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THE CONTRIBUTION OF THE AD HOC TRIBUNALS TO INTERNATIONAL HUMANITARIAN LAW

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MODERATOR—ROBERT K. GOLDMAN

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PANEL INTRODUCTION

MODERATOR, ROBERT K. GOLDMAN
 PROFESSOR OF LAW, WASHINGTON COLLEGE OF LAW

Ladies and gentlemen, we are going to start this afternoon's session. My name is Bob Goldman. I teach here at the Washington College of Law. I am also Co-Director of the Center for Human Rights and Humanitarian Law.

This panel is entitled "The Contribution of Ad Hoc Tribunals to International Humanitarian Law." We have a fine group of people to talk about this subject today. As you know, there have been some slight changes in the program. Unfortunately, Georges Abi-Saab, at the last moment, was not able to attend, which puts more of a burden

on some of our other speakers. I am going to introduce them now, but it would take too long to go into the biographies of all of these people.

To my far right, that is only geographically—and there is a reason I am going to proceed geographically—is my good friend Professor Ted Meron, the Charles L. Denison Professor of Law at New York University Law School. Professor Meron is one of the outstanding legal scholars in the field of both human rights and humanitarian law. He is also the person who discovered that Shakespeare really knew how to write rules of engagement. Also to my right is Patricia Viseur-Sellers, the Legal Advisor for Gender-Related Crimes of the Office of the Prosecutor for both Tribunals.

To my left is Payam Akhavan, who also is a Legal Advisor with the Office of the Prosecutor for the two Tribunals. Finally, at my far left geographically, is my co-teacher in the law of war class here, W. Hays Parks, Special Assistant to the Judge Advocate General of the Army.

With this, I would like to ask Professor Meron to begin his remarks.

* * *

THE HAGUE TRIBUNAL: WORKING TO CLARIFY INTERNATIONAL HUMANITARIAN LAW

PRESENTATION BY THEODOR MERON

CHARLES L. DENISON PROFESSOR OF LAW, NEW YORK UNIVERSITY LAW SCHOOL

INTRODUCTION

Thank you so much, Diane, for inviting me to this important conference and to you, Bob, for your very kind remarks. It is nice to be on a program with so many good friends, including Patricia and Payam from The Hague, as well as many others. I would like to start by saying that despite all the difficult problems that the international community still faces, especially in the context of the Rome conference, there actually is good cause for some heady feeling.

In looking back at the ground-breaking achievements in international humanitarian law over the last few years—with about twenty

individuals in custody—the International Criminal Tribunal for the former Yugoslavia is no longer in danger of running out of defendants. The Hague Tribunal has issued several important decisions that clarify and give judicial interpretation to some fundamental rules of international humanitarian law.

The Rwanda Tribunal is functioning effectively, despite the problems that plagued it during the first few years of its existence. Most of the indicted persons in Rwanda are in custody. The Rwanda Tribunal also has issued an important judgment on its competence and on the Security Council's competence, under Chapter VII, to establish the tribunal. We may expect some important judgments from that tribunal this year.

Beyond this, the work of both Tribunals has demonstrated that international investigation and international prosecution of persons responsible for serious violations of international humanitarian law are possible and credible. This work has created a very positive environment for the establishment of a standing international criminal court. Equally important, these developments have given new vigor to principles of universal jurisdiction, and have encouraged at least some prosecutions by various states of persons responsible for gross violations.

The development of these institutions is ground-breaking. The Hague, Rwanda, and the prospect for a permanent tribunal, however, are actually dwarfed by the developments that have taken place during the last few years in the substantive normative aspects of international humanitarian law. There is no question that international humanitarian law has developed significantly since the atrocities in Yugoslavia began. This area of law has grown much more during these last few years than in the half-century following Nuremberg.

I would like to turn now to the question of the contribution that the Yugoslav Tribunal made to the clarification and development of international humanitarian law. There is no question that such important contributions, apart from the substantive area of international humanitarian law, also have taken place with regard to general principles of criminal law, particularly with regard to duress and superior orders. I have no doubt that before long, the Tribunal at The Hague, and perhaps also in Arusha, will make very significant contributions

to a further clarification of the very difficult concept of command responsibility.

I. DEFINING CRIMES AGAINST HUMANITY

Regarding substantive humanitarian law, the first, and perhaps foremost, contribution of The Hague Tribunal was to advance the concept of the applicability of The Hague law to non-international conflicts. The Hague Tribunal has also given a very expansive, yet credible, reading to international customary law. Clarifying crimes against humanity has been one of the Tribunal's important contributions.

In the *Tadic* case, the Tribunal confirmed that customary international law requires no nexus between crimes against humanity and a state of armed conflict. Interpreting the Statute's requirement that crimes against humanity be directed against any civilian population, the Tribunal held that such crimes must involve a course of conduct, not one particular act. The Tribunal balanced that statement by emphasizing that as long as there is a link with widespread or systematic attack against a civilian population, a single act could qualify as a crime against humanity.

Although the crimes against humanity that the Tribunal emphasized in *Tadic* can be committed only against civilian populations, the Tribunal construed the term "civilian population" very broadly. Thus, a person who commits a crime against a single person or a very small number of victims could be guilty of crimes against humanity.

The Tribunal defined "crimes against humanity" in a similar manner. The Tribunal construed Article V disjunctively. Taking this approach, the Tribunal allowed fulfillment of the requirement that acts be directed against a civilian population, if the acts are either widespread or systematic. The acts do not have to be both. The United States delegation supported the Tribunal's disjunctive approach when it submitted definitions of offenses to the Preparatory Committee in New York a few days ago.

Even more important, now that we see so many non-governmental actors, is the fact that the Tribunal is departing from the post-Second World War understanding of international law and holds that states

and non-governmental actors alike may commit crimes against humanity.

I find less persuasive, however, the Tribunal's holding in *Tadic* that all crimes against humanity, not only persecution, require discriminatory intent. The Tribunal recognized explicitly that it was departing from customary law and from the practice of the Nuremberg tribunals, which did not impose such a requirement. There was no reason, in my view, for the Tribunal to regard the more restrictive report of the Secretary General as if it were a gospel binding on it.

The Tribunal should have followed, and I hope that it might consider following in the future, the Nuremberg jurisprudence, which reflects customary international law. Establishing crimes against humanity is difficult enough without adding to the requirements imposed on the prosecution and requiring more than is necessary or justified under international customary law.

