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# War Crimes and Other Human Rights Abuses in the Former Yugoslavia

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# PANEL II: WAR CRIMES AND OTHER HUMAN RIGHTS ABUSES IN THE FORMER YUGOSLAVIA\*

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## I. A MILITARY LAWYER'S PERSPECTIVE: LEGAL PROTECTION OF CIVILIANS AND U.N. PEACEKEEPERS IN THE FORMER YUGOSLAVIA

MR. MOUNTS: The Judge Advocate General ("JAG") plays a very active role in "Operations Law for the Commander." This role is based

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on the Protocol I requirement of Article 87 of the Protocol Additional to the Geneva Conventions of 1949.<sup>1</sup> Protocol I requires commanders to train military personnel concerning their responsibilities under the Law of Armed Conflict, previously called the "Law of War," but currently referred to as "LOAC."<sup>2</sup> Commanders are also required to suppress and report breaches of the Geneva Conventions and the Protocol, in order to prevent violations and to discipline violators. Thus, the Protocol is tied up with military discipline and with international human rights law. Furthermore, there is an affirmative obligation to train military personnel.

Protocol I came into being around 1977. Since the early 1980s, the United States's military has very vigorously been training its forces. Unfortunately, the United States has been almost alone in its efforts. Between 1982 and 1985, the United States had regular exercises with its NATO counterparts, such as the Belgians and the Dutch. When the unit would test Law of Armed Conflict awareness, the Belgians and the Dutch would just laugh. They said, "You are six minutes away from the nearest missile. There is going to be general war here. It is going to be 'no holds barred'. There are no rules. There is no need for rules." They kind of scoffed at the "LOAC." This reaction was surprising to me because of their European background, which I presumed to be more sophisticated and progressive than it was.

South Korea, where I served from 1989-1993, is in the embryonic stages of trying to teach the Law of Armed Conflict. Their JAG's do not have nearly the same degree of influence upon their commanders that JAG's in the United States have. There are not nearly as many lawyers in Korea as in this country, but Korea is our ally, and they have the overwhelming number of the ground forces that would be committed if the United States had to go to war in Korea. So the problem for the United States is: How does the LOAC ensure compliance on its own side by allied forces?

The majority of the military's recent combat experience came from the war in Vietnam. In Vietnam, some of the problems were blamed on the politicians and the lawyers. Commanders and soldiers blurred the distinction between the two. They did not really see the difference between where the law ends and where the United States

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1. Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts, *opened for signature* Dec. 12, 1977, art. 87, 1125 U.N.T.S. 1 [hereinafter Protocol I].

2. *Id.*

had made a political decision to refrain from doing something, otherwise permitted under the LOAC. Fortunately, General Norman Schwarzkopf, who commanded the Desert Storm Operation, was in Vietnam twice and was able to derive several lessons from Vietnam. General Schwarzkopf knew that the JAG's role was not to create obstacles, but to find legal ways to achieve the commander's goals, even when those goals were to blow things up and kill people.

In 1974, there was a Department of Defense ("DOD") directive which was a result of the massacre at Mai Lai. This directive addressed the United States's need to train its forces, particularly those who might become prisoners of war. In addition, in 1983, there was a Joint Chief of Staff memorandum which clearly expanded and defined the area of Operations Law. A very detailed article published in the ABA Journal in 1991, by Steven Keeva, entitled *Lawyers in the War Room*, details how far the military has come with this whole area.<sup>3</sup>

During the Persian Gulf War, with the aid of "smart weapons," the U.S. military was very careful in their targeting decisions. Lawyers were closely involved with the commander in his decisions. My former wing commander in Germany once said: "When we go to war, I want you to get out of my way." However, this attitude has changed dramatically.

A side-bar by Mr. Keeva reads: "[T]aking a humane approach—besides being its own reward—makes good military and political sense."<sup>4</sup> During the Persian Gulf War, we were not only able to confine collateral damages and losses to our own forces and protect prisoners of war, but we were also able to take the moral high ground every day on CNN or in the news. Since the coalition prisoners of wars ("POWs") were paraded on television by Saddam Hussein, this, contrasted with the coalition's apparently humane treatment of over a hundred thousand Iraqi detainees after the war, and combined with the analysis of the majority of U.S. targeting decisions, allowed the United States to take the high ground. Fundamentally, the JAG convinced the leadership that it did not want to sow the seeds of future wars, and that compliance with LOAC was in our own self-interest. This was the hardest thing to do, that is, to train the operators and the pilots in the belief that the Law of Armed Conflict had some relevance to their operations. Previously, the operators and pilots scoffed at it.

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3. Steven Keeva, *Lawyers in the War Room*, 77 A.B.A.J. 52 (Dec. 1991).

4. *Id.* at 55.

A POW I know who had been in "Ha Noi Hilton" for six years, a well-known detention facility for American POWs, returned, attended law school, and became a JAG. He was able to enumerate beautiful examples of why LOAC compliance might be in the nation's self-interest. For example, if a pilot is downed in enemy territory and he falls into a clearing surrounded by an enemy patrol, and he puts up his hands in surrender or per military policy waves a white flag, and, as the enemy lets down its guard, he reaches behind his back, takes out his gun and starts firing it, what do you suppose will happen to the next pilot that falls out of the sky into a clearing in enemy territory? It is on this basis that the JAG has tried to train the soldiers.

#### A. BASIC LAW FOR PROTECTION OF CIVILIANS

As to the basic law for protection of civilians, first, there is the Geneva Convention of 1949.<sup>5</sup> It was rather limited in scope. It applied to declared wars and other armed conflicts involving the "High Contracting Parties" who were participants to the convention, and to all cases of partial or total occupation of the territory of such parties. It also provided limited protection for armed conflicts not of an international character occurring, again, in the territory of a High Contracting Party, such as a civil war. It required humane treatment of persons taking no active role in the hostilities. It outlawed: (1) all types of violence to their persons; (2) hostage systems; (3) humiliating or degrading treatment; and (4) summary punishment and executions. In the movie "Schindler's List,"<sup>6</sup> the young engineer female prisoner who argued with the commander about the structural sufficiency of the foundation she was asked to build was shot summarily. That is the kind of thing that the Geneva Convention protects against—summary executions.

Article 4 of the Geneva Convention reads: "Nationals of a state not bound by the Convention are not protected by it."<sup>7</sup> To my knowledge, Serbia, Croatia, and Bosnia are not parties to this convention. However, Part II provides some protection on a broader basis with a

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5. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287 [hereinafter Geneva Convention].

6. SCHINDLER'S LIST (Universal 1993).

7. Geneva Convention, *supra* note 5, 6 U.S.T. at 3520, T.I.A.S. No. 3365, Part I, Art.

wider application for the general population against the consequences of war, primarily treatment accorded persons in occupied territories.<sup>8</sup>

### B. *PROTOCOL I*

Then, in 1977, came Protocol I.<sup>9</sup> Protocol I outlines the basic rule that must be taught to the military commanders—the basic rule being: parties to a conflict must distinguish between the civilian population and combatants, between civilian objects and military objectives, and direct military operations only against military objectives. Contrast this with what the United States did in Desert Storm with the destruction of Sarajevo, when military forces targeted a civilian population, encircled them, and bombarded them week after week, month after month. Protocol I says: “Civilians shall not be the object of attack.”<sup>10</sup> The protocol requires civilians to be protected, at least by the law, from violence and threats of violence primarily designed to spread terror. It forbids indiscriminate attacks which are not directed at a legitimate military target.

For example, during World War II, in the back of a church in Salzburg, there was a Nazi communication station. The church was a military target, and a national treasure, but, of course, also of religious significance. The church was a military target because it was being used as a cover for a military purpose.

Protocol I requires commanders to do certain things to prevent violations of it.<sup>11</sup> It also requires commanders to take feasible precautions to avoid excessive military operations in relation to the anticipated concrete and direct military advantage.

### C. *PROTOCOL II*

Protocol II supplements Protocol I.<sup>12</sup> It develops and implements the Article 3 of the Geneva Conventions of 1949, which only provided some basic requirements for humane treatment. But the Protocol is not to be used as a basis for intervention in civil wars. It requires funda-

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8. Geneva Conventions, *supra* note 5, 6 U.S.T. at 3526-36, T.I.A.S. No. 3365, Part II, Art. 14.

9. *See generally* Protocol I, *supra* note 1.

10. *See generally* Protocol I, *supra* note 1.

11. *Id.*

12. Protocol II Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, Dec. 7, 1978, 1125 U.N.T.S. 609.

mental guarantees of humane treatment for noncombatants—respect for their person, honor, convictions, and religious preferences.<sup>13</sup> It seeks to protect civilians from being the object of attack, to preserve the civilian objects necessary for survival, and to prevent forced displacement.<sup>14</sup> Civilian objects include those things that are indispensable to the survival of the civilian population, such as water supply, crops, food and so forth.

Neither Protocol I nor Protocol II have yet been ratified by the United States. Protocol I is being considered for ratification by the U.S. Senate. The DOD, however, is still in the process of studying Protocol II. As mentioned previously, the United States has implemented Protocol I very vigorously in its military since the late 1970s.

#### D. NUREMBERG PRECEDENT

The Nuremberg Trials<sup>15</sup> are considered to be historical precedent for the Bosnia War Crimes Tribunal. The crimes listed in the Draft Statute for the Bosnia War Crimes Tribunal are: (1) crimes against peace; (2) crimes against humanity; and (3) punishment of the broad criminal effort committed in an execution of an aggressive war which was devised and executed with ruthless disregard for the very foundation of law and morality, including violations of the Law of Armed Conflict and the persecution of minorities.

The traditional war crimes include murder, ill-treatment of prisoners of war and civilians in occupied areas, pillage of public and private property, deportation of citizens to slave labor, and persecution of the "Jews" and other ethnic minorities. The agreements establishing these war crimes were not ratified by the former Yugoslavia, but there is a "fix" for that, as we shall see.

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13. *Id.*

14. *Id.*

15. Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis Powers and Charter of the International Military Tribunal, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 284.

### E. GENOCIDE CONVENTION

The Genocide Convention<sup>16</sup> is an example of how public international law has slowly expanded to try to protect individuals from internal oppression by their own governments. Sovereignty, however, has been the traditional legal obstacle. In the past, sovereignty was a basic tenant of international law. Yet sovereignty has also stood in the way of international efforts to do anything credible about civil wars, about the things that happened with the Khmer Rouge or what is happening now in Rwanda. There are still problems with jurisdiction, structure, due process, and enforcement. Against this backdrop, there is an overwhelming humane imperative which people are repeating more often: we must be able to "stop the killing."

### F. U.N. SECURITY COUNCIL RESOLUTION 827

In 1993, the U.N. Security Council acted in response to the situation in Bosnia; the war in Bosnia had been ongoing for some time. The Security Council finally passed U.N. Security Council Resolution 827.<sup>17</sup> In addition, a Draft War Crimes Statute was recommended to the Security Council by the Secretary-General.

