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## Tribunal Justice: The Challenges, The Record, and the Prospects

Nina Ban-Jensen

Tom Gjelten

Roy Gutman

Ivana Nizich

Diane F. Orentlicher

*See next page for additional authors*

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**Authors**

Nina Ban-Jensen, Tom Gjelten, Roy Gutman, Ivana Nizich, Diane F. Orentlicher, and Thomas Warrick

# TRIBUNAL JUSTICE: THE CHALLENGES, THE RECORD, AND THE PROSPECTS

NINA BANG-JENSEN  
TOM GJELTEN  
ROY GUTMAN  
IVANA NIZICH  
THOMAS WARRICK

MODERATOR—DIANE F. ORENTLICHER

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## PANEL INTRODUCTION

MODERATOR, DIANE F. ORENTLICHER  
PROFESSOR OF LAW, WASHINGTON COLLEGE OF LAW

In this final panel we are going to undertake a rather ambitious overview of the record, challenges, and accomplishments of the Yugoslavia and Rwanda Tribunals.

We are going to start with an insider's perspective from Ivana Nizich, who will address some of the key challenges that she and her colleagues confront as investigators. As I mentioned last night, those of us who have had the privilege of working with the Tribunals have discovered that their staff includes some real gems. None shines more brightly than Ivana Nizich. Many of you know Ivana from her previous work with Human Rights Watch. In that role, she became known to many as one of the preeminent experts on human rights in the former Yugoslavia.

On a more personal note, I take special pleasure in welcoming Ivana because she was a student of mine when she did her graduate work at Columbia University. But, for the last seven or eight years, she has been *my* teacher and I have learned an enormous amount from her on matters relating to war crimes committed in the former Yugoslavia.

Our next panelist will be Tom Gjelten, who has received numerous journalism awards for his coverage of the conflict in the former Yugoslavia and has been a keen observer of the Yugoslavia Tribunal.

I am delighted that Tom is with us. Those of us who were somehow involved in efforts to respond to the conflict and the atrocities in the former Yugoslavia relied on Tom's outstanding reporting, for which he has deservedly won numerous awards. Tom will offer his perspective on the impact of the Yugoslavia Tribunal on the peace process in Bosnia.

Our next speaker will be Nina Bang-Jensen, who is also well known to many of you. Nina is Special Counsel to and Advocacy Director for the Coalition for International Justice and is a superb advocate. Nina will address the subject of public perceptions of the Tribunals and why—or why not—those perceptions should play a role in defining the Tribunals' success.

I will then turn to Tom Warrick, an alumnus of the Coalition for International Justice, who is now working as deputy to Ambassador David Scheffer in the Office of War Crimes in the United States Department of State. Tom will identify some of the special challenges that are presented in investigating and prosecuting crimes of sexual assault.

Our final panelist will be Roy Gutman, who needs little introduction to those who have followed recent developments in the former Yugoslavia. It was Roy who first reported many of the crucial stories that are now the concern of war crimes tribunals: He uncovered the existence of the notorious Omarska camp, and was the first to document the targeting and liquidation of Muslim elites in Bosnia. Roy's reporting on these and other stories made it clear that the crimes that came to be known as "ethnic cleansing" were not the product of spontaneous violence, but were systematic and planned.

His dispatches from Bosnia played an important role in spurring the world to react—by, among other things, establishing the Hague Tribunal. Today, Roy will speak not about the implications for the Tribunal of the events he reported from Bosnia, but rather about the implications of the Tribunals' work for journalists.

Without further delay, I would like to turn to our distinguished panelists, beginning with Ivana.

\* \* \*

## PRESENTATION BY IVANA NIZICH

INVESTIGATOR, INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER  
YUGOSLAVIA

### INTRODUCTION

I am briefly going to speak about some of the practical aspects of investigations in the ICTY. I also hope that at least some of my remarks will bring to bear what we at the Yugoslav Tribunal face on a daily basis, and also to a certain extent what the Rwanda Tribunal faces, and what are some of the practical investigative aspects that need to be addressed by the International Criminal Court when it is formulating its day-to-day work agenda.

## I. PREPARATION IS ESSENTIAL TO MOUNTING WAR CRIMES INVESTIGATIONS

Prior to the commencement of investigations of the type of crimes with which the two Tribunals are concerned, a comprehensive review of what actually happened during the wars needs to be conducted. A general, factual overview of the crimes perpetrated by all sides will determine the investigative strategy a tribunal adopts and will influence who ultimately is indicted and prosecuted.

Oftentimes, investigators, analysts, lawyers and others are eager to prosecute a particular crime they find particularly appalling, and to immerse themselves in the particulars of that case. However, although this particular case may have involved the commission of heinous crimes, many similar—or more egregious—crimes involving higher-ranking officials or different perpetrators may also have occurred but may remain unknown to the investigative team. If such a general overview of similar crimes is made available to the investigative team, they may opt not to investigate the case they initially planned to pursue. Moreover, other considerations also affect which crimes a tribunal intends to prosecute, and investigations should not commence until all the factual-, legal-, and resource-related issues are taken into account by the Prosecutor. Indeed, without a general knowledge of events and crimes perpetrated during a war, conflict, or relevant event, one cannot properly craft an investigative strategy and allocate staff and other resources that will lead to sound indictments and successful prosecutions.

Also, many people who come to the Tribunal have never dealt with the gravity of these crimes. They come from domestic jurisdictions, having dealt with local murders and homicides, some of which are quite graphic and quite horrific, but nothing that approximates systematic ethnic cleansing, genocide, and things of this effect.

On the other hand, there are others who have been covering that conflict for five, four, three years, who have been inundated with gory stories and who have taken testimonies perpetually. Some of these people have either become subjective or cynical, viewing anything less than genocide to be a “petty crime,” if you will.

It is thus important that there is a middle ground between these two approaches; that you look at everything comprehensively and

that you approach things from a factual basis, not an emotional basis and not solely from the point of view of domestic jurisdiction.

## II. PROCEEDING TO PROSECUTION

Once you have a comprehensive view of the facts, then you can determine which cases you are going to investigate and hopefully prosecute, if the facts lend themselves to that extent.

One of the things you can look at is the type of crimes. You can focus on categories. Do you focus on rape? Do you focus just on murders? Do you focus on detention? Or, beatings in detention?

Do you focus on the egregious level of the crime? Do you focus on the aspect of the things that were the most horrific?

Another approach is a regional or perpetrator approach. Do you focus on crimes that were perpetrated in a certain region or by a certain perpetrator?

We cannot prosecute every crime and that is obvious. To a certain extent, some of the national courts in Western Europe have looked at some cases because suspects have been within their territory. The Germans are probably the most obvious case and the most active in this context.

In other circumstances, there are trials in the national jurisdiction of the former Yugoslavia and in Rwanda as well. Many of these local trials, insofar as they deal with trials of an enemy ethnic group, have serious violations of due process either inherent to the respective legal systems or in relation to the investigative, detention, or trial stages.

The ICTY is also engaged in what is known as the "rules-of-the-road agreement," which emanated from a post-Dayton meeting of relevant parties in Rome. Under the terms of this agreement, we review some of the cases that deal with war crimes in a national jurisdiction and then we decide whether or not there is sufficient evidence for a national court to continue with the prosecution of a certain case.

To a certain extent, this is an imperfect review. We obtain a dossier and basically review the paper. You have no way of corroborating whether or not what is on paper is actually accurate; but you try, to the best of your ability, to determine whether a prima facie case exists, and thus warrants further investigation or prosecution by the



national authorities. Significant resources need to be devoted to such reviews.