II. DETERMINATION OF WHETHER A CONFLICT IS INTERNATIONAL

A number of other decisions made at The Hague are also not entirely persuasive. I would like to turn to the trial chamber's decision of May 7, 1997 in the case of *Tadic*, which considered the question whether the conflict in Bosnia was international in character. If so, the provisions of the Geneva Conventions would apply to that conflict, as would other provisions of international humanitarian law that are applicable to such conflicts.

The majority of the Tribunal decided to resolve this question by relying on the ruling and the standards suggested by the International Court of Justice ("ICJ") in the famous *Nicaragua* case. The Hague Tribunal's application of the *Nicaragua* judgment was inappropriate, however, because the question considered by the ICJ in that case was completely different. In *Nicaragua*, the ICJ considered whether the Contras were, for legal purposes, either an organ of the United States government, or acting on behalf of the United States. If either were true, the Tribunal could attribute the acts of the Contras to the United States for purposes of state responsibility.

The nexus between attribution and the character of the conflict found in *Tadic* was, in my view, never present in ICJ's *Nicaragua* discussion. In the *Rajic* case, the trial chamber asked the prosecutor to present a brief on the attribution standard. Influenced by the *Rajic*

opinion, the court in *Tadic* accepted attribution as the gravamen of its decision, despite the fact that attribution has nothing to do with the determination of the conflict's character.

The attribution standard, I would like to add, is almost entirely absent from serious law of war literature. If you read the definitive works on the subject by people from the International Committee of the Red Cross ("ICRC") and others, you find that there is generally no mention of imputability or attribution.

To demonstrate the dangers and artificiality of the *Nicaragua* standard as applied in *Tadic*, consider a conflict in a country where practically all the fighting is done by a foreign power alongside the rebels, but where the rebels maintain their independence from the intervening country. Thus, this conflict does not satisfy the *Nicaragua* criterion. Could anyone seriously suggest, however, that this is not an international armed conflict?

III. CONSTRUCTION OF THE "GRAVE BREACHES" PROVISIONS

The Tribunal's jurisprudence on another question is one with which I am not happy. I have in mind the construction and application of the "grave breaches" provisions of the Geneva Conventions. The grave breaches, I need not tell you, are the principal crimes under the Geneva Conventions.

Because the Tribunal decided in the *Tadic* case that it could not apply the grave breaches provisions, it was in fact deprived of the core of international criminal law in cases deemed to be non-international. The Tribunal is thus tempted to raise the level of actionable violence to crimes against humanity or, perhaps in the future, to genocide. This limitation handicaps the Tribunal's ability to carry out its mandate. Some commentators have observed, and I believe they have a point, that one should not resort to such heavy artillery in the case of evil, but relatively minor, offenders.

The Tribunal could have avoided these difficulties if the appeals chamber in the *Tadic* case had agreed with the prosecutor and the United States government that the situation in Bosnia amounted to one international armed conflict, to which the grave breaches provisions of the Geneva Conventions and The Hague law applied. Instead, the appeals tribunal left the determination of the nature of the conflict in each case to the trial chambers, thus creating the potential

for a crazy quilt of situations, norms, and normative inequality between two defendants operating in the same kind of environment.

For those who do not agree that the conflict was in fact an international armed conflict, Judge Georges Abi-Saab proposed another option in *Tadic*, in his separate opinion. His proposal was for the Tribunal to include grave breaches within the customary international law, which the Tribunal was willing and ready to apply to non-international armed conflicts.

In its amicus briefs submitted in those proceedings, the United States expressed support for the notion that persons covered by common Article 3 could be considered protected persons under the Geneva Conventions. The Tribunal's enlightened vision of customary law as applicable to non-international armed conflicts, and indeed to international armed conflicts, certainly could have encompassed the grave breaches provisions of the Geneva Conventions.

The grave breaches issue presents one other problem that will continue to plague the Tribunal, and I would like to face it squarely. The grave breaches provisions describe certain acts as criminal and subject the offenders to mandatory prosecution or extradition only when those acts are committed against protected persons. The Fourth Geneva Convention defines "protected persons" as persons in the hands of a party to the conflict, of which they are not nationals. Enforcing this nationality provision literally in the Yugoslav conflict and in other similar conflicts involving the disintegration of states or political entities in one country and the resulting struggle, is the height of legalism.

Imagine, for example, that in the Israeli-Arab war in 1947-1948, both the Jews and Arabs had a common Palestinian nationality. Imagine further that the Geneva Conventions were already in place. Would you agree that it would be complete nonsense to deny protected status to those captured by the other parties in the conflict just because the groups still formally shared a nationality? Is this not also true at least to some extent in the Yugoslav situation? We must have a different interpretation of the grave breaches provisions, at least in the increasingly common situation of disintegrating states.

In light of the Geneva Conventions' protective goals, I therefore support a different interpretation of Article 4 of the Fourth Geneva Conventions—especially in situations like Yugoslavia, where the

fighting was pervasive, and where there was a history as a single state resulting in one nationality. In this instance, I would construe the requirement of a different nationality as something that can be satisfied simply by being in the hands of the adversary.

Indeed, the ICRC, in its commentary on Article 4, stated that the reason for excluding a country's own nationals from the definition of "protected persons" was to avoid interfering in the relations between the government and the governed in one country. This concern obviously is not relevant to the circumstances prevailing in the *Tadic* case, in which each ethnic group regards every other ethnic group as an enemy.

To conclude on this point, I believe that the appeals chamber could make a very important contribution by rejecting the *Nicaragua* standard, and adopting a more flexible, up-to-date interpretation of the grave breaches provisions. The question whether the conflict is international or not should be decided by common-sensical, time-tested approaches of public international law. Considerations driving this analysis include: the reality, dimensions, scope, and duration of a foreign military intervention; the direct participation by the foreign power or powers in the hostilities; the nature of the states and entities; their recognition by foreign states; the attitude of the United Nations Security Council; the relative involvement of local and foreign forces; and, generally, considerations of all the relevant strategic military factions.

Several important authorities, including Professor Pellet, for instance, citing the example of former-Yugoslavia, state clearly that it is the military intervention of a foreign power that catalyzes the conversion of a conflict from internal to international and that imputability is irrelevant here. The situation is complicated enough even without this consideration.

CONCLUSION

In concluding, let me say that it is just marvelous that, in just a few years, we have reached a stage in which we find the existence of international criminal tribunals such a natural development. We discuss the tribunals, even criticize some of their approaches or judgments, as if they have been with us for the last generation or century

Because I was critical on a limited number of aspects, let me say that overall, The Hague Tribunal, the judges, the prosecutors, and the registrars, have all done an extraordinarily effective job. They have been extremely successful and we owe them gratitude, very deep gratitude as we move forward towards the creation of a permanent criminal court.