### G. DRAFT WAR CRIMES STATUTE

Commentary explaining the Draft Statute describes how one would set up a War Crimes Tribunal after a war. The Tribunal would be set up by having the belligerent states agree to it by treaty but also agree to enforce it.<sup>18</sup> In recent years, as the war in Bosnia progressed, the Security Council began to ask whether it should have the General Assembly get involved in this matter and how cumbersome that involvement might become. Finally, the United Nations decided it must act now and that the Security Council provided the proper mechanism to

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16. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951).

17. United Nations: Secretary-General's Report on Aspects of Establishing an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia, May 3, 1993, U.N., 32 I.L.M. 1159 (1993) [hereinafter U.N. Security Council Resolution 827].

18. *Id.* at 1167.



respond. The Security Council is able to do this under its enforcement powers in Chapter VII of the U.N. Charter. Under the Charter, such a decision to establish a War Crimes Tribunal would constitute a measure to maintain or restore international peace and security, following the requisite determination of the existence of a threat and breach of the peace or active aggression. It would be more expeditious—immediately effective on all states—regardless whether they were one of the High Contracting Parties to Protocol I, Protocol II, the Geneva Convention, or anything else.

In this particular case, the Security Council would be establishing, as an enforcement measure under Chapter VII, a subsidiary organ of a judicial nature within the terms of Article 29 of the Charter. This is a very important step; it solves the question of jurisdiction over the parties.

#### H. SUBJECT MATTER JURISDICTION

There exists the concept of grave breaches of the Geneva Conventions concerning subject-matter jurisdiction.<sup>19</sup> Grave breaches include: (1) willful killing; (2) torture or inhumane treatment; (3) willfully causing great suffering or serious injury; (4) unlawful deportation; (5) taking civilians as hostages; and (6) violations of the Laws of War.

The Nuremberg precedent is very important because the grave breaches and violations of laws or customs of wars began with Nuremberg. What the United Nations is trying to do now is apply the rules of international law which are part of the customary international law, as an international entity, so that the problem of adherence by individual states does not arise.<sup>20</sup>

There are also the matters of genocide and crimes against humanity. Crimes against humanity apply whether the violation is international or internal in character. The International Court of Justice decision in *Nicaragua v. United States* stands for this principle.<sup>21</sup>

All of the signatories do not agree to all of this, but a clear law has been established. Someone once stated that it is western legal standards which have been adopted and which are going to be enforced by

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19. *Id.* at 1170, Art. I.

20. *Id.*

21. *Id.* at 1170 n.9, citing *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*, Judgement of 27 June 1986, I.C.J. Reports 1986, p. 114.

the Security Council. The law will apply to civil wars and internal conflicts as well as international ones. This is a very radical and dramatic step in the law. The law may still be ponderous and slow in application, but we have come a long way since we had to deal with the obstacle of sovereignty.

### I. *PERSONAL JURISDICTION*

In relation to individual criminal responsibility and personal jurisdiction, the Draft Statute states that individuals are personally responsible. Also, responsibility lies with any person who planned, instigated, ordered, committed or otherwise aided and abetted in one of the four major categories. This is where the "Superior Orders Defense" comes into play. One of the concerns of the U.S. government is the failure to recognize the Superior Orders Defense. The fact that an individual is ordered to commit a crime is no defense under the Draft Statute,<sup>22</sup> but it may be considered in mitigation.

Command responsibility is established for any superior who knew or had reason to know that his subordinate was about to commit war crimes and then failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators. There is no immunity for the heads of state or for the others in government who are acting in their official capacity. Command responsibility is not a defense and it is not considered in mitigation.

### J. *TEMPORAL JURISDICTION*

The issue of temporal jurisdiction is interesting. The Draft Statute says temporal jurisdiction extends back to January 1, 1991.<sup>23</sup> This was done deliberately and arbitrarily in order not to express any judgment concerning whether the conflict within the former Yugoslavia is international or internal in scope.

### K. *SUPERIOR ORDERS DEFENSE*

As previously indicated, the U.S. governments' concern is with the "Superior Orders Defense."<sup>24</sup> Ambassador Madeleine Albright articu-

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22. U.N. Security Council Resolution 827, *supra* note 21, at 1176.

23. *Id.*

24. The abrogation of the Superior Orders Defense was originally proposed by Mr.

lated the United States's position by stating that a defense should arise when the accused was: (1) acting pursuant to orders where he or she did not know the orders were unlawful; and (2) a person of ordinary sense and understanding would not have known the orders to be unlawful. In the view of the United States, this preserves the delicate balance between discipline—the idea that somebody must react instantaneously during war-time—and individual criminal responsibility. However, it is only a mitigating factor in the Draft Statute.

Furthermore, a recent report in the *Los Angeles Times* concerning the U.N. Commission's investigation of war crimes in Bosnia, noted that the command and control structure in Bosnia was so loose that unlawful orders could have been disobeyed without risk to the individual, and therefore, that a real moral choice existed.<sup>25</sup> Thus, this question is still being debated.

#### L. RULES OF PROCEDURE

Another concern of the United States is the absence of any rules of procedure or rules of evidence. The court itself was authorized to adopt such rules. In order to develop these rules, one must resort to the Nuremberg Trials, military law and to the Uniform Code of Military Justice ("UCMJ").<sup>26</sup> The Joint Chiefs of Staff ("JCS"), the legal advisor, has submitted draft rules of procedure.

The key objective of the rules is to have a process which is fair and one which the United States would be willing to subject its own soldiers to should we be involved in the conflict. Therefore, the United States has introduced some ideas of American justice which are based on the UCMJ.<sup>27</sup> Many suggestions have been contributed, most of which have been accepted, including the standard of proof, which is "beyond a reasonable doubt," and the idea of the standard of relevancy in terms of what evidence can be admitted. The idea of plea-bargaining, in order to get at the big fish, has been rejected. There are some standards for the protection of national security information and secrets

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Morozov of the U.S.S.R.; U.N. ESCOR Ad Hoc Comm., 6th Sess., 18th mtg., U.N. Doc. E/AC.25/SR.18 (1948).

25. Stanley Meisler, *U.N. Panel Finds Evidence of Serb War Crimes*, L.A. TIMES, June 2, 1994, at A4.

26. The Uniform Code of Military Justice consists of 145 articles, codified at 10 U.S.C. §§ 801-940 (1988 & Supp. 1994). (The U.S. military now uses a modified version of the Federal Rules of Evidence).

27. *Id.*

which have also not been accepted. Some of these issues are still in progress.

Another key problem is the listing of crimes in the statute. The Draft Statute has listed some vague areas of what constitute the crimes within the jurisdiction of the Tribunal; but in the U.S. system, there also exists a list of elements for each offense which must be proven beyond a reasonable doubt in order to convict. Currently, international law merely lists crimes; it does not define the elements a prosecutor must prove to sustain a conviction.

Also in the Statute are provisions for fair and expeditious trials, but the accused defendants must be physically present. Thus, the first trial cannot be conducted until the political and military situation has stabilized enough so that the people may attend the trials. Then, the trial will be held in the Netherlands. There are no "in absentia" trials. There are public hearings. The rights of the accused are fairly standard and well set out. Defendants have a right to counsel, are considered innocent until proven guilty, and have a right against self-incrimination. There are protections for victims and witnesses.

At times, various witnesses are reluctant to testify. Therefore, there is a provision for *in camera* proceedings. The witness goes into a closed session with the judge. This method provides a situation where the identity of the witnesses can be protected.

Under the penalties section, there is only imprisonment, which will be served in those countries that are willing to accept prisoners outside Yugoslavia. There is no death penalty, which is consistent with the official Amnesty International position on the death penalty, despite the heinous nature of some of the crimes apparently committed.

The budget for the first year was almost \$31.2 million. The first appointed prosecutor quit almost immediately. Today, a new prosecutor has been appointed, and a staff of about 250 has been retained.

#### M. DRAFT CONVENTION ON THE PROTECTION OF UNITED NATIONS PERSONNEL

The Draft Convention on the Protection of United Nations Personnel<sup>28</sup> is a program to protect various U.N. personnel in such countries as Somalia, Northern Iraq, or the former Yugoslavia. The protection

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28. Draft Convention on the Protection of United Nations Personnel (draft text provided by Ukraine and New Zealand at U.N. General Assembly, Sixth Committee, Dec. 1993).

provided thus far has been insufficient. Therefore, the United Nations has proposed a Draft Convention on the Protection of U.N. Personnel. The common approach of the initial drafts is to establish that attacks on U.N. personnel are an international crime.

The U.S. government considers this program to be too broad. It covers people who are serving in countries with non-governmental organizations. The U.S. government would like to restrict the forces protected in order to avoid diluting this protection and preserve it for those people who really need it. Right now, the only thing protecting U.N. personnel is Article 3 of the 1949 Geneva Conventions, which is the basic protection of humane treatment for all persons.<sup>29</sup> If the Draft Convention is adopted, the U.N. peacekeepers will get what amounts to diplomatic immunity.

#### N. CONCLUSION

In conclusion, the JAGs have been a positive influence on the Law of Armed Conflict. Furthermore, JAGs have come a long way in the last 15 years. The law protects civilians, but there is still a great need for training, particularly in other countries and other military organizations. Broader acceptance is needed in order to have any hope of being effective. The long-term effect of all this will be slight without swift enforcement and international condemnation. The Security Council's efforts have been positive. But clearer direction and proper due process are needed to flesh this out with standards and with staff.

There is a quote from Zlata's Diary dated Monday, June 29, 1992:

Dear Mimmy,

**BOREDOM!!! SHOOTING!!! SHELLING!!! PEOPLE BEING  
KILLED!!! DESPAIR!!! HUNGER!!! MISERY!!! FEAR!!!**

That's my life! The life of an innocent 11-year-old schoolgirl!!! A schoolgirl without a school, without the fun and excitement of school. A child without games, without friends, without the sun, without birds, without nature, without fruit, without chocolate or sweets, with just a little powdered milk. In short, a child without a childhood. A wartime child. I now realize that I am really living through a war, I am witnessing an ugly, disgusting war. I and thousands of other children in this town that is being destroyed, that is crying, weeping, seeking help, but getting none. God, will this ever

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29. Geneva Conventions, *supra* note 5, Art. 3.

stop, will I ever be a schoolgirl again, will I ever enjoy my childhood again? . . .<sup>30</sup>

Furthermore, it reads: "Sunday, July 26, 1992. The Security Council is hopeless. It makes no reasonable decisions at all. Your Zlata."<sup>31</sup> In 1993 we made a start. What we have to do now is get on with it.

## II. THE UNITED NATION'S COMMISSION TO INVESTIGATE WAR CRIMES IN THE FORMER YUGOSLAVIA

MR. CASSEL: Today, the world is witnessing in Europe the first genocide in half a century. Unfortunately, everyone has failed to date to do much about it. Everyone has seen it so often in the papers and on the television in the last two years, that it sounds almost banal at this point to repeat it. History, sociology and the law can get pretty dry. One of the things that the report of the U.N. Commission of Experts on Violations of International Humanitarian Law in the Former Yugoslavia<sup>32</sup> attempted to do was to give all this a human face. This was done because the human face—on all sides of the conflict—is a face dripping with tears.

