident in the General Assembly's adoption in March of 2006 of the *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, which includes a duty to prosecute. However, that modest accomplishment took 20 years to get states to approve these *Basic Principles and Guidelines*, in large part because of the duty to prosecute. As the United Nation's Independent Expert who prepared this text between 1998 and 2002, I can attest to the obduracy of state interests even at this time, and even for such fundamental principles. Thus, what the international community is willing to profess is not necessarily what it is willing to act upon, let alone enforce.

The identification, application, and enforcement of commonly-shared values and interests in the international legal system presupposes the existence of a community that postulates certain universal objects and moral imperatives that require *inter alia* certain actions, while proscribing others. It is therefore necessary to identify the limits of state action and to thresholds that impel them to cooperate in the common interest. This proposition is not moralistic, because common experience teaches, based on the lessons of justified pragmatic considerations, that enlightened self-interest, and prudent judgment require limits on unilateral state-action and requirements compelling collective state cooperation for a common interest or a

common good. The acceptance of the above is not dependent on the existence or even the desirability of a world government.

Various models of international governance hypothesize an international community bound by international obligations that flow from commonly-shared values and interests. One model more applicable to the contemporary international system—the *civitas maxima*—derives from Roman law experience. This is a concept that reflects the existence of a higher body politic, and in the Roman legal system, it included the different nations and tribes that comprised the Empire. But it was the collective belief in the existence of this intangible whole that was greater than its parts—the *civitas maxima*—that engendered a collective social bond from which emanated duties that transcended the interests of the singular. The moral or ethical ligament and the pragmatic and experiential bonds thus coalesced in the *civitas maxima*. From that whole, legal obligations arose that the community had to enforce individually and collectively, for the benefit of all.

Against this vision stands the Hobbesian state of nature, in which each state pursues its own interests, defines its own goals, follows its own path, relies on its own means, and is limited only by its own considerations of expediency and whatever is prudent to achieve its goals. This includes the ability of a state to free itself from any moral or ethical limitations, even when these considerations represent its own society's commonly-shared values. Thus, no moral or ethical rules restrain states in their relations with one another, except those rules to which they voluntarily submit, including self-restraining limitations arising from countervailing deterring forces. More significantly, the state could opt out of its previously voluntarily accepted obligations without any other consequences than those that countervailing forces could exercise. The Hobbesian state, subject to its own considerations of enlightenment, expediency, and prudence, is essentially self-controlling. To a large extent, this quality is reflected in the Westphalian model of 1648 which, though without its original vigor, has managed to survive even in the present age of global interdependence. Philosophers from Aristotle to Rousseau do not set aside morality and responsibility of states as some

contemporary political realists do. These philosophers, notwithstanding their different views, consider morality and responsibility as components of state decision-making. The Kantian methodology of pure reason, which has influenced many modern philosophers and political scientists, co-exists with the metaphysical elements of ethics. Both are part of the rules controlling inter-personal and inter-social relations.

A modern *civitas maxima* model includes self- and externally-imposed limitations. But a process must guide such a model, lest it turn into a form of a collective Hobbesian state of nature where the powerful and wealthy nations dominate the community's collective processes and arrogate to themselves the prerogative of exceptionalism. The modern *civitas maxima* must therefore be subject to the international rule of law, which includes both binding legal norms that transcend domestic norms as well as legal processes that are similar to national legal processes. These legal processes have the capacity for "direct enforcement" through mechanisms such as international judicial institutions as a complementary approach to "indirect enforcement," which is achieved through the intermediation of state enforcement in accordance with its domestic legal system. More importantly, the modern *civitas maxima* must be founded on legitimacy and its acts must also conform to legal legitimacy. Such legal legitimacy cannot rest on the sole assertion of state interest, but it must be based on the right reason. This right reason is not necessarily the same notion of "right reason" that Aristotle advocated in his natural law conception. Legal legitimacy is the right reason premised on existing positive norms, though not excluding the application of higher norms derived in part from the commonly-shared values of the times, and enduring values represented in general principles of law. Such an approach regulating international relations is likely to better govern these relations and produce better outcomes, which is the ultimate utilitarian reward for compliance with the norms and processes of the international legal system. Legal legitimacy reduces the latitude of relativism that undermines the certainty of the law and eliminates the predictability and consistency of legal outcomes. Without legal legitimacy in state and collective

state action, the international legal system will have no predictable and consistent outcomes. Worse yet, it will have little chance of uniform voluntary compliance.

