

Foreword

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FOREWORD

Professor Barry Kellman

It takes a unique brand of tenacity to pioneer a permanent accountability mechanism for humanity's worst criminals. Before Nuremberg, political leaders were not prosecuted for genocide or war crimes; in the decades since, a half dozen investigative commissions and fewer ad hoc tribunals have been established but without overwhelming accomplishments. Even the most notable success—the Commission investigating war crimes in the former Yugoslavia and the criminal tribunal which followed it—met constant resistance. The lesson here is flagrant: the darkest spot in Hell is the only justice that abominable villains need fear; on this Earth, they have pretty much gotten a free ride. To change this immutable law of history is tantamount to tilting at windmills, and devoting an entire career to such a chimerical quest entails myriad frustrations.

There is another dimension of tenacity: a refusal to forget. But retention of history's sordid experience flies in the face of a diplomatic willingness to let bygones be bygones, to not dredge up the horrors of the past. It rejects the proposition that impunity may be a necessary element of a peace settlement, asserting instead that ending conflict by disregarding victims sets the conditions for a new cycle of violence. But remembering those victims, giving them a chance to tell their stories, and imposing the burden of responsibility on the victimizers is the only true foundation for justice, and without justice there can be no lasting peace.

Beyond coping with frustrations and remembering victims, there is yet another dimension of tenacity that is necessary for the campaign to establish an international criminal court: strict attention to meticulous legal detail. This dimension of tenacity is not at all quixotic, it is scholarly. Too much is at stake and the political implications are too deeply rooted for the establishment of an international criminal court to be guided by moral commitment alone. In this connection, the campaign for justice is not a straightforward assertion of good versus evil; difficult questions require intense analysis reconciling demands from diverse legal systems and interests.

This issue of the *DePaul Law Review* is dedicated to Cherif Bassiouni's tenacious thirty-year efforts to establish an international criminal court ("ICC"). These efforts will, of course, be successful. There will be an ICC because ever-evolving globalization cannot tolerate rampant criminality. The appeal of free-wheeling lawlessness and bombastic nationalism may serve the partisan agenda of neo-isolationists, but profound social and economic forces make an ICC imperative. Bassiouni's contribution is to have shaped the ICC's conceptual architecture, thereby accelerating the ICC's formation by a few decades. Moreover, he has encouraged a phalanx of legal scholars, themselves horrified at the incessant torrent of murder, rape, and exploitation, to devote their intellectual energy to an ICC.

Among legal intelligentsia, not imitation but elaboration is the sincerest form of flattery. And thus the *Review* has not chosen to print opulent homages to Bassiouni but to publish independent works of scholarship which profoundly contribute in their own right to the cause of international justice.

Michael Scharf, perhaps the leading young scholar in the field of international criminal justice, discusses the range of enforcement measures potentially available to the ICC. Scharf recognizes both that the ICC must often rely on the voluntary cooperation of the very governments whose officials and personnel it seeks to prosecute and that a substantial amount of money is needed to enforce international justice. He also acknowledges that the difficulties of employing enforcement mechanisms faced by the International Criminal Tribunal for the former Yugoslavia should caution against inflated hopes for the ICC. Yet, the international community has an impressive arsenal of indirect enforcement mechanisms that could empower the ICC if the political will exists to back them up.

Leila Nadya Sadat discusses article 10 of the draft ICC Statute which preserves the role of custom in developing normative standards of international criminal justice. Because the crimes within the ICC's prospective jurisdiction are narrowly defined, concerns arose that, absent article 10, the Statute's elucidations of substantive criminal law had codified customary international law generally. Because national courts will remain the principle vehicles of international criminal law enforcement even after formation of the ICC, the drafters included article 10 so that the restrictive definitions applicable to the international court's jurisdiction need not be a constraint. National courts can consider the provisions of the ICC Statute as an indicator of customary international law, but the drafters recognized that there exists

a larger body of international humanitarian law alongside the Rome Statute.

From a humanitarian perspective, the twentieth century was the historical nadir, leaving to this generation the task of raising criminal justice from the ashes. No one person can perform this task alone nor even symbolize its performance. It is the work, after all, which is significant, not the individual. In this sense, these articles by Michael Scharf and Leila Sadat indicate how fortunate Bassiouni is to have an enormous body of work surrounding and embellishing his own. By enlarging that body of work, this issue of the *DePaul Law Review* offers a most appropriate dedication.