* * *

THE DILEMMAS OF JURISPRUDENCE

PRESENTATION BY PAYAM AKHAVAN
LEGAL ADVISOR, OFFICE OF THE PROSECUTOR

INTRODUCTION

First, I want to express my honor at the invitation to attend this conference, and especially the pleasure of seeing my friend, Diane Orentlicher, again. I also would like to thank the students from the Washington College of Law who, over the past two or three years, have provided us with several outstanding legal memoranda in relation to the work we are doing.

I will speak very briefly, not so much about the substantive law of the Tribunal, but about what I see as being a central question in terms of jurisprudence—the dilemmas of jurisprudence.

I. INTERNATIONAL HUMANITARIAN LAW: REALITY V. UTOPIA

In particular, I want to use, as a starting point, a comment made by Professor Meron in an article he wrote for the 1987 issue of *The American Journal of International Law*, entitled the *Geneva Conventions as Customary Law*. I will not say it with the same eloquence as Professor Meron, but he wrote of the tendency of courts applying humanitarian law to blur the distinction between what we, in international law, call *lex feranda* and *lex lata*. There is a distinction between law as it is, and the law as it ought to be, the law as it may emerge in the future, or the law as we would like it to be.

Martti Koskenniemi, the distinguished Finnish international jurist, puts it a different way. He speaks about the tension in international legal argument between apology and utopia. He says international

law is sometimes an apology for state power based on the reality that the law is simply rules that states consent to be bound by. There is another tendency that looks at the law not in terms of power realities or state consent, but in terms of considerations of justice, humanity, and fairness, or in terms of utopia. What I would like to look at is how a judge applying humanitarian law, or rather how a judge, activist, or prosecutor, who wants to develop progressively and expand the ambit of humanitarian protection, has to take into consideration these two differing tendencies.

An instructive example is the somewhat artificial distinction between international and internal armed conflict. I recall Professor Abi-Saab saying that when a civilian individual is willfully killed in an armed conflict, whether it is international or internal, we are speaking about the same thing, the same crime. As he said, we are looking at the same man, but perhaps our spectacles are crooked so we see two men standing there. The problem, therefore, is with our spectacles, and not with the reality of the issue at hand. But, to what extent can a tribunal disregard this distinction—created by States—in favor of expanding the humanitarian protection of civilians in armed conflict?

We had, in the Rule 61 decision on Milan Martić, President of the Serbian Republic of Krajina, a case of rockets—cluster bombs—being thrown into Zagreb, killing numerous civilians, injuring many others, and destroying civilian objects in what appears to be an internal armed conflict. Subsequently, Martić made a television appearance to announce proudly that he used the bombs as a measure of reprisal against the Croats for an earlier offensive in what was then Sector West, a Serb controlled area in Croatia.

The problem we had was that while reprisals against civilians were authoritatively prohibited in Protocol I of 1977, there was a conscious decision not to include a similar prohibition in Protocol II, which regulated internal armed conflict. The exclusion of this provision, however, did not mean *a contrario* that reprisals against civilians were permissible. We were in a quandary as to how we could find an applicable norm. Again, we see the tension between the state consent view of international law and the justice oriented view, where there is an opportunity to exploit the ambiguity in the law.

This was a very peculiar situation because during the negotiation of Protocol II, many states expressly created this loophole with the desire to have a free hand to crush a rebellion or insurgency. For some reason, they believed that the standard that they would use in crushing an internal rebellion should be different than the standard they would use in an international armed conflict.

On the other hand, seven years earlier, the General Assembly unanimously adopted Resolution 2675 of 1970. Paragraph 7 of this prohibits reprisals against civilians in all circumstances, including both international and internal armed conflicts. This resolution is widely regarded as an authoritative expression of international custom. Thus, there was some inconsistency here.

Why would states say two different things seven years apart? Could it perhaps be that the delegation in 1970 in the General Assembly did not have military lawyers or experts who understood the technicalities of reprisals? Who knows? Whatever the case may be, we had this ambiguity that we tried to exploit in favor of extending the prohibition against reprisals to internal armed conflict.

Here the question was whether it is better to try to expand international humanitarian law. As we all know, this area of international law developed in a very haphazard way, in part because of the peculiar structure of the international legislative process but also, in part, because states want to create ambiguities. States want to have loopholes that do not curtail their power to use armed force. Thus, the conduct of hostilities is the area in which the greatest ambiguities exist in international humanitarian law. Correspondingly, it is the area in which the greatest opportunities for progressive clarification and development exist.

By expanding the ambit of humanitarian protection, do we risk creating a law that is more in the tendency of a utopia in the sense that it does not remotely reflect what states are actually willing to concede? Or, will the jurisprudence of the Tribunal create a *fait accompli*? Will a surreptitious legislative process arise that can be used by more progressive states in future treaty negotiations, future discussions, or future prosecutions before an international criminal court to suggest that this is the law, even if it does not strictly meet the standards of uniform and consistent practice required for a customary

norm? Or, will such judicial activism undermine the Tribunal's credibility in the eyes of States?

II. DIFFERING CONCEPTIONS OF FAIRNESS

Very quickly, I am going to move onto the issue of duress, which Professor Meron mentioned. The duress issue I think is an interesting case study, not so much in the tension between state consent or consent-oriented and justice-oriented views of international law, but rather in the intersubjectivity of trying to determine what is just. It is a reflection of how judges from different cultures and legal systems may have differing conceptions of fairness. This is especially true when international law does not provide any guidance as to the applicable norm and it is necessary to resort to policy considerations in order to resolve ambiguities.

I speak here, in the presence of Judge McDonald, who gave me a much easier time than some of the other judges did during the arguments on this issue in the *Erdemović* case, which was the first appeals case before the Tribunal. Of course, the prosecution tried to argue (and I am going to speak in the third person in order to avoid implicating myself) that international customary law stipulated that duress cannot be applicable where the underlying crime is murder. This argument had only three cases as its basis, two British and one Canadian case before the post-Second World War trials. As President Cassese said to me in wonderment and astonishment, "Mr. Prosecutor, you claim that the overwhelming weight of authority is in favor of the proposition that duress is not a defense; but, I have fourteen cases against your three!" I then had to explain why all of those fourteen cases were irrelevant and only the three should stand.

