The Perennial Conflict Between International Criminal Justice and Realpolitik

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by M. Cherif Bassiouni
Distinguished Research Professor of Law and
President, International Human Rights Law Institute,
DePaul University College of Law

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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 some historical empirical evidence points us in that direction. History records that a legal system has existed in every one of the forty 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, what is evident in every one of these civilizations is a constant struggle between the pursuit of power and wealth by some to the detriment of others, resulting in inequities and injustices that law and legal institutions have seldom successfully redressed. However, whenever justice or equity has prevailed, it has been because of law and legal institutions – and almost always because persons dedicated to the law saw to such an outcome. Almost always, such persons have been confronted with obstacles put in their way by the holders of power and by the proponents of power-interests. The pursuit of justice has never been easy, and all too frequently the holders of power and the servants of power-interests have prevailed, even over elementary fairness and basic rights.

In the last fifty years national legal systems have qualitatively advanced far more than during the preceding 7,000 years. This is due in large part to the impact of international human rights norms on national legislation. The concept of the Rule of Law with all that it comports of substantive and procedural norms and rules, has not only enhanced the attainability of justice, but has contributed to 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 as to participants, processes, structures, values, goals, decision-making processes, and above all, enforcement

mechanisms and capabilities. The international legal system is essentially based on voluntariness and cooperation, and it lacks effective enforcement deriving from collective decision-making as well as institutional capabilities to carry out enforcement, particularly with respect to international criminal justice.

Reduced to its fundamentals, what motivates states in their relations is not enduring values as those that bind human beings, but interests whose significance and timeliness are in a constant flux. Thus, the dominant feature of inter-state relations is characterized by state interests. Nevertheless, it is evident from the evolution of inter-state and international relations since WWII, until now defined by the Westphalian concept of sovereignty and the Hegelian concept of state interest, both bridled only by prudence and good judgment, that a significant change has occurred. This is characterized by considerations of commonly-shared values which transcend the unilateral pursuit and preservation of power and wealth which are now part of the global equation. This is reflected in the many changes which have occurred in the international legal system as of the twentieth century, particularly with respect to multilateral decision-making and limitations on state sovereignty deriving from commonly-shared values and commonly-shared interests. As a result of the above, the international legal system now includes the concept of international criminal accountability for the commission of certain international crimes, and the emerging concept of the duty to protect as harm-preventing, separate and apart from the United Nations collective security system. Both international criminal accountability and the duty to protect partake of the same commonly-shared values and commonly-shared interests. Indeed, if nothing else, protection is a means of prevention, as is accountability with respect to its deterrent effect. Advances in international human rights protection go hand in hand with international criminal accountability, if for no other reason than victims' rights include bringing their perpetrators to justice. This is evident in the General Assembly's adoption 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.

The identification, application and enforcement of commonly-shared values and commonly-shared interests by the modern international legal system presuppose the existence of a community that postulates certain universal objects and moral imperatives requiring certain actions and compelling the refraining from others. From there we identify the boundaries that limit the actions of states, impel them to cooperate for the common good and act in the common interest. To argue that this is exclusively a moralistic approach is to ignore all that which common experience teaches based on the lessons of justified pragmatic considerations, enlightened self-interest, and prudent judgment. An international community is not therefore dependent on the existence or even the desirability of a world government.

Various models refer to the hypothesis of an international community bound by international obligations flowing from commonly-shared values and commonly-shared interests. One of them more aptly applicable to the contemporary international system derives from Roman law experience – the *civitas maxima*. This is a concept which reflects the existence of a higher body politic, and which in the Roman legal system included the different nations and tribes which comprised the Empire. But it was the collective belief in the existence of this intangible whole which is greater than its parts,

the *civitas maxima*, that engendered a collective social bond from which derived duties that transcended the interests of the singular. The moral/ethical ligament and the pragmatic and experiential bonds thus coalesced in the *civitas maxima*, and from that whole, legal obligations arose that the community individually and collectively had to enforce.

