JUSTICE AS A TOOL FOR PEACE-MAKING: TRUTH COMMISSIONS AND INTERNATIONAL CRIMINAL TRIBUNALS

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One of the things that is remarkable about the stories of both Brazil and Uruguay is the way in which, to a large degree, the rehabilitation of the torture societies, to the extent it has occurred, was accomplished by the torture victims themselves. These victims—hollowed-out, burnt-out shells—came alive once again by testifying to the truth of their own experiences. And that truth, to a degree, has set both themselves and their societies free.1

I. INTRODUCTION

In the second half of the twentieth century, many countries have moved from repressive regimes to democratic governments. The catalyst for these changes has varied. After the Second World War, such change was a consequence of the defeat of Nazi Germany. More recently, in Europe, it was as a result of the dismemberment of the Soviet Union. In South America, it was the inability of military regimes to contain the demands for civil government which enabled transition to democracy. In South Africa, the transition was the happy result of the victory of the anti-apartheid movement.

A problem common to all countries moving from repressive regimes to democratic rule is how to deal with the past, and, in particular, how to deal with former leaders and their collaborators responsible for past egregious human rights abuses. Are they to be granted immunity, or are they to be held accountable? And what of the victims? Are they to be

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denied justice? And if not, how is such justice to be achieved—through punishment of the perpetrators, official acknowledgment of past abuses, reparations, or a combination of these processes? In short, what do we mean by justice, and what is the most effective mechanism for the implementation of such justice?

Decisions as to which remedy may be appropriate for any country or region are always complex and difficult. What makes them even more difficult is that these decisions may be crucial to the prospects for future peace and prosperity. The stability of an emerging democracy, and perhaps even the outcome of a war that still is being waged, may depend on the wisdom behind such a policy decision.

While justice clearly involves questions of principle, the kind or degree of justice possible in a society in transition must depend upon many factors—historical, political, socio-economic, and even military. One must therefore eschew generalizations. The solution must take into account both the nature of that society’s past illness as well as the present and future needs of such a society. Furthermore, one must not expect too much from justice, for justice is merely one aspect of a many-faceted approach needed to secure enduring peace in a transitional society. The merit in securing justice, however, is that it provides a procedure for exposing the truth—and it matters not whether this procedure is by way of a war crimes trial or a truth commission. Such exposure of the truth, as we shall see later, enables a society to move beyond the pain and horror of the past.

In this paper I shall concentrate, for the most part, on the three regions with which I have had close personal contact—the former Yugoslavia, Rwanda, and my own country, South Africa.

II. The Link Between Peace and Justice

Much has been written about the decision of the Security Council to establish an international criminal tribunal to investigate and prosecute war crimes in the former Yugoslavia [Yugoslav Tribunal], but what is not often stressed is that this decision was necessarily founded upon the recognition of a direct link between peace and justice. In establishing the Yugoslav Tribunal, the Security Council was acting under powers con-
ferred upon it by Chapter VII of the U.N. Charter. In terms thereof, the Security Council is only authorized to pass resolutions binding on all states parties if it decides that enforcement measures are necessary to bring to an end a situation which constitutes a threat to international peace and security.²

In September, 1991, the Security Council determined that the situation in the former Yugoslavia constituted such a threat that, acting under Chapter VII, it imposed a complete arms embargo on Yugoslavia. It was, however, Resolution 827, passed twenty months later, which explicitly acknowledged that the widespread violations of humanitarian law and human rights occurring in the region constituted a threat to international peace. This is made clear in the following paragraphs of the resolution:

Expressing once again its grave alarm at continuing reports of widespread and flagrant violations of international humanitarian law occurring within the territory of the former Yugoslavia, and especially in the Republic of Bosnia and Herzegovina, including reports of mass killings, massive, organized and systematic detention and rape of women, and the continuance of the practice of "ethnic cleansing," including for the acquisition and the holding of territory,

Determining that this situation continues to constitute a threat to international peace and security,