The Commission stated in its report,<sup>33</sup> "The crimes committed have been particularly brutal and ferocious in their execution."<sup>34</sup> The report further stated, "The commission is shocked by the breadth and manner of the criminal conduct."<sup>35</sup> One paragraph from the Commission's report may help clarify, in a humane manner, what has been happening in the former Yugoslavia. It states:

Rape is present in the camps. Captors have killed women who resisted being raped, often in front of other prisoners. Rapes were also committed in the presence of other prisoners. Women are frequently selected at random during the night. These rapes are done in a way that instills terror in the women prisoner population.

The Commission has information indicating that girls as young as seven years old and women as old as 65 have been raped while in

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30. Filipovic, Zlata, "Zlata's Diary: A Child's Life in Sarajevo," New York, Viking, 1994 (entry dated June 29, 1992).

31. *Id.* (entry dated July 26, 1992).

32. *Secretary Council's Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)*, U.N. Doc. S/1994/674 (27 May 1994) [hereinafter U.N. Commission of Experts].

33. This is uncommon for the United Nations since its reports are given to indirection, understatement, and bureaucratized.

34. U.N. Commission of Experts, *supra* note 36, at paragraph 310.

35. U.N. Commission of Experts, *supra* note 36, at paragraph 319.

captivity. The group most targeted for rape, however, is young women between the ages of 13 and 35.

Mothers of young children are often raped in front of their children and are threatened with the death of their children if they do not submit to being raped. Sometimes young women are separated from older women and taken to separate camps where they are raped several times a day, for many days, often by more than one man.

Many of these women disappear. Or after they have been raped and brutalized to the point where they are traumatized, they are returned to the camps and are replaced by other young women.

There have also been instances of sexual abuse of men, as well as castration and mutilation of male sexual organs.<sup>36</sup>

This quotation, one should note, did not refer to Serbs, Croats, or Bosnians. It refers to human beings, to victims.

Has the response of the international community been worthy of the challenge posed by this kind of inhumanity? In terms of the international legal response to these crimes, we are at a midpoint. The Commission completed its report, which was transmitted by the Secretary-General to the Security Council on May 24th and publicly reported on June 3, 1994. A prosecutor for the International Criminal Tribunal was finally named on July 9, 1994. Thus, this is the point of transition between the Commission and the Tribunal. This is also a good moment for perspective and stock taking. As to the Tribunal, the appointment of Justice Goldstone of South Africa is by far the most promising development since the Tribunal was created by the Security Council on paper over a year ago. Justice Richard Goldstone has an excellent reputation for objectivity, thoroughness, and courage in the investigations he has conducted in South Africa.

However, large and important questions remain. First, will Justice Goldstone attack the genocide issue, as well as the other crimes in the former Yugoslavia, where they count the most—at the level of those responsible for ordering them? Or will Justice Goldstone conduct trials that involve only a few soldiers, and perhaps at best, mid-level officers? Second, even if Justice Goldstone tries to go after the commanders, will the Security Council let him do so? Or will the senior people be amnestied as part of a peace negotiation through either a *de facto* or a *de jure* arrangement?

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36. U.N. Commission of Experts, *supra* note 36, at page 230, paragraph 230, subparagraph O.

On this point, some of the evidence which the Commission's report compiles regarding command responsibility must be considered. According to evidence received and reported by the Commission,<sup>37</sup> there is a mass grave near Vukovar that may contain the bodies of 204 wounded Croatian soldiers allegedly taken from a hospital and dumped into that mass grave after being summarily executed. The Commission attempted to exhume that grave but was initially blocked by local Serbian commanders. Once the Serbian commanders' consent was received, bureaucratic machinations at the United Nations prevented the Commission from being able to carry out the exhumations within the time limit of its mandate. According to the Commission's information, the operation was commanded by a major who reported to the Army Corp Commander, who is now the Minister of Defense.

Also, the siege of Sarajevo should be considered. It violated almost every rule in the Geneva Conventions, such as targeting the civilian population and the hospitals. That 14 month operation was commanded by only three generals who cannot possibly claim not to have known. The definition of "command responsibility" is such that, if they knew, they are responsible. The Commission's evidence also correlates the military activity with the political activity. The Commission noted the following:

A review of the incidents in the chronology reveals a pattern of heavy shelling, prior to, and during, the various peace conferences and other negotiations, suggesting a political link to the attacks. There are also indications that shell fire has increased or decreased in reaction to statements by local and international political leaders and governments.<sup>38</sup>

This evidence, if documented and proven before the Tribunal, would lead straight to the door of the civilian leadership of the Bosnian Serbs.

Two conclusions could be drawn from this. First, that there is significant evidence of command responsibility by top-level civilian and military leaders for war crimes. Second, that very fact creates the risk that they will never be prosecuted because they are needed to negotiate peace. And, further, as part of that peace negotiation, they will secure for themselves an amnesty.

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37. This is not a finding or a conviction because that requires due process of law before the Tribunal.

38. U.N. Commission of Experts, *supra* note 36, at page 45, paragraph 192; Chronology mentioned is the that of shelling of Sarajevo.



Assume, however, that Justice Goldstone decides to go after the leaders, the ones responsible at the top, and that the Security Council will permit him to do so. The question that remains, from an evidentiary point of view, will he be able to do so? This turns in part on the investigative work done to date by the United Nations Commission. The Commission was established on October 12, 1992, and is chaired by Professor M. Cherif Bassiouni of DePaul University's International Human Rights Law Institute. Its database and analysts are also based at DePaul's Institute.

In reading the news accounts of the Commission's final report, the numbers might sound impressive: 18 months of work, 65,000 pages of documents, and 300 hours of video-tape were analyzed by Pippa Scott's group. All of this information was computerized, retrieved, and turned to the prosecutor's office. It is now sitting in the Hague awaiting the arrival of Justice Goldstone. This mass of information is indeed adequate for a number of purposes. It can be used to derive policy conclusions, lessons for history, and to show the existence and execution of crimes. In the Prijedor area, for example, the Commission concluded, "It is unquestionable that the events qualify as crimes against humanity. Furthermore, it is likely to be confirmed in court under due process of law that these events constitute genocide."<sup>39</sup> But crimes by whom?

As Americans have been reminded in recent weeks by the coverage of the O.J. Simpson case,<sup>40</sup> there is a big difference between knowing that a crime was committed and proving who did it. Nicole Brown and Ronald Goldman were obviously murdered, but did O.J. do it? Aside from the fact that many of us would prefer to believe that he did not, his lawyers have challenged every point, every piece of evidence. Where is the knife? Are the blood stains leading from the scene and at O.J.'s house really his? What happened to the bloody shoes? Perhaps not until the trial will enough of these questions be resolved to pronounce a verdict of either guilty or not guilty. Furthermore, this is a case where the police were on the scene within hours, if not minutes; where hundreds or thousands of hours of investigative time have already been expended; where physical evidence, including hair and blood, which can be subjected to forensic analysis, has been recovered; and where experienced prosecutors have been guiding the police closely since at least the first few days.

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39. U.N. Commission of Experts, *supra* note 36, at page 43.

40. *People v. Simpson*, No. BA097211 (Super. Ct., Los Angeles County 1995).

Now, imagine instead that the police arrived at Nicole Brown's house, not two hours, but two years after the murders. Not only are the blood stains gone, but the house itself has been destroyed. Imagine also that the neighbors who were walking their dog that night have fled to another country, where even if they can be located, they no longer remember even the date, let alone the hour and the minute, so crucial to the alibi defense, of what they saw. Imagine all that, and you are Judge Goldstone beginning to plan the prosecutions in Yugoslavia. Obviously, his task, while never easy, would face far fewer difficulties had a team of U.N. police investigators, prosecutors, and forensic experts been dispatched to Croatia, Bosnia, and to the refugee camps to maintain a continuous presence during the last two years and to gather fresh evidence. Logistically and financially that could have been done. For example, compared to the cost of the U.N. humanitarian assistance and military presence in Bosnia, the cost of such an investigation would have been quite small. Too much for the average person or even for a large non-governmental organization ("NGO") like Amnesty International, but quite manageable for the United Nations. However, this did not happen. With some exceptions, the U.N. Commission of Experts was relegated to receiving written reports which were often second, third, and fourth-hand, which came from thousands of miles away, long after the actual events. With enough data of that sort, general conclusions can be reached. However, no one can be convicted of a crime unless it is proven beyond a reasonable doubt.

A team of investigators was not put in the field from the start simply because the U.N. Security Council did not so desire. Professor Bassiouni did manage to raise slightly over a million dollars in private funds, enough to support a paper-processing operation and a computer database in Chicago. Yet, for the first half of the Commission's existence, the United Nations gave no funds at all for its investigations. By the summer of 1993, the United Nations, through a voluntary trust fund, came up with over a million dollars. However, they were so slow in disbursing it, that by the time the Commission's mandate ended in April, 1994, about a fourth of that money still had not been spent. The Commission was then refused permission to conclude several of its proposed investigations. Again, within the last two weeks, the Security Council has authorized another commission of experts to investigate yet another series of horrendous atrocities. This time it is situated in Rwanda. Will it be any different?

Shameful as the response of the international community has been, it should not be enough for everyone to plunge into cynicism or de-

spair. Despite all of the problems, there are a number of positive aspects here which should be recognized. First, the United Nations created, for the first time since Nuremberg, an international investigative commission, as well as an international criminal tribunal. The U.N. was not allowed to treat the war in the former Yugoslavia as only a war. It was also forced to treat it as a massive violation of human rights. At least in principle, that is a step forward.

Second, the existence of the Commission's report, which has been widely covered over the last 15 months in various public media, together with the courageous work of many people in the press and NGOs, has stimulated an informed public consciousness and concern about the violations in the former Yugoslavia. Third, a record has been created for history. Fourth, the Commission's evidence focusing on the broad patterns may be especially helpful for prosecution of cases based on command responsibility for widespread violations. The more violations, the less the importance of each individual blood stain. Now that a credible prosecutor has finally been named, the time has come to step up public pressure for credible prosecutions. In good conscience, no less should be done.

### III. THE PROBLEMS FACING THE WAR CRIMES TRIBUNAL AND THE NEED FOR A PERMANENT INTERNATIONAL CRIMINAL COURT

MR. BLEICH: As others have already made clear, there are many practical and political obstacles presently facing the War Crimes Tribunal in accomplishing its work. I hope today to identify at least the principal challenges confronting the tribunal, clarify how it affects the work of the Tribunal, and ultimately draw some conclusions about how these obstacles can be avoided. In my view, most of these problems are unnecessary. Virtually all the most difficult impediments before the Tribunal result from, or are exacerbated by, the fact that the Tribunal is an ad hoc body. Until the international community commits to a permanent criminal court, I believe we will continue to face great and unnecessary challenges in bringing war criminals to justice.

At the outset I do not wish to suggest that the obstacles facing the Tribunal are insurmountable or to otherwise speculate about the Tribunal's ultimate success or value. Rather, I think the Tribunal is good in the same way that Churchill is said to have believed democracy was good, that is: "democracy is the worst form of government

[ever devised] except [for] all [the] other[s]."<sup>41</sup> At this point, I am optimistic the Tribunal will overcome the obstacles in its path. My point is not to criticize the Tribunal but to suggest that the obstacles it faces should not be present in the first place. Understanding the hurdles before the Tribunal provides lessons about how to improve future international efforts to prosecute war crimes.