The prosecution ultimately prevailed on this issue, but on policy grounds. Judge McDonald and Judge Vohrah, with Judge Li concurring, concluded that there is no applicable norm of customary law. Additionally, they found that the only general principle deducible from various domestic legal systems was that duress mitigates the culpability of a defendant guilty of murder. This was because civil law systems allowed duress as a defense to all crimes, whereas common law systems excluded its application to murder though recognizing that it is a mitigating factor.

After stating that policy rationales should not be abandoned in favor of "slavery to logic," Judges McDonald and Vohrah found that duress would not be a defense in the narrow circumstance where the defendant was a soldier. Because of the tremendous power in the soldier's hands, and because of the fact that dying is an occupational hazard of a soldier, in this narrow instance a defense of duress should not be admissible.

President Cassese, in a vigorous dissent, concluded that this decision was wholly unacceptable because judges cannot legislate and because such resort to policy is unthinkable in a civil law system. He based his main objection on the general principle that duress applies as a defense in every instance with the exception that, in most common law jurisdictions, it does not apply to murder. Thus, the general rule should prevail and not the exception.

In addition, on policy grounds, President Cassese went on to mention a variety of hypothetical scenarios where someone, for example, in order to save the lives of ten people, may kill one person; or where someone who is asked to kill someone rather than being killed himself should be able to kill in the sense that one person would be killed anyway. He gave a variety of situations that he argued the common law cases did not cover, and which had been discussed before the court, and which would justify application of duress to murder.

Of course, the decision of Judges McDonald and Vohrah mentioned that prosecutorial discretion would be appropriate in these situations so as not to indict an individual. To use Professor Meron's example of the concentration camp victim being forced to kill a fellow inmate, the prosecutor would clearly be in a position not to indict.

Again, one sees the tension between common law and civil law notions of prosecutorial discretion and differing notions of what is a just or fair norm under such circumstances. As President Cassese said, the prosecutor in certain systems may not have such discretion and a much more categorical, less pragmatic approach towards the law may be necessary. Furthermore, this suggests that if something is wrong in principle, why try to remedy it through this sort of logically inconsistent contrivance? In short, I am just trying to outline here that there are differing conceptions of fairness among judges where international law does not provide an applicable norm. These are

some of the problems of jurisprudence with which the Tribunal will have to deal.

CONCLUSION

The impulse to expand the ambit of humanitarian law is not always a good one. Perhaps I am saying this to the wrong audience, but in certain circumstances, it can undermine humanitarian law to push the law to a point where it is not likely to be accepted by states. By states, we mean foreign ministry officials, diplomats, and so on. Additionally, in the case of "mega-crimes," such as crimes against humanity and genocide, dilution of the law may actually undermine the human rights agenda by trivializing these crimes and the historical legacy upon which they are built. In all cases, what is required is an appreciation of the context and the delicate compromises that ultimately lead to an optimal result.

* * *

EMERGING JURISPRUDENCE ON CRIMES OF SEXUAL VIOLENCE

PRESENTATION BY PATRICIA VISEUR-SELLERS

LEGAL ADVISOR FOR GENDER-RELATED CRIMES, OFFICE OF THE PROSECUTOR

INTRODUCTION

I am in a very fortunate position today. This is the first time that I have attended a conference and heard so many speakers before me speak on the topic of sexual violence in a very normative fashion. I would like to congratulate not only the speakers but also the audience for starting to understand that sexual violence under international humanitarian law is as normal as rape is in war.

When the United Nations Secretary General put together the International Criminal Tribunals for the former Yugoslavia and for Rwanda, they gave us a legal framework under which we could prosecute and investigate sexual violence. Under both statutes, "crimes against humanity" enumerates rape but, in addition, the Rwanda Tribunal went even further. Protocol II, which was incorporated under their Article 4, explicitly lists rape. Within the Yugosla-

via Tribunal, we have interpreted Article 3, which just refers to common Article 3, within our indictments, to include rape.

In addition, we have de-constructed sexual violence. As Deputy Prosecutor Mr. Muna stated before, we have been able to allege sexually violent conduct, as the *actus reus* for crimes, under a variety of other provisions of the statute. What I would like to speak about today is the emerging jurisprudence on sexual assault that is starting to appear from both Tribunals.

I. PRESENTATION OF SEXUAL VIOLENCE EVIDENCE TO THE TRIBUNALS

Most people will say, "There's been no big case yet. Where is your rape case?" I would like to ask you to look at minutiae just for a minute. Within the prosecutor's office, we can present submissions of evidence before the judges in several instances, such as in confirmation of an indictment, amendment of an indictment, and by motions—both pre-trial and during trial. Additionally, evidence is admissible during the trial and during an appellate proceeding, particularly new evidence or evidence reviewing the law. In all of those instances, the prosecutors of the Yugoslavia Tribunal have presented evidence of sexual violence before the judges, and in most of those instances, the prosecutors have presented evidence in the Rwanda Tribunal. Therefore, evidence of sexual violence has been the subject of rulings and decisions by both Tribunals.

A. Presentation of Evidence at the Indictment Stage

The first instance when evidence of sexual violence is presentable is the confirmation stage, or indictment, stage. The prosecutor must meet a *prima facie* standard in order to prevail and have an indictment confirmed. What is a *prima facie* level? Article 19 states that the judge of a trial chamber, if satisfied that the prosecutor has set forth reasonable grounds—in other words, established a *prima facie* case—shall confirm the indictment.

Upon confirmation of the Kayishema indictment, Judge Pillay, from the Rwanda Tribunal, articulated two standards by which the *prima facie* standard can be satisfied. The first test is whether the facts and circumstances would justify a reasonable or ordinarily prudent man to believe that a suspect has committed a crime. By the

second standard, a prima facie case is a credible case that, if not contradicted by the defense, would be a sufficient basis to convict the accused of the charge.

In addition, Rule 47 says that the confirming judge may confirm or dismiss each count. Based upon the prima facie standard, the ad hoc Tribunals have reviewed and confirmed over 130 counts of sexual violence within their indictments to date. This is law that judges are starting to make and that other institutions, such as the ICJ, are starting to cite. Thus, it is very important to look at this prima facie standard, because although it is less than a burden of proof, its impact is still substantial.

I would like to note two examples. The first is the *Gagovic and Others* case commonly referred to as the Foca indictment. This indictment alleges that during the takeover of the municipality of Foca a number of Muslim females were repeatedly raped while detained by Bosnian Serbs, paramilitary, and police forces.

