FOREWORD

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Describing the conference whose proceedings are published in this volume, veteran correspondent Roy Gutman observed that there was a “sense of electricity” as the top leadership of the Yugoslavia and Rwanda Tribunals came together at the Washington College of Law to assess the brief, but already rich, record of the Tribunals and to mine their experiences for lessons that might usefully guide preparations for a permanent international criminal court. Throughout the conference one had the sense, Gutman remarked, that a whole area of law—one that concerns the deepest interests of humanity—was coming to life.

That a conference devoted to international tribunals could evoke this response would have been difficult to imagine even a few years ago. The early history of both ad hoc tribunals provided more cause for concern than confidence: It took more than one year after the International Criminal Tribunal for the former Yugoslavia (“ICTY”) was established for the Security Council to appoint its first Chief Prosecutor, Richard Goldstone, and in its early years one of the most widely known facts about the tribunal was that it was unable to secure custody of the vast majority of those whom it had indicted. The International Criminal Tribunal for Rwanda (“ICTR”) had an even less auspicious start. As Ambassador David Scheffer recalled in his conference remarks, a United Nations audit released in February 1997 found that the ICTR was afflicted by gross mismanagement. Shortly after the report’s release, the United Nations discharged two of the ICTR’s most senior officials.

In larger perspective, as Chief Prosecutor Louise Arbour suggested in her conference address, the very fact that the tribunals were created bore stark witness to profound failures. For criminal law is brought to bear, in her words, only when “things have dramatically gone wrong.”
In the former Yugoslavia, what went dramatically wrong came to be known as "ethnic cleansing"—a cynical euphemism for the systematic extermination of individuals belonging to another national group. What went dramatically wrong, as well, was the wholesale failure of political leaders to respond effectively when confronted with the worst war crimes in Europe since World War II.

In Rwanda, things went dramatically wrong in April 1994, the beginning of a genocide that consumed Tutsi victims at a rate three to four times that at which the Nazi machinery of death claimed Jewish victims. And again, the world stood aside.

It was against the backdrop of these failures that the United Nations Security Council created the first international criminal courts since the Nuremberg and Tokyo tribunals. It was small wonder, then, that the ICTY, established in May 1993, was at first widely seen as a figleaf for Western States’ unwillingness to intervene to stop the carnage then underway in Bosnia-Herzegovina. When the ICTR was established in November 1994, there was equal cause for cynicism: the United Nations not only failed to intervene to stop the genocide in Rwanda, it withdrew troops already deployed in Rwanda when the genocide began, leaving just a token force. Testifying in the first trial before the ICTR, the commander of the United Nations force in Rwanda, Major-General Romeo Dallaire, estimated that if he had had 50,000 troops he could have stopped the genocide. If this were not cause enough to question the legitimacy of the Security Council’s action in establishing the ICTR, many doubted whether it would have done even this much had it not already created a tribunal for the former Yugoslavia.

Yet despite the inauspicious circumstances surrounding their creation and continuing challenges to their authority, both the Yugoslavia and Rwanda tribunals have emerged as credible and increasingly effective institutions of justice. Their history to date has been a study in the steady—if still incomplete—triumph of professionalism over cynicism and of an emerging global constituency for justice over a pervasive culture of impunity.
DOING JUSTICE IN EXTRAORDINARY CIRCUMSTANCES