#### A. *THE PROBLEMS FACING THE WAR CRIMES TRIBUNAL*

The Tribunal presently faces a variety of difficulties, including political resistance in the Security Council and European nations to the Tribunal per se, bureaucratic inertia providing funding and staffing, a lack of procedures for an ad hoc court, complicated legal and jurisdictional restrictions upon its authority, and difficulties in locating qualified personnel. The difficulties, to varying degrees, created five types of impediments to effective prosecutions: (1) spoilation of evidence; (2) inefficiency; (3) diminished enforcement power; (4) limited legal and jurisdictional authority; and (5) weakened credibility.

##### 1. *Spoilation of Evidence*

The key to effective prosecutions is evidence: finding it, collecting it, preserving it, and presenting it to a jury. Although the point may seem obvious, without evidence there are no convictions; there are not even charges. Accordingly, a rule of thumb among police officers and prosecutors is that the most important time in any prosecution is the first 24 hours after the crime occurs. With each minute that passes after the crime, the risk increases that witnesses will disappear, memories will fade, evidence will be lost or concealed, fingerprints will smear, and blood will dry to powder and then scatter with the wind. Effective prosecution thus depends upon prompt, professional collection of evidence.

It is already too late for evidence of hundreds of crimes to be properly gathered to support prosecutions by the Tribunal. The only evidence collection that has occurred in Bosnia thus far has been done largely in fits and starts by private organizations working on meager budgets.<sup>42</sup> The Tribunal's prosecutors had no ability to collect evi-

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41. THE OXFORD DICTIONARY OF QUOTATIONS 202:23 (4th ed. 1992).

42. While the U.N. was putting its plan together, several states and organizations were collecting information in the former Yugoslavia. A project at DePaul University (overseen by Cherif Bassiouni, who chairs the U.N. Commission of Experts), collected over 65,000 docu-

dence of crimes in 1992 or 1993 because the prosecutors were *not even appointed* until after these crimes were committed. Although evidence certainly still exists to support some prosecutions, untold evidence has already been lost, making those prosecutions more difficult and, other prosecutions impossible.

The loss of evidence in the former Yugoslavia, moreover, did not end with creation of the Tribunal. For fourteen *more* months, the Tribunal failed to collect evidence because the U.N. could not agree on a prosecutor. Not surprisingly, without an independent prosecutor to perform the investigatory and prosecutorial tasks of the Tribunal, those tasks went unperformed. Questions were not asked, samples were not collected, warrants were not issued, and suspects were not detained. It was not until over a year after the Tribunal was formed that the Honorable Richard Goldstone was appointed as prosecutor. Justice Goldstone must now attempt to build cases upon evidence collected haltingly, and often randomly, by private organizations and individual states.

In sum, more than two years have passed since war crimes were reported in the former Yugoslavia. Two years in which crucial evidence—witnesses, memories, bullet shells, buildings, blood samples, torn clothes—have deteriorated or been lost for good. In many cases, even though a crime had been committed, it may now be impossible to prove. The failure to act quickly against these crimes has in many cases been no different from a failure to act at all. Evidence has spoiled, and the Tribunal must now work with what remains.

## 2. *Inefficiency and Training*

The second key to effective prosecutions is prosecutors. Even overwhelming evidence may not be enough to obtain a conviction, unless there are trained professionals and staff who are able to piece this evidence together, understand the critical requirements of the law, and present evidence that establishes each element of the offense. This requires specially trained personnel, and of course, money. Thus far, the Tribunal has had difficulty getting either, and its preparation has inevitably suffered.

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ments documenting war crimes. Governments and private organizations have assembled evidence of at least 5,000 specific cases along with lists of 3,500 individuals allegedly responsible for committing the crimes. Ten teams of prosecutors and mental health specialists have collected evidence of over 1,000 rapes. The State Department has produced 650 reports of refugee interviews, including confessions by some refugees of having engaged in atrocities themselves. However, as Professor Cassel from DePaul University has explained, the amount of evidence actually collected pales in comparison to the number of documented crimes.

Until May 1993, there was no such thing as the "War Crimes Tribunal." In fact, there had been no war crimes tribunals or war crimes prosecution of any sort in the nearly fifty years, since the Nuremberg trials. As a result, there has been no corps of international prosecutors developing skills in addressing war crimes, no budget processes, no procedures for evaluating the merits of cases, no developing body of law—in short, no professional, administrative development in this field.

Not surprisingly then, the U.N. and the Tribunal have had a difficult time performing even the most basic tasks, such as establishing and gaining approval of a budget, hiring qualified prosecutors, and putting together cases. Some of this, of course, is attributable to the U.N. not having appointed a prosecutor. But for several months there has been a deputy prosecutor, Graham Blewitt from Australia, who has been on duty and grappling with these issues. Mr. Blewitt's difficulties have nothing to do with his capabilities—by all accounts he is both talented and dedicated. The problem lies in the fact that neither Mr. Blewitt (and now Justice Goldstone), the Tribunal staff, nor the Security Council have any recent precedent to draw upon in answering basic questions.

The most obvious consequences of these bureaucratic problems is that the Tribunal is under-funded and understaffed. The Tribunal's budget of \$11.5 million for the rest of the year will barely cover rent, judges' salaries, and overhead—leaving virtually nothing for the prosecutor's office. As a result, only a few prosecutors are on duty, and there is almost no budget for investigators. The budgetary and staffing problems are due almost exclusively to the fact that the United Nations has never before budgeted for such an organization, did not have funds reserved for this purpose, and did not have experience in evaluating budget proposals from the Tribunal.

There are other consequences as well, however, that burden the Tribunal's efficiency. The prosecutor's office is not only limited by a lack of money and staff, it lacks experience among that staff. Because there are no professional "international criminal prosecutors," the office has had to make do with domestic prosecutors, most of whom have no training in international law, let alone international humanitarian law. These prosecutors face a very steep learning curve in mastering complex questions of jurisdiction and customary international law, the new procedures of the Tribunal, and working with independent State governments to obtain evidence. In sum, the Tribunal presently faces a

deficit of money, prosecutorial resources, and experience that will increase its burden of successfully prosecuting war criminals.

### 3. *Legal and Jurisdictional Problems*

A third key to prosecuting crimes is a well-developed body of law setting forth specific and readily applicable standards. Prosecutors enforce the law, and thus a prerequisite to prosecutions is having some understanding of what that law is.

There are a broad range of unsettled questions of law raised by the Balkan conflict. For example, the Genocide Convention applies only to armed conflicts between internationally recognized states. There are potential questions about whether the Serbian Federal Republic qualifies as a state or is otherwise bound by the Genocide Convention. There are questions about the standard of proof. As a practical matter, these questions may determine whether leaders who advocated Serbian "purity," for example, can be held responsible for the ethnic cleansing campaign under the doctrine of command liability, and if so, whether their participation must be shown beyond a reasonable doubt.

Many of the standards that will be employed are entirely novel. For example, rape is recognized for the first time as a crime against humanity, provided that it is committed within the context of a widespread or systematic attack against a civilian population for national, political, ethnic, racial or religious reasons. It is unclear what standard of proof will be necessary to show whether individual attacks against Bosnian Muslim women will qualify under this standard.

It is impossible to predict all of the legal issues that will arise in the course of these prosecutions. However, the risks that attend so many unsettled questions are clear. Prosecutors may devote vast portions of their scarce resources to proving crimes that are ultimately non-cognizable by the Tribunal or impossible to support under the relevant standard of proof. By the same token, prosecutors may be discouraged from pursuing viable actions because of their misunderstanding of existing law. The Tribunal, as well as defendants, may waste precious resources deciding cases that are later made moot by discovery of a previously unconsidered legal difficulty.

In sum, the ability of the Tribunal to do its job will be hampered by present limitations on the understanding of international criminal law. Prosecutors may have difficulty in knowing who to prosecute, or even what crimes to prosecute, and risk diverting their energies from appropriate cases.

#### 4. *Lack of Enforcement Powers*

A fourth key element to successful prosecutions is—obviously enough—the opportunity to prosecute. Even an “open and shut case” will not result in a conviction if there is no trial or opportunity to present that case. At present, there is no assurance that Tribunal prosecutors will, in fact, be able to try cases. Even after they have identified suspects and built a sufficient case to warrant prosecution, prosecutors must still gain custody over the suspect. The Tribunal rules require that the defendant must be present in order for a case to go forward, and thus the rules empower the prosecutor to issue indictments for the arrest and detention of suspected war criminals. That power, however, may be limited by important practical concerns.

States have historically been reluctant to turn over their nationals for international prosecution in cases where those nationals hold positions with the Government or arguably acted in a manner consistent with the Government’s policies. Only two years ago, Libya refused to extradite two intelligence officials who were suspected of killing over 100 civilians by placing a bomb on Pan Am flight 103. With Serbia likely to prevail in the conflict, the chances of it surrendering its nationals is remote. Indeed, even defeated nations have been able to hide certain high level officers from prosecution. Several German officials eluded the Nuremberg prosecutors, and ended up being tried in absentia.

Under the statute, failure to cooperate in extradition may be sanctioned by the Security Council either in the form of provisional measures, economic sanctions, or armed force. But, there too, the law may not as a practical matter dictate what occurs. International bodies have been reluctant to use any so-called “interim” measures based upon concerns about national sovereignty. The possibility of non-action by the Security Council is particularly acute, given the ambivalence of Russia and Great Britain toward the whole enterprise of criminal prosecutions.

The need for politics and diplomacy in resolving the Balkan conflict will introduce further impediments to extradition. Even in post-war periods, where the atmosphere is more conducive to wide-spread prosecution, selective extradition and prosecution are typical. In Nuremberg, for example, it is no accident that allied nationals who committed atrocities were not prosecuted. Even among the vanquished states, the Nuremberg prosecutor pursued only 26 of 250 high Japanese officials, and conspicuously omitted Emperor Hirohito. With Serbia a likely



victor, international pressure may exist to settle the prevailing government in a volatile region. Again, the fact, that no international summons procedures are in place and there is no history of cooperation or precedent to draw upon, will most likely work against the Tribunal.

### 5. *Political Will and Credibility*

The last key to successful prosecutions is the community's confidence in the justness and wisdom of the prosecutors and the Court. Unfortunately, doubts about the purpose of the Tribunal and its ability to deliver justice have already surfaced. Specifically, some in the international community question the motivations for creating a Tribunal in *this* case when comparable crimes against humanity have gone unprosecuted in Cambodia, Tibet, Rwanda, Bangladesh, Haiti, and in numerous other conflicts. Some complain that introducing a Tribunal at this stage may only interfere with attempts to establish peace in the region. Accordingly, some wonder if the international community is attempting to impose its own notions of justice at the expense of more Balkan lives. If the Tribunal's decisions prolong hostilities, they fear the public will question whether the United Nations and the Tribunal are producing justice at all.

