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**SYMPOSIUM: SHOULD THERE BE AN  
INTERNATIONAL TRIBUNAL FOR  
CRIMES AGAINST HUMANITY?  
AN INTRODUCTORY NOTE**

**Surya Prakash Sinha†**

Nuremberg is the image that flicks in the vision when we think about an international tribunal for crimes against humanity. In Nuremberg, by an Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis,<sup>1</sup> the victors of the Second World War brought their wrath upon the vanquished for the horrible deeds of the latter. They established a Tribunal for the trial of War Criminals. There were prosecutions and punishments for Crimes Against Peace, War Crimes, and Crimes Against Humanity. Crimes Against Humanity were enumerated as

murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial, or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.<sup>2</sup>

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<sup>1</sup> Agreement for the Prosecution Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, U.S.-Fr.-U.K.-Gr. Brit.-N. Ir.-U.S.S.R., 59 Stat. 1544.

<sup>2</sup> *Id.* at 1547 Article 6 (c) of the charter, annexed to the Agreement. The International Law Commission's 1950 Formulation of the Nuremberg Principles has rightly dropped the war predicate of Article 6 (c). U.N. Doc. A/CN.4/25 (1950).

Leaders, organizers, instigators, and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of these crimes were made responsible for acts performed by any persons in the execution of such a plan.

These crimes initiated prosecutions and punishments. In order to maintain the integrity of these prosecutions, fine principles of evidence and due process were practiced. International legal literature devoted its energy in elaborating what came to be called the Nuremberg Principles. The International Law Commission developed, in 1950, a formulation of the Nuremberg Principles and prepared a Draft Code of Offenses Against the Peace and Security of Mankind.<sup>3</sup> It seemed as if we were just about to see the emergence of a general and concordance practice of states (*usus diuturnus*) with respect to international punishment of the Nuremberg crimes which, accompanied by the conviction of states that they were bound in law by these Principles (*opinio juris sive necessitatis*), would yield a customary principle of international law. Enthusiastic proclamations were made that such horrendous deeds deserved not merely moral condemnation of humanity but punishment as well by the international law of that humanity. However, even at the very beginning, the application of these Principles was selective, not general. They were applied to acts of Germany but not to acts of the Allied Powers, such as the bombing of Dresden. When occasions arose for application of these high Principles against their founding fathers, for example, in Vietnam, these Principles were nowhere to be found in the practice of states. Therefore, despite all their inspirational power, the Nuremberg Principles never passed the twin tests of *usus diuturnus* and *opinio juris sive necessitatis* for the creation of a principle of international law.

Some of the Nuremberg sentiment was given the legally binding force of a treaty. An example is the Convention on the Prevention and Punishment of the Crime of Genocide.<sup>4</sup> This Convention was approved unanimously by the United Nations

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<sup>3</sup> *Id.* In 1987, the name of the code was changed to Draft Code of Crimes Against the Peace and Security of Mankind. *Report of International Law Commission*, U.N. GAOR, 40th Sess., Supp. No. 10, at 145, U.N. Doc. A/43/10 (1988).

<sup>4</sup> Convention on Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, Austl.-Bulg.-Cambodia-Ceylone-Czech., 78 U.N.T.S. 277.

General Assembly on December 9, 1948 and came into effect on January 12, 1951.<sup>5</sup> It provided for the punishment of persons committing genocide and related crimes, whether they were constitutionally responsible rulers, public officials, or private individuals. The contracting parties undertook to enact necessary legislation for effective penalties. The accused persons were to be tried either by a tribunal of the state where the crime was committed or by an international penal tribunal. Although an international penal tribunal never came to be created, the Genocide Convention did become binding law. However that convention was dumped in the heap of dead-letter law as genocide proceeded in Tibet, or Vietnam, or Cambodia, or Iraq, or Bosnia.

Early this year, Bosnia-Herzegovina invoked the Genocide Convention in its suit against Yugoslavia (Serbia-Montenegro) before the International Court Of Justice. The Court issued a Provisional Measure on April 8, 1993 and ordered Yugoslavia to take all measures to prevent the crime of genocide.<sup>6</sup> However, as Judge Schwebel of the World Court pointed out, Court Orders in this case were no more effective than the Security Council Resolutions.<sup>7</sup> In May of this year, an International Tribunal was set up to expiate the conscience of Powers-that-run-the-world.<sup>8</sup> Their conscience must bite because they did not do any-

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<sup>5</sup> The provisions of the Convention are now contained in the International Law Commission's 1991 Draft Code of Crimes Against the Peace and Security of Mankind. *Report of the International Law Commission*, U.N. GAOR, 46th Sess., Supp. No. 10, at U.N. Doc. A/46/10 (1991).

<sup>6</sup> International Court of Justice: Order on Request For the Indication Of Provisional Measures In Case Concerning Application Of The Convention On The Prevention And Punishment Of The Crime Of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro)), 32 I.L.M. 888 (1993), United Nations: General Assembly Resolution And Declaration On The Rights Of Persons Belonging To National Or Ethnic, Religious And Linguistic Minorities, 32 I.L.M. 911 (1993).

<sup>7</sup> Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia) 1993 I.C.J. 29 (April 16).

<sup>8</sup> United Nations Security Council Resolution 827, Adopted on 25 May 1993. On September 17, 1993, eleven judges were elected by the U.N. General Assembly, for a four-year term beginning November 17, 1993, to this 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. These judges are Georges Michel Abi-Saab (Egypt), Antonio Cassese (Italy), Jules Deschenes (Canada), Adolphus Godwin Karibi-Whyte (Nigeria), Germain Le Foyer De Costil (France), Li Haopei (China), Abrielle Kirk McDonald (U.S.), Eliza-

thing to prevent the crime when they could have done so. If these powers did not intervene to stop the leaders and heads of states from committing their act, they are not going to capture them and bring them to trial before the Tribunal. One can only expect that the Tribunal's court calendar will be filled by scapegoats.

It is in the world as sketched above that we raise our question: Should there be an international tribunal for crimes against humanity?

Therefore, our question issues from several naiveté.

It issues from the naiveté of locating itself in a world in which a piece of humanity had just bled from genocide while the Powers capable of preventing it did little more than inventing the new vocabulary of the ethnic cleansing.

It issues from the naiveté of witnessing the creation of the new Tribunal for Bosnia as an artifice for conscience cleansing of these powers, who need a mollification for their inaction when that action was desperately needed.

It issues from the naiveté of wondering if there is the political will in the Powers-that-run-the-world to capture the leaders, heads of states, and high officials and bring them to trial before an international tribunal.

It issues from the naiveté of asking for an international tribunal to be possessed of a world-wide jurisdiction in the face of the entrenched tradition of being highly selective, such as using it in Germany but not in Tibet, or Vietnam, or Cambodia or Iraq.

It issues from the naiveté of the cry of humankind for recognition of its humanity in a system of states.

Therefore, should there be an international tribunal for crimes against humanity? The questions that arise are: (1) Is the Nuremberg definition of crimes against humanity sufficient? (2) Since such a tribunal of general jurisdictions will have to be created by a treaty, is there a willingness among states to enter into such a treaty and put high officials of their government under the jurisdiction of such a tribunal? (3) How are the leaders, heads of states, and high officials to be captured

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beth Odio Benito (Costa Rica), Rustam S. Sidhwa (Pakistan), Sir Ninian Stephen (Australia), and Lal Chand Vohrah (Malaysia).

and brought before it for trial? (4) What modes of punishment are possible, given the conflicting practices of punishment among states whereunder, for example, some states practices capital punishment and others prohibit it?