Determined to put an end to such crimes and to take effective measures to bring to justice the persons who are responsible for them,

Convinced that in the particular circumstances of the former Yugoslavia the establishment as an ad hoc measure by the Council of an international tribunal and the prosecution of persons responsible for serious violations of international humanitarian law would enable this aim to be achieved and would contribute to the restoration and maintenance of peace,

Believing that the establishment of an international tribunal and the prosecution of persons

². U.N. Charter ch. 7.
responsible for the above-mentioned violations of international humanitarian law will contribute to ensuring that such violations are halted and effectively redressed.³

As we see, the Security Council resolved that the establishment of the Yugoslav Tribunal was the most appropriate way of dealing with such a threat.

In November, 1994, a similar decision was taken by the Security Council in respect of Rwanda, where an internal armed conflict had resulted in the commission of a genocide claiming the lives of up to one million people. It was thus anticipated by the Security Council that justice would help restore peace in both the former Yugoslavia and Rwanda and hasten the return of refugees to their former homes.

Particularly at the time of the negotiations at Dayton, Ohio, in September, 1995, there were many astute politicians and political commentators who suggested that, in fact, peace and justice were in opposition, and that the work of the Yugoslav Tribunal was retarding the peace process in the Balkans. Even at that late juncture in the history of the conflict, and in the context of that debate, people failed to see the link between peace and justice which had so deliberately (and in my view correctly) been made by a unanimous Security Council in May, 1993.

I have no doubt that in countries or regions where there have been egregious human rights violations, it is less likely that there will be an enduring peace without some attempt to bring justice to the victims. In particular, there are the following five positive contributions which justice can achieve.

First, exposure of the truth can help to individualize guilt and thus avoid the imposition of collective guilt on an ethnic, religious, or other group. During my visits to the former Yugoslavia, and particularly Belgrade, I was astounded at the manner in which Serbs I met were consumed by their historical hatred of Croats. Most meetings I attended began with a history lesson—if I was lucky the history began during the Second World War, but on less happy occasions it began with the Battle of Kosovo in the fourteenth century. It was no different in

Zagreb or Sarajevo where collective guilt was ascribed to Serbs or Muslims, as the case may be. In the Balkans, violence has been erupting periodically over a span of six hundred years. Very seldom have the perpetrators of that violence been brought to account. Victims were denied justice.

The result is that blame has been ascribed not to the leaders who sponsored the violence, but to the communities or people represented by those leaders. In one respect, perhaps, the most important beneficiaries of the Nuremberg Trials were the German people. Credible evidence presented at those trials established the guilt of the Nazi leaders beyond a doubt. Through the criminal trial process, focus was placed upon the accused as individual criminals or leaders and not as Germans. So the group of men standing in the dock at Nuremberg were seen as the criminals they were, and not as representatives of the German people. I have no doubt that Germany would have had far more difficulty in coming to grips with its sordid World War II history but for the fact that those leaders were brought to trial.

Second, justice brings public and official acknowledgment to the victims. This usually is the first step in their healing process.

Third, public exposure of the truth is the only effective way of ensuring that history is recorded more accurately and more faithfully than otherwise would have been the case. The Nuremberg Trials have made the work of Holocaust deniers far more difficult. Without the exhumation of mass graves in Bosnia, the fabrications of some Bosnian Serb spokespersons would have had some credibility. The first Yugoslav war criminal to be sentenced, Drazan Erdemovic, confessed to having murdered over seventy innocent Muslim men outside Srebrenica in July, 1995. His evidence helped to verify the occurrence of mass murders at Srebrenica. This evidence was confirmed later by photographic material taken by the U.S. government which showed bodies lying in the vicinity of a grave on the day of the shooting. Further photographs taken the following day showed the grave freshly covered with earth. According to a Bosnian Serb Army spokesperson, the grave contained the bodies of soldiers killed during battle.

