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Morris, Virginia, and Michael P. Scharf. *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia. A Documentary History and Analysis* (2 vols.). Irvington-on-Hudson, NY: Transnational Publishers, Inc., 1995. Pp. xxiii, 487; ix, 691. Index. \$165.

Bassiouni, M. Cherif and Peter Manikas. *The Law of the International Criminal Tribunal for the Former Yugoslavia*. New York: Transnational Publishers, 1996. Pp. xxxiii, 1071. Index. \$135.

Writing a commentary on the Statute of a new and innovative legal institution constitutes a daunting task. In the absence of binding precedents, jurisprudential authority must be substituted by a more subjective analysis. This is even more so in the case of the International Criminal Tribunal for the Former Yugoslavia (ICTFY), which has lived in an ambience of uncertainty since its creation. But the authors of these two commentaries seem well placed for such an enterprise: Virginia Morris and Michael Scharf took part in the drafting of the Statute as, respectively, member of the United Nations Office of Legal Affairs and Attorney-Advisor for United Nations Affairs at the State Department. Professor Cherif Bassiouni might even be thought by some to be the *spiritus rector* of the project: a renowned expert on international criminal law and long-time advocate of an international criminal court, he served as chairman of the Commission of Experts, the forerunner of the Tribunal.

The two commentaries take completely different approaches. In their 'insider's guide', Virginia Morris and Michael Scharf concentrate on the drafting history. They largely limit themselves to the citation of official documents and the Nuremberg precedent, thus giving their work more the air of an 'official history' than an 'insider's guide'. The scholarly literature on international criminal law, though listed in the bibliography, is not digested in the text, neither are the proposals for the Statute. The first volume contains brief introductions to the his-

tory of international criminal law and the Yugoslav conflict. The main part of the book, about 300 pages, consists of an article-by-article commentary on the Statute. The remainder comprises a brief conclusion, an index, an extensive bibliography and a comparative chart of the eighteen proposals for the Statute.

Professor Bassiouni's project is more ambitious. He analyses the ICTFY law against the background of the development of comparative and international criminal law. The articles on jurisdiction are followed by the relevant passages of the Secretary-General's report, the report of the Commission of Experts, and comments to the International Law Commission's 1991 Draft Code of Crimes against Peace and the Security of Mankind. Two (very informative) special sections explain the criminal classification of rape/sexual assault and the practice of 'ethnic cleansing'. The Rules of Procedure and Evidence, the Rules of Detention and other secondary sources are also analysed briefly. The bibliography is large, though unedited. The comments are of uneven quality. At times Bassiouni only cites more or less authoritative sources of a primary or secondary character, at other times his comments are largely his own. Sometimes he keeps to the principle of an article-by-article commentary – though not in numerical order – sometimes he departs from it.

One of the conundrums for every legal commentator of the Yugoslav conflict is how to deal with history. Morris and Scharf's treatment is limited to a mere few pages. They simply omit the troublesome history of Yugoslavia's creation after World War I and praise Tito's Yugoslavia, without the slightest critical overtone. Fortunately, this historical blunder seems not to have affected the other parts of the commentary. Professor Bassiouni's collaborator Peter Manikas goes into much greater detail, literally beginning with the Stone Age. The following 64 pages contain highly relevant and basically fair information on the historical background of the conflict, though his unequivocal support for the idea of the Tribunal

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might prevent him on occasion from a more balanced assessment of his subject.

Both commentaries give extensive accounts of the drafting history of the Statute. But only Professor Bassiouni problematizes the 'quasi-legislation' by the Security Council and the delegation of the drafting of the Rules of Procedure of Evidence (RPE) to the Tribunal itself. As to the former, he pleads convincingly for an interpretation of the jurisdictional articles of the Statute not as an innovative codification, but as references to existing customary and treaty law on the matter. As to the latter, Professor Bassiouni is not uncritical of the direct effect of international legislation on individuals, drafted as it were by governments or judges. Nevertheless, his account of the RPE is largely positive. He does raise concerns, however, about the lack of resources for translation and interpretation facilities for the defence and expert witnesses, and the lack of concrete standards for indictments and evidence. Some of these issues have indeed played an important role in the jurisprudence of the Tribunal.¹

Professor Bassiouni also considers the problematic aspects of the international administration of justice. Traditional international criminal law relies (with the notable exception of the Genocide Convention) on national, 'indirect' enforcement. Therefore, the conventions codifying it cannot easily serve as a code of substantive criminal law. This lack of a 'general part' must be filled either by customary law or by the application of domestic law. Professor Bassiouni argues for the latter, but although he reproduces part of the Yugoslav Criminal Code, he does not explain how he intends to apply it. As far as its procedure is concerned, the Tribunal must develop its own mix of civil and common law traditions, which has proven to be no easy task.² Professor Bas-

siouni's comments are largely based on common law, mainly US law. From a civil law perspective, his suggestion that the standard of *nullum crimen, nulla poena sine lege*, should be lowered to *nullum crimen sine iure*, is, to say the least, problematic, especially when it leads him to the acceptance of an interpretation by analogy in criminal law.