Rules governing interstate and international relations must be flexible because they are subject to interpretation within context. These rules are also likely to respond or succumb to both countervailing considerations of different state interests and power relations. Without that flexibility, states would not assent to a system that requires compliance with collective rules absent the countervailing benefits of an international social contract à la Rousseau. The basic quid pro quo that may exist in a national community does not have the same counterpart in the international community, for no other reason than no one can entirely redress the imbalance of power and wealth among the members of that community. To the contrary, in the international community, the unilateral quest for power and accumulation of wealth continues to be one of the avowed goals. Thus, the international community has yet to accept what the French philosopher Pascal urged: "In times of peace nations must do to each other the most good, and in times of war, the least harm." To achieve this lofty goal, nations must enter into an international social contract that includes the obligation to protect, some basis for wealth-sharing, and the transfer of technology and knowledge from developed to developing countries. Thus, existing notions of collective security in the Westphalian context must yield to a new international collective responsibility to protect. Similarly, the international social contract must embrace an equitable system of sharing world resources and transferring technology and knowledge. In short, protection, resource-sharing, and international criminal justice must be part of the new world social contract in the age of globalization.

Modern political realism reflects the disjunctive and contradictory forces that exist in international intercourse. These forces make it implausible to accept the existence of binding rules capable of restraining states in their conduct by means other than power. Political realists view the international system as an arena in which a Hobbesian state of nature controls the behavior of states without

externally imposed limitations. Accordingly, international law has been based on a concept of equal sovereignty of states and voluntary acceptance of international obligations with no external coercion or enforcement and no intervention in the domestic affairs of any state, save for the United Nations collective security system as determined on an ad hoc basis by the Security Council. This paradigm implicitly accepts the inequities of power relations whereby the stronger can impose their will on the weaker. Such a model contradicts an international legal order based on the rule of law, which brooks no double standards.

Political realists, particularly those of the school of realpolitik, assume that the relations between nations are in a constant anarchic state of change because they reflect an ongoing power struggle restrained only by countervailing power. However, in the age of globalization, when so much interdependence exists, multilateral interests have, by their own force, bound unilateral power. The analogy is to the giant Gulliver who represents the unbridled power of political realism at its best and the Hobbesian state of nature. But in the age of globalization, many large and small strings that represent in part the commonly-shared values and multiple interests of the international community tie Gulliver down. These strings cumulatively represent the multilateral that has tamed the power of the giant unilateral. Admittedly, the giant is not entirely tamed, and should he want to, he could break away from all or many of his bonds, unless of course he finds it of greater interest to remain bound, or he is further restrained.

The age of globalization has increased the incentives for the giant of unilateralism to remain bound, just as it has increased its disincentives to break away from the agreed multilateral system of norms and legal processes. Presently, globalization is viewed as involving communications, commerce, finance, and only in part, collective security. However, it still does not include the collective duty to protect, wealth-sharing, or international criminal justice. So far, globalization has not ripened into an international social contract, and it only represents a small portion of the commonly-shared values and interests of the international community. Indeed, there is only

some evidence that globalization includes the duty of international criminal accountability.

Multilateral problem-solving and collective decision-making by international institutions with rulemaking authority that transcends the powers of member states exemplify the changes that have occurred during the past decades. Many international organizations and the mechanisms of collective decision-making they embody have brought about a new reality of international governance without the need for world government. Moreover, the web of multilateral and bilateral agreements containing cooperative obligations, coupled with enforcement mechanisms that include sanctions, has created interlocking relationships between states. These relationships, in turn, have enhanced the acceptance of external obligations while simultaneously nurturing confidence among states that the relinquishment of individual decision-making is not without concomitant benefits. Experience has demonstrated that multilateralism, notwithstanding its weaknesses and shortcomings, accomplishes more than unilateralism can. What is lost in unilateral freedom of action is compensated by what is gained from collective decision-making and collective as well as cooperative action.