The exhumations conducted by the Office of the Prosecutor in the summer of 1996, however, exposed the lie in such
claims. The persons buried in the grave had been killed with a single bullet shot in the back of the head, most of them while their arms were bound behind their backs—certainly not the way in which people die in the course of battle! Through the establishment of the Yugoslav Tribunal, the massacre of thousands of innocent Muslims who sought safety in the U.N. “safe haven” of Srebrenica has been established with a degree of certainty that otherwise would have been absent.

Fourth, in my experience, there is only one way to curb criminal conduct and that is through good policing and the implementation of efficient criminal justice. In any country there is a direct relationship between the effectiveness of policing and the crime rate. If would-be criminals believe that there is a good prospect of their being apprehended and punished, they will think twice before embarking upon criminal conduct. It is no different in the case of international crimes. If political and military leaders believe they are likely to be brought to account by the international community for committing war crimes, that belief in most cases will have a deterrent effect. Between the Nuremberg and Tokyo war crimes trials and the establishment of the Yugoslav Tribunal, there was not a single international attempt to enforce humanitarian law. Leaders of countries bent on fighting wars in blatant disregard of the laws of war could be confident that the international community would make no attempt to bring them to account. If they were safe in their own countries, they had nothing to fear from any external agency. An international deterrent can come only from the enforcement of international law.

Fifth, exposure of the nature and extent of human rights violations frequently will reveal a systematic and institutional pattern of gross human rights violations. It will assist in the identification and dismantling of institutions responsible therefor and deter future recurrences. That already has been the experience of the Yugoslav Tribunal in relation to the conduct of the Bosnian-Serb administration, and patterns may well emerge in the case of other parties to the Balkans conflict. It already is the experience of the South African Truth and Reconciliation Commission [TRC].
III. Forms of Justice

Criminal prosecution is the most common form of justice. Prosecution is, however, not the only form, nor necessarily the most appropriate form in every case. The public and official exposure of the truth is itself a form of justice, and it does not matter whether that exposure takes place in criminal or civil proceedings. The work of truth commissions or judicial inquiries share with criminal prosecutions the ability to bring significant satisfaction to victims. If that satisfaction is sufficiently widespread within a community, it can have a soothing effect upon a whole society.

This calming effect was well illustrated by the work of the South African Commission of Inquiry into Political Violence and Intimidation [CIPVI], which I headed for three years, from 1991 to 1994. Its brief mission was to investigate the causes of violence, much of which was clearly directed at preventing a peaceful transition from apartheid to a non-racial democracy. Some of the acts of violence had the potential to cause widespread bloodshed. Three events in particular come to mind: the assassination of Chris Hani, one of the most popular leaders in South Africa; the terrible massacre of men, women, and children at Biopatong; and the indiscriminate shooting of African National Congress [ANC] demonstrators outside Bishop by members of the Ciskei Army. In those cases and others, the CIPVI was able to mount inquiries in less than a week after the events.

Evidence of victims and eye-witnesses was made public, together with the official security force account of these events. These hearings had a calming effect on the nation—it was widely accepted that the work of the CIPVI played a substantial role in enabling the negotiations to keep on track. From the point of view of victims, successful criminal prosecutions have the advantage of providing retribution. In many cases, that is what victims justifiably demand. But criminal prosecutions also have disadvantages. Prosecutions and the preceding investigations are time-consuming. Furthermore, it often is difficult to find sufficiently cogent evidence to justify indictment. Moreover, the resources of most countries are such that only a handful of the perpetrators can be brought before the courts. The great majority of the guilty will escape without any penalty or even public sanction.
In essence, a country wishing to deal with a past of serious human rights violations has a choice of four solutions: (1) to grant a blanket immunity from prosecution or indemnity for past criminal acts; (2) to allow a regular justice system to operate and ordinary courts to try and sentence anyone proven guilty of criminal conduct prior or subsequent to the transition to democracy; (3) to establish a truth and reconciliation commission or its equivalent in order to enable confessions of guilt for past human rights abuses to be traded for indemnities; or (4) to establish a modified truth commission under which the most serious offenders remain subject to loss of office or even prosecution. All but the first of these four options constitute different forms of justice. Which one a country should choose depends upon many and varied political and economic factors. History, too, is an important factor to take into account.