Judge Vohrah of the International Criminal Tribunal for the former Yugoslavia ("ICTY") reviewed the prosecutor's submission in the Foca indictment, and determined that those acts of sexual violence satisfied the prima facie standard under several provisions. For example, he found that rape as a crime against humanity, and as torture within the grave breaches provisions under Article 2, as well as provisions of common Article 3 that we have charged under Article 3. Most significantly, Judge Vohrah's confirmation of the Foca indictment affirmed the prosecution's allegation of the crime of enslavement based upon evidence of sexual violence.

A second example, is the *Akayesu* case in the Rwanda Tribunal. Midway through the prosecution's presentation of evidence in that case, we moved to amend to include sexual violence. There, the prosecutor alleged that the sexual violence was evidence of genocide, crimes against humanity, and violations of Protocol II couched under Article 4 of the Rwanda Statute as rape.

In *Akayesu*, both the prosecution and the defense have rested. The evidence is currently before the court awaiting the Chamber's final judgment. Parts of the *Gagovic and Other* indictments, now known as *Kunarac*, are currently before the court as well awaiting the scheduling of a trial date. I will not comment on them further, but I think we should recognize that there has already been a judicial con-

firmation that the prosecution evidence satisfied the prima facie standard.

B. Presentation of Evidence at Rule 61 Hearings

At Rule 61 hearings, a confirmed indictment is presented to a three-judge panel. The hearing is essentially an administrative mechanism to show that a state has not complied with the indictment in terms of arrest of the accused. In addition to that, the judges may hear new evidence and then, in a type of mini-appellate procedure, the panel may re-confirm the indictment based upon reasonable grounds.

In July 1996, a panel heard a Rule 61 hearing for the Karadzic and Mladic case. Within the determination that the indictment could be re-confirmed, the court reviewed evidence of sexual violence presented by the prosecutor in the form of testimony given by an investigation commander and also one of the investigators of the sexual assault team within the Office of the Prosecutor. In addition, the judges themselves called for a presentation of oral testimony by a former member of the Commission of Experts to determine the scope of the sexual violence.

The judges considered this evidence as a basis for establishing that the accused, Mr. Karadzic and Mr. Mladic, committed the charged crimes. The testimony showed that inside camps and at other places, many women and girls being detained were raped or subjected to other forms of sexual assault by the Serbian soldiers and police, or by their agents, with the consent and complicity of the detention unit officials. On a smaller scale, many men were also the victims of rape and sexual assault by the Serbian forces. Various forms of sexual assault were practiced, including the castration of men, as well as assaults using a variety of objects, which were particularly degrading for women. The judges considered this conduct part of the reasonable grounds for reconfirming the indictment against Mr. Karadzic and Mr. Mladic.

In addition, the court went further when looking at evidence of genocide. Using Article 4(2)(b) of the Yugoslav statute, which basically incorporates the genocide Conventions, the court specifically stated that causing serious bodily or mental harm to members of a

group—genocide—occurred through inhuman treatment, torture, rape, and deportation.

This type of judicial declaration concerning sexual violence does not have a precedent. In the future, we hope that this pronouncement will be just a tiny footnote in the jurisprudence on sexual violence.

C. *Presentation of Evidence at Pretrial Motions*

In addition, evidence of sexual violence has been presented in pretrial motions. Possibly the most relevant were the witness protection motions that we already have been spoken about briefly at this conference.

Witness protection motions to the Yugoslavia Tribunal seem to fashion what I would call the sexual assault sensitivity criteria. This is not properly considered an exception, because it is not necessarily exceptional. This sensitivity criteria means that for most witnesses to get mere confidentiality—I am not speaking of anonymity—the prosecutor must show a reasonable fear for the safety of the witness or the witness' family. In terms of sexual violence, the *Tadic* witness protection decision of August 1995 stated that the Tribunal was attempting to facilitate the sexual assault witnesses' appearance at the Tribunal. In terms of confidentiality, the judge would grant these witnesses such protection measures to encourage them to come forward.

Within about a year, in the matter of Delalic, which we commonly call the *Celebici* case, the Tribunal confirmed the *Tadic* witness protection ruling. The *Celebici* decision also stated that judges reviewed the witnesses who applied for confidentiality measures, they noted, but did not entirely decide on whether there was a reasonable risk of safety for the witness and the witness' family. To facilitate testimony about sexual assaults, and because of the nature of the crime committed against them, the Chamber more readily granted confidentiality to these witnesses.

The *Celebici* decision is very important jurisprudence. We must realize that the Chamber, through grants of witness protection, is carving out a manner to facilitate the admission of a certain type of evidence. This evidence was largely absent in the prosecutions in Nuremberg and Tokyo. Interestingly, sexual assault evidence is often absent from our national prosecutions as well.

D. Presentation of Evidence at Rule 96 Motions

Another type of motion that was filed during the *Celebici* trial must be spoken about with slight hesitation. It was the first motion that the prosecutor filed actually citing Rule 96, which concerns evidence in cases of sexual assault.

During the testimony of the *Celebici* trial, one of the witnesses, during cross-examination, referred to a type of medical procedure performed on her. The prosecution filed a motion to redact that testimony, stating that it was illegal under Rule 96. In its last section, Rule 96 states that prior sexual conduct shall not be admitted. The judges conferred on this matter for what seemed to the prosecution a very long time, about six weeks. Finally, they ruled that as a special type of evidentiary rule, Rule 96 required the redaction of the evidence from the transcript in regard to this medical procedure.

This is a very interesting decision because submission of evidence usually falls under Rule 89, which allows for the admission of evidence that is relevant and probative in nature. The judges of the *Celebici* trial panel, however, said that Rule 96 was a special evidentiary rule. This ruling allows the use of Rule 89 for evidence submission, and Rule 96—to which there are no exceptions—for evidence exclusion. Therefore, the ruling that Rule 96 excluded evidence of prior sexual conduct appeared to end the debate. The policy rationale, I imagine, concerns how evidence—even through a medical procedure—of any prior sexual conduct is relevant to sexual violence that occurs during times of war.

II. SEXUAL ASSAULT JURISPRUDENCE: LESSONS FROM *TADIC*

Finally, I would just like to briefly go over the sexual assault jurisprudence from the *Tadic* case. Many people view this case, particularly the prosecution case, as something of a failure in terms of sexual violence. Being the eternal optimist, I thought it was a fabulous success. I could not wait to read it and found absolute gems and nuggets throughout it. I believe that the *Tadic* decision will be a forerunner of the richness of sexual assault jurisprudence.