Even those who favor the creation of the Tribunal worry that certain aspects of its creation may call the Tribunal's credibility into question. Specifically, there is something unsettling about creating a criminal justice system *after* the international community already has suspects in mind. The timing creates the perception, correct or not, that judges, prosecutors, rules, and the entire apparatus of justice are being constructed to ensure the conviction of specific individuals. Defendants will no doubt challenge the fairness of the Tribunal on this ground, and their arguments may well color the international community's confidence in the justness of the Tribunal's work.

Finally, as delays mount, some observers fear that the Tribunal could potentially set back the cause of international justice in the broadest sense. Specifically, these observers worry that if the Tribunal fails to prosecute effectively (due to loss of evidence, confusion in the law, lack of training, and the related problems discussed above), the public will lose confidence in humanitarian law or will question whether U.N. reports of the terrible atrocities in the Balkans were accurate. Delays in the Tribunal and widely-publicized political disputes over personnel and peace initiatives have thus created a risk that the Tribunal will not, in fact, vindicate the international community's interests.

## 6. *The Costs Of These Problems*

The sum of these problems is thus far reflected in the work of the Tribunal. The Tribunal has held only one session to date and that was a purely ceremonial meeting in November 1993, with no actual business conducted. No indictments have been issued. The failure of the Tribunal to bring war criminals to justice does not merely hurt the Tribunal as an institution. Rather, this is the least of the damage caused by the disappointing performance of the U.N. thus far. The primary casualties of non-prosecution are the victims themselves and the outraged community. Prosecution and conviction are intended at least in part to vindicate the interests of the community. As long as criminals go unpunished, the community suffers.

The community also suffers from increased criminality. When there is a delay in bringing criminals to justice, those criminals remain free to commit more crimes against more people. At least in theory, other criminals are encouraged to commit crimes because they understand that the community lacks the ability to exact retribution. The community suffers directly from these new crimes, as well as indirectly from the sense of helplessness and fear that comes with being powerless.

Finally, the stature of international law and the international justice system suffer. The failure to respond adequately in Bosnia threatens to make all of humanitarian law suspect. If the most extreme affronts to humanity can go on unchecked—war crimes, genocide, and brutal crimes against humanity—then the public may justifiably conclude that humanitarian law has no practical effect or meaning. Accordingly, there is a great need to understand the causes of systemic problems in the prosecution of war criminals in the former Yugoslavia in order to ensure that these problems do not continue to recur.

### B. *THE CAUSES OF THE TRIBUNAL'S PROBLEMS: "AD HOCRACY"*

Many factors including politics, bureaucracy, incompetence, bad luck, and the rest of the usual suspects, have been blamed for the problems described above. Although all of these factors have had their role, these problems are inevitable. They can be minimized but never eliminated from any human institution. The key difficulties facing the Tribunal that *can* be addressed all relate to one feature: ad hoc structure. The ad hoc nature of the Tribunal has contributed significantly to unneces-

sary delays, politicization, erosion of the Tribunal's credibility, inefficiency, limitations on the law it will apply, and the stature of its work in general.

### 1. *Delay and The Loss of Evidence*

The main reason that the Tribunal will be deprived of key evidence and the reason that thousands of war criminals remain uncharged, is that there was no Tribunal around to initiate prosecutions when these crimes first occurred. There is, as present, no permanent international criminal court. As noted, the Tribunal is the first international criminal court established since the Nuremberg Tribunal in 1946.<sup>43</sup> Accordingly, years passed since the first crimes in the Balkans were committed without an international instrument to adjudicate these crimes. The fact that the Tribunal had to be built from scratch, more than any other reason, explains why the Tribunal's history thus far has been one of delay.

The United Nations did not even agree to a Tribunal in principle until a full year after it first obtained information about war crimes in the Balkans. Much of the first year of delay can be attributed to the inherent difficulty of constructing an institution that has never previously existed in human experience.<sup>44</sup> Reports of atrocities in the former Yugoslavia were coming out of international organizations as early as Spring 1992. However, because no formal international prosecutorial or police apparatus existed to investigate these crimes, the Security Council, in August, 1992, at first reacted to reports principally with statements of disapproval. After six months, the Security Council issued a strongly worded resolution condemning the reported war crimes, but it still had no vehicle to take formal action. Two months later, the Security Council commissioned an impartial Commission of Experts to consider whether the possibility of prosecuting these crimes was warranted. More time elapsed as the Experts conducted their investigation and reported that grave breaches of international humanitarian law were, in fact, ongoing.

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43. Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis Powers and Charter of the International Military Tribunal, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 284.

44. The Nuremberg Tribunals—the closest analogy—was not in fact a body representing the international community as a whole, but was created by a special treaty of the victorious nations after World War II.

In February 1993, the Security Council finally adopted resolution 808 which held, *in principle*, that an international war crimes tribunal would be created, but did not propose the form of that Tribunal. That was left to the Secretary-General. Even working quickly, it took three more months before the Security Council adopted resolution 827 approving the Secretary-General's plan that formally established the Tribunal. Thus, a full year's worth of brutal international crimes occurred, without any formal U.N. apparatus capable of prosecuting them.

Delays continued into a second year, again because of the Tribunal's ad hoc origins. Much of the delay in the second year after hostilities began was caused by political machinations over the selection of a prosecutor. The politics surrounding selection of a prosecutor were greatly exacerbated by the fact that the Security Council was not merely selecting an ad hoc prosecutor, but was selecting a prosecutor to pursue specific individuals for specific deeds. As a result, between May and October 1993 several prosecutorial candidates were rejected based on objectives relating specifically to the crimes and figures alleged in the former Yugoslavia. Great Britain, in particular, did not want an overzealous prosecutor who might interfere with Lord Owens's peace initiatives. Thus, Cherif Bassiouni, an American, was vetoed by the British, because of concerns that he would be too active. Likewise, the United States vetoed Great Britain's candidate—an Indian constitutional law scholar with no experience as a prosecutor or in international law—from fear that he would be too passive in bringing Serbian war criminals to justice.

On October 21, 1993, after months of wrangling, the Security Council appointed Venezuela's Attorney General, Ramon Escovar-Salom: a compromise choice who showed little enthusiasm for the job. Escovar-Salom first informed the Security Council that he would not be able to take office until December. A few months later he resigned to take a post as minister of justice in his own country.

Another five months passed with no successor selected, allowing new political concerns to surface, and turning selection of a prosecutor into a bargaining chip. Russia blocked two candidates, an American and a Canadian, based upon growing qualms over the efficacy of the Tribunal. The political machinations over the prosecutor demonstrate that politics can be far more easily exploited where no system is in place and a prosecutor must be selected to prosecute particular crimes as opposed to all crimes.

Finally, even with the appointment of Justice Goldstone, delays will almost inevitably continue. This is due in large measure to the

problem of the Tribunal's ad hoc creation. The posting of a prosecutor is only a first step in making the Tribunal functional. The Tribunal still must generate a workable budget, locate and train qualified staff members, sift through mounds of evidence, and begin long-overdue investigations before it can begin issuing indictments. Had the Tribunal been a pre-existing body, it would already have had a budget, staff, and a system for investigating evidence in place. Accordingly, delays in prosecutions and the problems that come with delay have occurred in the War Crimes Tribunal largely because the Tribunal was not in existence at the time the crimes occurred.

## *2. Inability To Develop A Coherent Body of Law and Procedure*

The second set of problems confronting the Tribunal—uncertainties about international criminal law—also stem from the Tribunal's post hoc creation. Because there has not been a Tribunal to adjudicate international criminal law since Nuremberg, international criminal law has gone untested for five decades. The principles set forth at Nuremberg have had no opportunity to mature with society, and now, understandably, do not necessarily fit the goals or values of an evolving civilization.

American lawyers are familiar with the idea that words change in their meaning over time as society continues to revisit, ponder, and experiment with the interpretation of those words. The terms "due process," "equal protection of the law," and "cruel and unusual punishment" have resisted any fixed meaning over time. For example, when the Bill of Rights was first ratified, it was not cruel or unusual for the government to crop the ears of a convicted criminal, nor was it understood that a criminal defendant was entitled to an attorney, regardless of his ability to pay. Today, the unaltered words of the Constitution convey precisely the opposite understandings.

The principles enunciated by the Nuremberg Tribunals are no different from any other legal principles and require the same type of elaboration. The Nuremberg trials first established the notions of "command liability," "crimes against the peace," and "individual criminal liability under international law." However, in the Nuremberg and Tokyo trials, the crimes were committed by officials of sovereign states. Moreover, those states had invaded other sovereigns, and, in Germany's case, had instituted a formal policy of eradicating entire segments of the civilian population. It is an open question how these Nuremberg principles will apply where Serbia's sovereignty is suspect,

where there was no formal war by Serbia in Bosnia, and where Serbian leaders deny that soldiers are acting pursuant to Genocidal policies.

In the years since World War II, other situations have arisen that would have justified wide-scale war crimes prosecutions and allowed the elaboration of international law principles. Pol Pot's massacres in Cambodia, although not directed at a specific "culture" or sovereign, were nonetheless a systematic murder campaign in violation of international law. The same is true of Stalin's purges in the former Soviet Union and Idi Amin's slaughters in Uganda. The rape of over 200,000 women in Bangladesh by Pakistani soldiers, was not "murder", but it was nonetheless a campaign to destroy a culture by "soiling" its women and altering their bloodline through forced impregnation. At present, the killing of Buddhists in Tibet and the mass atrocities in Rwanda would justify investigation and prosecution. Each set of prosecutions would have permitted further elaboration of the principles of international humanitarian law, including the scope of individual liability, the elements necessary to establish command liability, and the viability of "crimes against the peace" or comparable innovations. Instead, no such developments have occurred.

In describing the evolution of law, Thomas Jefferson said, "[W]e might as well require a man to wear still the coat which fitted him when a boy, as civilized society to remain as under the regimen of their barbarous ancestors."<sup>45</sup> Yet that is what has been done with international criminal law. The U.N. in many ways has straight-jacketed the Tribunal with the undeveloped Nuremberg model. Some portions of the law developed at Nuremberg are not only undeveloped, they are flatly out-of-date. For example, Nuremberg permitted prosecution of crimes that were not recognized as law at the time the crime was committed. Before Nuremberg, there was no such thing as individual liability in international law, or "crimes against the peace." The application of such laws would probably be unconstitutional in American courts under the federal constitution's *ex post facto* clause. Likewise, Nuremberg permitted trial in absentia and imposition of the death penalty, both of which are now condemned under international law. Although good at the time, the law of Nuremberg must now be stretched, altered, hemmed and tightened to fit a maturing society.

The lack of legal development is unfair to the Tribunal's prosecutors and to the international community. For example, rather than

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45. Schneiderman v. United States, 320 U.S. 118, 137 n.15 (1943).

building cases, the prosecutors must wonder if there are laws that would even permit them to prosecute Karadzic or Milosevic and other command figures at all. This uncertainty saps the prosecution's resources and may result in wasted prosecutions.

### 3. *Inexperienced and Inefficient Prosecutors*

The same problems that have caused under-development in international criminal law are also responsible for the shortage of trained prosecutors. Good prosecutors are not born that way. They require experience, direction, and support in order to develop. Because no international criminal court has operated in fifty years, over two generations of lawyers have passed without any development of a trained corps of international prosecutors. Although the Tribunal has hired highly talented domestic prosecutors, these prosecutors are handicapped by the lack of historical precedents in international fora in three ways.