No court in history has had to confront the formidable range of obstacles to mounting effective and fair trials that have beset the first cases tried before the Yugoslavia and Rwanda Tribunals. Even the basic task of obtaining evidence has presented singular challenges. Alan Tieger, lead prosecutor in the ICTY’s first case, *Prosecutor v. Dusko Tadić*, and Michail Vladiatoroff, defense counsel for Tadic, recalled the extraordinary obstacles they faced in trying to obtain testimonial evidence—the lynchpin of prosecutions before the ad hoc tribunals. As Mr. Tieger recalled, the three and one-half year conflict in Bosnia was still underway when he and his colleagues undertook their investigatory work. Those responsible for the atrocities committed during the conflict were still very much in control, and threatened to arrest ICTY staff if they undertook on-site inquiries. In these circumstances, Mr. Tieger reminded us, he and his colleagues could not have foreseen that the fighting would be brought to an end by the Dayton Peace Agreement in late 1995 or that a NATO Implementation Force (“IFOR”), deployed to help enforce that agreement, would be available to provide security to ICTY investigators. Many key witnesses had scattered—an intended consequence of “ethnic cleansing”—and had to be tracked down by Mr. Tieger in fourteen countries. And there was no assurance that witnesses, once located, “would be willing to risk re-traumatization and even physical retaliation for testifying publicly.”

The obstacles were no less daunting for defense counsel as they tried to locate witnesses in the Serb-controlled area of Bosnia where Dusko Tadic’s alleged crimes were committed. Serb authorities “harassed and jailed people” after Mr. Vladiatoroff had spoken to them. Further, he recalled, “witnesses, once located, disappeared, not only because of the threats of local authorities, but also as a result of the ongoing conflict. They simply were displaced. They were refugees. We could no longer locate them.”

If anything, the challenges confronting the ICTR were more formidable still. That an armed conflict is still underway in Rwanda has had a profound impact on the Tribunal’s efforts. Few of us can fathom what it means for a court to undertake its work under the conditions described by ICTR judge Navanethem Pillay: “I am...
sad to say that there were two attempts at hijacking the Tribunal’s staff and two people were shot, but not fatally. There is an ongoing conflict and a real risk to witnesses as well as a risk to Tribunal staff.”

No blueprint was available to guide the two tribunals as they confronted these challenges; innovation was in order. For example, the ICTY Trial Chamber that conducted the Tadic trial established a video link to Serb-controlled areas of Bosnia to take live testimony from defense witnesses who were unwilling to travel to The Hague.

But any measure undertaken to meet the peculiar challenges confronting the tribunals had to meet the stringent demands of fair process. Panelists puzzled through the vexing question of what constitutes a fair trial in the unprecedented setting of the Hague Tribunal. As their discussion made clear, the answer is by no means self-evident. For, as Mr. Wladimiroff noted, “the concept of a fair trial should and can only be understood in the context of the system in which it functions.” Yet the ICTY did not function within any established legal system and therefore lacked established benchmarks of fairness against which its innovations could readily be measured. To the contrary, its judges sought to construct a genuinely international code of procedure, drawn from all major legal systems. (In fact, as presiding Judge Gabrielle Kirk McDonald observed, there were six different legal systems represented in the Tadic trial alone.)

In this uncharted setting, some of the Tribunal’s early rulings were bound to be controversial—perhaps none more so than the decision to allow, in exceptional circumstances, certain witnesses to remain anonymous. The conference at American University’s Washington College of Law afforded an unprecedented opportunity for the lead actors in the Tadic trial to confront together the fundamental fairness of this and other controversial rulings. Their exchanges were rich and genuinely illuminating; many of the insights that emerged were surprising even to avid students of the ICTY. Mr. Wladimiroff concluded, for example, that on the whole the Trial Chamber’s rulings on witness protection, far from unfairly prejudicing the defense as has sometimes been charged, served defense needs as well as those of the prosecution. “This was,” he noted, “a very astonishing thing to me.”
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OPERATING IN AN INSTITUTIONAL VACUUM

While many commentators have remarked upon the degree to which the ad hoc tribunals represent an incursion on time-honored principles of state sovereignty, the experience of those who participate in their daily work highlights the reverse side of the proverbial coin—the costs of being unrooted in an established state system. All who have participated in the work of the tribunals have been profoundly affected by this phenomenon. Thus, for example, Mr. Wladimiroff observed: “The reality was that the defense was not an entity, not an organ of the Tribunal, and therefore, non-existent for [states whose cooperation with the Tribunal was essential]. I had no access to any official authority and I had no way to track down the witnesses.” Ultimately, the particular challenges to which he alluded were satisfactorily resolved by the Tribunal itself—another instance in which essential pillars of a functioning judicial system had to be improvised even as the Tribunal sought to dispense justice.