I think the reason that my view differs from everyone else's is that people concentrated on the withdrawal of the rape charge by "Witness F" or the withdrawal of testimony by "Witness L." That did oc-

cur, and withdrawals of witness testimony will continue to occur in the future. That happens during normal prosecutions; sometimes witnesses, for their own reasons, do not come forward. That is something that not only the prosecution has to accept, but the defense, the judges, and the greater public as well.

The *Tadic* trial chamber heard four witnesses who spoke about sexual violence. Two were members of the medical profession, in the broadest sense; in fact, one was a veterinarian. A third witness was a victim and the final witness was what I would call a forced perpetrator-victim. We have not quite devised the word for this type of witness. I am referring to Witness H, who was granted anonymity.

The first two testimonies, medical testimonies, were from people who were determined at one of the camps. Various people came to these witnesses to tell about either their own rape, or the rape of others they knew. Importantly, these two witnesses were not eyewitnesses to any sexual violence or rapes. Thus, their testimony is technically hearsay. Nonetheless, the trial chamber permitted the evidence under Rule 89. Because the eyewitnesses thought they were speaking to medical personnel, this evidence might be inherently reliable, or, for lack of a better word, a hearsay exception.

One medical witness, Mr. Gustic, testified and the decision quotes him: "The act of rape had a terrible effect on them. They could perhaps explain it to themselves when someone stole something from them, or committed beatings or even killings; but when the rapes started, everybody in the camp, both men and women, lost hope. There was such horrible fear." The court permitted this testimony and that of another medical witness. The court found that this testimony was part of the establishment of the preliminary facts and was admissible to show that sexually violent conduct was part of the crimes that occurred within the camp.

In addition, the court subsequently heard the testimony of victim survivors of rape, but not one that Mr. Tadic himself had personally sexually violated. This testimony came from an extremely brave woman, who did not ask for any type of confidentiality or anonymity. She was very clear that she wanted the perpetrators within the camp to see her and know that she survived. She testified that during the takeover of Prijedor, Bosnian Serbs raped her at the military barracks, at her home during the search and seizure, and again after

taking her into police custody. During her subsequent internment at the Omarska camp, according to her testimony, camp guards raped her five times.

The court, in their decision, interpreted testimony of rape as evidence of discriminatory intent. The prosecutor currently is appealing this requirement of discriminatory intent in connection with crimes against humanity. I think it is very interesting, however, that the court construed the evidence to show that one's religious or ethnic background could prompt a sexual assault, and that sexual assaults of that type are evidence of discriminatory intent. I think that is an extremely important and even broad construction of how sexual violence that takes place during war and can be legal evidence of "jurisdiction elements" of international crimes.

Finally, the court heard testimony from "Witness H." This witness, as stated earlier, received anonymity. H testified that he was specifically asked to lick the bottom and suck the penis of another male detainee. In addition, H was forced to bite that detainee's testicles while the on-looking uniformed men shouted to him, "bite harder!" According to his testimony, G, a third detainee, was finally made to bite off the testicles of the victim.

Other witnesses besides H described Mr. Tadic as standing among the uniformed men. The court then considered what the culpability of Mr. Tadic would be for his acts, using 7(1) of the Yugoslav statute, which relates to direct criminal responsibility. Based on this, the court reasoned that they must determine whether Tadic's conduct, which the prosecution had proved beyond a reasonable doubt, sufficiently connected him to the crime so that liability could attach.

For precedent, the court looked at the *Mattenhaus* case, one of the subsequent trials in Nuremberg. It noted that when people worked at the camp—understanding that it was a type of criminal enterprise, and continued to perform their functions—they intended to bring about the consequences of the illegal acts. Thus, the court reasoned that Mr. Tadic was more than merely present at the scene of criminal activity; as mere presence is not sufficient, particularly if it is an ignorant or unwilling presence. The court stated that when an accused is present, participates in the beating of one person, and remains with a group as the group continues the beating, the accused should be

viewed as participating via encouragement in the second beating as well.

Therefore, Mr. Tadic was found guilty of crimes against humanity for inhumane acts under Article 3, and violations of law and customs of war for cruel treatment arising from the testicle incident. Although he did not physically touch the victims or force the perpetrators, and he did not speak a word during the incident, his more than mere presence was viewed as encouraging the activity.

This decision, and this manner of examining the evidence of sexual violence, is remarkable and straightforward. It should not be forgotten that these acts resulted in a conviction for male sexual assault under international law.

CONCLUSION

There are many cases currently before the court that will expand sexual violence jurisprudence even further. The cases of *Akeyesu*, as I stated before, will construe sexual violence in terms of genocide. The case of *Kayishema* looks at sexual violence that caused death. The case of *Furundzija*, which soon will be before the Yugoslav court, will look at the act of a commander charged with conducting an interrogation while the victim was being raped. In addition, with Mr. Kunarac, part of the Foca indictment, we will be able to look at an accused in a position of authority as a direct sexual assault perpetrator.

The importance of our jurisprudence has not been lost on either the ICJ or the European Court for Human Rights; they have already cited to us. I believe that the judges at the Rwanda and Yugoslav Tribunals should be very proud of the work to date on sexual violence jurisprudence.

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PANEL COMMENTARY

W. HAYS PARKS

SPECIAL ASSISTANT TO THE ARMY JUDGE ADVOCATE GENERAL

It is my privilege to comment on these very valuable presentations and to do so from a slightly different viewpoint. I try to look at the

larger picture of international law and its development. In my classes, I try to describe how treaty law codifies international law, more often than not, in general terms—although the participants at the time may not realize the terms they are using are going to be quite general.

Treaty law, particularly in the area of the law of war, the law of armed conflict, is notorious for codifying laws for conflicts just completed. Certainly, the major references for the Tribunal, that is the 1949 Geneva Conventions, did an excellent job of codifying law for a conflict that ended four years before.

I think—as Ben Ferencz, who is sitting here in the front row can tell you—with respect to the post-World War II war crimes tribunals, the courts in The Hague and Rwanda are engaged in the very difficult task of flushing out codified and uncodified law in many areas. Each tribunal is doing something for the first time—blazing new trails—and we should give them credit for that.

For The Hague Tribunal, the task has been made all the more difficult by a very complex set of circumstances with respect to the nature of the conflict. I would describe this as a situation beyond the wildest imagination of the most innovative author of a Jessup moot court problem. The *Tadic* case shows how they have tried to resolve many of the issues raised to date. The decisions of the courts, of course, are binding only upon the parties before them at the time and not necessarily upon nations. It is now up to governments actually to take those cases and decisions and to sort out what is of continuing precedential value to them.

