Introduction

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INTRODUCTION

Judge Edward D. Re*

It was with great pleasure that I accepted the invitation of the editors of the St. John's Journal of Legal Commentary to write an introduction to this special issue of the Journal. The Articles and Notes published in this special issue, which discuss and examine the legal aspects of the horrors of war crimes in the 1990's, are undoubtedly a valuable addition to the literature on this important area of international law.

The present discussion of war crimes, reminiscent of some of the unspeakable atrocities and gross human rights violations of the World War II era, once again highlights the responsibility of the world community to respect, promote and protect the human

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rights of the individual. Clearly, the subject of these incisive articles deals with gross human rights violations that cannot be ignored in a civilized world dedicated to the protection of fundamental human rights.

The necessity of discussing recent war crimes consisting of gross human rights violations in 1998 is indeed tragic. It is ironic that this year marks the 50th Anniversary of the adoption of the Universal Declaration of Human Rights by the General Assembly of the United Nations. The specter of war crimes, however, mars the great progress that has been made in achieving the fundamental principles of human rights and fundamental freedoms that it proclaims. Upon its adoption on December 10, 1948, the Declaration was hailed as a "common standard of achievement for all peoples and for all nations."¹ Indeed, high hopes were expressed that the Declaration would soon become a Magna Carta for all throughout the world.

The subject of this special issue of the Journal treats a major failure of the hopes and efforts of those who worked tirelessly to achieve a world of peace and justice in which an international law of human rights would prevail and prevent the recurrence of past outrages against human dignity. Any discussion of the subject of war crimes would be woefully incomplete without an examination of their relation to the burning issue of gross international human rights violations.² Although the subject of war crimes deals with violations of fundamental human rights, it cannot be forgotten that they are now clearly acknowledged and are being prosecuted as violations of fundamental human rights.

These gross violations of human rights, however, cannot obscure the progress that has been made since the founding of the United Nations. Notwithstanding failures and unfulfilled expectations, one must view with satisfaction and confidence the emergence of a human rights awareness and an international law of

² See Annual Human Rights Reports submitted to the Congress by the Department of State in compliance with sections 116(d)(1) and 502B(b) of the Foreign Assistance Act of 1961, as amended, and Section 505(c) of the Trade Act of 1974, as amended (on file with author).
human rights. This body of human rights law, which deals with the promotion and protection of human rights, owes much to the Declaration and the United Nations Human Rights system that has developed. Indeed, in 1993, at the United Nations Conference on Human Rights, more than one hundred nations reaffirmed "their commitment to the purposes and principles contained in the Charter of the United Nations and the Universal Declaration of Human Rights."

Without minimizing prior efforts to affirm and solemnly declare the human rights of the individual, the turning point for the effective promotion and observance of human rights was the Charter of the United Nations. Followed by the adoption of the Universal Declaration of Human Rights, the Covenant on Political and Civil Rights and the Covenant on Social and Economic Rights, the United Nations succeeded in establishing a new international juridical order. This new international order altered the sovereign status of nation-states and their responsibilities to the individual.

As a result of the unprecedented concern for human rights, nations were obliged to acknowledge the inherent dignity of the individual and fundamental human rights and freedoms. The unfettered sovereignty of states was irrevocably eroded, and the duty of the state to promote and observe human rights was solemnly proclaimed. No longer were sovereign states the sole subjects of international law and the individual merely an "object."

It must be stressed that the very notion of the existence of human rights of individuals necessarily implies a restriction or limitation upon the sovereign power of states and governments. The American Declaration of Independence, after proclaiming as self-evident truths certain "unalienable rights," declares that governments are instituted to "secure these Rights." For the United States, therefore, to protect or guarantee fundamental human rights is to be faithful to its founding document and the Bill of

3 For a general discussion, see materials in International Human Rights in Context (Henry J. Steiner & Philip Alston eds., 1996).
5 Id.
Rights of the Constitution which gave legal status to the moral rights proclaimed in the Declaration of Independence. Much of this American political philosophy undoubtedly influenced the Universal Declaration of Human Rights.⁶

The founding of the United Nations resulted in establishing a new international legal environment in which human rights assumed unprecedented importance. Our present efforts, therefore, are not merely to proclaim or assert the existence of fundamental rights and freedoms to which human beings are entitled, but rather, to strengthen the legal enforcement institutions and mechanisms that must exist to give these rights vitality as enforceable legal rights.⁷

The United Nations Commission on Human Rights, presented the "Universal Declaration of Human Rights" to the General Assembly at its 1948 meeting in Paris and it was overwhelmingly approved by the General Assembly on December 10, 1948. Although past declarations of rights were usually to remedy specific abuses or grievances, the Universal Declaration of Human Rights is the first all-embracing official codification of human rights. It encompassed a broad range of human rights, and was the first concrete step to fulfill the pledge of the Charter to "promote universal respect for, and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language or religion."