Alternatively, there is the option of involving the international community. Whether or not this is possible, or indeed appropriate, also depends upon a number of factors. Once international involvement is deemed appropriate, one option is for the international community to participate in a truth commission as it did with some success in El Salvador. The other is to establish criminal tribunals as in the case of the former Yugoslavia and Rwanda.

IV. THE LESSONS OF TRUTH COMMISSIONS

The most important lesson to be learned from truth commissions in Latin America, and now in South Africa, is the deep need of victims for acknowledgment. Victims cannot forget what has happened to them and cannot proceed to build for the future until their calls for justice have been answered. The worse the violations and the greater the time span over which they were committed, the louder are those calls. Forgiveness cannot be considered without knowledge and insight—and without forgiveness, there cannot be any meaningful reconciliation.

The TRC is halfway through its allotted time span. Even before it started, evidence already had been collected and brought to light by the CIPVI implicating senior police and army officers in a host of criminal activities. It was widely believed that what had emerged during the time of the CIPVI
was only the tip of the iceberg, and that was indeed so. Now, more and more evidence is coming to light—almost daily—as thousands of people apply for amnesty, and in the process, confess not only to their own criminal acts, but point fingers in the direction of their superiors under whose orders they claim to have acted. Thousands of victims have come forward to tell their stories. Hearings of the commissioners have been held in many cities and in small villages. Community leaders have come to listen, and there is much anger and many tears have flowed.

No important endeavor in the life of a people is without cost. The cost of the TRC is that many victims of the worst human rights abuses will be denied full justice. They will have to bear the pain of seeing the perpetrators walk away free of punishment. Without in any way depreciating the pain and suffering of the victims, the benefits of the TRC, in my opinion, far outweigh those negative consequences. The decision to opt for a truth commission was itself an important compromise. If the ANC had insisted on Nuremberg style trials for the leaders of the former apartheid government, there would have been no peaceful transition to democracy. And, if the former government had insisted on a blanket amnesty, then similarly, the negotiations would have broken down. A bloody revolution, sooner rather than later, would have been inevitable. The TRC is therefore a bridge from the old to the new.

A further important benefit of the TRC is its inclusive nature. If the sins of apartheid had been left to the criminal justice system to ferret out, very little would have emerged. Criminal procedures and police investigations are slow and inefficient. Very few cases would have come before the courts. Trials would have been long, and they would have provided a political platform for the apologists of racial oppression. The TRC already has been able to expose a wide array of human rights abuses including many murders and "dirty tricks" such as the blowing up by the South African Police of a Johannesburg city center office block which housed the headquarters of anti-apartheid organizations. There still are many thousands of amnesty applications pending, and much more undoubtedly will come to light.

Simply relying upon the existing criminal justice system also would have excluded the participation of important and respected community leaders. No better example is the
Chairperson of the TRC, Archbishop Desmond Tutu. It is a commission representative of all sectors of our society that has been mandated the task of recording our history and helping to redefine our future.

Yet a further benefit of the TRC is that its life-span is limited to two years. At the end of the period, in December 1997, a report will be published, and it is hoped the country will be able to close the book on the past and concentrate on building a stable democracy for future generations.

The TRC, it should be noted, is dealing also with human rights violations committed by members of the liberation movements. Innocent civilians were killed by bombs planted by some members of these movements. And, in well publicized cases, members of the ANC were themselves the victims of serious human rights abuses in their own camps. These victims also are coming before the TRC. ANC leaders, including members of the present Cabinet, are applying for amnesty in return for confessing their own involvement in serious violations of human rights.