Insofar as we are to look at national trials, or the International Criminal Court is to look at national trials, one needs to determine the relationship between a national court and an international court dealing with war crime issues. If review of national war crimes trials is to be one of the goals of an international Tribunal—a task that, in my opinion, should only be conducted in exceptional instances—then sufficient resources must be allocated to ensure a reasonable level of confidence that a review of a local trial is adequate at the very least.

The crimes that you intend to investigate will obviously necessitate the type of perpetrators you go after. This brings us to the question of whether one prosecutes the “big fish” or the “little fish.” Do you go after a superior commander or do you go after an individual perpetrator? To a certain extent, you are going to have to combine both. In order for you to go after a commander, you have to prove that a certain crime was, in fact, perpetrated in the field. The important point is to remember that these things should be done simultaneously. While one investigation is focussing on crimes from the bottom up, others should be investigating from the “top-down,” and at some stage, the investigations will fuse.

### III. ADEQUATE RESOURCES ARE ESSENTIAL TO THE TRIBUNALS

There is also the question of resources. I think everybody has raised the question of resources in this conference, but I am going to raise it again, not just on the point of staffing. We do not only need lawyers and investigators. We also need translators and data inputters, people who can go through millions and millions of pages of documents in a foreign language. If we cannot read the language, someone has to go through huge quantities of documents to determine if any of them are of evidentiary value to a particular or potential future case; or whether, for example, the documents need to be authenticated.

### IV. STRUCTURE OF THE INVESTIGATION

The allocation of investigative staff to various cases can also become pertinent. In some instances, a group of investigators, lawyers,

researchers, analysts and others focus only on crimes perpetrated by one ethnic group. This enables them to thoroughly understand the structure of that groups' involvement in a particular area, its military and civilian command structure, and so forth.

Such an investigation structure, however, also can lead to bias on the part of some. For example, if a person is solely exposed to crimes perpetrated by one particular ethnic group, military force, or other such group, one can develop a tainted view that only one side suffered at the hands of another, or that that particular ethnic group was the sole or main victim during a war or armed conflict. One solution to such a potential problem is to have investigators focus on regions, examining crimes perpetrated by all or both sides in that area, rather than just on a single perpetrator ethnic group. In such cases, it is hoped that the investigators would be able to view a particular crime scene from all relevant points of view. The "down" side to such an approach is the fact that the perpetrator-specific expertise gathered by perpetrator-specific investigative teams may be diluted due to the spreading of already minimal resources.

A possible "middle road" may be to ensure that Team A investigating a particular ethnic or military group wherein that group is a perpetrator, keep in close contact with colleagues from Team B who work on cases wherein Team A's perpetrator group is the victim group for Team B. Contact between various investigative teams is vital in this regard, but—as indicated earlier—a general knowledge of the war itself and the crimes perpetrated therein may sensitize staff to the need to look at a particular case from several points of view, and thereby prevent bias. Moreover, the "bias issue" is not only important for effective investigation, but also for identification of evidence that may be deemed exculpatory and that may affect the determination as to whether to continue with an investigation, whether to indict and/or prosecute particular individuals, and how to anticipate a potential defense counter-argument in court.

## V. SCOPE OF THE INDICTMENT

Another issue involves the type of indictment one decides to issue—i.e., do you hope to issue an indictment that is limited, where you can easily prove the case, or do you hope to issue an indictment that encompasses larger crimes for which that person might be re-

sponsible? This may determine how broad an investigation becomes, or may lead to the end of an investigation and the issuance of an indictment.

One of the cases Payam mentioned is the *Martic* case. Some have been critical of that indictment because it focuses on crime committed by this individual in less than one-week in 1995. It does not encompass other responsibility that he may have had for crimes perpetrated from 1991 to 1995.

The positive aspect of this limited indictment approach, generally, makes it quicker and probably easier to prosecute and to obtain a conviction. However, it may result in a "partial" prosecution of crime, and may affect the historical and legal record of that person's culpability, or the culpability of the entity with which he/she was affiliated or commanded.

## VI. COMMON LAW V. CIVIL LAW

The difference in litigating a case in common and civil law traditions is, at times, an issue of comment in legal circles. However, the differences between common and civil law systems are not a primary source of concern within the investigative stages at the ICTY. What, at times, is at issue is the different emphasis placed on various elements of a case by those who come from an international law background and those who come from a law enforcement background in a national jurisdiction. Those investigators and prosecutors whose professional expertise was gained in their national jurisdictions focus on elements of a crime: how was the crime perpetrated, who were the victims, who were the perpetrators, how should the crime be categorized, will this witness help my case, and so forth? Those coming from an international law background focus on whether a conflict was international or internal, do the victims in the case fit the definition of "protected persons," can the crimes be charged as a "grave breach" of the Geneva Conventions or should the charge be limited to a violation of the laws and customs of war?

One could simplify and joke that the international law types view those from national jurisdiction law enforcement backgrounds as "Philistines who do not appreciate the complexities of adjudicating war crimes and who cannot grasp the intellectual concepts behind the legal issues at stake." Conversely, those from national law enforce-

ment expertise might view the international law proponents as "academicians who pontificate about theory that is not relevant to the case and who have never prosecuted a case in their lives and thus cannot adequately comment on what is and is not pertinent during trial." This situation should not be construed as antagonistic; indeed, it is complimentary. The points stressed by both those who come from a national law enforcement jurisdiction and international law "adherents" affect all cases investigated and prosecuted at both Tribunals. It is thus important that such a discourse take place so as to ensure that all elements of crimes over which the Tribunals have jurisdiction are met before an indictment is issued and before the case proceeds to court.

#### VII. DEFENDANT'S RIGHTS

Another issue that arises relates to the rights of the accused. During the course of an interview, it might become evident that the interviewee could become a suspect. In such an instance, at what point do you stop the interview if he or she begins to incriminate himself?

Even if it never even occurred to you that this person could have been indicted in the future, if he or she says something that does implicate him or her, do you stop the interview and ask him or her to get a lawyer, or do you continue with the interview? Do you already know, given the lack of resources, that you will never be able to indict this person anyway? If so, do you let him or her talk? Do you actually break what you are doing and ask him or her to obtain counsel?

This, again, is something that needs to be decided on an ad hoc basis, but it may become an increasingly important issue in the future.

#### VIII. INTERNATIONAL MILITARY ASSISTANCE FOR TRIBUNAL INVESTIGATIONS

Just a note about cooperation of states in our investigations. Justice Arbour mentioned Rule 70 and I need not elaborate on that further. We are also supported by various states whose military forces participate in the SFOR mission in Bosnia, most notably in providing security staff to the field, guarding some exhumation sites when necessary, and, on occasion, arresting indicted people.

However, there is sometimes a reluctance to provide such field assistance again because some military establishments do not view prosecution and apprehension of war criminals as a military responsibility or as part of their mandate under the Dayton Accords. Tina Rosenberg made this point yesterday about the United States Defense Department being leery about assisting.

To a certain extent, SFOR is very forthcoming, but in other cases, they are excessively reticent in providing assistance. An extreme example of such reticence involves the following: A colleague of mine and two other individuals had gone to a certain site where several hundred people were put into a warehouse and machine-gunned to death. Their brain matter and blood were splattered across the wall. We were collecting forensic evidence. This warehouse had been crowded with many people and the Serb forces were the perpetrators. They had taken an RPG, a rocket-propelled grenade launcher, and shot it off from a certain corner of the building, so that there was a huge gapping hole where the grenade came out in the other wall. People's body parts came out through the other side. We went out behind the building and found skull fragments and bone fragments; but as we got rid of the surface dirt, we saw that there was more underneath. We asked one of the SFOR soldiers, in this case United States troops, if we could use one of their shovels, which they have under their APCs. After a half-hour of walkie-talkie communications, we were told we could not get a shovel because it was considered "mission creep."