Other fundamental challenges relating to the fact that the ad hoc tribunals are not embedded in established state structures were elucidated by two officers on whose shoulders the resulting burdens rest heavily—the President of the ICTY, Judge Gabrielle Kirk McDonald, and the Chief Prosecutor of the ICTY/R, Madame Justice Louise Arbour. Where most courts operate within an established legal structure, Judge McDonald reminded the audience, the ICTY “depends entirely on... States” to carry out essential tasks relating to the fair and effective administration of justice. The tribunal cannot even “offer practical protection to witnesses who are at risk by virtue of the fact that they have assisted the Tribunal” once they leave its premises. And without a police force of its own, the Tribunal has had to rely on others to arrest those whom it has indicted. At the time of her remarks, forty-nine suspects who had been publicly indicted by the ICTY remained at large; their continuing freedom, in Judge McDonald’s view, “makes a complete mockery of the Tribunal and international criminal justice.”

Justice Arbour also evoked the insidiously debilitating effects of “the fact that an international court sits in a vacuum.” Even a permanent international criminal court, she cautioned:
cannot rest on the other pillars of democracy that we take for granted in our domestic criminal justice system. I speak, for instance of the absence in areas of the world in which our work matters so much of a free and independent media. I can refer to what we take for granted domestically as the following: the existence of an independent, but regulated profession; and the unconditional endorsement of accountable governments who are required to enforce the law. We cannot count on those two items.

More importantly, universal acceptance of the duty to give evidence in criminal cases can be understood by all in our own society, but not in the international arena.

Justice Arbour’s allusion to the absence of an independent media “in areas of the world in which our work matters so much” presumably referred to the former Yugoslavia, where virulently nationalist media have at times presented grossly distorted accounts of the ICTY’s work. But in a more complicated way, the tribunals have suffered from their less than satisfactory relationship with independent media.

Far removed from the daily cares of most societies, the ad hoc tribunals must work hard to remain in the foreground of a diffuse public’s consciousness and concern. Yet too often, as journalist Kitty Felde reminded conference participants, the tribunals have effectively discouraged press coverage that could help generate and sustain public support for their work—support that is critically important in countering states’ much-noted reticence to meet their obligations toward the tribunals.

Equally important, the effectiveness of international tribunals depends crucially on the operation of critical watchdog sectors, including an independent media. Had the press reported more aggressively on the Rwanda Tribunal during its troubled early years, for example, its problems of gross mismanagement might have been exposed—and addressed—much earlier. Instead, precious time was lost.

With a permanent international criminal court on the horizon, issues of the accountability of international tribunals—courts that are unrooted in any established state system—will assume even broader importance. As they do, we would do well to heed Judge Pillay’s call for a departure from the ad hoc tribunals’ characteristic opacity.
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CONFRONTING GRAND EVIL

However important in their own right, the daily challenges of doing justice in The Hague and Arusha matter above all because of the profoundly important interests the tribunals were created to serve. Bernard Muna, Deputy Prosecutor for the ICTR, suggested the enormity of the task he has undertaken when he reminded the audience of the human tragedy that is the focus of his efforts:

You have heard that the genocide in Rwanda was five times faster than the one in Germany, even though the German genocide had gas chambers. If you take the lower figure of 500,000 people killed you are looking at 5,000 people a day. If you take the higher figure of one million people killed, you are looking at 10,000 people killed a day without guillotines or gas chambers. Instead, most of the killings were done with match heads and spears. This meant that a large proportion of the population were implicated for this to succeed.