To paraphrase Myres McDougal's position in the 1960s, he framed international relations by a web of constitutive processes of multilateral authoritative decision-making. The pervasive effect of this world constitutive process cannot be solely applied to matters of economic interests because what brought about this elaborate process was an array of values and policies that include human values. As a consequence, it is now well-established that the individual is a subject of international law, though not in all the same respects as states and international organizations. But today, surely no one will deny that the individual, as a subject of international law, is the beneficiary of rights arising under international law, even when the recognition of these rights derives from the will of states. These individual rights derive from the traditional notion of third party beneficiary under traditional treaty law, which is evidenced in multilateral and bilateral treaty provisions intended to make the

individual a beneficiary of these legal rights with standing to have states and international institutions uphold them.

The recognition of the individual as a subject of law and the establishment of treaty rights inuring to his benefit imply that the international community as a whole, states individually and collectively, and international organizations have the duty to protect these human rights. This duty to protect is binding upon states insofar as they have assumed specific treaty obligations as well as by non-treaty obligations arising from the peremptory norms of international law, referred to as *jus cogens*. The latter imply certain collective obligation by the international community to for example prevent genocide, to criminally pursue its perpetrators and to compensate its victims. Many, including this writer, argue that this postulate extends to other international crimes such as: crimes against humanity, war crimes, torture, slavery and slave-related practices and international trafficking in women and children for sexual exploitation, as well as certain forms of terrorism.

Legal experience demonstrates that the enunciation of rights without concomitant remedies is a pyrrhic pronouncement and that remedies without enforcement are empty promises. However morally compelling these arguments about individual human rights and their enforceability may be, it remains necessary to induce states to recognize and enforce such rights. The need for such an inducement arises because outcomes from an international legal system based on the rule of law are likely to be detrimental to state interests and may limit the waning Westphalian concept of state sovereignty. Therefore, the inducement must be correlated to state interests. The argument supporting this proposition is that protecting individual and collective human rights enhances peace and security; reduces domestic, regional, and world disruptions; and is ultimately more economical than having to engage after the fact in military intervention. In other words, the argument for the duty to protect advances the utilitarian side of human rights with respect to its impact on state interests.

While there has never been empiric verification of this proposed argument, common sense reveals that the human and economic costs that the international community has incurred since the end of WWII,

which heralded the United Nations Security Council system of collective security, have by far outweighed the costs that the world would have incurred if that failed Security Council system had been transformed into an effective international system to protect human rights. While this may sound anathema to political realists intent on ignoring their own realism in assessing the economic costs of conflicts, let alone the human costs, of advancing the proposition of a duty to protect is predicated as humanistic and pragmatic considerations.

As an illustration, it is noteworthy that between 1948 and 1998, there have been approximately 250 conflicts whose estimated number of victims range from 70 million at the low end to 170 million at the high end. These conflicts fall into the following arbitrary legal categories: conflicts of an international character, conflicts of a non-international character, internal conflicts, and tyrannical regime victimization. No matter the conflict's label or legal characterization, they contain the same human interests and prohibitions in international humanitarian law, international human rights law, and in the domestic law of most legal systems. The fact that the same protections overlap is also indicative of diversity in the enforcement mechanisms and remedies for the violation of these rights. Such overlapping legal regimes ultimately necessitate a choice of law that frequently results in the non-applicability of any one of them. In other words, such overlaps also produce gaps, particularly with respect to international criminal justice. Aside from the problems of multiple legal regimes applying to the same protected social interest, an enforcement disparity exists even though each one of these legal regimes is predicated on the same values and aimed at achieving the same goals. In turn, this disparity impacts the international community's perception of its obligation to protect and thus prevent human harm, including by means of international criminal accountability.

