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## Remarks Made at Pace University School of Law on October 23, 1993

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# DR. KREŠIMIR PIRŠL†

## I. INTRODUCTION

In making a case for an affirmative answer to the main theme of today's symposium, one might very well start with yet another question: Is there any alternative way to re-establish confidence in the international legal order and reaffirm the basic principles upon which such order is based? The ineffectiveness of the international community to end the aggression on the territories of the sovereign, internationally recognized states of Croatia and Bosnia-Herzegovina puts in doubt the effectiveness of the United Nations' Charter. As well, it reiterates the conclusion derived from the outcomes of previous world crisis: perpetrators remain unpunished. To understand the reasons for the ineffective and meager response of the international community to dictators and regimes that violate international law, one should contrast legal principles and political compromises.

### A. *Legal Arguments Versus a Need for Political Compromise*

The major concern involving the establishment of a war crimes tribunal is the fact that political considerations and ending of hostilities by peaceful settlement may be put in front of the international community's focus. History provides ample evidence of successful cessation of hostilities that made prosecution of persons responsible for war crimes an issue of secondary political importance.<sup>1</sup> As an editorial on genocide in Cambodia

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<sup>1</sup> There are numerous examples of more recent military conflicts that ended by cease-fire agreements, making impossible the imposition of personal jurisdiction over suspected war criminals. See Whitney R. Harris, *A Call for an International War Crimes Court: Learning From Nuremberg*, 23 U. Tol. L. Rev. 229, 250 (1992).

noted, "even when genocide is at issue, the demands of peace sometimes outweigh those of justice."<sup>2</sup>

Numerous international bodies have called for the establishment of such a tribunal.<sup>3</sup> The Rapporteurs under the CSCE Moscow Human Dimension Mechanism to Bosnia-Herzegovina and Croatia, have also assumed that there is, "a determination common to a number of concerned States to take action with a view to attributing personal accountability for war crimes and crimes against humanity committed in the former Yugoslavia."<sup>4</sup> Professor Theodor Meron stated, "The credibility of international humanitarian law demands a war crimes tribunal to hold accountable those responsible for growth violations in the former Yugoslavia."<sup>5</sup> The Security Council of the United Nations has also determined that violations of international humanitarian law constitute a threat to international peace and security and has emphasized the importance of the establishment of a tribunal.<sup>6</sup>

Unfortunately, the arguments favoring the establishment of a tribunal must face the reality of the political considerations and the need, whether grounded or not, for compromise. Attempts at resolving the conflict by solely political means have thus far been fruitless. The international community's handling of aggression on the sovereign states of Croatia and Bosnia-Herzegovina has been unsuccessful, lacking determination and preferring partial political interests of nation-states over the principles of international law and order. Indeed, this

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<sup>2</sup> Reprinted in 105 L.A. DAILY J., Nov. 3, 1992, at 6, col. 1.

<sup>3</sup> E.g., Commission of Experts (War Crimes Commission) established by the Security Council, S.C. Res. 780, U.N. SCOR, 47th Sess., 3119th mtg., U.N. Doc. S/RES/780 (1992); United Nations Commission on Human Rights; Helsinki Watch, Amnesty International, International Law Commission, etc.

<sup>4</sup> Proposal for an International War Crimes Tribunal for the Former Yugoslavia, CSCE Moscow Human Dimension Mechanism to Bosnia-Herzegovina and Croatia. 9 Feb. 1993, at 42 [hereinafter Proposal].

<sup>5</sup> Theodor Meron, *The Case for War Crimes Trials in Yugoslavia*, 72 FOREIGN AFF. (Summer 1993) 122, 122.