In his closing remarks at the conference, Aryeh Neier touched upon a related aspect of the crimes committed in Bosnia and Rwanda—what he called the “grotesque intimacy of the killers and their victims in Bosnia and Rwanda.” In this, the perpetrators of “ethnic cleansing” and genocide in Bosnia and Rwanda have brought a new permutation into the grim lexicon of mass atrocity; while the Nazis deployed mobile killing units to exterminate their victims and sent others to death camps, in Bosnia and Rwanda lifelong neighbors were mobilized to commit sadistic crimes. In Mr. Neier’s words, “the killers knew their victims very well.”

The direct participation of tens of thousands of ordinary people in the massive crimes committed in Bosnia and Rwanda and the grotesque intimacy of the killers with their victims has presented peculiarly vexing challenges to prosecutors in The Hague and Arusha. As Mr. Neier observed, these patterns have made “the question of collective guilt versus individual guilt a more troubling phenomenon than we have ever dealt with previously.”

How, if hundreds of thousands of Rwandans participated in genocidal murders, can the ICTR fairly select a finite number for prosecution? And, in light of the staggering evil described by Bernard Muna, how can a court of law—one that seems to operate at an ex-
quisitely slow pace—make a meaningful contribution? What would a meaningful contribution be? What are the benchmarks of success for tribunals like those established in The Hague and Arusha?

For Mr. Neier, one of the principal contributions the tribunals can make is provoking a broad audience to confront its own responsibility for the crimes that took place, even while scrupulously hewing to the principle of individual criminal responsibility. In Bernard Muna’s view, the ICTR can help prevent future genocides by laying bare the truth of how it came to pass that hundreds of thousands of Rwandans slaughtered as many as a million of their neighbors in three months’ time. Further, Mr. Muna noted, in the wake of such a tragedy, peaceful coexistence is difficult to contemplate absent a sense that some measure of justice has been rendered.

In the view of Alan Tieger, the experience of witnesses in the Tadic trial served to justify faith in the healing and pacifying potential of international tribunals. Many of the witnesses who had found the courage to testify in The Hague, he recalled, experienced a sense “that they had been relieved of a heavy burden that they had carried for a long time.” One such witness left the courtroom looking “ten or fifteen years younger than when he arrived.” It was those moments, Tieger said, “that many of us felt most proud of our participation in the Tribunal.” In his view, the experiences of these witnesses vindicated the belief, on which the ICTY was at least partially predicated, “that peace requires the sense of closure that only justice can provide.”

These contributions, above all, may serve to justify confidence in the redemptive power of the two tribunals. The possibility that the tribunals could at least partially redeem past failures was eloquently evoked by Justice Arbour in her conference remarks; suggesting that the stunning failure of the international community to stop the slaughter in Bosnia and Rwanda “can be modestly addressed and redeemed if we can now bring it amongst ourselves to hold these murderers, rapists, and torturers accountable for their actions.” Justice Arbour added: “This is, in fact, the last redemption . . .”
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CONTRIBUTIONS TO THE DEVELOPMENT OF HUMANITARIAN LAW

It is, of course, far too soon to take the measure of the ad hoc tribunals' success in redeeming the failures that led to their creation—in particular, by contributing to the broader process of political accountability of which Aryeh Neier spoke and to the agonizing, and agonizingly necessary, process of reckoning and reconciliation in Rwanda and the former Yugoslavia. But in one important respect, both tribunals' contributions can already be measured—and judged an impressive success. Although the two tribunals have rendered only a handful of verdicts, they have already made extraordinary contributions to the development and consolidation of international humanitarian law.

The substantive norms of international humanitarian law have, as Professor Theodor Meron observed, "grown much more during these last few years than in the half-century following Nuremberg." Among the most important contributions in this respect has been the Hague Tribunal's ruling in October 1995 that certain violations of the laws of war applicable in situations of internal armed conflict are international crimes—crimes that may be prosecuted by an international court and, indeed, by any national court pursuant to the principle of universal jurisdiction. In that same ruling, the ICTY resolved at last an issue that has been debated by international jurists since the postwar period—whether crimes against humanity must be linked to armed conflict under customary international law. In the view of the Tribunal, they need not.