In addition to SFOR reticence, we are often hampered by the United Nations' bureaucracy. Indeed, Cherif Bassiouni earlier had alluded to obstacles posed by the United Nations administrative bureaucracy. We also have to go through this concerning whether or not we can get body bags, and whether or not we can get a ladder. Approval for such obvious supplies must come from New York and The Hague and this can often take days to procure. Waiting for such approval in the field results in wasted time and opportunities.

## IX. VICTIM AND WITNESS PROTECTION

I would like to turn also to the point of victims and witnesses. Much has been said about victim protection and witness protection. I do not purport to speak on behalf of the people of the former Yugo-

slavia or to say that I understand what they went through. I do not think any of us could unless we actually lived through that type of horror—especially as did the people of Rwanda. But to a certain extent, some of them are leery about what we do at The Hague. They look at us and say, “That’s fine, even if you do arrest this person and you prosecute him or her, where will they serve out their sentence, in a nice little cushy prison in Norway?” There is a lot of truth to that. There is also the question of the perversity that they might obtain lighter sentences in an international court than in a national court. For example, there is some credence to the fact that if Drazen Erdemovic was tried in a Bosnian court, he would not have received just five years for his involvement in the Srebrenica massacre. We have to be sensitive to the victims’ cynicism—which is often understandable—when we deal with the witnesses and the victims in this conflict and in other conflicts as well.

In terms of the protection afforded to witnesses and victims, it is important to delineate the type of witnesses you are dealing with in a certain instance.

You have victims, including victims of sexual abuse. You have eyewitnesses, policy witnesses, and expert witnesses who are either forensic experts, ballistics experts, or political/historical types.

One point I wanted to raise was the question of high level witnesses, people who were members of their respective governments who were testifying against their government. This has not been a major issue to date at the ICTY or at the International Criminal Tribunal for Rwanda (“ICTR”), but it could be in the future.

For example, a Croat testifying against the Croatian government or the Bosnian Croats, or a Serb testifying against the Bosnian Serbs, the Croatian Serbs or Serbs from the FRY, are viewed as people testifying against their own “kind.” If their testimony is public, they will go home, and will be smeared in the press for being traitors against the nation, enemies of their own people. They often times have the courage to defend publicly what they might say in court. It is the responsibility of the Tribunal to maintain contact with such witnesses, to make sure their safety is in fact ensured and that they and their families are not in any way harmed. In other instances, sometimes these witnesses can testify *in camera* because of their concerns for their safety, but then measures must be taken to ensure

the confidentiality of their statement before the court and also their presence at the ICTY must be kept secret.

In one such case, a witness had testified *in camera* and the prosecution had disclosed to the defense a week earlier that this person would be testifying. As is required by rules of procedures, this person's statement was forwarded to the defense. Somehow this statement was released to the Croatian Government, who then broadcast and attacked the substance all over the media in that country. This person was then publicly smeared, threatened, and harassed. We then asked the court to take some type of measure against the defense attorney because it appeared that the defense attorney indirectly or directly gave a copy to the Croatian government. The court did not do much besides issue a verbal scolding to the defense attorney. This is something that will be an issue in the future and something that the ICC should also consider. Insofar as any attorney, either the prosecution or defense, does anything to endanger or aggravate or call any attention to a witness' safety, there should be some type of punitive measures.

There are punitive measures currently in our rules of procedures, which basically entails a monetary fine. However, punitive action in such cases should be strengthened and enforced by the court or appropriate agencies. Otherwise, potentially important witnesses will not be willing to come forward to testify. This is especially true when dealing with the leadership cases.

The Tribunals must be able to convince a witness of their professionalism and ability to adequately protect witnesses, or they will not be willing to cooperate. First, you must prove to them that you know what the situation is, what the crimes were, what the background to the conflict was. You have to assure them that you can protect them and that the court will enforce any type of punitive measures or punishment if either the defense or the prosecution violates procedure.

## X. POLITICAL AND LEGAL EFFECTS OF THE TRIBUNALS

Finally, I would like to point out the political and legal implications of what we are doing at the ICTY. The legal implications are obvious to everyone here. It is a question of taking forward, enunciating, elaborating on the principles of Nuremberg. However, the po-

litical impact of what we are doing is sometimes lost even among those of us who work at the Tribunals.

By "political," I do not mean that the Bosnians, the Croats, or the Serbs are telling us who to prosecute and who to investigate. That is not an issue. It never is. There is also a question of why we are not prosecuting this person or this high-level official. Some suspect the Americans must be telling us not to do it, or that the Brits must be. That also does not go on.

However, what is political is our impact on what is going to transpire in the former Yugoslavia. First, we are there to prosecute people who are responsible for war crimes. But, some of them are still in and will continue to remain in power, until they are prosecuted and thus removed from power and incarcerated.

There is a great deal of talk about repatriation of refugees to various places in the former Yugoslavia. This is very relevant and should be advanced. However, in many cases, these people are fearful of going home because the local authorities or the republican authorities who are responsible for their expulsion, the killing of their family, the massacre of their children or their siblings or spouses are still in power. They will not go home no matter how much support SFOR or anybody else provides to them. I think we should be cognizant of that and accelerate our work, in that respect as well.

### CONCLUSION

In closing, I would raise the issue of how we measure success, what do we at the Tribunal consider to be a success in a certain individual case.

Our long-term aims would obviously be to hold individual perpetrators accountable, particularly those political and military leaders who were the master-minds of the crimes. These are people who oversaw, supported, encouraged—in fact, planned, instigated or otherwise acted in furtherance of—any of these crimes.

It also is a matter of creating a record of truth, and ascribing individual guilt and not collective guilt. I do not think we have achieved these goals quite yet. People in the former Yugoslavia still hold all Serbs or all Croats or all Muslims responsible for their own suffering.



But this is slowly changing, and the ICTY has made significant strides in the past year to accelerate our work and efforts. Until we actually hold these people responsible, until they are removed from power, refugees will not be able to go home. Restructuring of the countries of the former Yugoslavia will be impossible until those responsible for the crimes that were part of the gross destruction are removed from power and held accountable for their crimes. There will not be a sense of reconciliation and forgiveness. While we do play an important part in that respect, I also think it is a complimentary role that needs to be pursued in conjunction with monetary assistance, rebuilding of homes, assisting people in repatriation, developing a democratic society that includes a free press. The Tribunal cannot do these things, but we should be cognizant of the fact that we are a piece in that puzzle that is aimed at bringing justice to the area, not just from a judicial point of view, but also from a broader practical point of view.

\* \* \*

## PRESENTATION BY TOM GJELTEN

DIPLOMATIC CORRESPONDENT, NATIONAL PUBLIC RADIO

### INTRODUCTION

Ivana gave you an insider's perspective. My perspective will be that of an outsider in the sense that I am not personally involved in war crimes prosecutions or in advocating the process as such. Rather, I am a reporter and I am going to be speaking as a reporter here today. I am a reporter who like Roy covered the events that gave rise to the war crimes Tribunal in the former Yugoslavia and once I returned to Washington, the political debate over how to respond to those events and what to make of them.