First, while the saying may be trite, there is no substitute for experience. Domestic criminal prosecutors typically develop skills related to their particular specialty. In the United States, attorneys will often divide between attorneys who litigate in federal courts and those who litigate in state courts. This makes sense for efficiency reasons and because the rules, procedures, nature of argument, the law, and even the atmosphere may differ markedly between the courts. Many skills, of course, are transferable. However, no state prosecutor's office would voluntarily agree to a rule that prohibited it from allowing the same attorney to appear in the same court twice. The subtle skills developed in court appearances are invaluable to skillful advocacy.

Second, because no courts have prosecuted war crimes since 1945, there are no attorneys today who can give up-to-date advice on preparing war crimes cases, if there are any attorneys left at all. Without knowledgeable tutors, prosecutors will make mistakes that could be avoided. Prosecutors have no alternative but to learn by trial and error.

Third, because there has not been a permanent court, there has not been an administrative system created to facilitate prosecutions in that court. Prosecutors will inevitably face organizational problems or be distracted from their principal duties in order to attend to administrative issues. To reiterate, the problem of inefficiency and effectiveness relates directly to the absence of a pre-existing international tribunal to provide a training ground for international criminal prosecutors.

#### 4. *Loss of Credibility For Court*

Attacks on the Tribunal's credibility and capacity to dispense justice almost exclusively relate to the method of the Tribunal's creation. The key concerns about the Tribunal's ability to act justly are: (1) the fact that its introduction is unprecedented; (2) it may unsettle attempts at "political" justice in the region; and (3) some doubt the impartiality of a court whose prosecutors, judges, procedures, and legal rules were selected specifically for the prosecution of specific acts and crafted for *known* suspects.

Had a criminal court already been in place, objections to the Tribunal's fairness per se would be largely eliminated. If the criminal court already existed in the background, its decision to prosecute would not be seen in the context of peace initiatives but for what it is—a separate entity addressing a separate set of issues. A Tribunal is not concerned with war, peace, or politics, but only with crime and the administration of international law. Likewise, if the Tribunal existed as a permanent fixture prior to the time atrocities began to occur, there could be no suggestion that the judges, prosecutors, or rules of the court, were crafted to ensure the conviction and punishment of specific individuals.

Although I do not think there is anything inherently unfair about how the Tribunal was created or that the Tribunal will not deliver justice, public perceptions of fairness and confidence in the Tribunal are weakened by the ad hoc nature of the Tribunal. Ad hoc administration creates, at the very least, the appearance of impropriety, which is counter-productive to achieving international justice.

#### 5. *Risks To The Stature of Humanitarian Law*

Lastly, concerns about the stature of international humanitarian law and the impact of the Tribunal upon that law, are closely tied to the Tribunal's post hoc creation. Humanitarian law, as a whole, has been threatened by the fact that no Tribunal was in existence at the time the crimes were committed and by the problems arising from delay and inexperience. Bosnia demonstrates the importance of punishing war criminals as an expression of international commitment to humanitarian law. The fact that we are not administering any punishment so far, places the credibility of international humanitarian law in doubt, and exposes just how tenuous that law really is.



International humanitarian law is largely untested. The body of international humanitarian law has been developing steadily since World War II through treaties and conventions, U.N. resolutions, and scholarly articles, yet few of these laws have been formally tested by judicial organizations. How we respond to the situation in Bosnia may tell us whether this law has any force at all.

What we have seen thus far is extremely damaging to the stature of international humanitarian law. The public sees pictures of skeleton-thin Muslim and Croat soldiers dying in Serbian concentration camps and reads reports of torture, killing grounds, mass graves, and starvation rations at these camps. The existence of crimes is undeniable. The public is properly amazed that, for all the talk about humanitarian law, the United Nations has no enforcement mechanism in place to address such conduct on a regular basis. Eighty-five percent of the 200,000 people killed thus far in the Balkans were civilians. Tens of thousands of other civilians have been enslaved and raped in camps. Whole civilian populations are displaced or forced to do unspeakable acts. There is a systematic effort, at least by the Serbian government, to exterminate other races entirely—by mass murder, by rape, and by humiliation calculated to destroy their cultural identity. After three years of this, due largely to the fact that no permanent institution existed to address these war crimes, no indictments have been brought in any international forum and no punishment has been meted out.

Failure to swiftly and effectively punish war criminals in the Balkans could do more than eliminate the accomplishments of the past five decades. It could potentially *set back* human rights to pre-World War II standards. The message delivered by the absence of a permanent court is that the international community lacks the power to punish government officials who, in war-time, commit crimes against humanity. If we cannot adequately prosecute war criminals in the former Yugoslavia, then even the Nuremberg and Tokyo trials no longer stand as examples of the international community punishing criminals. Instead, they are limited to their circumstances: victors expressing their triumph over the vanquished. Without prosecutions in war time, war crimes appear enforceable only against those who are now powerless.

The failure to respond adequately in Bosnia thus threatens to make all of humanitarian law suspect. Unsuccessful action may, in fact, degrade international law to some lesser status. If the most extreme affronts to humanity can go unchecked, then international humanitarian law is not really law at all; it becomes nothing more than an elaborate statement of international disapproval. The status of international law

thus depends upon confidence that the law can and will be enforced. That stature is compromised where, as here, we face the most blatant and extreme human rights violations—war crimes, crimes against humanity, and the systematic extermination of a race. The international community has no body immediately available to deal with these crimes.

In sum, many of the difficulties facing the Tribunal and international humanitarian law stem from or are exacerbated by the ad hoc nature of the Tribunal. The fact that no Tribunal existed when crimes against humanity were first discovered has caused tremendous delay. The Security Council has had to create a system from scratch and is unguided by a comparable system or by experienced professionals. It must locate money for its budget that it did not have, and it lacks any expertise even on what an appropriate budget should be. While it struggles with these issues, those who have political objections to the Tribunal have been able to use the delays and uncertainty to inhibit the progress of the court. Finally, the fact that the rules, officers, and mandate of the Tribunal were selected with a specific set of deeds and actors in mind, as opposed to merely the prosecution of humanitarian crimes per se, makes it far more likely that political factors will come into play, undermining the force of the Tribunal's decisions. Thus, "ad hococracy" has threatened not only the Tribunal's success, but the success of international humanitarian law as a whole.

### C. WHY THE AD HOC MODEL EXISTS

Given the obvious shortcomings of creating war crimes tribunals ad hoc, it is reasonable to ask why this system exists at all. It appears that there are three reasons why the ad hoc model, with all of its problems, has been adopted: (1) rote reliance on the Nuremberg Trials; (2) inertia in the international community; and (3) lack of commitment to human rights.

#### 1. *The Fallacy Of The Nuremberg Model*

The international community takes understandable pride in the accomplishments of the Nuremberg Tribunals, which for the first time established that individuals may be held accountable for their crimes under international laws. Nuremberg, of course, is the best model in part because it is also the only model. The Nuremberg model, is not without its flaws, however. Nuremberg was in some ways a great success, but its successes were not due to its ad hoc nature or its adminis-

tration. If anything, the hasty, post hoc creation of the Nuremberg trial may have limited its effectiveness. Nuremberg was set up out of necessity, and not by design. Thus, it is, at the very least, not a paradigm of an efficient court system.

The fact that the United Nations patterned the War Crimes Tribunal after the ad hoc Nuremberg Tribunal makes clear just how un-focused the United Nation's thinking has been about punishing international crime. The Nuremberg model is uniquely ill-suited to the task facing the Tribunal. Yet, the Security Council largely overlooked the vast differences in the posture of the issues in Nuremberg compared to what exists in the Balkans today.

First, efforts to collect evidence and indict criminals were not as urgent in Nuremberg. The war crimes at issue at Nuremberg were in the past: Germany was vanquished before the four "victorious powers" entered into a treaty creating the Tribunal. Second, the crimes had already been committed before Nuremberg *could* be created. Individual liability for international violations had previously not been recognized until after the Holocaust was completed. No new crimes were being committed while the Court went about its work, and the situation was effectively neutralized. Unlike the Balkans, the Court had many of its principal suspects in custody and had physical control over the evidence. Accordingly, although the victorious powers had no choice but to set up the Court as they did, they were fortunate to have had the luxury of time to construct a court from scratch.

While Nuremberg *could* operate in an ad hoc manner, that does not mean its ad hoc structure was optimal. If anything, the fact that Nuremberg was created after the fact interfered with its operation. As with the War Crimes Tribunal, the Nuremberg Court faced difficulties with respect to lost evidence, uncertainty about the law, and inefficiency. As a result, although thousands of individuals participated in Nazi war crimes, atrocities, and genocide, only 18 people were in fact prosecuted at Nuremberg, and only 26 were prosecuted at the Tokyo trials.

In borrowing from the Nuremberg Tribunal's experience, therefore, the Security Council may have borrowed the wrong parts. Although Nuremberg may be a useful prologue for the War Crimes Tribunal, it is not a responsible method to systematically address recurring violations of international humanitarian law.

## 2. *Civil Law Bias Of International Jurists*

The second reason why the international community may have embraced an ad hoc Tribunal model for criminal law is that the ad hoc

model is familiar to civil lawyers. The international community remains predominantly civil law oriented, and looks to civil law concepts. Ad hoc Tribunals have been used routinely in the civil context, and generally work well where timing is not as critical and the legal challenges are very different. Examination of several international tribunals, including the Iran-United States Claims Tribunal, the Permanent Court of Arbitration, and the International Court of Justice, reveals that the civil law system simply does not transfer well to the criminal system.

For example, the Iran-United States Claims Tribunal has successfully resolved over 4,000 claims arising from disputes during the revolution in Iran during the late 1970s, even though it did not begin its work until years after the civil claims became ripe. Commonly, in civil cases, the Tribunal sits idle for over a year before it has a system in place for processing claims. It adopts its own rules, sets compensation, establishes staffing needs, and formulates procedures for docketing, prioritizing, and hearing cases. Lately, as the Tribunal has narrowed its docket down to the most difficult cases, its progress has again slowed. And yet, the Iran-United States Claims Tribunal has still been able to serve its purpose because the damages at issue are monetary, the harms are not ongoing, and the evidence, mostly concerning contract terms, is not particularly susceptible to spoliation. The fact that none of these factors apply in the criminal context is largely overlooked by lawyers with a civil law orientation.

If more international lawyers were also criminal lawyers, they would most likely recognize the inadequate fit between the civil law model and the type of court system necessary in the former Yugoslavia. However, because of the civil law bias, the ad hoc model is retained in the criminal context.

### 3. *Ambivalence About International Humanitarian Law*

Third, and most disturbingly, we cannot deny that how we choose to enforce certain laws reveals the level of our commitment to those laws. Ultimately, what is most disconcerting about the impediments to the War Crimes Tribunal is that they are generally accepted. There is an acquiescence to such impediments, even an expectation that these obstacles will exist to enforce humanitarian rights.