<sup>6</sup> S.C. Res. 808, U.N. SCOR, 48th Sess., 3175th mtg. at 2, U.N. Doc. S/RES/808 (1993); reaffirmed in S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg. at 1, U.N. Doc. S/RES/827 (1993). See also, 32 I.L.M. 1203 (1993). For the report on the establishment of the international tribunal, besides official United Nations documents, see Commission on Security and Cooperation in Europe (the Helsinki Commission), *Prosecuting War Crimes in the Former Yugoslavia; An Update*, 19 Oct. 1993.

statement does not need much elaboration. Individuals who are the main organizers of Serbian aggression, deemed potential war criminals by the United States, Amnesty International, Helsinki Watch, and others, are also sitting at the negotiation table, fully protected by immunity in that capacity. Because cessation of hostilities is the primary aim, they are sometimes looked at as peacemakers.

Does the mere fact that the Security Council went on to establish the tribunal show that alternatives, *i.e.*, political settlements, negotiations, political pressures, did not work? In that vein, documents establishing the tribunal and its statute, as well as the existence of the tribunal itself, will not be enough unless there is a willingness by the international community to take further effective steps towards its implementation. Such steps as the arrangements of the extradition of the accused, exerting pressure on states unwilling to cooperate and extradite them, second the enforcement of judgments, etc.

### B. *Past Experiences*

The Nuremberg and Tokyo Tribunals do not represent ideal models for a present tribunal because of their historical surroundings, temporary character, and the fact that those Tribunals were an expression of victors' justice.<sup>7</sup> Victors' justice is lacking today mainly due to the abovementioned negotiations with the perpetrators. However, there is a lesson to be learned from Nuremberg and Tokyo. Although the political environment today differs from that after World War II, there remains a legacy of Nuremberg and a principle of deterrence. There is also a rule established in Nuremberg that prohibits the initiating and waging of aggressive war, which was the rule affirmed by the United Nations' General Assembly in 1946.<sup>8</sup> If there is no "new Nuremberg," dictators all over the world can rely on the world's inactivity and ignorance. The past experiences serve to warn those in the future. Turkish genocide against

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<sup>7</sup> See Elizabeth L. Pearl, *Punishing Balkan War Criminals: Could the End of Yugoslavia Provide an End to Victor's Justice*, 30 AM. CRIM. L. REV. 1373 (1993).

<sup>8</sup> See Harris, *supra* note 1, at 248. The U.N. resolution "declared that any person who commits an act which constitutes a crime under international law is personally responsible and liable to punishment, and that the planning and waging of aggression constitutes such a crime." *Id.*

600,000 Armenians was not punished because of the political calculations of the Allies who had granted the Turks amnesty. In 1939, Hitler used this example to ask, "who after all is today speaking about the destruction of the Armenians?" How many dictators would be using the same or similar examples, if a modern tribunal proves to be as ineffective as the earlier attempts by the international community in this area?

## II. WHAT THE ESTABLISHMENT OF THE TRIBUNAL SHOULD ACCOMPLISH?

There are strong reasons to continue efforts in the direction of the tribunal's effectiveness. One of the main goals is to punish individuals on all sides who are responsible for war crimes and crimes against humanity. A personal, individual, criminal responsibility is a necessity.<sup>9</sup> If those individuals are left free, what will stop them from committing other crimes in the future? Therefore, their punishment will have an effect of deterring future war crimes by setting a precedent for ongoing or future conflicts. It will also strengthen international law and order. Victims of war crimes are the main group affected. By punishing perpetrators, victims will be given satisfaction of justice, but will also be discouraged from committing revenge crimes.

There is a specific aim the tribunal should accomplish. In the area where war crimes and crimes against humanity took place, the tribunals effective performance will encourage democratic transformations by discrediting irresponsible political leaders who prepared and organized the aggression and those that carried it out.<sup>10</sup> In Croatia, punishment of war criminals will diminish fears among survivors and help encourage displaced persons and refugees to return to their homes in peace and dignity. It requires mentioning that 13,000 Croats are still

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<sup>9</sup> See *Report of the Secretary-General Pursuant to Paragraph Two of Security Council Resolution 808*, U.N. SCOR, 48th Sess., U.N. Doc. S/25704, at Art. 6, point 53 (1993). 32 I.L.M. 1163, 1174 (1993) [hereinafter Report].