In that sense, I am going to address the context of this entire discussion. To me, the essential thing to keep in mind is that this discussion over the record and prospects of War Crimes Tribunals has arisen in the post-Cold War era. I think two points are relevant and stand out.

The first is the change in the nature of war in the post-Cold War era: The greater extent to which civilians have become the target of military action, the much greater frequency of violations of interna-

tional humanitarian law, and the greater impunity with which those violations occur all make the issue of war crimes prosecution far more important.

The second point about conflicts in the post-Cold War era is the reluctance of great powers, particularly the United States, to intervene; or at the very least, the uncertainty of whether and when to intervene.

I think the first of these two points, underscores the increased importance of War Crimes Tribunals and war crimes prosecutions. The second one I think forces us to be realistic in our assessments of their prospects and even perhaps somewhat humble.

## I. THE TRIBUNALS IN LIGHT OF THE NUREMBERG TRIALS

I am going to begin with that second perspective first. The point is often made, and it has been made here repeatedly today, that the war crimes prosecutions in the former Yugoslavia and in Rwanda cannot possibly be as effective as the Nuremberg trials because there cannot be any victor's justice. I think the contrast between the Nuremberg trials and the Bosnia, Yugoslavia, and Rwanda trials is even greater than that. I would go so far as to say whereas the Nuremberg trials were a symbol of the allies' triumph, the Tribunals for the former Yugoslavia and Rwanda in many ways symbolize failure. Had there been more effective international action earlier, there would have been no war crimes committed and hence, no need for a Tribunal. We see this now clearly in the case of Rwanda. We now know that in 1994, it was the United States—probably more than France—that blocked the kind of action that would have prevented widespread massacres there from taking place. The United Nations was asked to do something, but President Clinton said that the United Nations had to learn when to say no. So genocide in fact took place and what do the Rwandans get now? Well, they got last week an apology from President Clinton, which I do not mean to underestimate. They got a war crimes Tribunal, but they were left with a horrible genocide.

The same kind of dynamic took place with respect to Bosnia. It was clear what was going on in Bosnia early, I would argue. The United States and other powers made a decision, a carefully calculated decision, not to intervene; and as a result, war crimes occurred,

genocide occurred, and what the Bosnians wound up with in the end was a war crimes Tribunal.

The point here for me is that in one sense, at least, the debate over the record and prospects of war crimes prosecution may be irrelevant. The prevention of genocide, I am convinced, still depends on the political will of the great powers more than it does on the institutionalization of a war crime prosecuting mechanism.

In this sense, Tribunals in the current era have to be seen as a symptom of the problem rather than a solution to the problem. I think that in general, the world knows what war crimes are, the world can see them coming, and the United States and other world powers are able to prevent them if they are willing.

I think it is important to remember this because those who supported the creation and establishment of the ad hoc Tribunals and the creation of an International Criminal Court need to build political support for these in the United States Congress. It is my sense, having covered the debate around the Tribunals, that a portion of the support they have received is due to the fact that they have often been seen as a cheap alternative to more forceful intervention early on. If we are not going to prevent genocide, we can at least approve a couple of million dollars to let some investigators go after the perpetrators.

I think that is feeble support and it is support that fades fast when you get to the really tough questions. It is one thing for members of Congress to approve funds for the Yugoslavia Tribunal or for the Rwanda Tribunal. It is another for members of Congress to stand up on the floor of the Senate or the House and say that United States troops should actually help arrest Mladic or Karadzic.

Senator Helms can give his support to the work of the ad hoc Tribunal for the former Yugoslavia. When it comes time to apply the lessons of that work to the creation of an International Criminal Court, of course, his support disappears.

I even think there is a kind of cheap vogue popularity that surrounds war crime Tribunals right now, as well as war crimes prosecutions. You have Senator Trent Lott second-guessing the Clinton Administration's plan to confront Saddam Hussein militarily, and then he goes on to suggest that maybe Saddam Hussein could be put

on trial for war crimes. The European powers are unwilling to confront Slobodan Milosevic over Kosovo, but they are ready to send Judge Arbour to Pristina.

I noted with great interest today Judge Arbour's reluctance to be, in effect, the tool of the European powers who are unwilling to confront Milosevic in a more assertive fashion. She said, and I thought the point was very important, that she does not like the idea of the war crimes Tribunal being seen as responding to political challenges. Rather, they respond to their own professional determination of what needs to occur.

I do not mean to be cynical or harsh, but I think that is a sober assessment of the political context in which the debate over the future of War Crimes Tribunals has arisen. I think this will be played out in the coming months.

## II. ACCOMPLISHMENTS OF THE TRIBUNALS

Now having said that, what do I see as the role and the potential accomplishments of War Crimes Tribunals and possibly an International Criminal Court? As a reporter based in the former Yugoslavia, I tried to pay much attention in my reporting to the way that demagogues there manipulate people through their fears, their grievances, their insecurities. Because I saw this manipulation as being such an enormous factor, I saw very early the institutionalization of the war crime prosecution process as incredibly important, because it could break that cycle of thinking and reacting collectively as one nation against other nations, other people.

In the early days of the Tribunal, Judge Goldstone, in particular, used to emphasize the importance of establishing individual guilt for what happened rather than collective guilt. Like Ivana, I am unfortunately afraid that the Tribunal for the former Yugoslavia, for all the determined efforts it has made to remain impartial, has not yet been able to establish that proposition of individual guilt. I still have the sense that most Serbs feel the Tribunal is hostile to the Serb nation. I think to a lesser extent many Croats come to the same conclusion.

This is to me one of the most discouraging aspects of the Tribunal's work, discouraging because I frankly do not see what else the Tribunal can do to make its impartiality more evident. A lot of Serbs

clamor for Alija Izetbegovic to be indicted. If that is what it would take in order to get Serbs to take the Tribunal seriously, to give it credibility as an impartial institution, it is hard to be very hopeful. I, of course, am no prosecutor, but it is objectively difficult for me to see how you would justify the same basic charges against Izetbegovic and Radovan Karadzic, for example.

As a result, looking back on this now, we may see at least in Bosnia the limits of what a war crimes tribunal can accomplish. I now wonder whether it is fair to judge the Tribunal by whether it is able to advance this proposition of individual rather than collective guilt.

For these purposes and for the purposes of reconciliation, it may be that something along the lines of a truth commission may be more useful. I was just talking before this panel started with Bill Stuebner from the Peace Institute, where there is a very important issue going on. I think now that it is probably less important that individual people go to prison for crimes than that there is recognition among all people of what did actually happen and who was responsible. There are so many Serbs, for example, who are convinced that Srebrenica was a big hoax and that Muslims massacred their own people for public relations purposes. If a truth commission composed of honest people from all sides could reach facts that everyone could agree on, I think that would be a huge contribution and one that the Tribunal, for very understandable reasons, is unable to make.

As far as the Tribunals themselves are concerned, I think one of the lessons is it may make sense to focus less on this political aspect, the question of reconciliation and building confidence and so forth, and to in a sense narrow the focus more to the issues of violations of humanitarian law.

I would now judge the Yugoslavia Tribunal, for example, more on the basis of whether it is able to advance the understanding of when and whether shelling civilian targets or obstructing aid convoys are war crimes. I personally found it very interesting and illuminating what Ms. Viseur-Sellers was saying about the advances in the understanding of rape as a war crime.

#### CONCLUSION

I think it is in these somewhat narrower aspects that the Tribunals are making great contributions, but as to the larger questions of

whether the Tribunals are able to prevent genocide from taking place and even to prosecute genocide and ethnic cleansing, I am less confident.