The TRC will make it difficult, if not impossible, for apartheid apologists to deny what happened during the five dark decades of the most appalling social engineering and manipulation. It also will expose the shallowness of present attempts by some of South Africa's former rulers to equate their sins with those of the leaders of the anti-apartheid movement.

South Africa, at present, finds itself in a political situation in which it is able to afford a truth commission. We are fortunate in that our transition is the result of relatively peaceful negotiated settlement, and is not the fragile and unstable consequence of a violent revolution. Both the new government and South African society at large are firmly committed to the transition from an oppressive and racist system of government to a non-racial democracy founded upon respect for human rights and the rule of law. The establishment of the TRC was itself a demonstration of a determination that the gross violations now past should never occur again.

South Africans are fortunate, too, in that the vast majority of the black victims of centuries of racial oppression have not sought to hold whites or even Afrikaners collectively responsible. That can be ascribed, at least in part, to the inclusive policy of the ANC—in its almost ninety years, it has never wavered
in its principle of non-racism. The ANC has included non-blacks within its ranks and at a leadership level. It is all the more important that present and future generations of young South Africans should be able to see beyond race. For this reason it is important to officially establish that the executors of apartheid were not exclusively white, and that there were white victims and brave white opponents of racial oppression. The importance of "non-racialism" being taught and understood cannot be exaggerated.

Finally, but importantly, because of the political context mentioned earlier, South Africa has been able to avoid the granting of blanket amnesties. The TRC may only grant amnesty to an individual who applies for it. In the application, detailed information concerning the offense must be provided. There must be a "full disclosure" of the human rights violations, and in most cases, the applicant will have to appear before the TRC at a public session. Then too, there are strict criteria for determining whether or not the violations were carried out in pursuit of a particular political objective. Already a number of applications for amnesty have failed to meet all the above criteria and have been refused.

To sum up, I think it is appropriate to quote the words of Archbishop Desmond Tutu, the chairperson of the TRC:

You see there are some people who have tried to be very facile and say let bygones be bygones: they want us to have a national amnesia. And you have to keep saying to those people that to pretend that nothing happened, to not acknowledge that something horrendous did happen to them, is to victimize the victims yet again. But even more important, experience worldwide shows that if you do not deal with a dark past such as ours, effectively look the beast in the eye, that beast is not going to lie down quietly; it is going, as sure as anything, to come back and haunt you horrendously. We are saying we need to deal with this past as quickly as possible—acknowledge that we have a disgraceful past—then close the door on it and concentrate on the present and the future.4

Michael Ignatieff, a London-based Canadian journalist, has incisively written that:
Truth commissions have the greatest chance of success in societies that have already created a powerful political consensus behind reconciliation, such as in South Africa. In such a context, Tutu’s commission has the chance to create a virtuous upward spiral between the disclosure of painful truth and the consolidation of the political consensus that created his commission in the first place.5

V. INTERNATIONAL CRIMINAL TRIBUNALS

In some countries or regions, serious violations of human rights are not capable of being addressed by national courts or institutions. In too many cases, this can be ascribed to the inability—or worse, the unwillingness—of national governments to take appropriate action. A good example is that of Iraq’s Saddam Hussein who remains in power, and his government certainly is not going to take steps to investigate the horrendous violations of humanitarian law committed by him. In too many countries, the political reality is such that past human rights abuses are never investigated and the criminals responsible for them are not brought to account. If no one “effectively look[s] the beast in the eye”, it eventually “come[s] back and haunt[s]” the nation.6

Then, too, there are some crimes that, in my view, are so serious—are such egregious violations of the laws of humanity—that in any event, they should not be left to national courts to handle. Perhaps the most important legacy of Nuremberg was the recognition of crimes against humanity. If crimes of the magnitude of those perpetrated in Nazi Germany, the former Yugoslavia, or Rwanda are committed, then all of humankind must have an interest in bringing those who are responsible to account. After the Second World War, the victorious powers would certainly not have left it to future German courts to bring the Nazi leaders to justice. Indeed, it was not until 1955 that the United States, France, and the United