<sup>10</sup> "The establishment of the Court would not be only of the legal and humanitarian importance, but also of the utmost political importance, because it would significantly contribute to stop and resolve the conflicts in the entire region of former Yugoslavia." Statement by the Representative of the Republic of Croatia in the Sixth Committee of the United Nations General Assembly on Nov. 6, 1992, reprinted in Proposal, *supra* note 4, at 97.

missing. Two hundred sixty wounded soldiers, civilians, women and children were taken from Vukovar hospital alone. Their destiny is still unknown. At the end of July, Croatia cared for 277,000 refugees, making up to 6% of the population on the territory that is under Croatian control. In addition to that, there were close to 250,000 Muslim refugees from the neighboring Bosnia-Herzegovina. Only the prosecution of the people who caused the exodus will bring this tragedy to a just end.

Furthermore, during the aggression on the territory of the Republic of Croatia, of the 2,387 persons killed, 304 were civilians, 40 of whom were children. Among the 6,028 wounded, 1,402 were civilians, 156 of whom were children. Between January 10 and October 11, 1993, 274 were killed, including 68 civilians and 9 children; 2,285 wounded, including 416 civilians and 47 children. These statistics show that the failure to stop the Serbian government's aggression led to more victims. Unreadiness or unwillingness to stop the Serbian genocidal policy against its neighbors by using force also ignited war crimes by the other sides. Therefore, any further delay, already significant, will lead to more victims as a result of new war crimes and crimes against humanity.

### III. THE CROATIAN POSITION

Croatia advocated the establishment of an international war crimes tribunal from the very early stages of the war in former Yugoslavia. On November 22, 1991, the Croatian Government discussed this issue and enacted a proposal for establishment of an international war crimes tribunal, thereby welcoming the creation of the United Nations' Commission of Experts. The Croatian Permanent Representative to the United Nations sent a letter to the Secretary-General on March 11, 1993, emphasizing that Croatia "fully endorses Security Council Resolution 808 (1993) and the establishment of an international tribunal."<sup>11</sup> In a statement before the Sixth Committee of the U.N. General Assembly on November 6, 1993, the Croatian representative stated:

We would like to emphasize that the Republic of Croatia has already proposed and initiated the international trials for the war

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<sup>11</sup> U.N. Doc. S/25412 (Mar. 13, 1993).

crimes, crimes against humanity and international law, and the crimes of genocide, committed on the territory of former Yugoslavia, in order to punish all perpetrators and organizers irrespective of their nationality, religion, whereabouts. Republic of Croatia is fully prepared and has already offered their cooperation with the experts in this field.<sup>12</sup>

This position was reiterated on numerous occasions by Croatian officials, most recently, by the Croatian Foreign Minister, Dr. Mate Granic in New York, on July 28, 1993.

One further point is very significant. In order to explain the ineffectiveness of the international community, there has been an attempt to "balance guilt on all sides." Croatia admits that war crimes have also been committed by the Muslims and Croats, and although sometimes indisputably brutal, these cannot be compared with the magnitude, scale and frequency of war crimes perpetrated by the Serbs. The international community failed to respond adequately to a clear case of international aggression and genocide. Instead, it left the issue to the goodwill of the so-called "sides in conflict" to agree on political and military matters. In Croatia and Bosnia-Herzegovina, Serbian crimes were orchestrated on a mass scale, with clear evidence of cooperation and coordination between Serbian (JNA) regular army troops, paramilitary, and irregular forces. Crimes against civilians, committed on such a large scale, can only be the result of decisions made at high levels of the Serbian Government. To support this well-known fact, we can cite Judge *ad hoc* Lauterpacht's separate opinion in the case *Bosnia and Herzegovina v. Yugoslavia* (Serbia and Montenegro) regarding the application of the Convention on the Prevention and Punishment of the Crime of Genocide, "The Respondent [Yugoslavia - Serbia/Montenegro] stands behind the Bosnian Serbs and it must, therefore, be seen as an accomplice to, if not an actual participant in, this genocidal behavior."<sup>13</sup>

The UN's proposed statute which would establish a war crimes tribunal does not provide for trials *in absentia*, which

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<sup>12</sup> Proposal, *supra* note 4, at 97.