To me, the lesson of looking back over what has happened over the past six or seven years, my sense still is that the focus should be on preventing genocide rather than trying to prosecute it, and I think the political challenge of preventing it is more important right now than the political challenge of establishing a mechanism for prosecuting genocide.

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## PRESENTATION BY NINA BANG-JENSEN

SPECIAL COUNSEL AND ADVOCACY DIRECTOR,  
COALITION FOR INTERNATIONAL JUSTICE

### INTRODUCTION

Tom's remarks were so provocative, I feel I have to respond to them. What I do day-in and day-out is provide support through a coalition of non-governmental organizations ("NGOs") to the Tribunals. We are independent of the Tribunals, but our mandate is to provide them political, legal, and technical support.

My first response to Tom's very provocative comments is that I am sympathetic to them, because we are all frustrated by the profound lack of political support for enforcement mechanisms on behalf of the Tribunals. That is, of course, best illustrated by the failure to arrest the most notorious and powerful of those who have been indicted by the ICTY—Radovan Karadzic and Ratko Mladic.

### I. TRIBUNALS ARE NO SUBSTITUTE FOR EARLY GLOBAL INTERVENTION

But frustration with the fact that those arrests have not yet happened and that the United States and other major powers failed to intervene early enough and forcefully enough to prevent the tragedies of Bosnia and Rwanda, does not mean that Tribunals should be supported less vigorously. The question is not whether the Tribunals have achieved all we could hope for them with regard to preventing future or potential violations of international humanitarian law, but

rather whether the world is better off because of their work. The question is really, the Tribunals compared to what? What is the alternative?

Many of the people who are supporting the Tribunal, many of the people on the Hill, are the very same people who called for forceful intervention in Bosnia, who have called for military action now in Kosovo. I think it is a mischaracterization to suggest in any fashion that the bulk of them are people who are looking at this as a band-aid or as an excuse for inaction. Yes, clearly, there are some people who have those motives, but they are, in my opinion, in the minority.

I spend a lot of time every day talking to politicians, reporters, and ordinary people about the Tribunals. I am very impressed and heartened by how instinctively enthusiastic people are about Tribunals, even if they do not know very much about them. I think that comes from the legacy of Nuremberg. I think that legacy is very much alive. You can talk to members of Congress who really are not internationalists at all, who are not interested in much beyond the borders of their state, but they understand War Crimes Tribunals. They understand that there is something profound and something good and grand about them. They instinctively understand them to be—to paraphrase Robert Jackson, the chief prosecutor at Nuremberg—one of the most significant tributes that power has ever paid to reason.

I have my own criticisms of the Tribunals, as we all do, but we have to accept the reality that the world did not respond adequately in Bosnia and Rwanda. It should have responded and it did not, and now the Tribunals are cleaning up the mess and bringing some justice to the victims. The Tribunals have an opportunity now to send another message and to prevent other genocides, particularly in Kosovo, where the Tribunal has jurisdiction over ongoing violations of international humanitarian law.

## II. THE TRIBUNAL'S WORK IN KOSOVO

We have some of the same perpetrators in Kosovo that we saw in Bosnia. We have the same planner of the genocide, using what appear to be the same tactics—using children as shields, ethnically cleansing people out of their homes. We have an opportunity now, which Justice Arbour has publicly acknowledged, to assert the Tri-

bunal's jurisdiction and send a message to Slobodan Milosevic that maybe this time the world will not tolerate it.

I will say that while we are heartened by the Tribunal's response, I am concerned, as are others in our coalition, by the fact that while the Contact Group mentioned the Tribunal in a very prominent way in its first statement following the events at Kosovo, they failed to mention it in their most recent statement.

We are also concerned that we do not see anything visible from the Tribunal with respect to the Kosovo investigations. I understand judicial institutions have an instinctive reaction against publicity. It is very difficult for prosecutors, judges, and others in the judicial world to understand how important public perceptions about the Tribunal are. Perceptions are particularly important when you have an ad hoc tribunal whose livelihood directly depends on what people in the world think about it. The Tribunal depends on public perceptions for its resources and enforcement power. While we have spent the better part of eighteen months trying to bang on the White House door and other places to try to force political powers to meet their obligation to act as an enforcement authority for the Tribunal, I still remain optimistic that this will ultimately happen because the Tribunals have clearly passed the fundamental test of seriousness—a test that, at this stage, includes twin and interrelated tests of political power and the ability to do justice.

### III. INTERNATIONAL SUPPORT FOR THE TRIBUNALS MUST CONTINUE

But, that support can fade away relatively quickly if the perception grows that these are not politically important institutions—that is, that they are well-intended experiments, best known for establishing abstract legal principles. No matter how much we, as lawyers or as supporters of tribunals, recognize the importance of those legal precedents over the course of history, if they are created in a vacuum that has little meaning to the victims or to the perpetrators, they will do damage to the legacy of Nuremberg, as well as popular support for that legacy.

The existing support for the ICTY is sorely tested by the continuing freedom of Radovan Karadzic, Ratko Mladic, and the forty-five other indictees who are still at large. And support for the ICTR con-



tinues to be tested by the lingering memories of its early and serious administrative problems. Whether fair or not, to the extent that both institutions, over time, do not successfully overcome those problems, their legacy will be mixed, at best.

#### IV. INFORMING THE WORLD ABOUT THE TRIBUNALS' ACCOMPLISHMENTS

People are only going to remember snapshots of this Tribunal. The lawyers, academics, and people who bring cases for the International Court of Justice and elsewhere will use the precedents in very profound ways over time. But, political leaders and people will remember snapshots. What we do not want people to remember about the ICTY is that they did not have the big fish and they only tried the little ones. With respect to the ICTR, we do not want people left with a memory that while they had the big fish, they were unable ultimately to bring them to justice because of disorganization, cronyism, or the failure of other governments to cooperate.

The Tribunals have to do a better job of informing the world and, even more importantly, the victims and witnesses of these crimes about their successes and failures. The ICTR is starting to do so by making radio broadcasts in Rwanda. The ICTY has been improving its outreach as well. Success will breed attention and, I am convinced, all-important political support.

If one looks at the press accounts of the public reaction to the establishment of the Nuremberg Tribunal and then the conduct of the trials, the twin importance of leadership and support from top political leaders and the perception of competence and fairness of the tribunal itself can be seen. Reviewing press stories and public opinion polls of the era is fascinating. Before the Nuremberg Tribunal was set up, public opinion polls showed that Americans did not really want to have war criminals prosecuted in long, drawn-out trials. They wanted to have them executed. It was an understandable reaction.

When the political leadership of the United States decided to set up the Tribunals and insisted that fundamental principles of due process be honored, people followed. They were proud of it. The series of editorials at the time, and the glowing reports show the pride people took in Nuremberg. This pride still exists. It is what makes our job easier when we knock on a door in Congress. People get it.

## CONCLUSION

I worry about our disinclination to honor that legacy by failing to provide the Tribunals with sufficient political support, as Tom mentioned. There is, of course, always a danger that the Tribunals just become, as he fears, a way to salve international conscience.

An important test is at hand and that is the ability of the Tribunals to act quickly and visibly in any investigations of crimes or killings in Kosovo. How the ICTY responds will say a lot about how far this Tribunal has come; whether its successes to date—which are considerable—can be translated into the kind of maturity and strength necessary to act quickly and effectively in Kosovo. If the Tribunal does not grab this opportunity to respond to the commission of the same kinds of crimes by some of the same perpetrators using the same tactics they employed in Bosnia, it clearly will diminish its record and the prospects for any tribunals—ad hoc or permanent—to follow.