6. Tutu, supra note 4.
Kingdom allowed the courts of West Germany to try Nazi war criminals.

This is an issue which might arise in the future in Rwanda. The relationship between the International Criminal Tribunal for Rwanda [Rwanda Tribunal] and the Rwandese government has not always been an easy one. The Rwanda Tribunal was established at the request of the Rwandese government which took over power from the government responsible for the genocide. When requesting the establishment of the tribunal, however, that government acted upon some misconceptions. The first was that the international tribunal would have jurisdiction to impose the death penalty. The second was that the seat of the tribunal would be Kigali, and that the trials would take place in Rwanda. When it realized that those two expectations would not be fulfilled, the Rwandese government, at the time a non-permanent member of the Security Council, voted against the Security Council resolution establishing the Rwanda Tribunal. It made clear, however, that it was nonetheless not opposed to the work of the Rwanda Tribunal and would give its full cooperation to it. In return, the Security Council decided that the Office of the Prosecutor should be established in Kigali whilst the registry and the seat of the tribunal should be in Arusha, in northern Tanzania.

Perhaps the biggest hurdle in the way of a working relationship between the Rwanda Tribunal and the government arose when the government insisted that it be given preference with respect to the extradition of Colonel Theoneste Bagasora. The Rwandese government wanted him to be extradited from The Cameroons to Kigali. Bagasora, according to the evidence collected thus far, is the most important of all the previous leaders responsible for the organization of the terrible events of 1994. He had been arrested in The Cameroons at the request of the Rwandese government. I was not prepared to surrender the primacy of the Rwanda Tribunal in respect of Bagasora. To have done so would have been to subvert the credibility of the Rwanda Tribunal. I informed the Rwandese government accordingly. Not without unhappiness, the government accepted my decision. The relationship, to the great credit of the government of Rwanda, was mended, and cooperation with the tribunal continued.

I would like to raise a hypothetical question, and I sincerely hope that it does not ever become a real issue. Assume
that at some point, for whatever reason, the government of Rwanda were to request the Security Council to discontinue the work of the Rwanda Tribunal in order that its own national courts be solely responsible for trying Rwandese war criminals. It is my opinion that the international community, in such an event, should insist on exercising primacy of jurisdiction through the Rwanda Tribunal. There are two reasons to support this view. The first relates to the magnitude of the crimes. In the short period of three months, nearly one million people were murdered for no reason other than that they were Tutsi or moderate Hutu perceived as a political threat to the Hutu government. (It is too often overlooked that amongst those killed many were moderate Hutu who would have been opposed to the genocidal plans of those in power.) Second, and apart from the fact that the crimes were the most serious imaginable, their effect caused havoc in the surrounding countries to which millions of refugees fled. These were truly international crimes, and the international community, through the Security Council, having assumed jurisdiction, has no good reason to surrender it. There is an additional practical consideration. The former Rwandese leaders who were responsible for the genocide all fled Rwanda and took up residence in a number of countries in Africa, Europe, and North America. If there is no international tribunal to claim their arrest and delivery for trial, it is more than likely that they will never be apprehended.

It is still too early to judge the successes or failures of the two ad hoc international tribunals. They are still at the beginning of the trial stage. However, the Yugoslav Tribunal is at a crucial stage in its existence. Of the seventy-four persons indicted by the Yugoslav Tribunal, all but seven are free. The arrest warrants have not been executed. The reason for this is unquestionably the lack of political will on the part of the major powers. If their political leaders felt sufficiently strongly about bringing war criminals to justice, there is no question that they would have been arrested and surrendered to the tribunal. Having regard to the reasons for the Security Council establishing the Yugoslav Tribunal in the first place, there can be no doubt concerning the moral duty of its members to insist on their arrest and surrender for trial. For some time I have been concerned with the effect upon victims of this failure to arrest those indicted. I have tried to imagine how let
down they must feel. Their expectation of some justice was raised when the Yugoslav Tribunal was established, and again when indictments were issued. Imagine their disappointment at the failure of the international community to follow through with the arrest of those indicted. If this situation is not corrected, the establishment of the Yugoslav Tribunal will have caused more harm than good to the persons it was intended to benefit.