As stated above, during the period between 1948 and 1998, and throughout the 250 various conflicts, the estimated number of casualties resulting ranges from a minimum of 70 million to a maximum of 170 million persons. The low end of the estimate

represents twice the number of the victims of World War I (WWI) and WWII combined. Yet with only a few exceptions during the course of this long strand of worldwide human tragedies, there has been little evidence of the existence of an international duty to prevent these harms or a duty to provide for international criminal accountability. The international collective security system of the Security Council seldom has been invoked effectively to protect individuals and collectivities from death, human suffering, and other human depredations. In nearly all of these cases, an injudicious political realism has prevailed, even in the face of ample early warnings and unfolding stark realities revealed by conflicts.

The history of international criminal justice started with the 1447 Breisach trial, where 26 judges of the Holy Roman Empire sat in judgment over the case of Peter Von Hagenbach, who committed "crimes against the laws of nature and God" in the sacking and pillaging of the city of Breisach. Although Von Hagenbach acted on the orders of the Duke of Burgundy (to whom Breisach had been given by the Holy Roman Empire for his services to the Empire) the court precluded him from raising the defense of "obedience to superior orders." The reason was that the Empire did not want one of its sovereigns held accountable for such crimes. Thus, political considerations prevailed over justice. Von Hagenbach was drawn and quartered, and the Duke of Burgundy benefited from impunity.

It was not until 1918 that the victorious allies, in the treaty of Versailles that ended WWI, announced their intentions to prosecute Kaiser Wilhem II of Hohenzollern for the "Supreme Offense against the sanctity of treaties" under Article 227 of that treaty. But the Kaiser sought and obtained asylum in the Netherlands because Article 227 did not reflect the existence of a recognized international crime. The Allies wanted to assuage world public opinion for the 20 million victims of that war, but they certainly did not intend to prosecute a royal monarch when most of Europe's heads of state were monarchs. In fact, many of Europe's monarchs were related to the Kaiser as descendents of Queen Victoria. Once again, politics prevailed over justice.

The same treaty, in Articles 228-229, provided for the prosecution of those Germans who had committed war crimes. While on its face this was a double standard because it excluded prosecution for similar war crimes by the Allies, the prosecution of German war criminals never took place. The Allies established a Commission to investigate the responsibility of the authors of the war and its conduct, and the Commission concluded that they should prosecute some 19,000 Germans. In time, that number dwindled to 895. By 1923, the Allies had abandoned their lofty goals of international prosecution. Instead, they agreed to have Germany take over that task of prosecution under German law. The German Supreme Court sitting in Leipzig agreed to prosecute 45 of the 895 but only tried 22. The stiffest sentence imposed was three years imprisonment for a U-boat officer who committed the crime of sinking a hospital ship with over 600 wounded. This time, even though politics prevailed, justice was symbolic, and that in itself constituted progress.

However, for obvious political reasons, the Allies also decided to forego the prosecution of Turkish officials for the 1915 massacre of a then estimated 200,000 Armenian civilians. In time, that estimate grew to one million Armenian victims. Regardless of the total number of victims, politics prevailed, and there was no accountability for this crime. Notably, the 1919 Commission mentioned above, recommended the prosecution of Turkish officials for "crimes against the laws of humanity." Even though the preamble of the 1909 Hague Convention on the Regulation of Armed Conflicts contained this term, the United States and Japan vigorously opposed the recommendation, and accordingly, no one carried it out. The reason was that in 1917 the Bolshevik Revolution had taken over Russia, turning it into what became known as the U.S.S.R., and the Western Allies wanted Turkey on their side to face the new threat of communism. Once again, realpolitik prevailed. The Treaty of Sevres did not require Turkey to prosecute any Turkish officials for the massacre of the Armenians.

Some report this tragic episode, although with questionable historical accuracy, led Adolf Hitler to tell his officers in 1939, on the eve of their aggression against Czechoslovakia and Poland, "and who

now remembers the Armenians?" Presumably, the senior officers of the German Wehrmacht had qualms about engaging in aggression and the ensuing killing of civilians in these first countries that fell victim to Nazi aggression. Thus, Hitler reminded them that impunity is the rule because politics prevail over justice in international affairs.