In my official capacity, one of my jobs is to draft substantial portions of the new United States Joint Services Law of War Manual. It is going to be very comprehensive. I can tell you that the cases to date have been absolute gold mines of information to me. They have assisted me very substantially in my drafting.

You certainly can gather from the discussions on this panel that one may look at what has transpired as a glass half empty or a glass half full. I would suggest that in fact what we are seeing is only the beginning. The Tribunals are still waiting to adjudicate a number of cases.

If we were to look at the post-World War II tribunal process at this same relative point of time, we would see a very incomplete picture. What I am suggesting, with respect to my distinguished colleague, Professor Meron, is that I am perhaps a bit more optimistic about the progress the Tribunals have made already. I agree more with Ms. Visser-Sellers that we are finding gems and nuggets of great value in the decisions to date. They are certainly not all that we might have hoped them to be in some cases, but in other cases and other regards, their specificity has been of great value. Thus, the picture that we are looking at is still being drawn, and I recommend patience as the two Tribunals continue their very challenging and difficult task.

With respect to Mr. Akhavan's presentation, he touched on a point that I think is quite important: What is customary law? It is one thing for us as professors to talk about what customary law should be. It is quite another for a prosecutor to convince a Tribunal that in fact that point has been attained.

The easy way to talk about whether or not the 1949 Geneva Conventions are customary international law is to point out that ninety-eight percent of the nations of the world today are parties to the 1949 Geneva Conventions. Next year, these Conventions will celebrate their fiftieth anniversary. Therefore, one may infer that in fact they are customary international law.

The problem with that premise, of course, is that many nations have done nothing yet to implement the Conventions. Let me give you an example from 1990. At that time, a coalition was organizing to liberate Kuwait from the Iraqi invasion. The various parties in that coalition convened a meeting to talk about various subjects, one of which was how to handle enemy prisoners of war. The United States delegate suggested following the Geneva Conventions. The representative of another coalition country said that his country was not a party to the Conventions. Someone had to remind him that his country ratified the Conventions in 1955.

It is very important to appreciate that nations that have not been challenged by war since the time they ratified the 1949 Geneva Conventions, in many cases, have done very little to think about them. The mere ratification or accession to treaties is not necessarily an indication that nations have taken all the other steps that they are

bound to take by the Geneva Conventions to complete implementation.

One value of the ad hoc tribunals has been the assessment of exactly what customary law is, and what it is not. They are separating the wheat from the chaff. One may not always agree, and certainly not all of the judges have agreed in all the cases, but the decisions to date have advanced our understanding of which parts of the law of war now constitute customary law.

I think Ms. Viseur-Sellers' presentation is extremely important. We were talking before the panel began and I have searched in my mind to try to figure out why the post-World War II tribunals and the drafters of the 1949 Geneva Conventions said virtually nothing about sexual assault. You will not find the word "rape" anywhere in most of these documents; it is simply not there. The only thing I can figure is that half a century ago, modesty prevented its use. I think that we are emerging from that modesty and I think the work that she is doing is extremely important. Sexual violence during times of war is something that has to be on the table; it is something that has to be recognized. I commend her for her work.

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ROBERT K. GOLDMAN

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Before I open the time remaining for questions, I want to make a couple of observations myself.

This panel has dealt primarily with the contributions of the work of the Tribunals to international humanitarian law. It is also important to realize, as Patricia mentioned to some extent, that the Tribunals are having an impact on the development and interpretation of human rights law. I was struck by, for instance, Payam's discussion about the problem of dealing with the absence of an express prohibition against reprisals against civilians. Obviously, there is the notion in human rights law that no person can ever be subject to summary execution, and certainly not by a state or its agent.

Coincidentally, my colleague Dean Grossman and I are members of the Inter-American Commission on Human Rights ("Commission"), and we have been following very closely the work of the Tribunals. Spurred on by some of the progressive developments and in-

terpretations as well as its own convictions, the Commission, in a series of cases last year, determined that it had clear competence to directly apply rules of international humanitarian law. Additionally, the Commission determined its competence to find violations of humanitarian rules as well. Finally, the Commission may interpret articles in the American Conventions on Human Rights by reference to definitional standards in humanitarian law, such as distinctions as to who are civilians and who are combatants.

Increasingly, the Commission is receiving complaints arising from the Andean region and Mexico. The Commission is faced with the task of how to characterize conflicts in these countries, and dealing with complaints, alleging deaths and injury to civilians arising out of the conduct of military operations. The only way the Commission has been able to do these tasks is to look to the appropriate definitional standards found in humanitarian law. These standards allow distinctions based on, for instance, whether an attack was permissible under the circumstances, or whether the person attacked was actively participating in hostilities at the time.

The Commission has followed the Tribunals's jurisprudence, and it has weighed heavily in our deliberations in these areas. Moreover, the Commission is taking its cue from that part of the *Tadic* case, which indicated that it is nonsensical to think that common Article 3 and Protocol II conflicts the fundamental rules of Hague law governing the conduct of hostilities somehow do not apply.

Two other developments are extremely important. Whether or not one agrees that the grave breaches provisions of the Geneva Conventions apply or should apply to internal conflicts, to me what was most important was what was done in the *Tadic* case when the appellate chamber held that serious violations of common Article 3 and Protocol II entail individual criminal responsibility and therefore subject the perpetrators to individual liability.

The Commission, as many of you know, was the first international organization to clearly declare amnesties for serious violations of human rights—such as murder, torture, and enforced disappearances—to be in violation of the American Convention. Implicitly, the Convention requires ensuring that, through appropriate remedies, the perpetrators of human rights violations—state agents—be subjected to individual criminal investigation, tried, and punished. Con-

sistent with the Convention, measures of clemency should be given only after such punishment.

I would note to you today one historic thing that happened last week, when the Parliament of Argentina voted to repeal the amnesty laws that were voted by the parliament in the late 1980s during democratic regimes. This vote is a first, and is certainly an act that the Commission will probably commend to others.