Of even greater concern is that this inaction on the part of the international community is likely to bring a premature end to the tribunal. The trials of the persons presently in detention in The Hague will have been completed by about the middle of this year. As Professor Theodor Meron points out, the end of the trials more or less coincides with the end of the terms of office of the eleven tribunal judges appointed by the United Nations. If there are no further trials for them to hear, will there be any point in the United Nations appointing another eleven judges to serve further four year terms of office?

It is similarly premature to judge the Rwanda Tribunal. The problems in setting up the tribunal in Arusha have been many and difficult. Its logistical problems have been manifold. Again, however, if there is the political will to make the Rwanda Tribunal function effectively and efficiently, it can without question be done.

If the tribunals fail, the noble purpose for which they were set up will be frustrated. The tragedy is that much has already been achieved by the tribunals—enough to have justified the brave decision of the Security Council to establish them. What are those achievements? I would suggest the following.

First, the norms of international humanitarian law have been substantially advanced through the work of the tribunals. The decisions handed down by judges of both the appeals and trial chambers have begun to create a new international jurisprudence which, if allowed to develop further, will undoubtedly influence national systems of law positively. The problematic gaps in humanitarian law, in particular the artificial distinctions made between international and internal wars, have

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been reduced considerably. And, the prior deficient approach to mass rape has been significantly transformed by the recognition that such ghastly conduct constitutes not only a war crime, but also a crime against humanity. In short, until the establishment of the Yugoslav Tribunal, international humanitarian law was only of academic interest—it was hardly enforced or applied. Now, through the work of the tribunals, it has become a living body of law, and how sad it would be if that life were snuffed out in its infancy.

Second, in setting up the two tribunals, the Security Council struck a meaningful blow against impunity. It gave notice to would-be criminals that the international community was no longer prepared to sit back and allow serious war crimes to be committed. Again, how unfortunate it would be if that notice were withdrawn. It would, in a very real sense, be a license for future criminals to commit war crimes with impunity.

Third, the tribunals have given rise to an international resurgence of interest in humanitarian law. It is now written about and discussed in the media on a daily basis in many countries. It is beginning to be taught with renewed interest in law schools. And, most important of all, political and military leaders in a number of countries are paying attention to it. The International Law Commission of the United Nations has made impressive progress with the drafting of a treaty for the establishment of a permanent International Criminal Court [ICC]. It is anticipated that the drafting will be complete this year and that a diplomatic conference to consider its terms could be called during 1998. Interest has also been revived in the need for a declaration or a treaty to augment existing humanitarian law in certain areas relating to internal armed conflicts. At a meeting of experts from thirty-five countries held in Cape Town in September 1996, there was unanimity on such a need, and the matter has now been raised in the U.N. Human Rights Commission.

Fourth, governments are beginning to take humanitarian law seriously. Three permanent members of the Security Council, the United States, France, and the United Kingdom, have passed national legislation recognizing their international obligation to comply with the statute under which the tribunals operate. The Russian Federation has formally informed the Yugoslav Tribunal that it does not require national
legislation in order for it to do so, and it has confirmed that it will so comply. Under tremendous international pressure, Croatia amended its constitution in order to enable it to comply with the statute. Alas, it has done little to act under the amended provision. A number of governments in Africa, Europe, and the United States have responded affirmatively to requests for the detention of indicted war criminals. In the case of the Rwanda Tribunal, some thirteen such persons have been arrested. Some have been transferred to Arusha, and it is hoped that others will soon follow.