In 1942, the Allies started to contemplate the prosecution of Germans for aggression, war crimes, and what later became known in the Nuremberg Charter as "crimes against humanity." In 1943, the Allies, in the Moscow Declaration, affirmed their intentions to prosecute the Axis powers for war crimes. In 1945, the four major Allies in the European theater started to draft the Charter of the International Military Tribunal (IMT), whose seat became Nuremberg. On August 6, 1945, the four major Allies signed a treaty establishing the IMT, which ultimately prosecuted 22 major war criminals. The three crimes included were crimes against peace, war crimes, and crimes against humanity. The charge of crimes against peace was reminiscent of the Allies' failed effort to prosecute the Kaiser under Article 227 of the Versailles Treaty. Crimes against humanity was the counterpart to the failed effort of the 1919 Commission to prosecute Turkish officials for what was then called crimes against the laws of humanity. Thus, international criminal justice in 1945 built upon the failures of the post-WWI experience.

Control Council Order No. 10 followed the IMT prosecutions, which the four major Allies adopted, exercising sovereignty over Germany to prosecute German violators of war crimes and crimes against humanity. Each of the four Allies in their respective zones of occupation undertook the equivalent of national prosecutions based on international law.

Almost contemporaneously, the Allies in the Far East, who differed from those in the European theater, proceeded to prosecute the defeated Japanese. The International Military Tribunal for the Far East (IMTFE), unlike its counterpart, the IMT, was not established by a treaty. Instead, General Douglas MacArthur, the Supreme Allied Commander for the Far East, promulgated an order. The United States did not want to give the U.S.S.R. a role in these proceedings because the latter joined the war against Japan only three weeks

before its defeat. More significantly, the United States did not want the U.S.S.R. to have political influence in post-war Japan. Thus, politics had an impact on the way that international criminal justice proceeded in that part of the world.

Even though the Allies modeled the IMTFE Charter after the IMT and thus included crimes against peace, MacArthur had more concern about governing Japan than prosecuting Japanese Emperor Hirohito. Japan's head of state thus escaped responsibility for allowing his country to enter the war on the side of Germany and for attacking the United States at Pearl Harbor in violation of the existing laws and customs of war. Members of Hirohito's family also avoided prosecution, particularly for the horrendous crime that Japanese forces committed in the Chinese city of Nanjing, where Japanese forces killed an estimated 250,000 civilians and raped a large number of women. Japanese forces committed those crimes at the direction of the Japanese Emperor's uncle. Thus, political reasons had an impact in this and in many other ways on the Tokyo war crimes proceedings.

Subsequently, the Allies in the Far East conducted criminal prosecutions of Japanese prisoners. One such trial occurred in the Philippines, where General MacArthur established a military commission to prosecute Japanese General Yamashita. The commission charged him for crimes that Japanese forces committed nominally under his command but over whom he had no control and about whose actions he had no knowledge. The five general officers of the Yamashita military commission were non-lawyers under the command of General MacArthur. They found Yamashita guilty on the grounds that "he should have known." Never before nor after has anyone applied this standard of command responsibility. But General MacArthur, who had previously been in command of the Philippines and who had to escape the island Corregidor, leaving his troops behind, wanted to make an example of a Japanese General. Thus, political as well as personal considerations prevailed over justice in this case. In 1946, the United States Supreme Court reviewed this case in *In re Yamashita*, 327 U.S. 1 (1946), and refused to grant habeas corpus. But the dissent of two Justices, Murphy and Rutledge, will remain in the annals of legal history as beacons of opposition to

injustice. Since then, the legal standard of command responsibility applied to General Yamashita was never applied again.

Unlike prosecutions in Germany that continued for years by the Federal Republic of Germany after the IMT and prosecutions under Control Council Order No. 10 concluded, there were no prosecutions in Japan after 1951. By 1953, all of those convicted in the Far East who had not been sentenced to death and executed were brought to a central prison in Tokyo and released. By 1954, two of the major war criminals convicted by the IMTFE became cabinet members. To date, the government of Japan refuses to acknowledge its responsibility for the crimes its troops committed in China, Korea, and the Philippines. Moreover, Japan refuses to acknowledge responsibility for what is euphemistically called the Korean "comfort women"—some 300,000 women kidnapped from Korea and held in brothels in sexual bondage for the benefit of Japanese forces.