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 it deems to be prudent to achieve its goals. This includes the ability of a state to free itself from any moral/ethical limitations even when these moral/ethical considerations represent its own society's commonly-shared values. Thus, no moral/ethical rules restrain states in their relations with one another, except those rules to which they voluntarily wish to submit themselves, including self-restraining limitations arising out of countervailing deterring forces. More significantly, the state could opt out of its hitherto voluntarily-accepted obligations without any other consequences than what 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 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 do some contemporary political realists. 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, and both are part of the rules which control inter-personal and inter-social relations.

A modern *civitas maxima* model includes self-imposed and externally-imposed limitations. However, such a model must be guided by a process, 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 binding legal norms which transcend domestic ones as well as legal processes, similar to those existing in national contexts, with the capacity for "direct enforcement" 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 whose acts must also conform to legal legitimacy. Such legitimacy cannot rest on the sole assertion of state interest, but it must be based on the right reason, though not necessarily the same notion of "right reason" advocated by Aristotle in his natural law conception. Legitimacy is the right reason premised on existing positive norms, though not excluding the application of higher norms deriving 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 are likely better to govern these relations and to produce better outcomes – and that is the ultimate utilitarian reward for compliance with the norms and processes of the international legal system. Legitimacy reduces the latitude of

relativism which in turn undermines the certainty of the law, and eliminates the predictability and consistency of legal outcomes. Without 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 effective compliance.

Rules governing inter-state and international relations must necessarily be flexible, because they are open to interpretation by those who are subject to them. These rules are also likely to respond or give way to countervailing considerations of different state interests and to power-relations. Without that flexibility, states would not "buy into" a system that hamstrings them into compliance with collective rules without having 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, if for no other reason than the imbalance of power and wealth among the members of that community can hardly be entirely redressed. On the contrary, in the international community, the unilateral quest for power and accumulation of wealth continues to be one of the avowed goals of that community. Thus, the international community has yet to accept what the French philosopher Pascal urged, that in times of peace nations must do to each other the most good, and in times of war, the less harm. To achieve this lofty goal requires an international social contract which includes the obligation to protect as well as some basis for wealth-sharing and transfer of technology and know-how from developed to developing countries.

Existing notions of collective security in the context of the Westphalian system of interstate relations must thus give way to a new international collective responsibility to protect. Similarly, an equitable system of sharing world resources and transfer of technology and know-how must be included in an international social contract. 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 which exist in international intercourse, under which it is implausible to accept the existence of binding rules capable of restraining states in their conduct, other than by power. They see the international system as essentially 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, subject only to 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 is a contradiction in terms with an international legal order based on the rule of law, which brooks no double standards.

The assumptions of political realists, and more particularly, of the school of *realpolitik* are 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 where 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. However, Gulliver in the age of globalization is tied down

by many large and small strings which represent in part the commonly-shared values and multiple interests of the international community. These strings cumulatively represent the multilateral which has tamed the power of the giant unilateral. Admittedly, the giant is not entirely tamed, and should he want to, he could surely 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. Globalization is so far seen as involving communications, commerce, and finance and only in part, collective security, but it still does not include the collective duty to protect, wealth-sharing, or international criminal justice. But so far, globalization has not ripened into an international social contract, and only represents a small portion of the commonly-shared values and commonly-shared interests of the international community. Indeed, there is only some partial evidence that it includes the duty of international criminal accountability.

Multilateral problem-solving and collective decision-making by international institutions with rulemaking authority transcending the powers of member-states, serve as examples of the changes which have occurred during these past decades. Many international organizations and the mechanisms of collective decision-making they embody have brought about a new reality concerning 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, have created a web of interlocking relationships between states. These in turn have enhanced the acceptance of external obligations while at the same time nurturing confidence amongst states that the relinquishment of individual decision-making is not without its concomitant benefits. Experience has demonstrated that multilateralism, notwithstanding its weaknesses and shortcomings, accomplishes more than unilateralism can; and, that what is lost in unilateral freedom of action is compensated for by what is gained through collective decision-making and collective as well as cooperative action.