Although not a legally binding treaty, the Declaration is an "authoritative interpretation" of the human rights provisions of the Charter and served to awaken the world to a "human rights conscience."⁸ It was no longer subject to question that international protection was to be granted to all individuals, and that the international community would no longer tolerate gross human rights

⁶ See Louis Henkin, Rights: American and Human, 79 COLUM. L. REV. 405, 415 (1979) ("[m]ost of the Universal Declaration of Human Rights, and later the International Covenant on Civil and Political Rights, are in their essence American constitutional rights projected around the world").
⁸ Eleanor Roosevelt, General Assembly Adopts Declaration of Human Rights, 19 DEPT. OF STATE BULL. 751 (1948).
abuses, or discriminate on account of "race, sex, language or religion."^9

The articles in this issue of the St. John's Journal of Legal Commentary facilitate an informed discussion not only of the crimes themselves but also of the remedial devices and procedures on how best to effectuate the goals of the international community in protecting fundamental human rights during armed conflict. The articles reflect a variety of viewpoints. They express the views of human rights' activists, academicians, as well as those persons who have had actual experience in dealing with the horrors and tragedies that occurred in recent armed conflicts.

Mr. Mark R. von Sternberg, a veteran human rights activist, in his article “Yugoslavian War Crimes and the Search for a New Humanitarian World Order: The Case of Dusko Tadic,” has offered his thoughts on jurisprudential aspects of the recent conflicts which have brought to the forefront the gross human rights violations that still occur in armed conflicts. Mr. von Sternberg applies the international norm or principle of *jus cogens*^10 to sustain the legitimacy and validity of international tribunals convened to prosecute the human rights violators. Specifically, he notes that the jurisdiction of the tribunals established to prosecute the violators is consistent with the principles of international law under the doctrine of “universal jurisdiction.” In essence, the argument focuses on the legitimacy of such an undertaking by the international community, and he notes that universal condemnation of certain acts confers universal jurisdiction over the offenders.

Professor Joseph L. Falvey, Jr., in his article “Criminal Sexual Conduct as a Violation of International Humanitarian Law,” offers a helpful analysis of the appropriate procedure to prosecute crimes of sexual violence which are committed during armed conflict. Crimes of sexual violence, a tragic by-product of many armed conflicts, have received much international attention and condem-

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^9 See *Universal Declaration of Human Rights*, supra note 1, arts. 2, 3, 7.

nation especially with the frequent reports of genocidal rape campaigns undertaken in the tragic conflict in the former Yugoslavia. Professor Falvey suggests consideration of Michigan's Crimes of Sexual Violence statute as a model for the prosecution of sexual offenses committed in armed conflicts. The statute, which is in effect in the State of Michigan, removes many of the traditional obstacles in a criminal sexual conduct prosecution. He notes that focusing attention on the acts of the perpetrators, rather than on any perceived acquiescence on the part of the victims, is consistent with basic principles of jurisprudence in this area.

Professor Terri Day has written a poignant essay on her experience traveling to the former Yugoslavia. Her article, entitled "Ode to Sarajevo: 'Where Have All the People Gone?'" starts with the words: "I took a journey across the ocean to a City, still beautiful despite the ravages of war . . . ." There reference is to her journey to Sarajevo where she presented a paper at a Conference sponsored by U.N.E.S.C.O. just prior to their first free elections. She describes the despair experienced by many who participated in the conflict, and by those who suffered the horrors of the widespread war crimes that occurred. Drawing an analogy to the Jewish experience of the monstrous atrocities during World War II, she quotes the moving words of the 1986 Nobel Peace Prize recipient Elie Wiesel: "How can I describe to you what I myself cannot understand."

Major Peter H. Sennett and Lieutenant Commander Gregory P. Noone, in their contribution "Working with Rwanda Toward the Domestic Prosecution of Genocide Crimes," discuss their experience in Rwanda and their efforts to help develop effective mechanisms for the Rwandans to prosecute war criminals within their own criminal justice system. Their essay commences by providing a helpful historical background to the armed conflict. This factual orientation is often overlooked in a presentation of the abuses of the conflict that must be understood in any effort to resolve the armed conflict. They note the difficulties experienced in their effort to assist the Rwandans bring order to their system to enable them effectively to prosecute war criminals. They express the belief of their delegation that the most effective way for Rwanda to heal from the bloody conflict was to handle these matters in accordance with their judicial system without the excessive infusion of other legal systems. The authors left the region praising the
efforts of the Rwandan people for what they were able to accomplish in their effort to restore order to the region.

Finally, Mr. William M. Walker, in "Making Rapists Pay: Lessons from the Bosnian Civil War," provides an overview of some common problems faced in the aftermath of the conflict in the former Yugoslavia. While mindful of many practical difficulties and concerns facing the International Criminal Tribunal, he is highly critical of the lack of enforcement measures. He is especially critical of the methods of bringing those indicted into custody, and providing adequate safeguards for victims and witnesses who may be intimidated and not provide crucial testimony. Mr. Walker aptly points out that until enforcement mechanisms are enhanced, the Tribunal will not accomplish its goals of providing an effective forum to prosecute war criminals and to deter future war crimes.

The discussions of the gross human rights violations in these articles on war crimes are a sobering reminder of what remains to be done to achieve the ideals and goals of the Universal Declaration. As we commemorate the enactment of the Declaration these articles make possible a more objective evaluation of the progress that has been made since 1948. They chronicle some of the failures and difficulties that must still be surmounted to achieve the fundamental human rights and freedoms set forth in that monumental Declaration. May the articles in this special issue help promote enlightened discussion and understanding to reinvigorate a noble cause truly in the interest of the entire human family.