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## PRESENTATION BY THOMAS WARRICK

DEPUTY FOR WAR CRIMES ISSUES, UNITED STATES DEPARTMENT OF STATE

### INTRODUCTION

I would like to take this opportunity to make a few points about the investigation and prosecution of sexual assault before international criminal tribunals. This is a difficult subject to do justice to. Patricia Viseur-Sellers, the gender advisor to the Prosecutor of Yugoslavia war crimes tribunal, tells the story that rape was one of the first war crimes ever prosecuted. She tells the story of a military commander during the Renaissance who was executed for allowing his troops to commit murder, rape, and plunder in a town that he captured after failing to follow the laws of the war of his day. Since then, the laws of war have changed, but the need to investigate and prosecute sexual violence during wartime has not. We have learned a lot in the last four years about how to investigate and prosecute crimes of violence. We still have a long way to go, because we want to see those responsible for ordering the use of rape and sexual violence during the conflicts in the former Yugoslavia and Rwanda brought to justice.

Most of the rest of the speakers here today from the non-governmental organization ("NGO") community will focus on the need to apprehend those indicted for sexual violence and other crimes in the former Yugoslavia. Let me deal with this at the outset. In the last year, the number of indictees taken into custody in The Hague has more than tripled, from eight to twenty-eight. 43% of those publicly indicted for genocide are no longer at large. Even so, most of those charged with crimes of sexual assault by the International Criminal Tribunal for the former Yugoslavia ("ICTY") are not yet in custody. This has caused understandable anguish among the victims of rape in Bosnia. I would repeat a point that has been made both by Secretary Albright and Ambassador Scheffer. The United States is totally committed to strengthening the capabilities of the ICTY and to pressuring the regional authorities in order to accomplish the arrest or voluntary surrender and subsequent prosecution of the indictees. Those indictees who remain at large, including Radovan Karadzic and Ratko Mladic, should realize that their day before the ICTY will come; that there are no deals to cut; that there is no way they can avoid a fair trial. The Administration keeps all options open to ensure that all indictees can stand trial in The Hague.

I do want to take this opportunity to brief you on three other points relating to the investigation and prosecution of sexual violence, the importance of victim and witness protection, and the importance of adequate resources—including paying our United Nations dues.

## I. INVESTIGATIONS MUST FOCUS ON SEXUAL VIOLENCE

One of the lessons taught by the experience in the former Yugoslavia is the need to focus specifically on sexual violence during the investigations. This may sound like a simple truth, but the pattern of both the former Yugoslavia and Rwanda has shown us that this point deserves emphasis every time investigators, be they from a criminal tribunal or an NGO, go out into the field. The questions must be asked.

There is little question that sexual violence is under-reported in the realm of atrocities, or that stories about it come out only after investigators inquire more thoroughly into what happened. This is a lesson we can draw from Rwanda, where the extent of sexual violence became known long after the extent of killing became known.

## II. WITNESS SECURITY AND PROTECTION IS ESSENTIAL

The testimony of witnesses, for the prosecution or for the defense, is vital for international tribunals, particularly since so much of the evidence is dependent on witness testimony rather than on documentary evidence. This is especially true of crimes of sexual violence. Let me speak of the three phases of an investigation.

First, in the investigative phase before a witness testifies, the tactics of the investigators are important. For example, it is important for the criminal tribunal to have unmarked cars to travel to meet witnesses. Safe houses, particularly in Bosnia, are essential. Investigators have to arrange to meet witnesses in places where it will not be apparent to neighbors that they are cooperating—a requirement in both Bosnia and Rwanda. Interviews have to be arranged with witness security in mind.

Second, during the testimony phase, witness security is crucial. The Victims and Witness Units of the two Tribunals are important. To work, they need to be adequately staffed and well coordinated with the investigators in the Office of the Prosecutor. Investigators are the first line of contact and frequently work more closely with witnesses than do the Victim and Witness Units of the Tribunals. The Victim and Witness Units arrange transportation of witnesses from home to the tribunal, and accompany witnesses where necessary. They arrange exit and entry permits, travel documents, safe conduct agreements, and visas. They also arrange protection, safe accommodation, and transportation for witnesses during trials. The Units liaise with states for pre- and post-trial protection and support services, and for temporary and permanent relocation of witnesses. This work is hands-on, time-consuming, resource-intensive work.

In the past, the Victim and Witness Units of both Tribunals have relied to an inordinate degree on voluntary contributions. The result has been insufficient protection for witnesses. This jeopardizes fair trials. The funding for protection of witnesses must be strengthened. We were pleased to see that the 1998 regular budget requests of both Tribunals provide regular budget financing for witness protection and permanent direct hire staffing for it. Much more will need to be done, however, to build a truly effective Victims and Witnesses Unit in each Tribunal. Voluntary contributions will continue to be re-

quired. We ask for Congress's support for our budget request for the Tribunals in Fiscal Year 1999 so that we can do our part.

The third stage of witness security occurs after testimony is delivered. The most significant issue here is whether local police will be supportive and protect the witness afterwards. Where local police may be hostile, it is important to keep the fact of a witness' testimony secret. That is particularly difficult in the highest-profile cases. Also, states need to make witness protection a national priority.

It is in this third stage of witness protection where progress is particularly lacking. That is why, for example, in Bosnia the United States is so focused on full implementation of the Dayton Peace Accords, including proper training, screening, and upgrading of local police forces so that they can responsibly begin to assume some of these duties.

While it goes beyond the scope of today's briefing, I want to make it clear that in the negotiations underway to establish a permanent international criminal court ("ICC"), the United States recognizes how important it will be for the permanent court to understand the significance of witness protection issues. Lack of witness protection can be an effective brake on the ability of the ICC prosecutor to prosecute, and it would be exceedingly difficult to overcome a state's unwillingness to properly protect witnesses on its territory. We also want to see the ICC have a separate Victim and Witness Unit within the Office of the Prosecutor, not just within the Registry. Our federal court system places witness protection under the authority of the Department of Justice, not the Administrator of the United States Courts. A separate unit within the Registry would serve the needs of security for defense witnesses.

### III. ADEQUATE RESOURCES ARE VITAL TO INVESTIGATION AND PROSECUTION OF SEXUAL VIOLENCE CASES

I have spent this much time on the witness security issue not just because it is important in itself, but because it highlights the need for the tribunals to have adequate resources for investigations and prosecutions into sexual violence cases. Resources have been a constraint on the speed of investigations and trials, as a close reading of the ICTY's budget request for 1998 makes clear. Because of inadequate resources during 1997, the Tribunal had to cut back the number of

active investigations to three. This is unacceptable. The United States played a key role in efforts to get other countries in the United Nations to support a much-needed increase in the budget for the Tribunal in 1998. I am pleased to say that was successful—the Tribunal received 97% of its budget request.

Now, however, we need to encourage other states to make voluntary contributions to meet urgent needs that were not anticipated in the 1998 budget. The 1998 budget for the Tribunal released by the Secretariat assumed that no new indictees would come into custody in 1998. None. Already, the number is five. We expect more will arrive during the remainder of the year. Other investigative needs have arisen already. On March 13, Secretary Albright announced the United States was contributing \$1.075 million for investigations into Kosovo and for other key investigative needs.