To paraphrase Myres McDougal's position in the '60s, international relations are framed 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 common economic interests. Since what brought about this elaborate process is an array of values and policies which 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 surely no one will deny today that the individual is, as a subject of international law, the beneficiary of rights arising under international law, even when these rights' recognition derive from the will of states. These individual rights derive from the traditional notion of third party beneficiary under traditional treaty law, reflected 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 the benefit of the individual, who is also granted standing to seek the enforcement of these rights, particularly that which we call human rights, necessarily

implies that the international community as a whole, states individually and collectively, and international organizations have the duty to protect these human rights. A duty to protect is binding upon states insofar as they have assumed specific treaty obligations. As states accept to be bound by non-treaty obligations arising out of the peremptory norms of international law referred to as *jus cogens*, there is by implication a collective obligation by the international community to enforce these human rights, and that includes international criminal justice.

Legal experience demonstrates that the enunciation of rights without concomitant remedies are pyrrhic pronouncements, and that remedies without enforcement are empty promises. However morally compelling these arguments about individual human rights and their enforceability may be, it is still necessary to offer states an inducement to "buy-into" the recognition of such rights and their enforcement. The need for such an inducement arises because outcomes deriving from an international legal system based on the rule of law are likely to be detrimental to state interests, and may constitute a limitation on state sovereignty, as carried over from the waning Westphalian system. The states' "buy-in" argument must necessarily include corresponding state interests. The argument supporting this proposition is that protecting individual human rights as well as collective human rights enhances peace and security, reduces domestic, regional and world disruptions, and is ultimately more economical than having to engage in military humanitarian intervention, and certainly by having states embroiled in regional conflicts – in other words, the argument advances the utilitarian side of human rights in its reflection on state interests.

While there has never been empiric verification of this proposed argument, it can nevertheless be advanced that the human and economic costs incurred by the international community since the end of WWII, which heralded the United Nations Security Council system of collective security, have by far outweighed the costs which would have been incurred had that failed Security Council system been transformed into an effective international system to protect human rights. While this may sound anathema to political realists who for some reason are intent on ignoring their own realism in assessing the costs of conflicts arising out of and/or producing human harm, destruction of material and natural resources, and the wasting of economic resources, both on the conflicts themselves and on bringing them to an end, it is a fact to be reckoned with.

In this respect, it is useful to consider that between 1948 and 1998, there have been approximately 250 conflicts whose estimated number of victims ranges from 70 million at the low end and 170 million at the high end. These conflicts fall in the arbitrary legal categories of: conflicts of an international character, conflicts of a non-international character, internal conflicts, and tyrannical regime victimization. No matter what the label or legal characterization of the conflict may be, the same human interests and the same prohibitions are contained in international humanitarian law, international human rights law, as well as 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 in the remedies for the violation of these rights. Such overlapping legal regimes ultimately result in necessitating a choice of law which 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 having multiple legal regimes apply to the same

protected social interest, each one of these legal regimes, though predicated on the same values and aiming at achieving the same goals, an enforcement disparity exists, which in turn has an impact on the international community's perception of what its obligation may be to protect and thus to prevent, including by means of international criminal accountability.

As state above, during the period 1948-1998, and throughout these 250 various conflicts irrespective of how they have been legally characterized, 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 WWI and WWII combined. Yet with only a few exceptions during the course of this long strand of human tragedies occurring in every region of the world, there has been little evidence of the existence of an international duty to prevent or a duty to provide for international criminal accountability. In very few instances has the international collective security system of the Security Council been effectively invoked 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 as well as in the face of unfolding stark realities revealed by conflicts.