Both tribunals have also made path-breaking contributions to the jurisprudence of crimes of sexual assault. As outlined in the presentation of Patricia Viseur-Sellers, the Hague Tribunal has made clear that rape can be prosecuted as a war crime, as a crime against humanity, and as an act of genocide when other elements of those crimes are established. And in the first verdict ever rendered by an international court interpreting the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, the Arusha Tribunal affirmed on September 2, 1998 that rapes are acts of genocide when accompanied by genocidal intent. These rulings stand in stark contrast to the judgment at Nuremberg, which omitted any mention of
The seemingly rapid development of international criminal law by the ad hoc tribunals raises a raft of complex issues concerning the nature of international law-making processes, some of which were touched upon by panelist Payam Akhavan. At what point do progressive interpretations of ambiguous law breach the prohibition of retroactive justice? In larger perspective, have judges in The Hague and Arusha crossed over from their acknowledged role in interpreting and enforcing lex lata into the controversial terrain of enforcing lex ferenda? Is there an appropriate place for this manner of judicial law-making in the peculiar processes of international lawmaking? As Mr. Akhavan suggested, rulings that may be ahead of state practice and acquiescence might invite rejection—especially when the law of The Hague and Arusha is brought to bear against citizens of states that are not subject to Chapter VII enforcement action.

The legitimacy of the law emanating from the ad hoc tribunals was put to a critical test during the diplomatic conference to establish a permanent international criminal court ("ICC") held in Rome from June 15 to July 17, 1998. The statute adopted on the final day of that conference provided powerful vindication of the two tribunals' jurisprudence. Indeed, many aspects of the Rome statute would have been inconceivable without the foundation laid by the Hague and Arusha tribunals.

Notably, crimes of sexual assault figure prominently in the enumeration of crimes subject to the jurisdiction of the ICC. Further, following the lead of the Hague Tribunal, the Rome statute's definition of crimes against humanity makes clear that there is no required nexus to armed conflict, whether international or internal. The statute also includes serious crimes committed during non-international armed conflicts in its enumeration of war crimes that can be prosecuted before the ICC—a strong affirmation of the ad hoc tribunals' jurisprudence.

Even before Rome, key aspects of the Hague and Arusha tribunals' jurisprudence had received crucial endorsement by various states. Panelist W. Hays Parks, who is revising the United States Joint Services Law of War Manual, noted that "the cases to date
[from the Hague Tribunal] have been absolute gold mines of information” and have assisted him “very substantially” in his drafting. The very existence of the Hague Tribunal has also spurred several European countries to undertake national prosecutions, pursuant to the principle of universal jurisdiction, of individuals charged with committing war crimes in Bosnia and Rwanda.

A MARKER, A STEP IN HISTORY

In the course of his conference remarks, M. Cherif Bassiouni acknowledged the presence in the audience of Drexel Sprecher, one of the United States prosecutors at Nuremberg. Professor Bassiouni recalled the hopes of the Nuremberg prosecutors that their undertaking would become the foundation for a new architecture of international criminal justice. The officers of the Hague and Arusha tribunals who were gathered at the Washington College of Law, Professor Bassiouni suggested, “also believe that their institutions are another step in the course of that history.”

Their belief, as well as Professor Bassiouni’s leading contributions to the ambitious project conceived at Nuremberg, received historic affirmation a short time later. Professor Bassiouni was elected to serve as Chairman of the Drafting Committee of the Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court. On July 17, 1998, 120 states voted—over the negative votes of seven states, including the United States—to adopt the statute for the court that had been drafted over the previous five weeks.

Transforming the ICC from the concept envisioned in the Rome statute into a viable, credible and effective institution will demand the commitment, support, and—when necessary—criticism of a concerned and engaged public. There will be countless opportunities for the court to founder; its success is scarcely assured. Still, when the ICC is created, it will enjoy one significant advantage that the ICTY and ICTR lacked: the assurance from recent example that an international court can meet extraordinary challenges, mount effective trials, and at last honor the humanity of those who endured epic crimes.