The work of the ICTY has established individual criminal responsibility for serious violations of rules of international humanitarian law are applicable to non-international armed conflicts. Moreover, the International Committee of the Red Cross's written communication to the Tribunal's prosecutor indicates that Article 6 of Protocol II, which allows the broadest possible amnesty at the conclusion of hostilities, cannot cover serious violations of international humanitarian law. The combination of these actions makes it easier for the Commission to tell states, particularly states in this hemisphere continuing to engage in internal armed conflict: "Not only must you stop illicit conduct, you must sanction it. And, at the conclusion of hostilities, you cannot give an amnesty to state agents or to members of dissident armed groups that committed serious violations of international humanitarian law."

I want to say on my own, and on behalf of my colleagues on the Commission, that we are grateful for the work of the Tribunals; it is having an impact. We routinely review the cases decided by the Tribunal and cite its jurisprudence in new decisions of the Commission.

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AUDIENCE QUESTIONS

AUDIENCE MEMBER: Professor Meron alluded to the importance of the Tribunals' jurisprudence—not just in terms of humanitarian law, but international law as well—when he referred to the Commission's affirmation of its jurisdiction and competence. This is essentially a judgment about what the Security Council did when it established the Tribunals. My question for Professor Meron, and anyone else, is: Could you comment on that in a little bit more detail because that has rather serious implications for the international law system as a whole. The International Court of Justice ("ICJ"), for example, is

potentially facing the same issue in the Pan Am 103 case, and one can imagine that the issue could arise in other situations both before the ICJ and other bodies. Some scholars have argued that tribunals, such as the ICTY or the ICJ, are not competent to judge the validity of Security Council action.

PROFESSOR MERON: I said that the Hague Tribunal was perhaps not enthused about being given the task of examining the Security Council's competence in establishing the Tribunals, but it was compelled to do so by Mr. Wladimiroff.

The Tribunal, I think, adopted an extremely important decision by discussing those questions in a very reasoned and scholarly way. Its conclusion, that the Security Council may establish tribunals of this kind in situations involving Chapter VII, is actually limited in scope.

With recognition by the international community that gross violations of human rights or humanitarian law pose a threat to international peace, it falls within the power of the Security Council to create ad hoc tribunals. You will recall that one of the provisions of the draft statute of the international criminal court—this is a very important residual provision—allows the Security Council to confer on the future International Criminal Court (“ICC”) functions, which would actually be functions of ad hoc tribunals. We must assume that many of the rogue states will not accede to the jurisdiction of the ICC. Thus, in order to have a court with a muscle, we absolutely must reserve this capacity for the Security Council to do that.

If I may, I would just like to make a small comment on what, my friend, Hays Parks said, and relate it to what also Bob Goldman said. I really intended my review of the jurisprudence of the Hague to be very positive. The fact that I found it necessary to criticize some aspects was simply because I think it is good for any institution to hear critical comments. Especially as the appeal in the *Tadic* case will soon be heard, I think it is important to encourage the Tribunal to correct its course on important issues.

There is no question that both Hays and Bob Goldman were extremely right in saying that the impact of the Hague Tribunal on the development of the concept of customary law is extraordinarily important. The Hague Tribunal gave customary law a very expansive reading and applied Hague law to non-international armed conflicts as well.

There is a synergistic relationship between the Tribunals, between views of governments, and between views of international institutions. Were it not for the Hague Tribunal's contribution to the clarification of these issues, and for the first ever statement that common Article 3 and others are applicable in terms of criminal liability, we surely could not have had, on the 23rd of March, a statement by the United States Delegation to the Preparatory Committee on the establishment of the ICC, consisting of three points that are of extraordinary importance for the future of international law. The first was a clear statement that in the view of the United States, crimes against humanity are not dependent on a nexus with armed conflict. This is very much in line with what the Tribunal said. Second, in the view of the United States, serious violations of the customary common Article III should be the centerpiece of the ICC's jurisdiction. Third, certain rules pertaining to the conduct of hostilities must be regarded as applicable to non-international armed conflict.

It is good international law and good policy to make serious violations of such fundamental rules a part of ICC's jurisdiction. Can you imagine the United States making this statement without the background and foundation of the Hague decisions? Surely not.

AUDIENCE MEMBER: I am with the American Coalition Information Network and Advocacy Group for the Kurds in the Middle East. I want to express my appreciation for the work that you do to heal and to strengthen our humanity in the face of lapses into the abyss. Having paid you my homage in this fashion, I feel at liberty to tell you that what you have described does not just happen in "Country Y" or "Country R." Is it fair for the United Nations to pick countries R and Y and not other countries? Would it be better for countries to apply to tribunals on their own?

PROFESSOR MERON: The only point I would make is that there is an important problem of selectivity, perhaps not so much from the legal perspective, but from the moral perspective. That is one of the reasons why we are now moving from the idea of ad hoc tribunals to a permanent tribunal, which would hopefully not be based on selectivity.

MR. AKHAVAN: As someone with origins in the region—I was raised in the Middle East—I am happy that Judge McDonald mentioned the case of the Kurds—not after the war with Kuwait, when

Hussein became the bad guy during the Iran-Iraq war, but when he was the good guy. I refer here to the massacre in 1988 of several thousand Kurdish civilians by means of chemical weapons and the ambivalent response of the international community thereto.

The problem is that we are speaking about a very primitive political culture. The Yugoslavia and Rwanda Tribunals are the very early glimmerings of international justice. What you see with these cases of selective justice, for the first time in the history of the United Nations, is the gradual internalization of the notion of international accountability into a hitherto entrenched culture of impunity.

In his provocative article on the Yugoslavia Tribunal in *Foreign Affairs* some time ago, Professor Meron speaks about how humanitarian law has now entered the mainstream of decision making. This was unthinkable within the United Nations system, even just a few years ago. Additionally, as Judge Arbour mentioned during the lunch hour discussion, states are still extremely reluctant, not only about having their officials indicted, but about having their dirty laundry aired in public.

The war between Iran and Iraq lasted for eight years, and was the reflection of a very cynical policy of divide and rule. Hussein was treated, at best with indifference. At worst, he was given active support. Now we are beginning to see that the stockpile of weapons that have been destroyed, have been the very same weapons that the western powers originally supplied when the geopolitical situation was different.

When I have spoken to government officials, they are adamant about an international criminal court to cover the Kuwaiti invasion and the aftermath against the Kurds. No one, however, wants to talk about the years between 1980 and 1988, in which over one million people were killed. The fact is that an impartial investigation will necessarily implicate some of the western powers that were supplying armaments, including chemical weaponry to Saddam Hussein. My hope is that once we have established a precedent for punishing war crimes in certain situations, it will be increasingly accepted, even in the cynical mindset of international politics, that similar situations have to be treated in a similar fashion.