The post-WWII prosecutions were essentially for the defeated, leading many commentators to call these prosecutions "victors' justice." No member of the Allied forces was ever prosecuted for a war crime. No one raised the issue of war crimes or crimes against humanity for the deliberate bombing of non-military targets such as the city of Dresden, which had no military value, and which resulted in the killing of 35,000 civilians. To date, not much question was raised about the atomic bombings of the civilian cities of Hiroshima and Nagasaki, which resulted in an estimated 250,000 victims who died of the attack, countless others who died after the attack from atomic radiation, and those who suffered from it and survived. Harry Truman personally sanctioned the latter, while Winston Churchill personally sanctioned the former. For Dresden, it was retaliation over the German bombings of Coventry and other civilian targets in England at the beginning of the war. But retaliation, as well as other forms of reprisals against protected targets such as innocent civilians, is impermissible under the law of armed conflict. The atomic bombings of Hiroshima and Nagasaki were also in violation of the laws of armed conflict, but they were motivated by the desire to bring the war to an end, and thus to save American lives, even at the cost of taking Japanese civilian lives and notwithstanding a clear violation of

the laws of armed conflict. In war and peace, the lives of some have tragically and regrettably always been valued more than that of the lives of others. Why else did the international community not intervene to protect the lives of those who were so helplessly and tragically slaughtered in Cambodia, Rwanda, Sierra Leone, and Liberia, to name only a few as the contemporary egregious crimes of the past few decades.

Soon after WWII, the Cold War began, and efforts to advance international criminal justice gave way to the political conflict between the East and the West. The United Nations' efforts to establish an international criminal court and develop a Code of Offenses Against the Peace and Security of Mankind continued, but without a successful outcome. Politics once again prevailed over efforts to advance international criminal justice. A succession of committees and commissions worked to draft a statute for an international criminal court and to elaborate an international criminal code, but to no avail. Political realities of the time thwarted these efforts, leaving no room for the progress of international criminal justice.

The efforts to define "aggression," the term used to replace "crimes against peace" used in the IMT and IMTFE Charters, took 22 years. The process resulted in a General Assembly consensus resolution, but not a treaty. The major powers did not want aggression defined in a binding treaty because they saw themselves locked in a cold war that might lead to hot wars, as was the case with the Korean conflict in 1953. The realities of major powers' politics once again thwarted the pursuit of international criminal justice.

It was not until 1987 that the International Law Commission seriously resumed the project of establishing a draft Code of Crimes Against the Peace and Security of Mankind, but that effort was short-lived. There was not much progress for international criminal justice until 1992 when the Security Council established a Commission of Experts to Investigate Violations of International Humanitarian Law in the former Yugoslavia. While the Commission received the broadest mandate since Nuremberg, it was not given the resources or political support to do its work. Nevertheless, it was able to

circumvent these difficulties, and the evidence it accumulated led the Security Council in 1994 to establish the International Criminal Tribunal for the former Yugoslavia (ICTY). As a result, the former head of state of Serbia, Slobodan Milosovic, was brought to the bar of justice before the ICTY in The Hague. Shortly after the Security Council established the ICTY, it established the International Criminal Tribunal for Rwanda (ICTR). After some difficulties in start-up, that tribunal proceeded to prosecute a number of persons, including the former head of state of the Hutu government in Rwanda during that conflict.

The ICTY and ICTR became landmarks in international criminal justice. Their accomplishments helped pave the way for the establishment of the International Criminal Court (ICC) and the 1998 Treaty of Rome. But the ICC has suffered since then from the opposition of the United States—an opposition that is essentially politically motivated. The Bush Administration came into power after the Treaty of Rome, intent upon unilateral military intervention based on whatever it deemed to be in the national interest. The Administration did not want to see members of its government and senior members of the military prosecuted for war crimes and crimes against humanity should these occur in the context of any foreign military intervention.