The history of international criminal justice can be said to have 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. Though 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, he was precluded from raising the defense of "obedience to superior orders." The reason was that the Empire did not want one of its sovereigns to be 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 which ended WWI announced their intentions to prosecute Kaiser Wilhem II of Hohenzollern for the "Supreme Offense against the sanctity of treaties" contained in Article 227 of that treaty. But the Kaiser sought and obtained asylum in The Netherlands, because the way Article 227 was drafted 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 surely did not intend to prosecute a royal monarch when most of Europe's heads of state were monarchs, many of whom were related to the Kaiser as descendents of Queen Victoria. Once again, politics prevailed over justice. The same treaty provided in Articles 228-229 for the prosecution of those Germans who had committed war crimes. While on its face this was a double standard, since it excluded prosecution for similar war crimes by the Allies, the prosecution of German war criminals never took place. The Allies had established a Commission to investigate the responsibility of authors of the war and its conduct, and that Commission concluded that some 19,000 Germans should be prosecuted. In time, that number dwindled to 895. Even so, the Allies by 1923 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 22 were tried, and the stiffest sentence was three years' imprisonment for the crime

of sinking a hospital ship with over 600 wounded by a U-boat officer. This time, even though politics prevailed, justice was symbolic and that in itself constituted progress. But the Allies for very obvious political reasons, also decided on foregoing the prosecution of Turkish officials for the massacre in 1915 of a then estimated 200,000 Armenian civilians. In time, that estimate grew to one million Armenian victims. No matter what the actual number may have been, politics prevailed and there was no accountability for this crime. It should be noted that the 1919 Commission mentioned above, and established by the Allies, had recommended the prosecution of Turkish officials for "crimes against the laws of humanity" – a term contained in the preamble of the 1909 Hague Convention on the Regulation of Armed Conflicts – but the U.S. and Japan vigorously opposed the recommendation, and accordingly, it was not carried out. The reason was that in 1917 the Bolshevik Revolution had taken over Russia, turning it into what became known as the USSR, and the Western Allies wanted Turkey on their side to face the new threat of communism. Once again, *realpolitik* prevailed. Turkey was not required under the Treaty of Sevres to prosecute any Turkish officials for the massacre of the Armenians.

This tragic episode is reported, even though with questionable historical accuracy, to have led Adolf Hitler, Chancellor of the National Socialist Regime of Germany, to have told his officers in 1939 on the eve of their aggression on Czechoslovakia and then Poland, "and who now remembers the Armenians?" Presumably, the senior officers of the German Wehrmacht had qualms about engaging in aggression and in 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.

The Allies during WWII started in 1942 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, and 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 failed effort of the Allies to prosecute the Kaiser under Article 227 of the Versailles Treaty, while "crimes against humanity" was the counterpart of 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.

The IMT prosecutions were followed by Control Council Order No. 10 adopted by the four major Allies 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

however, established by a treaty. Instead, it was promulgated by an order issued by the Supreme Allied Commander for the Far East, General Douglas MacArthur. The reason for the difference was that the U.S. did not want to give a role to the U.S.S.R. in these proceedings since the latter had only joined the war against Japan three weeks before its defeat. The more significant reason, however, was that the U.S. 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 IMTFE Charter was modeled after the IMT, thus including "crimes against peace," MacArthur was more concerned about governing Japan than prosecuting Japanese Emperor Hirohito. The head of state of Japan thus escaped responsibility for allowing his country to enter the war on the side of Germany and by attacking the U.S. at Pearl Harbor in violation of the laws and customs of war as they existed at the time. Members of Hirohito's family also avoided prosecution, particularly for the horrendous crime committed by the Japanese forces in the Chinese city of Nanjing, where an estimated 250,000 civilians were killed, and a large number of women raped. That crime was committed at the direction of the Japanese Emperor's uncle. Political reasons thus 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 in their respective custody. One such trial occurred in the Philippines by a military commission established by General MacArthur to prosecute Japanese General Yamashita. He was charged for crimes committed by Japanese forces 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 influence of General MacArthur. They found Yamashita guilty on the grounds that "he should have known." Never before nor after has this standard of command responsibility been applied. 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. The U.S. Supreme Court in reviewing this case in 1946 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.