Fifth, in the case of indicted war criminals who have not been arrested, they have been marginalized and turned into international pariahs. Radovan Karadzic and Ratko Mladic provide good examples. They have been removed from office for no other reason. Indeed, for his removal from office as President of Republika Srpska, Karadzic would have been able to attend the Dayton negotiations, and that would have kept the Bosnian government away—there would have been no Dayton Agreement.

VI. Conclusion

All of the foregoing establishes, I would suggest, that justice can be a useful tool for peacekeeping or peace building. With it, countries emerging from periods of serious human rights violations can hope for an enduring peace. Without it, the terrible rate of war crimes will not abate.

The second half of the twentieth century has been a particularly bloody and violent period in the history of humanity. During the past fifty years, millions of innocent civilians have been murdered and many tens of thousands of women raped in international and internal armed conflicts. Tens of millions of people have been forced into refugee status. Not coincidentally, however, it has also been a half century in which, apart from the ad hoc tribunals, there has been no international attempt at all to enforce humanitarian law.

It is my opinion that the positive achievements of the two ad hoc tribunals justify the establishment of a permanent ICC. Governments serious about curbing war crimes and human rights violations must surely now accept that there is no way other than the enforcement of humanitarian law. It is time that they took a more positive role in hastening the establish-
ment of such an international court. I understand the fears many governments have in giving up some sovereignty to a new international body. This fear is illustrated by the long debate in the working group of the International Law Commission on the issue of the trigger mechanism for an investigation by a prosecutor of such a court. Some permanent members of the Security Council, and probably all five, insist that only the Security Council should have the power to initiate an investigation. In this way, the permanent five would retain the power to veto any such decision.

In my view, this procedure would destroy the credibility and independence of the ICC from its very birth. A compromise has to be found. A possible solution would be to adapt the procedure already followed by the Security Council when it established both ad hoc tribunals. Before adopting the resolution to establish the Yugoslav Tribunal, and later, the Rwanda Tribunal, the Security Council appointed a Commission of Experts to investigate whether serious violations of humanitarian law and human rights law had been committed. Only after those commissions reported back to the Security Council did it resolve to establish the ad hoc tribunals. A workable compromise could be for the treaty setting up the permanent court to require the appointment of such a commission by the Security Council to determine whether or not an investigation should be instituted.

The Security Council decision to establish such a commission should not be subject to the veto power. In other words, a resolution attracting the support of a majority of the members of the Security Council would be sufficient for that purpose. After the report of such a Commission of Experts has been placed before the Security Council, the decision as to whether the prosecutor of the ICC should investigate and indict could be subject to the power of veto. This procedure would at least set in motion an independent investigation, and the result thereof would be made public. A situation warranting prosecution would then be that much more difficult for any member state to oppose. And even if, despite such a report, states still oppose the institution of investigations by the ICC, the very fact of the appointment of a Commission of Experts and its report might well have some deterrent effect.

Again, if the political will is there, we could have an ICC operating before the end of this century. Such an event would
forever put an end to the kind of impunity the world has seen over the past fifty years. It would not put an end to the commission of war crimes any more than policing and a criminal justice system puts an end to crime in any national state. I have no doubt, however, that it would substantially curb such violations.

May I conclude with a further quotation from Michael Ignatieff:

[I]t is best to be modest about what war crimes trials can accomplish. The great virtue of legal proceedings is that its evidentiary rules confer legitimacy on otherwise contestable facts. In this sense, war crimes trials make it more difficult for societies to take refuge in denial; the trials do assist the process of uncovering the truth. It is more doubtful whether they assist the process of reconciliation. The purgative function of justice tends to operate on the victims' side only and not on the perpetrators. While it leaves victims feeling justice has been done, the community from which the perpetrators come may feel only that they have been made scapegoats. All one can say is that leaving war crimes unpunished is worse: it leaves the cycle of impunity unbroken and permits societies to indulge their fantasies of denial.8

Even on this most pessimistic appraisal of the benefits of war crimes trials, the call for a permanent institution to prosecute gross violations remains urgent. The international community owes it to future generations to give a high priority to such an endeavor.

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