Critics of the ICTY and ICTR raise questions about the slowness of the proceedings and their costs. While these concerns are valid, it is difficult to quantify the cost of international criminal justice, particularly when it is merely starting up. Moreover, it is difficult to quantify the value of due process in the exemplary manner in which these tribunals have proceeded, for they have shown the world how a system of international criminal justice, and for that matter, how domestic systems of justice should proceed. The symbolism of these tribunals and the examples they have set, costs and delays notwithstanding, demonstrate the extraordinary value of international criminal justice. Many lessons have been learned that informed the drafting of the ICC statute and that will inform its jurisprudence. Many other lessons could have been learned to improve the

dissemination of knowledge of these tribunals' work in order to inform victims that justice has been served.

The ICC is encumbered with the opposition of the United States as well as its efforts to prevent other states from fully cooperating with the ICC. But so far, the United States has not succeeded. The Security Council's resolution to refer the Darfur, Sudan situation to the ICC, with the implicit acquiescence of the United States, is an important step in furtherance of international criminal justice. However, its outcome is yet to be assessed.

Against this background, one must remember the many conflicts in which post-conflict justice has been sacrificed to politics. In the conflicts mentioned above, there has been much impunity and little accountability. Suffice it to recall that in Biafra in the early 1960s, Bangladesh in the early 1970s, and Cambodia between 1975 and 1985, the estimated number of victims in each of these conflicts exceeded one million, with possibly up to two million in Cambodia. None of the major perpetrators have ever been brought to justice, nor have any of the minor perpetrators for that matter. Other conflicts in different parts of the world have also resulted in either total or substantial impunity.

As each of these conflicts empties its horrors before the conscience of humanity, there is a growing demand for post-conflict justice by international civil society and a number of concerned governments. The United Nations has been at the forefront of trying to advance international criminal justice, but in the end, the United Nations can only do what the major powers expect it to do. The United Nations' noteworthy efforts include: the 2005 World Summit Outcome report, the 2005 Millennium Development Goals report, the 2004 Report by the Secretary General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, the 2000 Report of the Panel on United Nations Peace Operations, various reports by Special Rapporteurs on human rights and accountability, and lastly, the adoption by the General Assembly in March 2006 of the *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, which

includes the duty to investigate and prosecute international crimes. These and other efforts, as well as national post-conflict justice experiences, evidence the need to develop a range of accountability measures to prevent impunity and to ensure the existence of international criminal justice, not only as a way to punish the perpetrators, but as a way of preventing the commission of future crimes.

As stated above, the interdependence of the international community in the age of globalization requires a duty to protect as a means to prevent the occurrence of international crimes such as genocide, crimes against humanity, war crimes, torture, slavery and slave-related practices, and trafficking in women and children for sexual exploitation. These and other crimes such as terrorism require, in addition to international cooperation, an international system of criminal justice. The system need not be supra-national, nor should international institutions prevail over national ones. The ICC's model based on complementarity between national and international systems should be reinforced. This reinforcement requires developing capacity-building for national justice systems and examining other alternatives, such as mixed tribunals, as in the case of Sierra Leone. Without national capacity-building, the international community will have situations such as Afghanistan where there is no accountability for war crimes or crimes against humanity committed over a 30-year period of conflict. Surely without capacity-building, the international community will face the failure evidenced in the Iraqi prosecutions of Saddam Hussein and the leaders of the Ba'ath Regime.

International criminal justice requires a comprehensive and integrated approach that relies on the complementarity of international and national systems of justice, but it must especially rely on effective international cooperation in combating international crimes. The precondition for this approach is the removal of politics from international criminal justice.

All member states of the United Nations should unequivocally renounce impunity for international crimes, particularly those mentioned above. They should not allow governments to give impunity to heads of states or senior perpetrators of genocide, crimes

against humanity, and war crimes. Furthermore, international civil society should not tolerate governments who do so. Otherwise, as George Santayana said, "Those who do not learn the lessons of the past are doomed to repeat them."