<sup>13</sup> Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Yugoslavia* (Serbia and Montenegro)), 1993 I.C.J. 3 (Apr. 8) (*reprinted in* 87 AM. J. INT'L L. 505 (1993), Separate opinion by Judge *ad hoc* Lauterpacht, Point 69) [hereinafter Lauterpacht].

should be the case.<sup>14</sup> Such proceedings are not new, as Nuremberg set a precedent for *in absentia* trials of war criminals in the case of Martin Bormann.<sup>15</sup> If there is enough evidence collected, the mere fact that the accused is not accessible to the tribunal cannot impede his prosecution. If there is a possibility of trying individuals *in absentia*, as already emphasized, main war criminals will not escape international condemnation and punishment. If there is such a possibility, it will provide the way to isolate perpetrators as well as the governments giving shelter and refusing to extradite war criminals. The international community has means available for exerting pressure: a threat of economic sanction, isolation, blockade, or reintegration into the international community only for nations that show respect for international law and decisions by international institutions.

Croatia intends to fully cooperate with the international community and the tribunal. Croatia's legal and other authorities should be fully responsible for the fact-gathering, apprehension and extradition of its own citizens. Indeed, one of its first steps was to establish a Commission for War Crimes.<sup>16</sup> The Croatian Government appointed members, and entrusted them with the task of collecting and analyzing data on war crimes committed during the war in Croatia, as well as cooperating with the International War Crimes Tribunal and other international organizations. In that respect, Croatian citizens held responsible for crimes under the jurisdiction of the International War Crimes tribunal will be extradited. In fact, Croatia has been very active in collecting data, making reports on violations of international humanitarian law, and delivering its findings to the proper international authorities. It established a system according to the methodology used by the United Nations Commission of Experts. Particular attention was centered on identifying and prosecuting all violations of human rights committed on the territory of former Yugoslavia, and preventing further violations of human rights and humanitarian law.

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<sup>14</sup> See *supra* note 6.

<sup>15</sup> Harris, *supra* note 1, at 231 n.6, 245; see also B. SMITH, REACHING JUDGMENT AT NUREMBERG 229-32 (1977).

<sup>16</sup> The decision on establishing the Commission on War Crimes was published in PEOPLE'S GAZETTE, No. 34/93.

#### IV. POSSIBLE IMPEDIMENTS TO SUCCESSFUL OPERATION OF THE INTERNATIONAL WAR CRIMES TRIBUNAL

Besides the known financial difficulties which burden United Nations' activities, a problem rests with the above-mentioned correlation between legal and political goals. The international tribunal, created by the Security Council which will endorse future peace settlements that might include amnesty provisions (especially for the corresponding politicians) can be limited to prosecuting minor crimes. This conclusion is derived from the Secretary-General's Report, which stated that "[a]s an enforcement measure under Chapter VII, however, the lifespan of the international tribunal would be linked to the restoration and maintenance of international peace and security in the territory of the former Yugoslavia, and the Security Council decisions related thereto."<sup>17</sup>