Unlike prosecutions in Germany, which were continued for years by the government of the Federal Republic of Germany after the IMT and prosecutions under Control Council Order No. 10, 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 committed by its troops in China, Korea and the Philippines. Moreover, that government refuses to acknowledge responsibility for what is euphemistically called the Korean "comfort women" – some 300,000 women kidnapped from Korea and held in brothel 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 the city of Dresden, which had no military value, and which resulted in the killing of 35,000 civilians. 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, and countless others who died after the attack from atomic radiation, not to mention those who suffered from it and survived. The attack on Dresden was politically motivated and personally sanctioned by Winston Churchill as 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, notwithstanding a clear violation of the laws of armed conflict.

Soon after WWII, the cold war began, and efforts to advance international criminal justice gave way to the political conflict between East and West. The United Nations' efforts to establish an international criminal court and to 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 at drafting a statute for an international criminal court, and to elaborate an international criminal code, but to no avail. These efforts were thwarted by the political realities of the time, which left no room for the progress of international criminal justice.

The efforts to define aggression, the term used to succeed that of "crimes against peace" used in the IMT and IMTFE Charters, took 22 years, but the result was a General Assembly consensus resolution and not a treaty. The major powers did not want aggression to be defined in a binding treaty, since 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 pursuit of international criminal justice was once again thwarted by the realities of major powers' politics.

It was not until 1987 that the international law commission seriously took up again 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, presently stands at the bar of justice before the ICTY in The Hague. Shortly after the ICTY was established, the Security Council established the International Criminal Tribunal for Rwanda (ICTR), and 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 which is essentially politically motivated. The Bush Administration which came into power after the Treaty of Rome, and intent upon unilateral military intervention based on whatever it deemed to be in the national interest, did not want to see members of that government and senior members of the military being 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. For sure, these are facts, but how to quantify the cost of international criminal justice, particularly at a time when it is merely starting up? Moreover, how to quantify the value of due process in the exemplary manner in which these tribunals have proceeded, showing 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 should surely, costs and delays notwithstanding, demonstrate the extraordinary value of international criminal justice. Many lessons have been learned which informed the drafting of the ICC statute, and which will inform its jurisprudence. Many other lessons could have been learned as to how to disseminate the knowledge of these tribunals' work in order to provide victims with the knowledge that justice has been served.

The ICC is encumbered with the opposition of the United States, and with its efforts to prevent other states from fully cooperating with it. But so far, it 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 has to remember the many conflicts in which post-conflict justice has been sacrificed to politics. In the conflicts mentioned above, there has been so much impunity and so little accountability. Suffice it to recall that in Biafra in the early '60s, Bangladesh in the early '70s, and Cambodia between '75 and '85, 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, nor for that matter minor, perpetrators have ever been brought to justice. 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 by a number of concerned governments. For sure, 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. It is noteworthy here to mention these efforts. This includes 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 December 2005 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 for the commission of 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 in some way 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 such international crimes 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. It does not mean that it has to be a supra-national system, nor that international institutions should prevail over national ones. The ICC's model based on complementarity between national and international systems should be reinforced. This requires developing capacity-building for national justice systems and examining other alternatives such as mixed tribunals in the case of Sierra Leone. But surely without national capacity building, we will have situations such as Afghanistan where there is no accountability for war crimes or crimes against humanity committed over a period of 30 years' conflict in that country. Surely without capacity building, we will be faced with 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 which relies on the complementarity of international and national systems of justice, but more so on effective international cooperation in combating international crimes. The precondition for all of that is the removal of politics from having an impact on international criminal justice.

Impunity for international crimes, particularly those mentioned above, should be unequivocally renounced by all member states of the United Nations. Governments should not be allowed to give impunity to heads of states or senior perpetrators of genocide, crimes against humanity and war crimes, and 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."