We want other countries to do more to support the Tribunals. In this regard, however, I want to make sure the Tribunal's friends on Capitol Hill and in the NGO community understand a crucial point. We need to pay out United Nations dues—and we need to do it now. Our failure to pay our United Nations dues is hurting our ability to persuade other countries to make voluntary contributions for the Tribunals. This is not a theoretical point. Other countries are keeping their purses and wallets closed because they see us holding back on the payment of hundreds of millions of dollars. That may not be a fair point, but that is their position. The Tribunal's supporters on Capitol Hill and in the NGO community need to know that the United States' failure to pay our United Nations dues is hurting the Tribunals. We need your help on this one, and we need it right now.

Thank you.

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## PRESENTATION BY ROY GUTMAN

INTERNATIONAL NEWS CORRESPONDENT, *NEWSDAY*

### INTRODUCTION

I should first just say a word about the conference being held here at American University. I think it is a tribute, considering the tremendous turnout you have had and the attentive audience, and considering that people have come from such a long distance. I think it is

a tribute to the way American University has taken a leading role in dealing with Tribunal issues. From my own experience, working on a little project out of this university and out of this school, its professionalism is matched by the passion with which it is pursued here by the faculty, staff, and quite a few of the students as well.

Based on today's discussions and references to the news media, the news media are—and you can take your choice—the only court that counts or the prostitute in the door. I tend to prefer the former, though there is a lot of circumstantial evidence that the latter image may be more appropriate. Seriously, since everyone we cover seems to have an image problem or will soon enough, it is only fair to say that the news media also have an image problem on occasion.

#### I. MEDIA COVERAGE OF EVENTS IN RWANDA AND THE FORMER YUGOSLAVIA

I wanted to just cite a few recent stories reported in the last week, and the way they were covered, just to give you an indication; and then to say how this might apply to the coverage of the Tribunal.

Just about a week ago, President Clinton was in Rwanda, and there he made an apology on behalf of the United States and himself for—I think we can now call it—dereliction in 1994. He said that the facts were coming in too fast, you could not appreciate it. The way it was played in most of the media here was another apology from the President, the *mea culpa* caravan. There were various phrases used.

I thought it was a kind of trivialization of something that to me at least was significant. I mean gestures and rhetoric do matter. At least it starts you down a track of responsibility, and we will have to see if he sticks with it. I thought just going there was a terrific move. And, having been there myself a few months earlier with Madeleine Albright, where she said similar things but did not go anywhere near as far, I think the United States has at least said the right things here.

A second story in the last week that troubled me a bit, as I was thinking about it today, is the expansion of NATO. This is arguably a debatable development in international security, that we are taking on new members in NATO, and yet as you will notice, the Senate has delayed the vote on the expansion of NATO so it could take up important issues, such as a cigarette tax and school vouchers. I have not even seen that story anywhere, but it is an astonishing thing that a

major security organization is basically just put on the back burner for another few weeks.

Even more recently, the United Nations Security Council last night voted to impose an arms embargo on Yugoslavia and on Serbia-Montenegro. If you tried to find this story in the newspapers this morning, you would have had to search. The *Washington Times* ran a wire story on page three, and the *Washington Post* ran a short story on page thirty-six or so. Yet, it seems to me this is the first real signal of some seriousness with regard to the Kosovo problem and a lot of us who were watching this debate go on did not think it was going to happen or had great doubts. When it happens, it does not seem to be news.

Finally, there is this conference itself, which is celebrating the solid progress and achievements of the two Tribunals. What has been stated here today is not really news as such. It is not going to make it onto the evening news; but really, what is interesting is that other than the members of the panel and maybe a few other reporters from the United States Information Agency, Voice of America, and some other places, the press is more or less not here.

These developments are not insignificant, and they all seem to have a common theme—institution building. This is institution building in an era when there is no conflict going on. When there are no threats, there is no drama, but major institutions are being built.

What President Clinton did, and it may have been unintended, but it seems to me it is something that will happen, is that he basically threw a lot of support behind the Rwanda Tribunal. In making his apology and going to Rwanda, he told the people of Rwanda that the West really has had a change of mind, a change of heart, and feels it did the wrong thing and that justice is important. In other words, I cannot quite measure it, but from my time in Rwanda a couple of months ago, I can say I think that trip will make a difference.

The expansion of NATO is as essential for the future of European security as could be imagined. The Security Council's overnight action reveals that this is the reaction of an institution whose prestige really is not too high, especially after Rwanda and Bosnia. Yet, last night's decision in a small way illuminates my point. Put it this way, if that decision had been made to embargo arms to Yugoslavia or to Serbia Montenegro at the beginning of the Bosnia war instead of ap-



plying to both sides—the victims as well as the aggressors—I think the outcome might have been different. It is conceivable.

Again, it seems to me it is institution building. Finally, I think what this conference here at American University has done is to take kind of a reading, a temperature, a probe into how the Tribunals are doing—measuring it, having a debate about it. I think it has proven at least to my mind that the Tribunals are really moving right along.

## II. MEDIA COVERAGE OF THE TRIBUNALS

If there is not much news coverage of these events, and at least to my evidence it has not put it in the right context, it is not necessarily a cause for worry. To go back to an old adage, “No news is good news.” The reports of the Tribunal in particular, and their work, suggest that somebody is doing something right. I happen to disagree with Tom’s assessment that they are not really relevant. I think they are making themselves relevant. I think they are creating something that could not have been imagined before. I think they have taken on a life of their own. I mean, there are unforeseeable, unknowable consequences of actually getting an institution together and having some of the best legal minds. We have seen some of them here today, getting together and trying to deal with crises in their hands and with crime of unimaginable dimensions.

On the other hand, I can say when the press dissent on a story or on a place, and they stay, then you know something is wrong. That is what attracts the press to that place.

These institutions are up and running. At least from describing what I think has not been reported as the news but really deserves to be. I should say what is my definition of news anyway.

One of the classic definitions is that news is that which someone somewhere wants to suppress and all the rest is advertising. Well, another way to put it is that news is that which upsets law and order, and that which jars the equilibrium of society. There is no more clear cut case of news than crime.

In looking at the conflict in Bosnia, Tom and I were among the people trying to cover crime and to do it in real time. The Tribunal has now before it many cases—some of which we have covered,

some of which we did not cover—however, the cases that we covered were similar to the cases that we did not cover.

One of the reasons that there may not be a lot of coverage of the Tribunal today in the media is that in a sense we have reported it already or we reported the general picture; so, there have not been a lot of revelations, and now years have passed. It is hard, in a sense, to argue this to our editors.

### III. DEVELOPING A DEFINITIONAL FRAMEWORK FOR WAR CRIMES COVERAGE

That being said, since everybody else is institution building and trying to draw lessons from these events, I think that we in the media can and should do this as well.

One of the problems I found in covering Bosnia in particular, and even focusing on crimes to the extent I did, is that I operated mostly on an intuitive sense of what is right and what is not possible. I never really had the guidance of the framework of international humanitarian law of which probably everybody in this audience is more expert on than I am. It struck me somewhere along the way that if I knew more about the framework, I might be guided quicker to the stories that matter.

That brings me to the Project on Crimes of War that I just wanted to mention briefly. A group of us—Tom and several faculty here, as well as Aryeh Neier—are on the Board of Directors. A group of us came together, both reporters and legal experts, to try to figure out whether there is a way that we could do better coverage of conflict—particularly war crimes—so that the public will know. War is really confusing, especially if you take all the political statements made, not just by the parties, but by the United States government, and one way we really can relate war to the public better is by focusing on crimes, by knowing what crimes are in the first place.