The commentaries have already been cited extensively in the ICTFY jurisprudence, especially in the *Tadic* judgment.³ Whereas Morris and Scharf seem to agree with the uneasy introduction of the category of 'mixed conflicts' of a partly international, partly internal character by the Appeals Chamber,⁴ Professor Bassiouni's cautious pleading in favour of a characterization of the whole conflict as international is remarkable. In view of the *Erdemovic* judgment,⁵ extensive account in both commentaries of the problematic character of Art. 7 para. 4 of the Statute, which only allows for 'mitigating circumstances' when a soldier acted on superior orders, is of particular interest.

Unfortunately, both commentaries suffer from insufficient editing. Generally, their references are extensive, but not always reliable. In Professor Bassiouni's case, the continuous references to the author himself in his diverse capacities are as disturbing as the lengthy quotations from other works, including his own. At times, the volume seems more like an unedited collection of diverse materials than a smoothly-flowing, new text. Neither of the commentaries are always precise in their terminology. Thus, Morris and Scharf claim that Croatia has acceded to the Geneva Convention and the Additional Protocols. In fact, Croatia has declared its succession to their ratification by the former Yugoslavia. In Professor Bassiouni's case, there is some confusion between the respec-

1 For an overview, see Patel King and La Rosa, 'The Jurisprudence of the Yugoslavia Tribunal: 1994-1996', 8 *EJIL* (1997) 123.

2 See Yee, 'The Erdemovic Sentencing Judgement: A Questionable Milestone for the International Criminal Tribunal for the Former Yugoslavia', 26 *Georgia Journal of International and Comparative Law* (1997) 263. As of 15 July 1997, the Appeals Chamber is currently reviewing the matter.

3 Case No. 94-1-T, Judgment of 7 May 1997 (Trial Chamber II).

4 *Tadic* case, Interlocutory Judgment, Decision of 2 October 1995, Case No. IT-94-1-AR 72, at paras. 72 *et seq.*, but cf. the Separate Opinions of Judges Li (reg. page 6404 *et seq.*, at paras. 14 *et seq.*) and Abi-Saab (reg. page 6397 *et seq.*).

5 Case No. IT-96-22-T, judgment of 29 November 1996.

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tive roles of the ICJ as the organ for interstate complaints and the ICTFY as Tribunal for individuals. In the same vein, he fails to distinguish clearly between the obligatory nature of the statute and the self-executing effect of some of its provisions. Whereas the former is not subject to serious doubt, the latter is currently hotly contested in the *Blaskic* case.⁶

Both commentaries provide extensive documentation. Professor Bassiouni reproduces a large part of the summaries and conclusions of the Commission of Experts. In the article-by-article part, he consistently quotes the Secretary-General's report, the Tribunal's first annual report and diverse comments on the respective parts of the ILC draft. In addition, he provides a translation of the military regulations of the former Yugoslavia (with the original text) and excerpts from its Criminal Code (without the original). All this documentation is inserted in the text or annexed to certain parts of it, which makes it difficult to find. Morris and Scharf have done better by publishing the documentation in a separate volume. Their extensive documentation contains the UN Secretary-General's report, Tribunal documents, the relevant Security Council resolutions including the Council's debates, the proposals for the Statute, and the Nuremberg Statute and rules. Some of these documents are not easily accessible, and their practical value cannot be overstated.

Given the complexity of the task, perfection could not be expected. For those whose interest lies more in criminal law aspects, Professor Bassiouni's commentary is the more useful; those more interested in international law, the drafting history and documentation will be better served by Morris and Scharf.

The jury is still out on whether the Tribunal will be considered as a first step towards the establishment of a permanent court with a considerable role in the administration of criminal justice or whether it will remain an idealistic footnote to the gruesome history of the Yugoslav conflict. Both Morris and Scharf and Professor Bassiouni have made important contributions to strengthening the

former viewpoint with a more dependable legal basis.

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Mendlovitz, Saul and Burns H. Weston (eds.). *Preferred Futures for the United Nations*. New York: Transnational Publishers, 1995. Pp. ix, 505. Index. \$75.

It is not fashionable today to promote a movement for a just world order. Suggesting, however, that a reformed United Nations should play a central part in a project aimed at humane global governance will probably situate you somewhere between the stern adherents to utopian world order fantasies, post Second World War idealists and 1970s world economic enthusiasts – in other words, beyond the pale. In an intellectual climate where cynicism and timidity mixes with hard-balled pragmatism to create a shoulder-shrugging malaise, the editors of this volume remain unintimidated and unconvinced. On the occasion of the United Nations 50th anniversary, they organized a symposium at the University of Iowa, with the aim of undertaking a fundamental reconsideration of the United Nations. As the sole intergovernmental institution with global jurisdiction authorized to address the entire human rights agenda, the UN has the potential, according to the authors, to be the institutional centrepiece of a system of humane global governance. The selection of articles reproduced in this volume formed the preparatory reading for the symposium.

With David Kennedy's 'A New World Order: Yesterday, Today, and Tomorrow', the book begins with a sceptic's perspective: every now and again a new generation of international law enthusiasts enters the scene and criticizes the mainstream with the same set of renewable ideas, stylizing themselves as mavericks, just as their predecessors did. The question, however, is not what will further the international order, but which 'international' to further. Kennedy favours an international melting into the local, focusing on the order that structures civil society within and among states and showing an interest in particular redistributive strug-

6 Case No. IT-95-14-PT, see Orders of 28 February and 7 March.