As discussed more fully below, establishing a permanent criminal system remains controversial within the United Nations. The international community's ambivalence must be recognized not as a condition, but as a choice. The United Nations has, by default, adopted a system of waiting until after crimes have been documented before establishing

an organization to enforce those criminal laws. This is roughly the equivalent of waiting until the house is on fire before passing a resolution to create a fire department. One cannot claim that this demonstrates a real commitment to addressing the problem. If fifty years after Auschwitz, the London Agreement, the Nuremberg Trials, and the San Francisco Convention, it is still accepted that there is no permanent functioning international system in place for punishing even the most egregious of human rights violations, then a weakness in international commitment to vindicating human rights is ultimately the culprit. It is thus apparent that, at some level, the international community lacks a commitment to humanitarian law that must be addressed before any real progress in human rights can be achieved.

#### D. THE CASE FOR AN INTERNATIONAL CRIMINAL COURT

The case for establishing an international criminal court has been considered in a number of worthwhile articles.<sup>46</sup> It is worth discussing some of the arguments raised in opposition to creating an international criminal court if only to demonstrate that those arguments do not stand up in light of the experience in the Balkans.

First, it should be noted that resistance in the United Nations and the international community to a criminal court originated out of United Nations's inefficiency rather than incompetence. The General Assembly first considered the idea of an international criminal court in 1948, and, following an International Law Commission ("ILC") report,<sup>47</sup> concluded that an international criminal court was both possible

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46. See, e.g., H.R. 66, 101st Cong., 1st Sess. (1989) (calling for creation of international criminal court); ABA Section of International Law and Practice, *Report to the House of Delegates*, August 3, 1990 (supporting establishment of criminal court); ABA, *Task Force on an International Criminal Court* (Summer 1992); BENJAMIN B. FERENCZ, AN INTERNATIONAL CRIMINAL COURT: A STEP TOWARD WORLD PEACE 77 (1980); J. STONE & R. WOETZEL (eds.), TOWARDS A FEASIBLE INTERNATIONAL COURT (1970); John Bridge, *The Case For An International Court of Criminal Justice and the Formulation of International Criminal Law*, 13 INT'L & COMP. L.Q. 1255 (1964); Krass, *Bringing the Perpetrators of Rape In The Balkans To Justice: Time For An International Criminal Court*, \_\_ YALE L.J. \_\_ (draft dated Apr. 1, 1994, on file with author); Vespasian V. Pella, *Towards An International Criminal Court*, 44 AM. J. INT'L L. 37 (1950); Michael P. Scharf, *The Jury Is Still Out on the Need for An International Criminal Court*, 1 DUKE J. COMP. & INT'L L. 135 (1991); Quincy Wright, *Proposal for an International Criminal Court*, 46 AM. J. INT'L L. 60, 71 (1952); Quincy Wright, *The Scope of International Criminal Law: A Conceptual Framework*, 15 VA. J. INT'L L. 561 (1975).

47. Report of the International Law Commission to the General Assembly, 11 U.N. GAOR Supp. (No. 9), U.N. Doc. A/3159 (1956).

and desirable. From 1951 to 1954, a series of committees attempted to draft a statute for an international criminal court and a draft criminal code. The General Assembly however was reluctant to establish a court until it was certain about the law this court would enforce. The debate thus bogged down for nearly twenty years until the General Assembly reached some agreement on the meaning of the term "aggression" in a draft criminal code. By this time, however, the United Nations had forgotten about most of the ILC's work concerning the Court. It was not until 1989 that the United Nations seemed to rediscover the ILC Report, and request that the ILC elaborate on its proposal for an international court. In 1992, the General Assembly commissioned the ILC to make establishment of an international court a priority. As of yet, however, no formal report has been issued.

Although the United Nations's delay was not intentional, the net effect of this delay has, ironically, been more delay. Rather than suffering embarrassment at its inability to put a good idea into action for over forty years, many within the United Nations now seem compelled to *justify* the long delay by finding fault with the establishment of a criminal court. Such arguments, however, are largely without either intellectual or practical force.

The principle arguments raised in opposition to the Court are that an international criminal court would intrude upon State sovereignty, interfere with peace processes, and simply become another expensive and unproductive U.N. bureaucracy.<sup>48</sup> These contentions, however, are unconvincing when pitted against the very tangible benefits to the community of switching over to a permanent court system.

First, concerns about State sovereignty are already being addressed by the ILC on all levels. Thus, because these concerns are in the process of being resolved, discussing complaints about sovereignty in the abstract tends to be akin to aiming at a moving target. Nonetheless, at any level the big question is how a permanent court could intrude upon sovereignty *more* than the system that we already have in place. The present system allows a disfavored nation to be singled out for prosecution by a specially created court. A permanent court would be no worse than a War Crimes Tribunal and would likely be better in that it would be more predictable and less subject to discrimination. Objections to a permanent court thus appear to be related more to complaints about international criminal courts at all than to a permanent criminal court.

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48. See, e.g., George A. Finch, *An International Court: The Case Against Its Adoption*, 38 A.B.A.J. 644 (1952).

Sovereignty considerations further pale when one considers the system of international criminal justice that is now in place. In frustration over the sluggish pace of international justice, many States have opted to take matters into their own hands. The United States Supreme Court has found no violation of U.S. constitutional or international law in prosecuting individuals in federal courts who were kidnapped by U.S. officials from other sovereign states. To believe that an international court acting within the U.N.'s mandate will exact a greater toll on state sovereignty than a system of sanctioned kidnapping defies reason.<sup>49</sup>

Second, concerns about diplomacy are also a red herring. It is true that prosecutions of war criminals in some situations may exacerbate political tensions. However, these concerns may be muted largely by the fact that prosecution is always discretionary. In some cases prosecutors may choose to wait or refrain from prosecution in an international court, just as domestic prosecutors may consider community unrest before proceeding against gang leaders. Moreover, concerns about short-term diplomatic issues miss the larger point. Ultimately, as the situation in Bosnia itself reveals, it is more destructive to long-term international peace to allow war criminals to go unpunished and allow animosities to fester.

Third, there is, of course, a risk that any institution created by the United Nations will devolve into an unproductive bureaucracy, but this seems like a poor reason not to attempt to develop productive organizations. The main reasons that U.N. organizations fail relate less to the institutions themselves than to how they were formed. The ICJ has, by most accounts, been somewhat disappointing. As Professor Koh has accurately stated, the ICJ has "failed to provide a meaningful forum . . . for enunciating international human rights norms or curbing national misconduct."<sup>50</sup> The shortcomings of the ICJ, however, lie principally in the shortcomings of the document that established the ICJ—the statute of the court severely limits recourse to the ICJ (because of limitations on compulsory jurisdiction and the requirement that only states may advocate an individual's claims) and limits the

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49. Other problems with relying upon domestic courts to try one's nationals include whether they are likely to provide fair trials. Domestic courts also face such fundamental obstacles as obtaining jurisdiction over the suspect, getting physical custody, effecting service, establishing superior venue, overcoming claims of immunity, and ultimately trying to enforce the judgment.

50. Harold H. Koh, *Transnational Public Law Litigation*, 100 *YALE L.J.* 2347, 2360 (1991).

vision in the ICJ's decision (based on the same jurisdictional restrictions).<sup>51</sup> The ICJ's experience thus does not militate against establishing a criminal court, but merely argues against modeling such a court after the ICJ. In sum, despite the risks of bureaucracy, the more important issue is to consider the alternative. Rather than risk establishing a bureaucracy, we have adopted a model that is sure to be even worse: an "ad hococracy."

### E. CONCLUSIONS

The Tribunal presents a great opportunity to extend the Nuremberg model beyond victory courts and to establish a genuine form of judicial sanction for international crimes. But with this opportunity also comes the risk that if it is unsuccessful, the Tribunal will marginalize the Nuremberg Tribunal's achievements. Already this is happening. Over the past several months, the moral imperative to respond to the atrocities being committed in the former Yugoslavia has deteriorated in both public and international discourse. It appears to the public that because the international community is not doing anything, it probably cannot do anything.

The international community must have an effective system for punishment for the same reasons every civilized society punishes criminals: (1) to vindicate the rights of victims; (2) to express our outrage; (3) to deter crime by others; (4) to protect our members from these criminals while they are confined; and (5) to rehabilitate individuals who have lost their way. But the international community needs to punish, in this case, for another reason as well—to demonstrate to its members that human rights exist at all. If war criminals go unpunished then it will be hard to convince those who look to the international order for protection that any human right is safe.

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51. The problems with attempting to vindicate human rights through the ICJ are manifest. The most obvious problem with the ICJ is that only states and not individual defendants can be held accountable for crimes within the ICJ's jurisdiction. Thus, most human rights claims are outside of its jurisdiction. The other problem is that the ICJ has limited power. Over a year ago, the ICJ issued provisional measures against the Serbian Federal Republic, ordering the Serbian government to take all measures within its power to prevent the crime of genocide. This has had no observable effect. Even some of the better-intentioned countries are apt to exploit this weakness, as our own country made clear in the *Nicaragua* case. Thus, if a state objects to the World Court's exercise of jurisdiction, it is essentially free to ignore the judgment rendered.



The Tribunal, and all the problems of creating it, stand as symbols of the real impediment to the vindication of human rights. Until we create a permanent enforcement regime, we, as an international community, have not fully committed to the concept of human rights. The Tribunal today stands not as a symbol of international commitment to human rights but as tangible evidence of the international community's unmaturing resolve.

An International Criminal Court must be established if we are to learn anything from the Tribunal's experience thus far. As Nelson Mandela recently said, profound social change is always impossible until it happens, and then it is inevitable. International enforcement of human rights protections is inevitable, but the issues that presently face the War Crimes Tribunal reveal how far the international community has to go.

#### IV. QUESTIONS AND ANSWERS

*QUESTION: The Helsinki Act forbids any acts of economic or other coercion against a country. However, President Clinton is now in violation of this Act. He is using what are called negative earmarks. The United States does not give aid to Serbian victims. Right now, there are a hundred and fifty heart patients without medication. There are approximately one hundred thousand diabetes patients without medication or dialysis. Twenty-five babies are lost a month from the lack of antibiotics. Also, a great many people die from dysentery and typhoid because the United States does not give them the chemicals to purify their water as part of the sanctions.*

*So the question becomes how can we respect the tribunals when these kinds of violations are allowed to happen in the name of democracy? What is being done to the Serbian people is really creating medical genocide. Will there be a war crimes tribunal against medical genocide in the future?*

MR. NEWMAN: First, the Helsinki Act is not law. Since it is not law, nations feel very free, especially in war-time or in time of armed conflict to say, "Well, this is not the time to worry about these violations." As we demonstrated, nations are beginning to be concerned about real law. That is why it is important for them to decide what is the law and what is not. Sometimes real laws are also violated. However, we are not going to get very far by saying, for example, "What about the Universal Declaration of Human Rights?" because it is not part of the law.

However, the Charter is something else. In this world, some do not respect the law that is stated by the Security Council in Article 2, Section 3: "All members shall settle their international disputes by peaceful means in such a manner that international peace and security and justice are not endangered."<sup>52</sup> Nevertheless, today, no one has mentioned this article which states that no one can do dirty things.