In contrast, the tribunal's task should not only be deterrence, but just punishment. If aggression remains unpunished, it will affect not only the present international legal order, but any future attempts to create a new tribunal. The problems the tribunal would have to face are not insurmountable. The world should seek to have a good court, not strive for perfection. National justice systems are not without problems, and likewise, "an imperfect international court trying, punishing and deterring grievous crimes is infinitely better than nothing."<sup>18</sup> Recognition of problems facing the international tribunal should improve the quality of its preparation, thus not deterring the international community from taking decisive steps. The creation of the tribunal, although overdue, shows the international community's commitment to face difficulties. It must continue in that direction. There should be no excuses, such as interference in the domestic affairs of sovereign states or difficulties of enforcement.<sup>19</sup> The sovereignty exception is unacceptable, as it was in Nuremberg. Mr. Justice Jackson's words require repetition: "If those who have the power of decision revert to the concept of unlimited and irresponsible sovereignty, neither this nor

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<sup>17</sup> Report, *supra* note 9 Para. 28, at 8.

<sup>18</sup> Eric L. Chase, *Stop Swaggering and Start Working for Justice*, 133 N.J.L.J. 17, 24 (Jan. 4, 1993).

<sup>19</sup> See *Jurisdiction Over War Crimes*, 35 CRIM. L.Q. 129, 131 (Feb. 1993) (editorial).

any charter will save the world from international lawlessness."<sup>20</sup> Hopefully, the substance of these words found their reflection in the proposed statute.<sup>21</sup>

International documents are too weak in wording; the same goes for statements of officials. For example, there is ample evidence that "ethnic cleansing" is genocide as defined by the Genocide Convention.<sup>22</sup> However, officials of some states speak of acts tantamount to genocide. As long as there is hesitancy to be precise and determinative, there will not be a real tribunal with proper jurisdiction. Coming back the Judge *ad hoc* Lauterpacht's separate opinion:

[t]he evidence also indicates plainly that, in particular, the forced migration of civilians, more commonly known as 'ethnic cleansing,' is, in truth, part of a deliberate campaign by the Serbs to eliminate Muslim control of, and presence in, substantial parts of Bosnia-Herzegovina. Such being the case, it is difficult to regard the Serbian acts as other than acts of genocide in that they clearly fall within categories (a), (b) and (c) of the definition of genocide.<sup>23</sup>

Even Serbia, speaking in another context, characterized "ethnic cleansing" or comparable conduct as genocide.<sup>24</sup> Serbia and Montenegro do not deny that atrocities have occurred of the character and scale described in various instances, particularly as noted in the *Bosnia-Herzegovina v. Yugoslavia (Serbia/Montenegro)* case. Not only were these acts proscribed in various international conventions, but also in the internal Yugoslav federal criminal code, as well as the Republic's criminal codes. Because this is not an internal conflict, but rather an international one,<sup>25</sup> there is a need for an international tribunal to find those

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<sup>20</sup> See Robert Donih, *War Crimes*, 66 ST. JOHN'S L. REV. 733, 735 (1992); John Norton Moore, *War Crimes and the Rule of Law in the Gulf Crisis*, 31 VA. J. INT'L L. 403 (1991).

<sup>21</sup> "The official position of any accused person whether as Head of State of Government or as a responsible Government official, shall not relieve such person of criminal liability nor mitigate punishment." Report, *supra* note 9, at Article 7, para. 2.

<sup>22</sup> See also, Report, *supra* note 9, Article 4, at 12 (a definition of genocide in Article 4 of the proposed statute of the International War Crimes Tribunal).

<sup>23</sup> Lauterpacht, *supra* note 13, at Point 69.

<sup>24</sup> *Id.*, at Point 70.

<sup>25</sup> "There has been a broad consensus outside Yugoslavia to consider the conflicts there as international." Meron, *Rape as a Crime under International Humanitarian Law*, 87 AM. J. INT'L L. 424, 424 n.3 (1993).

who committed war crimes and crimes against humanity, collect the evidence, and pass judgments.

In closing, both the international community and victims of the present aggression need the tribunal. It is perhaps late, but it is never too late.

In addition, the tribunal should step over its *ad hoc* character and become a permanent international legal institution. In that capacity, it will stand as a warning for future dictators and war criminals, and as a pillar of the international legal order.