To make a long story short, we are working on a book. Imagine a Michelin Green Guide, but instead of the Prague castle on page thirty-four, you see an article about the grave breach of willful killing, an article written by Peter Maass relating his experiences, his report, his witness of the event, and then putting into that same article what the law states, what the Fourth Convention states about willful

killing and what other conventions might state, and maybe having an arresting picture. The idea is to give this to journalists or to anybody going into the field who wants to know what a war crime is, how to spot it, what are the characteristics, and what are the things that can be brought up for prosecution.

We are not in the business of seeing that the law is observed. That is above our pay grade and well beyond our job description as reporters. I think we can start reporting conflict in a way that reflects the conventions that are universally accepted and the criteria that have been established in those conventions, in some cases, most cases, fifty years ago.

### CONCLUSION

In summary, do not be discouraged by the seeming lack of attention to the Tribunal. I hope the people there carry on. I think they have made an extremely good start. I was very heartened to hear also about the Rwanda Tribunal's developments to date.

As I say, we in the news media, I think we can do better. I am hoping next year if we have another conference of this type, I will have the book and show it to you.

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### AUDIENCE QUESTIONS

PROFESSOR ORENTLICHER: Before turning to those who may wish to ask questions, I would like to respond briefly to Roy's observation about media interest in this conference. You may be heartened to learn that there has, in fact, been considerable press interest in interviewing participants in this conference. In recent weeks my staff and I have fielded countless requests for interviews with Justice Arbour, Judge McDonald, and various other speakers.

I see that a number of people in the audience would like to raise questions.

AUDIENCE MEMBER: I just wanted to clarify something about the truth commission we are working on. I do not want to leave the impression this is any implication that we think there is something wrong with the Tribunal. I think the Tribunal has turned some very

important corners lately. I think the Tribunals are doing an excellent job. This has absolutely nothing to do with that.

We heard last night someone mention the fact that you use different tools out of the tool box for different jobs. That brought back horrible memories to me because I am a guy with about ten thumbs and my father was one of these guys that could fix anything, and he always used to say, "You idiot, you don't use a hammer to do the job that you need a screwdriver for."

What this truth commission will do has nothing to do with the things that the Tribunal is doing and the things I think they are doing very well. What we are looking at is something that is going to enable the society to look at itself and kind of look at what is dysfunctional in society. Why do these things happen and why do they happen on a recurring basis?

I just wanted to clarify that very quickly. I will not take much time. We do not want any idea that this is somehow some kind of a criticism of the Tribunal. If it were, this would stop the project immediately.

MR. GJELTEN: Diane, speaking of clarification, I did not say the Tribunals are irrelevant. I said on the prevention of genocide, the Tribunals are less relevant than the political will of the United States and other great powers. In many respects, the Tribunals are very relevant; but as far as the question of preventing genocide, it is still left to the political will of the United States and other great powers to do that. In that sense, the responsibility of the Tribunals, I think, is less relevant than the responsibility of the United States and other powers.

AUDIENCE MEMBER: One point on that and how the Tribunals may in fact become quite relevant is the issue of genocide. One of the problems in the genocide convention—for those of you who have read it, and I am sure everybody here has—is it is a very short document without any triggering mechanism, and without any method really for determining if there is a genocide.

It is a tremendous gap. We saw this at the beginning of the Bosnia conflict, we saw it in the Rwanda conflict, that there was nobody really to even decide unless some government decided to call it that.

I understand from David Scheffer that one of the plans—at least in America and I guess for the world criminal court—is to give that power in some form to the prosecutor, that the Security Council can ask him to go to a scene and determine if there is a genocide happening.

I do not quite know where it goes from that stage, but at least the determination is made and, in a sense, triggers a convention that has been totally ignored.

PROFESSOR ORENTLICHER: I wonder if I could ask Ivana to respond to this discussion. I would like the last point that gets made on this panel to be about the victims. We have been talking about how you measure success for the Tribunals and it seems to me that perhaps we have not talked quite enough about what it means to the victims, and that is after all probably the most important thing.

In response to Tom's comments, Nina posed the question, what are our alternatives once we have failed; and, we have surely failed once you get to the point where you set up a Tribunal, what choice do you have but to do justice?

I wondered if you could say a word, Ivana, about your sense on the ground. You have interviewed hundreds of victims by now, survivors. If you could just give us a sense of what this whole project means to them.

MS. NIZICH: I think initially they were very cynical about it. I think many of them remain cynical. I think that number is diminishing though. They have been especially heartened in the past year since SFOR has started to arrest some of the indictees. Since it has become known that the Tribunal has secret indictments, the victims' confidence and willingness to cooperate has also been strengthened.

A lot of people who are potential perpetrators are looking over their shoulder as well. Some might come forward to confess, others might in the future.

I also want to allude to something that Alan alluded to earlier this morning. After victims testify, they sometimes feel a sense of purification, as if they have gotten the weight off their chest. You felt this during the war when people spoke about it, now even more so. It is a sense of vindication.

Some also thought the Tribunal was moving too slowly. Although they acknowledged the need for setting up the operation and time for a learning curve, many felt three years was too long. However, I think that in the past eighteen months, this has definitely improved. There is a sense that the Tribunal might actually do something. When the Tribunal was initially created, everyone in the field—especially the victims—thought it was just another joke, another nominal “band-aid” to the bloodshed rather than the elimination of its cause. Indeed, when the French and Americans began calling for the establishment of an ad hoc international war crimes tribunal in 1993, many people in the field—myself included—viewed these proclamations as yet another farce by the international community to prevent it from bringing an end to the war and attendant abuses in the former Yugoslavia, especially in Bosnia. At the time, I believe the cynicism was warranted. We were willing to feed those living in besieged enclaves, but we did nothing to bring an end to the shelling, death and destruction. We established “safe areas” and then watched on television as those “protected” areas were indiscriminately shelled, and, as in the case of Srebrenica in 1995, as thousands of its residents were summarily executed and dumped into mass graves because they were of the “wrong” ethnic group. Those of us who came from the outside world had little cause to believe the creation of a tribunal would be any different, and many Bosnians, Croats, and Serbs were justifiably more cynical and contemptuous than were we.

However, I do think the Tribunal has surprised many, in that it has become a functioning court, capable of investigating, indicting, trying, convicting and incarcerating war criminals. It has retained its independence from the states that created it, and it remains a genuinely apolitical institution, beholden to no political actor or state(s). As I said earlier, the fact that persons have been arrested and the issuance of secret indictments has significantly bolstered the work and credibility of the Tribunal, especially in the eyes of the victims.

With that said, I do, however, think that the victims believe the Tribunal will have been a failure if it does not indict and remove from power those persons deemed to have been in leadership positions during the war and whom they regard as responsible for the commission of crimes they suffered at the hands of their agents. Although some refer to major civilian or military commanders on the

state or republican level, others also refer to such "leaders" or "notorious offenders" who were responsible for crimes on the local and/or regional level. Persons in leadership roles at the republican, regional, and local level thus need to be brought to justice more speedily in the eyes of the wars' victims.

I think in the long term, maybe not in the short term, they do think that we will have had a positive role, that we will bring these people to justice. It might take a long time. It might take longer than they would like.

I do think the victims themselves are heartened by what we are doing. Despite their initial reticence, the Tribunal is positively viewed. I think the parties to the conflict, the governments who were the masterminds or supporters of the crimes perpetrated in the field, are increasingly leery and critical of what we are doing, but that is because they now see that they are being called to account for their crimes. I think therefore, these governments are taking our work more seriously.

But, in the long term, I think we will have had a positive effect in the eyes of the victims.