It is well known that justice means what people know the law means. This is the difference between the Declaration of Human Rights, which is very nice on one hand, and the treaties that are ratified, on the other hand. If someone violates treaties and this hurts people, then justice is not being discussed. There are lots of things to criticize about President Clinton, especially when we are dealing with morality and other niceties. The White House may not be observing all the rules mentioned previously. Since this is a big issue, the community will not win these battles if the issues are continuously ignored.

*QUESTION: It has been said that the United States was very selective in its targeting on Iraq. However, the United States knocked out Iraq's water and sewer systems, and killed a hundred thousand civilians, thus violating the Geneva Conventions. As a Serbian, I take great exception to the Roman Catholic institution gathering evidence on war crimes. If I suggested for a moment here that the Serbians at the Belgrade University collect data, you would think that I was insane. I bet that there is not one Serbian who collected data at the DePaul University.*

MR. CASSEL: How much money would you want to put on that bet?

MR. MOUNTS: I would like to respond to the comment about possible war crimes violations by Americans in Iraq. First, although the United States has not come 100 percent of the way, it has come a long way. This has been proven every day by the U.S. military's attempts to comply with the Law of War to the best of its ability. Smart weaponry has allowed the United States to chose targets very selectively.

There was an example in the ABA Journal agonizing whether the United States should go ahead and hit a Scud missile launcher on the highway at night, since we cannot distinguish it from a civilian vehicle or truck which also uses the highway.<sup>53</sup> The soldiers had to struggle with those things. Based on such circumstances, the soldiers made the best decisions they could. There are many more examples where we

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52. U.N. CHARTER Art. 2 § 3.

53. Keeva, *supra* note 7, at 52.

had legitimate military targets. There are going to be civilian deaths in war. There is going to be collateral damage. The church in Saltzburg was still a legitimate military target. The destroyed bunker that was so widely publicized in Baghdad turned out to be full of civilians. The intelligence that we had indicated that it was a command post—it was surrounded by barbed wire, it was covered by camouflage, and it looked to all intents and purposes like a military target.

MR. CASSEL: There was an effort made with respect to the military targets in the Gulf War to try to minimize collateral damage and incidental injury to civilians. On the other hand, I agree with the questioner that the result of a fundamental military strategy by the United States in that war, namely the deliberate targeting of the electrical system, the water system, and the agricultural system, has been documented by the Harvard Medical School and others to have led to casualties that have to be measured in the tens of thousands. Most of these casualties involve children, and mostly took place after the war was over, when CNN was no longer there to broadcast to all of us the cost of our action. It seems that a hard look needs to be taken at whether that military targeting during the war violated Protocol I.

With respect to the DePaul Institute doing the work for the United Nations, a lot of time does not need to be spent on the fact that DePaul University is a Catholic university. That had nothing to do with the work that was done. The people who worked on it were Muslim, Jewish, Catholic, Protestant, and Serb, among others.

If there is a concern about whether the work was impartial, one needs to look at statements that were made and reports that were issued based on the work. These reports were based on the investigations that were conducted on behalf of the United Nations and the reports came from every source that came into the Institute. All of those reports were placed into the database, tabulated, and analyzed.

The report repeatedly indicates that violations were committed by all sides: Serbs, Croats, and Bosnians. It also repeatedly indicates that the great majority of the violations that were reported were allegedly on the part of the Serbs. Also, when the report characterizes its findings, it makes an effort to emphasize that, from the point of view of human rights and humanitarian law, the issue is not about the ethnic coloration of the victim or the person who committed the act. The fact remains that if these acts were committed by one human being against another, whatever the ethnicity of the person may have been, the act was wrong. There is an ethnic conflict in the area. There are bitter and passionate disagreements on both sides. These are not what the Com-

mission of Experts and the Human Rights Institute are about. Everyone ought to consistently oppose these actions by whomever they might have been committed.

QUESTION: *The Serbians had no funding for collecting evidence about the crimes committed against them. However, DePaul was given a quarter of a million dollars, and the Tribunal was given, I think, \$950,000. So it appears that everyone was funding the Croatian and Muslim sides, but that the Serbians had no funding.*

MR. CASSEL: DePaul is not Bosnian and is not Croatian; the University was not in any way going into this saying, "We are only going to investigate violations committed by or against one side or the other." The mission of the U.N. Commission which contracted with DePaul to do the computerized database was to investigate violations of international humanitarian law by whomever might have committed them.

QUESTION: *Then why has DePaul not admitted in any of the public data that there were rapes of 800 Serbian women. Why is it so difficult to tell the world and the press that DePaul has 800 names of rape victims, and that, by the way, they are Serbian? Why are they omitted?*

MR. CASSEL: They are not. I am sure that is true. First, the Commission did not name anybody. Second, the data that is in the Commission's report from the DePaul database is not limited to the data received from the United Nations. It also includes all the other data made available to the Commission, including data based on a team of people who went over and interviewed some of the victims directly.

QUESTION: *Some of the speakers speak of the Serbs, Croats, and Bosnians. Serbs and Croats were also Bosnians. You are talking about the Muslims, and I think in this discussion, it is misleading to use the term Bosnians. What is disturbing about the War Crimes Tribunal is the lack of standards, or the ad hoc nature of standards, in bringing these people to trial. We speak of genocide, but what is the standard of genocide?*

*Two articles in the New York Times reported a tunnel incident that most people do not even know about. Three thousand Serbian people were taken from their villages and stuffed into a tunnel for the better part of a week. Out of the 3,000, 1,500 suffocated. The other 1500 were never seen again. Does anyone further investigate this genocide?*

*Again, in the New York Times, in the Croatian part of the war, 25 people were taken from their homes, killed, and burned. When this first came out, in the latter part of 1991, this massacre of people was*

*blamed on the Serbs. Finally when the bodies were found, it was found that the Serbian's had been massacred by the Croatians. Yet the Serbs were sanctioned at that time even when they too were the victims. Thus, what becomes of genocide? At what point do the killings meet the definition of genocide or a war crime so that it may be brought before the Tribunal?*

MR. MOUNTS: The Draft Statute, in Article 4, defines genocide: "Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic, racial, or religious group, as such." Those acts include "killing members of the group, causing serious bodily or mental harm to members of the group, deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part," and a number of other similar types of acts. As mentioned previously, the problem of defining what the elements of the offense are still exists.

MR. CASSEL: The definition in the Statute is the same definition that is in the 1948 Convention on Genocide. This has been published as international law for over 40 years.

MR. BLEICH: Additionally, because the Nuremberg Tribunal was an ad hoc tribunal and not a permanent system, there has not been a sufficient evolution of those standards. But at the same time, they are standards.

QUESTION: *We have heard a lot about the U.N. Tribunal being set up. Is there any educated guess as to whether they might actually be in session within a year or two?*

MR. BLEICH: Taking an optimistic view, it appears that since Judge Goldstone is an inspired judge and everyone is very anxious to see this move forward, there should be indictments issued within the next year. It is not certain whether the Tribunal can fulfill its potential of prosecuting on a broad scale the crimes that have been committed there.

QUESTION: *Is it considered a war crime to violate U.N. rules by exporting goods under a U.N. embargo to places in those countries? Is that a war crime itself, or is that just a violation of national rules? What kind of tribunal would address this?*

MR. CASSEL: It is not a war crime. It would be a violation of the sanctions imposed by the United Nations Security Council, which the Tribunal would refer to the Security Council. The Council's response would be a diplomatic response of some sort, but not a war crime prosecution.

QUESTION: *The idea of a Tribunal is good because it has implications beyond this conflict. As mentioned previously, this is one of many*

*conflicts. There will be more in the world. It is interesting to know that there are people dedicated to making some kind of standard. How can we as individuals here contribute to the things you are trying to accomplish? I think that is the best chance we have of getting a standard established and under control.*

MR. CASSEL: There are a good number of human rights activists and lawyers who are working in NGOs dealing with actual lawsuits. It seems to me the key issue now is whether the prosecution is going to pursue a theory of command responsibility and go after the people who are really responsible. Or is it going to limit itself to going after a few of the small fish? It seems that these are the main issues. Also, public pressure on such issues is needed if it is going to happen.

QUESTION: *Is there a legal issue whether this is a civil war or a conflict among independent sovereign nations?*

MR. CASSEL: There is such a legal issue. There are a lot of different opinions on the answer to that question. The opinion expressed in the report of the Commission is that it began as a civil war. At some point in time, but it is not clear when, it became an international war. Bosnia-Herzegovina is a member of the United Nations as an independent nation. The Federal Republic of Yugoslavia, which consists of two of the former provinces of Yugoslavia, is also an independent nation. So it is a war between two nations. But that occurred at a point in time prior to which there was an internal armed conflict according to the view of the Commission. Other international law experts may read it differently.

QUESTION: *One of the things that has not been brought up is the nonparticipation of the United States in the United Nations. The United States has not ratified the convention and has not paid its dues over the years. Now, from left field it wants a tribunal without a foundation.*

MR. CASSEL: The United States's record with regard to participating in international human rights treaties and in the human rights activities of the United Nations and international law has been pretty weak over the last 50 years. On the other hand, it is important to recognize that the United States is beginning to get into the game. After waiting only 40 years, the United States ratified the Genocide Convention in 1988. In 1990, the U.S. Senate consented to the ratification of the Torture Convention, which was finally perfected just last month when implementing legislation was adopted. In 1992, the United States ratified the International Covenant on Civil and Political Rights after waiting only 26 years. Last month, the United States ratified the Convention Against Race Discrimination. The Convention Against Discrimina-

tion Against Women is currently scheduled for Senate hearings later this year.

The United States has also been the key advocate of the International Criminal Tribunal for the former Yugoslavia. It is fair to say that the U.N. Ambassador, Madeleine Albright, has been the point person within the Administration and has been doing more than her superiors. It is also fair to say that without the United States there would not be an International Criminal Tribunal for the former Yugoslavia at all.

So while we have a long way to go, particularly in the last six or seven years, we have begun to make a lot of progress. The United States is beginning to recognize that it cannot just have a world in which the only thing that counts is power. Such a world is not in our self-interest because we do not have the power to control the world according to our own interests. International law and international legal institutions are becoming more and more the interests of the United States.

*QUESTION: A few months ago, someone in the State Department who is connected with human rights stated that the Administration was interested in three areas of big human rights violations: the former Yugoslavia, Cambodia and Turkey, because of the genocide against the Kurds. What happened to the other two? What about Turkey and Cambodia? Is the Administration still interested in those two?*

*MR. CASSEL:* Although a commission or tribunal could be justified in both Turkey and Cambodia as well as in many other places, neither an investigative commission nor an international criminal tribunal has been established in either of those places. In the case of Cambodia, the principal efforts of the United Nations have been to set up a peace-keeping force, a human rights monitoring presence, and promote elections, which were in fact held, and try to bring together the warring parties in some sort of peaceful government.

In the case of Turkey, the principal activity by the United States has been in the form of bilateral pressure: (1) diplomatic suggestions that there is concern about the violations against the Kurds; and (2) that bilateral sanctions might be imposed. But that has been done with considerable restraint because of the obvious security and military significance of Turkey.